Order Code RS21254
July 3, 2002

CRS Report for Congress
Received through the CRS Web

Education Vouchers: an Overview of the Supreme Court's Decision in *Zelman v. Simmons-Harris*

Christopher Jennings
Legislative Attorney
American Law Division

Summary

Education vouchers generally refer to school choice programs in which the state will help parents pay tuition for their children to attend out-of-district public schools, charter schools, private schools, and, sometimes, religious schools. When vouchers are used by parents to send their children to religious school, public dollars flow from public to religious coffers, and therefore, may violate the Establishment Clause of the First Amendment. However, in *Zelman v. Simmons-Harris*, the Supreme Court upheld an Ohio school educational choice program that gave poor families in the Cleveland public school system an opportunity to send their children largely at state expense to private schools, including religious schools. This report provides factual background and summarizes the Court's prior precedent, the Sixth Circuit's decision, and the Supreme Court's analysis of the relevant constitutional issues. It will not be updated.

Background. Vouchers generally refer to school choice programs in which the state will help parents pay tuition for their children to attend out-of-district public schools, charter schools, private schools, and, sometimes, religious schools. A voucher can take the form of a direct subsidy, a grant, or a tax benefit. Proponents of vouchers claim that America's elementary and secondary educational system are in disrepair and can only be revitalized by making schools compete to attract students. Vouchers, they argue, are the most feasible way to inject competition into education. Critics of vouchers decry the loss of money to public schools, and charge that when vouchers can be used to attend a religious school the constitutionally drawn line between church and state blurs.

In *Zelman v. Simmons-Harris,*[1] the Supreme Court, in a 5-4 decision, upheld an Ohio school choice program, which, among other options, gave parents vouchers which could be used to send their children to a private, religious school. The purpose of the program

---

[1] 536 U.S. __ (2002)(slip opinion). For analysis of cases prior to *Zelman*, see CRS Report RL30165, *Education Vouchers: Constitutional Issues and Cases*.

was to give poor families in the Cleveland public school system an opportunity to send their children largely at state expense to schools they prefer to their local public school. As designed, the program provided scholarships worth up to $2,250 a year for children to attend either private schools within the city limits, including sectarian schools, or public schools in the school districts around Cleveland. Participating schools could give preference in admission on the basis that the student's parents were affiliated with any organization that provides financial support to the school, but could not discriminate on the basis of race, religion, or ethnic background. The program does not place restrictions on the use of the funds; monies received through the program could apparently be used by the schools to further a religious mandate, and not just secular purposes. As an alternative to the voucher program, parents may also accept tutorial aid to obtain special help for students opting to remain in the Cleveland schools. Vouchers and tutorial aid are only one aspect of Ohio's school choice program; the Cleveland school district also offers parents the choice to send their children to a community or magnet school, which are secular, public schools within the city limits of Cleveland, but operate independently of traditional Cleveland schools.

The program went into effect in the 1996-97 school year. Over the years, none of the surrounding public school districts has chosen to participate in the program, and 82 percent of the private schools that participated were sectarian. However, the ratio of secular to sectarian private schools participating in the voucher program does not appear to be disproportionate, since 81 percent of the private schools in Ohio are religious schools. Of the participating religious schools, most were pervasively sectarian – they wove religion into traditional courses of study, mandated participation in religious services, and required students to take religious courses. Most students in the voucher program attended these schools. In the 1999-2000 school year, 96 percent of the students participating in the voucher program chose to attend sectarian schools, up from 78 percent in the 1997-1998 school year. However, when including the population of students participating in other aspects of Ohio's school choice program by opting to attend a community or magnet school, the number of students attending a sectarian schools drops from 96 to 20 percent.

