National Center for Policy Analysis & CEO AMERICA

BRIEF ANALYSIS
No. 272
For immediate release:
Friday, July 10, 1998

Are School Vouchers Constitutional?

Many legislators who vote for sweeping government programs without a second thought about their constitutionality suddenly grow concerned when the issue is school vouchers. The moment a dollar of public funds crosses the threshold of a religious school, they contend, it violates "separation of church and state."

It is also as certain as death and taxes that whenever a school choice program is enacted, a lawsuit challenging its constitutionality will follow. With public support and evidence of success for school choice mounting by the day, the last resort for opponents is the courts.

Are vouchers constitutional? The Wisconsin Supreme Court answered that question with a resounding "yes" on June 10. The same issue is before state supreme courts in Ohio, Vermont, Arizona and Maine. The question will linger until the U.S. Supreme Court delivers a definitive decision, perhaps as early as 1999. But the First Amendment's plain meaning, buttressed by an unbroken line of recent U.S. Supreme Court precedents, suggests that well-crafted school choice programs will survive constitutional scrutiny.

Constitutional Requirements of a Voucher Plan

- A secular legislative purpose
- Its principal or primary effe ct neither advances nor inhibits religion
- Does not create excessive entanglement between government and religion

Constitutional Language. The First Amendment to the U.S. Constitution does not erect a wall of "separation" between the state and religion. If it did, not only would Pell Grants, the GI Bill and day care vouchers be unconstitutional, but tax deductions and exemptions for religion would be as well.

The actual language of the First Amendment reads: "Congress shall make no law respecting an establishment of religion." Clearly, the framers meant only to proscribe direct sponsorship of religion, a conclusion buttressed by constitutional history. Moreover, the First Amendment guarantees citizens the right to "free exercise" of religion. When the two religion clauses are read together, it is clear that the First Amendment directs the state to chart a neutral course.

Hence, school choice opponents are forced to argue in court that allowing parents to choose where to direct their children's education dollars constitutes an "establishment of religion" — a difficult argument to make if we take constitutional language to mean what it says.

The *Nyquist* Decision. The strongest (and really only) precedent in the opponents' arsenal is the 25-year-old U.S. Supreme Court decision in *Committee for Public Education v. Nyquist*. In that 1973 decision, the Court invalidated a New York "parochaid" program that provided tax benefits and direct subsidies for private education, most of which consisted of religious schools. The Court reasoned that under such circumstances, the aid had the impermissible "primary effect" of advancing religion. The Court expressly left open the question of "a case involving some sort of public assistance (for example, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."

Two things have changed in the years since *Nyquist*. First, the nature of school choice: it is no longer designed to benefit particular schools, but rather is a remedial effort to help expand the range of educational options. Second, the Supreme Court itself: as the Court observed only last year, First Amendment jurisprudence has "significantly changed" over the past decade, specifically "our understanding of the criteria used to assess whether aid to religion has an impermissible effect."

Recent Cases. In every case since *Nyquist*, the Supreme Court has sustained programs that make aid available to parents or students who may direct it to the schools of their choice:

Dallas Headquarters: 12655 N. Central Expy., Suite 720 • Dallas, TX 75243-1739 • 972-386-6272 • Fax: 972-386-0924 • E-Mail: ncpa@public-policy.org
Washington Office: 727 15th St. N.W., 5th Floor • Washington DC 20005 • 202-628-6671 • Fax 202-628-6474
For more information: Jil Hicks in Dallas at 972/386-6272 or Joan Kirby in Washington at 202/628-6671

Mueller v. Allen (1983). The Court upheld a state income tax deduction for educational expenses, even though the vast majority of deductions were used for religious school expenses. Answering the question left open by *Nyquist*, the Court noted that the deduction was available for expenses incurred either in public or private schools, and that public funds are transmitted to religious schools "only as a result of numerous choices of individual parents of school-age children." The independent choices of third parties render the aid "indirect," as opposed to direct subsidies of religious schools.

Witters (1986). The Court unanimously upheld the use of college benefits by a blind student to study for the ministry at a divinity school. The state transmitted funds directly to the school at the student's direction. Again, the Court found that "[a]ny aid provided by Washington's program that ultimately flows to religious institutions does so only as the result of the genuinely independent and private choices of aid recipients," and that the program "creates no financial incentive for students to undertake sectarian education."

Zobrest (1993). This decision upheld the use of a publicly funded interpreter by a deaf student in a Catholic high school. The interpreter translated religious as well as secular lessons. "By according the parents freedom to select a school of their choice," the Court reasoned, "the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents."

Rosenberger (1995). The Court approved the *direct* funding of a religious student publication because other nonreligious activities were funded as well. "A central lesson of our decisions," the Court declared, "is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion."

Agostini (1997). This decision, the Court's most recent on the subject, overturned previous Supreme Court precedents and allowed the use of public schoolteachers to provide remedial instruction inside religious schools. Again, the decision relied heavily on the program's neutrality between religious and secular schools. The Court found that the program was neutral because "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."

Wisconsin. Distilling these precedents, the Wisconsin Supreme Court upheld the Milwaukee Parental Choice Program on the basis of two principles: "neutrality" (private and religious school choice operates within a broader range of educational options) and "indirection" (parents choose where the funds are spent). All current school choice programs satisfy those criteria. Because the Wisconsin Supreme Court is the highest court to apply recent First Amendment precedents to a school choice program, its decision probably will wield substantial influence. The two justices who dissented did so on state rather than federal constitutional grounds.

State Constitutions. Sometimes state constitutions contain more explicit prohibitions regarding aid to religious schools. However, since the "aid" here is not for schools but students, they tend to harmonize with federal precedents. Hence, the Wisconsin Supreme Court held that the Milwaukee program did not violate the Wisconsin Constitution's prohibition against public funds for the "benefit" of religious schools, because children were the primary beneficiaries and the benefit to schools is indirect.

Moreover, state constitutions must be read so as not to violate the First Amendment, which requires neutrality toward religion. If a state constitution is construed to discriminate against religious schools in an otherwise general program of education benefits, it may run afoul of the federal constitution.

Equal Opportunities. Allowing private and religious school options not only accords with First Amendment principles, but with the deeply entrenched constitutional principles of parental sovereignty and equal educational opportunities. Forty-four years ago in *Brown v. Board of Education*, the U.S. Supreme Court promised equal educational opportunities for all children. Upholding the constitutionality of school choice will be a major step toward fulfilling that promise.

This Brief Analysis was prepared by Clint Bolick, litigation director at the Institute for Justice in Washington, D.C.