Colorado Legislative Council Staff

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# EXAMINING THE SCHOOL VOUCHER DEBATE

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The belief that greater choice and competition among schools bring about improvement has made school choice initiatives a cornerstone of school reform efforts sweeping the nation. The issuance of school vouchers, or state money that may be used for attendance at private schools, continues to be one of the most closely watched and hotly debated of school choice initiatives. Voucher supporters tout the opportunities for low-income students and the stronger schools that will result from competition. Opponents maintain both that the inclusion of sectarian schools in voucher programs violates the constitutionally guaranteed separation of church and state, and that vouchers will undermine the ability of public school systems to improve by diverting funds away from where they are needed most.

Under great scrutiny from the education community, the media, and the courts, voucher programs in Cleveland, Milwaukee and Florida, as well as small-scale programs in Maine and Vermont, highlight the scope of the issues involved. This issue brief examines existing voucher programs and what recent court decisions may suggest for states considering voucher legislation. While the current U.S. Supreme Court has declined, thus far, to weigh in on the constitutionality of vouchers, recent legal rulings in lower courts appear to be setting strict parameters and legal standards for voucher programs to meet.

## Constitutionality of the Cleveland Voucher Program is in Question

Since its implementation in 1995, the Cleveland voucher program has faced a series of legal challenges. The program grants vouchers to between 3,400 and 3,800 low-income kindergarten through sixth grade students. Eligible parents may use these vouchers, valued at approximately $2,250, to send their children to one of 56 state-approved private schools, both sectarian and non-sectarian.

The Ohio Education Association, the American Civil Liberties Union, and the People for the American Way successfully challenged the latest reinstatement of Cleveland's program in a ruling handed down this past December. In *Simmons-Harris v. Zelman, 1999 WL 1216319 (N.D. Ohio 1999)*, a federal district court judge ruled that the program violates the U.S. constitutional ban on government establishment of religion. Students already participating in the program have been allowed to continue in the program pending an appeal by voucher supporters to the U.S. Court of Appeals.

What does the latest legal ruling reveal to those tracking the voucher debate? The basis for U.S. District Judge Solomon Oliver, Jr.'s legal analysis was that no law may have the "primary or principle effect" of advancing religion. He ruled that the Cleveland program failed to meet this test because 46 of the 56 participating private schools are religious schools. Therefore, the program does not allow for sufficient, independent choices for parents, but rather creates an incentive for students to attend religious schools. Additionally, Judge Oliver noted that the program makes no effort to distinguish state support of the secular, educational functions of a private school from support of its religious functions.

**Milwaukee Choice Program Has Withstood Legal Challenges**

Like the Cleveland program, the Milwaukee Parental Choice Program has precipitated legal battles and provided an interesting case study for policymakers and educators around the country. Implemented in 1990 and expanded to include religious schools in 1995, the Milwaukee voucher program serves families with incomes at or below 175 percent of the federal poverty level, but limits participation to 15 percent of the enrollment in the school system. The 8,000 students currently participating in the program may attend any private K-12 school in Milwaukee by receiving a voucher equal to the school's per pupil operating costs, or the state per pupil expenditure for Milwaukee Public Schools, whichever is less. The current value of the voucher is approximately $5,000.

A Wisconsin Supreme Court ruling in 1998 concluded several years of legal challenges to the program. Using the three-pronged Lemon test, in reference to a landmark 1971 Supreme Court decision, the Wisconsin court upheld the constitutionality of Milwaukee's program in *Jackson v. Benson, 578 N.W.2d., 602 (1998)*. First, the justices affirmed that the legislative purpose of the program is secular. The second standard, ensuring that the program did not have the primary effect of advancing religion, was met, according to the decision, because choice is vested with *parents*, and because public and private options are given equal footing. Finally, the justices determined that state monitoring of participating schools did not amount to excessive government entanglement in religion, the third prong of the Lemon test.

**Florida Ushers in First Statewide Program**

In a program implemented only last year, Florida forged a different path from Ohio and Wisconsin in beginning a statewide voucher program tied to the state's accountability plan. This plan grants vouchers to students attending schools deemed to be failing. Schools where more than 60 percent of students fall below basic levels in math and English may receive such a failing grade. Two Pensacola elementary schools received the first failing grades given by the state, resulting in the first use of state-issued vouchers by Florida students to attend private schools.

A Florida circuit court judge ruled in March that the voucher program is unconstitutional (*Holmes v. Bush, No. CV 99-3370 (Fla. Cir. Ct. 2d Jud. Cir., March 14, 2000*)). His ruling held that the program "supplants the system of free public schools mandated by the [Florida] constitution," and that guarantees of a free public education prohibit state provision of a K-12 education in any other manner. State officials vow to appeal the decision to the Florida Supreme Court.

**Courts Rule on Long-Standing Programs in Maine and Vermont**

Long-standing, small-scale voucher programs in Maine and Vermont have allowed parents in rural areas without high schools to send their children to private, non-sectarian schools. In Maine, the exclusion of parochial schools from the program was upheld by the Maine Supreme Court last year (*Strout v. Albanese, 178 F.3d 57 (1999)*. In a ruling also made last year, the Vermont Supreme Court determined that inclusion of religious schools in Vermont's program would violate state constitutional provisions barring state support for religion (*Chittenden Town School District v. Department of Education,738 A.2d 539 (1999)*. The U.S. Supreme Court has declined to review either of those cases.

**Moving Toward More Choice in the Future?**

Most observers agree that education policy nationwide is moving toward more school choice for parents and students. At least 20 states, according to the National Conference of State Legislatures, are considering implementing voucher programs. Other states are debating choice-oriented legislation such as income tax credits for private school tuition. At the federal level too, lawmakers have granted school choice proposals a high profile in the education debate. Federal initiatives under consideration include voucher-style use of Title I funds and education savings accounts. Education savings accounts would allow parents to place money in IRA-like accounts and use the tax-free interest for school expenses, including expenses at private, sectarian schools.