Discussion. When public dollars flow from public to religious coffers, as they do when vouchers are used by parents for religious schools, it may violate the Fourteenth Amendment, which applies the Establishment Clause of the First Amendment against the States, directing them "to make no law respecting an establishment of religion."[2] In *Lemon v. Kurtzman*, the Supreme Court set forth the following test to determine whether a statute withstands constitutional scrutiny: (1) the statute must have a secular legislative purpose; (2) the principal or primary effect of the statute must neither advance nor inhibit religion; and (3) the statute must not foster excessive governmental entanglement with religion.[3] In *Agostini v. Felton*, a case involving direct aid to religious schools, the Court folded the second and third prongs of the test together, since both inquiries largely rely on the same evidence, and "the degree of entanglement has implications for whether a

---

[2] U.S. CONST. amend I. See Everson v. Board of Education, 330 U.S. 1 (1947)(applying the Establishment Clause of the First Amendment against the States).

[3] 403 U.S. 602 (1971).

statute advances or inhibits religion."[4] While the Court has been divided on the utility of this test in cases of direct governmental aid, the Court has been consistent in cases involving "true private choice programs" or "indirect aid," and has affirmed the use of this test in those cases, particularly the "primary effects" prong.[5]

The Ohio voucher program may result in indirect aid of religion, since public dollars may flow from state to religious coffers through private citizens – an independent choice, not a governmental decree, determines whether a religious school receives public aid. As in most indirect aid cases, the primary question posed by *Zelman v. Simmons-Harris* is how to apply the primary effects prong. In other indirect aid cases, the Court has reached mixed results. In *Committee for Public Education v. Nyquist*, the Court struck down a New York tuition subsidy program for low-income students in private elementary and secondary schools.[6] The program failed the Lemon test's second prong, since it was confined to children attending private schools, most of those schools (85-90%) were pervasively sectarian, and, as a consequence, the programs had a primary purpose and effect of subsidizing such schools.[7] Moreover, the use of the aid was not restricted; it could be used by participating schools to further their religious mandate. On the other hand, the Court has upheld voucher and tax programs that benefit religious schools. In *Mueller v. Allen*, the Court upheld a program that allowed parents of elementary and secondary school children to deduct educational expenses from their state taxes, which would include deductions of tuition payments to sectarian schools.[8] In *Witters v. Washington Department of Services for the Blind*, the Court upheld a vocational rehabilitation program that allowed a blind student to attend a Bible college.[9] In upholding the programs, the Court stressed that they were designed as general welfare programs, and did not specifically aim to provide aid to religious organizations. Instead, they distributed funds to religious organizations based on religiously neutral criteria and only as a result of the independent choices of the individual beneficiaries.[10]

The Sixth Circuit held that the Ohio program was closer to *Nyquist* than *Mueller* or *Witters*, and, accordingly, held it unconstitutional.[11] Given that no public school and few secular private schools opted to participate, Ohio's program created an incentive for parents to send their children to religiously affiliated schools, the court found. Accordingly, the "choice" the program provided was "illusory" and "clearly ha[d] the impermissible effect of promoting sectarian schools," the court held.[12] The low level scholarship amount, the court found, was the program's primary flaw, since it essentially locked out most private secular schools from participating, but encouraged sectarian

---

[4] *Zelman*, 536 U.S. __, slip op. at 7 (O'Connor, J., concurring), *citing*, 521 U.S. 203 (1997).

[5] *Zelman*, 536 U.S. __, slip op. at 7 (Opinion of the Court).

[6] 413 U.S. 756 (1973).

[7] See also Sloan v. Lemon, 413 U.S. 825 (1973).

[8] 463 U.S. 388 (1983).

[9] 474 U.S. 481 (1986).

[10] See also Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993).

[11] 234 F.3d 945 (6th Cir. 2000).

