

School Vouchers after President Obama

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INTRODUCTION

School vouchers have long been a part of the public debate about education reform, and continue to be a factor today. A new president stepped into the White House, making public schools a priority in his campaign rhetoric, and in his first few months in office already was faced with a decision about the voucher program that is currently in place in Washington D.C. Before President Obama's decision, the courts have tackled this issue, addressing it from an Establishment Clause perspective, and analyzing the programs under state constitutions. First, in *Zelman* the Supreme Court upheld the constitutionality of voucher programs under the Establishment Clause. In contrast, the Florida Supreme Court struck down a voucher program as violative of its state constitution. Although these courts came to two different results, and support for vouchers remains strong in Washington D.C. and across the country, vouchers do not provide a long-term or comprehensive solution to the problems facing public school students today.

ZELMAN AND THE SUPREME COURT'S RESPONSE TO VOUCHERS

The Supreme Court upheld voucher programs as not violative of the Establishment Clause in *Zelman*, where the city of Cleveland had instituted a voucher program for its low-income students.¹ This Pilot Project Scholarship Program provided two kinds of assistance to students, both tuition assistance for students to attend a participating public or private school of their parents' choice, or tutorial aid money for students who chose to remain in public school.² Any private school was allowed to participate in the program and accept students if it was

¹ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

² *Id.* at 644-45.

located within a school district that was covered under the program and met the educational standards of Ohio. Additionally, these schools had to agree to not discriminate based on race, religion or ethnic background and not to “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin or religion.”³

Aid for tuition was distributed to students in Cleveland according to financial need, with the poorest of families eligible to receive up to ninety percent of the tuition.⁴ These families were also given priority in the selection process for participating students.⁵ During the 1999-2000 school year, fifty-six private schools participated in the program, of which forty-six were religiously affiliated.⁶ Additionally, approximately 96% of the participating students went to religious private schools with their tuition aid.⁷

Plaintiffs in this suit challenged the Cleveland program as a violation of the Establishment Clause of the U.S. Constitution.⁸ The Court disagreed, saying that it did not have the effect of advancing or inhibiting religion, finding no financial incentives that advantaged religious schools in the program.⁹ The Court did not give weight to the amount of students that ended up in religiously-affiliated schools, saying that it is irrelevant even if a “vast majority of program benefits went to religious schools.”¹⁰ The Court even went so far as to declare that the Ohio program was “entirely neutral with respect to religion.”¹¹ *Zelman* seemingly opened the door for more voucher programs like the one used in Cleveland, and pushed the issue further into the political and local arenas.

³ *Id.* at 645.

⁴ *Id.* at 646.

⁵ *Id.*

⁶ *Id.* at 647.

⁷ *Id.*

⁸ *Id.* at 648.

⁹ *Id.* at 658.

¹⁰ *Id.*

¹¹ *Id.* at 662.

THE FLORIDA COURTS ANALYZE SCHOOL VOUCHERS

Notwithstanding the Supreme Court's holding in *Zelman*, the Supreme Court of Florida took a different approach in evaluating its state's voucher program.¹² Instead of analyzing the constitutionality of the law under the Establishment Clause, it addressed whether the program violated the state constitution, which required the state to provide for "the education of all children residing within its borders" and provide "by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education."¹³

The Florida court found the program to be a violation of this provision of its constitution, finding that the program unlawfully diverted public funds away from public schools and into private schools, even though public schools are the sole means set out in the state constitution for educating Florida students.¹⁴ Additionally, the court found that the money redirected from public schools to private schools reduced the total amount of money available to the public system and funded schools that would not be considered "uniform" under the Florida constitution.¹⁵ The plaintiffs in this case had originally brought a claim under the Establishment Clause, but *Zelman* was decided while the case was pending, so the plaintiffs voluntarily dismissed that claim.¹⁶

Florida's voucher program, known as the Opportunity Scholarship Program, provided that a student who attends or should attend a failing public school may attend a higher performing public school or may use a scholarship provided by Florida to attend a private school that participates in the program.¹⁷ Under the program, the maximum amount of a scholarship was

¹² *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006).

¹³ *Holmes*, 919 So.2d at 397-98; Art. IX § 1(a), Fla. Const.

¹⁴ *Holmes*, 919 So.2d at 398.

¹⁵ *Id.*

¹⁶ *Id.* at 399.

¹⁷ *Id.* at 400.

the same as the base student allocation for students in the public school multiplied by a couple of factors, which amounted to a reduction in the amount of funds that would be available to the school districts where the students would have gone to public school.¹⁸

The Florida Supreme Court noted that its Constitution provides that education is a “fundamental value of the State of Florida.”¹⁹ The Court stated that this term, taken along with the provision requiring adequate support for a high quality system of free public schools for all children within the state, invalidated the Opportunity Scholarship Program as it used the state’s resources for education for a means separate from the operation of free public schools.²⁰ The Florida Constitution did not provide for or authorize alternate means for educating students, it only provided for a free uniform public school system.²¹ Also, because the program diverted funding from this free uniform public school system to the private system, it undermined the ability of the public schools to maintain a level of instruction that meets the “high quality” requirement under the state constitution.²² Finally, this program supported public funding of schools that did not meet the “uniformity” requirement under the state constitution, as they were private schools.

