

Jay P. Greene's Blog

5th Circuit Court Rejects “Disingenuous” DOJ Anti-School Choice Lawsuit

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For a few years, the Obama administration's Department of Justice has been trying to shut down or at least seriously constrain Louisiana's school voucher program. The DOJ unironically used anti-segregation laws to attack the school choice law, even though the DOJ's "success" would mean keeping black kids in failing schools. After two studies showed that the voucher program actually improved integration, the DOJ backpedaled a bit but still went forward with its lawsuit to give the feds greater control over the voucher program.

That effort ended today.

According to our friends at the Goldwater Institute, which was defending the voucher program from the DOJ, the Fifth Circuit Court of Appeals today ruled against the DOJ. Here is their press release:

New Orleans—In a case with national implications for parental choice programs in hundreds of school districts that still are subject to federal desegregation decrees, today the Fifth Circuit U.S. Court of Appeals ruled that the U.S. Department of Justice can't limit enrollment in a state private school scholarship program.

The Department of Justice was attempting to use an unrelated, decades-old desegregation case to assert federal jurisdiction over the state program. When it initially filed the case, DOJ asked for an injunction to block students in school districts under desegregation orders from using vouchers. DOJ backed off its request for an injunction, but pressed ahead with its case, placing a cloud of uncertainty over the school options for Louisiana scholarship families.

In the 2-1 decision written by Judge Edith Jones, the court referred to the Department of Justice's tactics as “disingenuous,” purporting merely to seek information and enforce desegregation while “imposing a vast and intrusive reporting regime on the State without any finding of unconstitutional conduct.” The decision also called the process as “burdensome, costly, and endless.”

“This is a victory for minority and low-income schoolchildren, not only in Louisiana but around the country,” said Clint Bolick, vice president for litigation at the Goldwater Institute, which is representing the Black Alliance for Educational Options and voucher families.

“The decision should put an end to efforts to use long-ago desegregation decrees to thwart

educational opportunities for their intended beneficiaries, whether through vouchers or charter schools. The educational horizon just brightened.”

The Student Scholarships for Educational Excellence Program was created in 2012. The statewide program provides private school tuition vouchers to children from families with incomes below 250 percent of the poverty line and who otherwise would attend public schools that the state has graded C, D or F. In the 2013-14 school year, nearly 6,800 students were awarded scholarships, a 20 percent increase from the year before. More than 85 percent of the children receiving scholarships that year were African American, nearly twice their representation among the Louisiana public school population.

Bolick argued and won the *Zelman v. Simmons-Harris* case before the U.S. Supreme Court, upholding the constitutionality of school vouchers more than a decade ago. He now leads the litigation efforts at the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation. [emphasis added]

UPDATE: Here is the [full decision](#) (h/t Ze’ev Wurman). The challenge was actually an expansion of a 40-year-old desegregation lawsuit that the administration cynically used to attack Louisiana’s school voucher program. However, Judge Edith Jones wasn’t having it. Here she notes that there is no evidence that the voucher law impeded the desegregation effort:

Louisiana hired an expert to produce reports on the voucher program’s impact for the 2012–2013 and 2013–2014 school years. The expert, Christine Rossell, is a professor of political science at Boston University who has 26 years’ experience designing and analyzing school desegregation plans. For both school years facing scrutiny, she found that the program “had no negative effect on school desegregation in the 34 school districts under a desegregation court order.” The DOJ has produced no evidence to the contrary.

The circuit court overturned a lower court’s ruling on several grounds, including the lower court’s erroneous assumption that the voucher program is intended to aid private schools. In actuality, as the circuit court found, the vouchers aid *students*. Likewise, the point of SNAP is to aid poor people, not grocery stores, even though grocery stores benefit when people spend their SNAP funds there.

In the 1975 order, the district court retained continuing jurisdiction for the remedial purpose laid out in the order, which was to prevent future state aid to discriminatory private schools. For three reasons, the April 8 Order goes beyond correcting—and indeed has nothing to do with—the violation originally litigated in this case. First, the voucher program’s potential impact on desegregation orders for public schools in separate federal desegregation cases is distinct from eliminating public funding for discriminatory private schools. Second, **the voucher program aid is for students rather than private schools**. Finally, even if the voucher program aids private schools, it is not being given to discriminatory private schools. **The district court’s order exceeded the constitutional infirmity on which this case was predicated and is therefore void.**[emphasis added]

The court continues:

The state's voucher program is also outside the scope of this case because it provides aid to students rather than to private schools. First, the voucher program allows students to state their preference for public or private schools on their applications. It is then the students' choice to accept the state scholarship so no money is given to a school, public or private, without the approval of the students' families. Second, the scholarship pays for the individual student's education; it does not aid private school operations. That is made clear by the fact that the scholarship is capped at the amount the state would have spent on the child had the child attended a local public school. La. Rev. Stat. § 17:4016. The scholarship covers the marginal cost of educating an additional child.

Exactly so.

The court concludes that the DOJ was disingenuous:

DOJ's attempt to shoehorn its regulation of the voucher program into an entirely unrelated forty-year-old case represents more than ineffective lawyering. Despite the district court's contrary conclusion, **it seems plain that DOJ's expressed concern—how the voucher program affects statewide public schools racially—has nothing to do with the narrow issues considered** in the *Brumfield* litigation. DOJ's bold strategy, if upheld, would circumvent the ordinary litigation process...

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