[12] Id. at 960.

schools to participate, since they have low tuition rates. "There is no neutral aid when that aid principally flows to religious institutions; nor is there truly 'private choice' when available choices resulting from the program design are predominately religious," the court concluded.[13]

Reversing the Sixth Circuit, the Supreme Court held that the Ohio program was closer to *Mueller* and *Witters* than *Nyquist*. According to the five Justice majority, this result "did not signal a major departure from [the] Court's prior Establishment jurisprudence," even though the majority never cited the *Lemon* test.[14] As there was no dispute that the voucher program was enacted for the valid secular purpose of providing educational assistance to poor children, the only question before the Court was whether the program had "the forbidden 'effect' of advancing or inhibiting religion."[15] "Where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct governmental aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause."[16] Under such programs, the Court found that the incidental advancement or endorsement of religion through the use of public dollars is "reasonably attributable to the individual" decision-maker, "not to the government, whose role ends with the disbursement of benefits."[17]

Empirical data suggesting that the Ohio voucher program had the primary effect of advancing religion did not significantly influence the Court's analysis. The Court attached no constitutional significance to the fact the majority of participating private schools were religious and found it irrelevant that most parents receiving vouchers chose to use them at a religious school, since the Court could "perceive no principled standards by which such statistical evidence might be evaluated."[18] For instance, statistics indicate that 96 percent of the students participating in the voucher program chose to attend sectarian schools, up from 78 percent in the 1997-1998 school year. However, when including the population of students participating in other aspects of Ohio's school choice program (e.g., those opting to attend a community or magnet school), the number of students attending a sectarian schools drops from 96 to 20 percent. The Court found that it would be "arbitrary" to only sample students participating in the voucher program and exclude students attending community or magnet schools. Thus, the Court de-emphasized the significance of empirical data in evaluating whether the program had the primary "effect of advancing religion."

---

[13] Id. at 961.

[14] *Zelman*, 536 U.S. at __, slip op. at 7 (O'Connor, J., concurring).

[15] *Zelman*, 536 U.S. at __, slip op. at 7 (Opinion of the Court).

[16] Id. at __, slip op. at 10.

[17] Id.

[18] Id. at __, slip op. at 17 (Opinion to the Court).

Instead, the Court focused on the formal qualities of the voucher program, and held that it was "a program of true private choice."[19] The Court found that the program was entirely neutral with respect to religion, since it provided aid to "a wide spectrum of individuals," who were defined only by financial need and residence, and made no reference to religion as a condition for participation in the program. Moreover, it found that there were no "financial incentives" that skewed the program toward religious schools.[20] The Court also found that the program permitted qualifying individuals "to exercise genuine choice among options public and private, secular and religious."[21] Specifically, parents may "remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious school, enroll in a community school, or enroll in a magnet school."[22]

Accordingly, the Court concluded that the principal or primary effect of the voucher program neither advanced nor inhibited religion, and held that the program did not violate the Establishment Clause.

Four dissenting justices emphasized that under existing precedent "'no tax in any amount, large or small, can be levied to support any religious activities or institutions whatever they may be called, or whatever form they may adopt to teach or practice religion.'"[23] Under this general rule, the dissent would have held the voucher program unconstitutional, since "the overwhelming proportion of large appropriations for voucher money must be spent on religious schools, [and, therefore, will] pay for eligible students' instruction not only in secular subjects but in religion as well ... ."[24] The dissent critiqued the majority opinion as a "dramatic departure from basic Establishment Clause principle."[25]

---

[19] Id. at __, slip op. at 21 (Opinion of the Court).

[20] Id. at __, slip op. at 12 (Opinion of the Court).

[21] Id. at __, slip op. at 21 (Opinion of the Court).

[22] Id. at __, slip op. at 14 (Opinion of the Court).

[23] Id. at __, slip op. at 2 (Souter, J., dissenting.), *quoting Everson*, 330 U.S. at 16 (1947).

[24] *Zelman* 536 U.S. at __, slip op. at 3 (Souter, J., dissenting).

[25] Id. at __, slip op. at 34 (Souter, J., dissenting).

EveryCRSReport.com

The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.