Even in reaching this decision, however, the Florida court recognized the importance of the public policy arguments provided by both sides. The court stated, “[o]ur decision does not deny parents recourse to either public or private alternatives to a failing school. Only when the private school option depends upon public funding is choice limited.”²³ This state decision decidedly shifted the voucher focus from an Establishment Clause focus to a question of

¹⁸ *Id.* at 402.

¹⁹ *Id.* at 405 (quoting Art. IX, Fla. Const.).

²⁰ *Id.* at 407.

²¹ *Id.* at 408.

²² *Id.* at 408-09.

²³ *Id.* at 412.

education quality and uniformity.²⁴ The opinion, however, has been criticized for failing to offer evidence of the supposed inequity of the program, instead relying on its interpretation of phrases within the state constitution.²⁵ An as-applied challenge may have allowed for more evidence showing either the success or failure of the program, as well as the amount of money diverted to the private system away from Florida public schools.²⁶

However, even if a challenge to the program that specifically focused on the application of this program may have better served both voucher opponents and proponents, as it would have provided more empirical evidence evaluating voucher programs, it was nonetheless proper for the court to strictly evaluate this challenge on a state constitutional level. Even if only a small amount of money is diverted from public schools, and even if each individual child that uses a voucher improves his or her performance, public school systems and public school students in Florida and elsewhere are not ultimately served by vouchers.

VOUCHER PROGRAM IN WASHINGTON D.C.

The extremely difficult decision, to forego any potential benefits of vouchers to the few that receive them, in favor of saving more funds for the public school system, as well as retaining higher performing students and more engaged parents in the public schools, is faced by a variety of individuals, from nearly every local community that has considered or put into place a voucher program to the executive branch of the federal government. A school voucher program was instituted in Washington D.C. in 2003.²⁷ The program provided some lower-income D.C.

²⁴ *State Constitutional Law—Education Clause—Florida Supreme Court Declares State’s School Voucher Program Unconstitutional—Bush v. Holmes*, 120 HARV. L. REV. 1097, 1097 (Feb. 2007).

²⁵ *Id.*

²⁶ *Id.* at 1101.

²⁷ Shailagh Murray, *Obama Offers D.C. Voucher Program Extension for Existing Students*, WASH. POST (May 6, 2009) available at http://voices.washingtonpost.com/44/2009/05/06/obama_proposes_extending_dc_vo.html?wprss=44

students with a maximum voucher worth \$7500 to attend a private school, secular or religiously affiliated.²⁸ All of the students that received vouchers came from families with incomes below 185 percent of the poverty line.²⁹ Approximately 8,000 students entered the lottery to be eligible for a voucher.³⁰

The statute that set up this program, however, required reauthorization in order for the program to continue, which Congress has not followed through on.³¹ The program will likely end, but President Obama has proposed a compromise that would allow for continued funding for students that already have vouchers and have been placed in private schools.³² Specifically, any student currently receiving money through the voucher program would continue to receive the money until he or she graduated from high school.³³

Although proponents of school voucher programs in general and of the D.C. program specifically have cried foul at the impending termination of the program for students not already receiving vouchers, the research on the program has tended to show that the voucher program did not achieve the kind of gains that supporters of the program wanted. The Department of Education issued a three-year analysis of the program and found that students in the program had achieved limited gains in reading, but no significant gain in math skills.³⁴ Although the National Education Association (NEA) had called for a more dramatic move on the part of the Obama administration to denounce the use of school vouchers, and voucher programs like the one in D.C., the administration feels that moving the students that already receive vouchers back to

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

public schools would cause too much a disruption in their lives and the lives of their classmates.³⁵

THE FUTURE OF VOUCHERS AFTER *ZELMAN, HOLMES, AND D.C.*

Voucher programs have been deemed “an ongoing threat to public education” by the NEA, but this extension proposal by Obama would likely keep voucher programs in the national dialogue, at least until the children receiving vouchers have graduated high school. The continuation of the program even if limited to students already a part of the program, allows the administration to toe the line between supporters and opponents of voucher programs. Although it may be politically unpopular for the President to take a more hard-line stance against vouchers and remove the students that are currently receiving aid to attend private schools, a strong action like that may have helped remove vouchers from the discussion of viable options regarding education reform.

With students still receiving voucher money in D.C. up until their graduation, it provides more opportunity for supporters of vouchers to make their case, whether or not the scores of these children improve. If their scores do improve before they graduate high school, supporters of vouchers will claim it is because they were allowed the time to flourish in private schools; if their scores do not improve supporters will claim that the D.C. program was not afforded the opportunity to gain its footing before it was cut short.

No matter how the program continues to work in D.C., it seems as if vouchers will be a part of the public debate for some time. After *Zelman*, it was predicted that the number of school voucher programs and their popularity and support among the public would greatly increase,

³⁵ *Id.*

however, that turned out to be untrue.³⁶ Since the Supreme Court's decision in *Zelman*, only a few jurisdictions have adopted school voucher plans and at the same time over thirty proposals have failed.³⁷ The case was decided at approximately the same time that No Child Left Behind was enacted, which mandated a greater oversight of all schools, including those private schools that accepted vouchers under voucher programs.³⁸ Private schools and individuals that support greater school autonomy may struggle with the added requirements that NCLB requires if they were to accept voucher students.³⁹

Even though communities and states did not jump at the opportunity for voucher programs immediately after *Zelman* was decided, voucher programs still have a large support base, and they continue to be a large part of the discussion regarding education reform, as evidenced by the backlash that surrounded the potential expiration of the D.C. voucher program under the Obama administration. *Zelman* opened one door for school voucher advocates, by establishing the constitutionality of vouchers under the Establishment Clause, but it did not address the core debate that is the focus of public policy arguments for and against voucher programs, which centers more on equality in education and public money being diverted from the public school system and funneled into private entities, religious or not.

The Florida Supreme Court attempted to inject itself into the focus of the public policy debate; however, how successful the court was in its attempt is hotly debated. At the beginning of its opinion, the court seemed to even acknowledge that it was side-stepping the heart of the debate about vouchers. It carefully noted that the case was before the state supreme court “[b]ecause a state statute was declared unconstitutional by the [lower court], [and] this Court is

³⁶ James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 549 (Feb. 2007).

³⁷ *Id.* at 550.

³⁸ *Id.* at 547.

³⁹ *Id.* at 547-48.

required by the Florida Constitution to hear th[e] appeal.”⁴⁰ The court went on to say that, “the justices emphatically are not examining whether the public policy decision made by the other branches is wise, or unwise, desirable or undesirable.”⁴¹ Indeed, critics have condemned this decision as a “half-hearted attempt” to address the impact of voucher programs on the public school system in the state, as the court did not provide empirical evidence to support its contention that the diversion of public school funds undermines the system.⁴²

Even if the Florida Supreme Court’s decision was half-hearted, in terms of its reluctance to step assertively into the school voucher conversation, it nonetheless was a rather successful attempt. The court made a persuasive argument as to why more empirical evidence was not necessary in this context, as any diversion of public money to private schools, even in a very small amount, violated the state constitution. Similarly, in D.C., Obama’s decision to extend the voucher program for those students already receiving vouchers could show that even a small amount of money diverted from the public schools can create a detriment for all public schoolchildren.

Furthermore, the empirical evidence as to the successes and failures of vouchers is decidedly mixed and even murky. While some writers claim that “the high-quality studies on school voucher programs generally reach positive conclusions about vouchers,”⁴³ others argue that “a comprehensive review of the research indicates that the initial optimistic expectations from theoreticians and policy advocates for improved academic outcomes are not supported by

⁴⁰ Bush v. Holmes, 919 So.2d 392, 397 (Fla. 2006).

⁴¹ *Id.*

⁴² *State Constitutional Law—Education Clause—Florida Supreme Court Declares State’s School Voucher Program Unconstitutional—Bush v. Holmes*, 120 HARV. L. REV. 1097, 1097 (Feb. 2007).

⁴³ Patrick J. Wolf, *School Voucher Programs: What the Research Says About Parental School Choice*, 2008 B.Y.U. L. REV. 415, 416 (2008).

the growing body of research on this question.”⁴⁴ Considering the ongoing debate about whether school vouchers provide any academic benefits to the limited number of students that receive them, it is logical that the Florida Supreme Court would not use these competing studies in reaching its conclusion on the constitutionality of the state statute. It is also logical that with the data indicating that D.C. students receiving vouchers were not making significant gains in either math or reading, the program be terminated, and the funds used to support the program be redirected elsewhere.

CONCLUSION

In Washington D.C., 1,716 students currently are using vouchers to attend private schools.⁴⁵ Approximately 8000 students entered a lottery to participate in the program.⁴⁶ A program that necessarily only serves that small of a percentage of needy students cannot be a permanent solution for public school students in the United States. While a continued debate will rage about the use of school vouchers, they do not serve all of the public school students, whether or not they are effective for a small group of selected students. The Obama administration ultimately declined to end the program in D.C. completely, in favor of committing completely to reform of the public school system itself, but that remains the only viable, comprehensive, solution. Instead of spending money, resources, and time compiling research on the academic outcomes of vouchers, school districts, communities and states should be

⁴⁴ Peter Weitzel, *The Effects of Vouchers and Private Schools in Improving Academic Achievement: A Critique of Advocacy Research*, 2008 B.Y.U. L. REV. 447, 448 (2008).

⁴⁵ Shailagh Murray, *Obama Offers D.C. Voucher Program Extension for Existing Students*, WASH. POST (May 6, 2009) available at http://voices.washingtonpost.com/44/2009/05/06/obama_proposes_extending_dc_vo.html?wprss=44

⁴⁶ *Id.*

expending these resources on the public schools themselves, in order to better serve all of the students that attend these schools.