EDUCATIONnext

# Public School Groups Sue to Limit Public's Educational Options

By Andrew Coulson
September 2, 2014

Last week, Florida's state school establishment sued to kill an education tax credit program that benefits 60,000 low income, mostly black and Hispanic children. The credits cut taxes on businesses that donate to non-profit scholarship organizations, and those organizations help needy families who want to send their children to private schools. Studies show performance gains for both the students who switch to private schools and the students who remain in public schools, and taxpayers save tens of millions of dollars every year. The tax credits thus create a win-win-win scenario.

But Florida's teachers union, school administrators association, and school boards association want to kill the program anyway. In their legal complaint, they claim that the credits violate state constitutional provisions forbidding public spending on religious schools and requiring a "uniform" public school system. Before getting to the merits of these claims, it is worth pointing out that the plaintiffs lack standing to sue in the first place.

Before courts will hear a lawsuit, plaintiffs must establish "standing" by showing that they have been injured in some concrete way. But on the same day that the Florida suit was filed, the New Hampshire supreme court ruled that plaintiffs in that state did *not* have standing to file suit against their education tax credit program. And in 2011, the U.S. Supreme Court reached the same conclusion with respect to a suit against Arizona's education tax credits (*ACSTO v. Winn*). In both the NH and U.S. Supreme Court cases, the justices ruled that plaintiffs demonstrated no personal injury either financially or to their constitutional rights, so they were sent packing.

In Florida, the public school plaintiffs have once again failed to demonstrate that they have been injured by the tax credit program. They imply that they have been forced to support religious schooling, but as the U.S. Supreme Court explained in *ACSTO v. Winn*, "that's incorrect."

tax credits and governmental expenditures do *not* both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are "extracted and spent" knows that

he has in some small measure been made to contribute to an establishment [of religion] in violation of conscience.... [By contrast,] awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.

Anyone who objects to the program has the option of not participating, in which case their taxes are collected as they had always been and none of their money goes to religious schools. So, no harm done.

The plaintiffs also allege that they have been injured because some of their children attend public schools, and because when a student uses a private scholarship to switch from public to private school it reduces district funding. This, they claim, hurts their children's education. Not only do they fail to provide any evidence of this, but the data actually prove the opposite. First, as noted above, research shows that the scholarship program *improves* the performance of students who remain in public schools. And second, Florida school districts lose only a fraction of their per pupil funding when a child leaves (the state "FEFP" portion, which is roughly 2/3rds of the total). So not only does the departure of scholarship students improve the performance of their public school peers, it also leaves more money per pupil to be spent on those peers. Public school districts are thus left better off both academically and with respect to per-pupil funding. Again, no harm done.

But, for the sake of argument, let's imagine that the courts decide to hear this case despite the lack of harm to the plaintiffs and hence their lack of standing to sue. Both of the plaintiffs' claims would still be without legal merit. The first claim, that public monies are being spent on religious education, is simply false. In addition to the U.S. Supreme Court ruling above, the Arizona Supreme Court, and Illinois district courts have also concluded that donations made under education tax credit programs are *not* public money. Black's law dictionary agrees, as the Arizona court observed.

Plaintiffs' second argument is that the tax credit program violates Article IX, Section 1 of the Florida constitution, which states that "Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools." The Florida supreme court ruled in *Bush v. Holmes* that the state's publicly-funded school voucher system violated this clause, because "it diverts public dollars" from "the sole means set out in the Constitution for the state to provide for the education of Florida's children."

It is worth noting that Florida's constitution does not stipulate that the uniform system of free public schools must be the *sole* means of providing for children's education. On the contrary, it explicitly authorizes—in the very same sentence—such "other public education programs that the needs of the people may require." The majority on the *Bush* court decided to interpret away this clause, claiming that it referred exclusively to junior colleges and adult education outside K-12 schooling. Though they cited a precedent for this claim (*Board of Public Instruction v. State Treasurer*, 231 So. 2d 1, 1970), the given case does not support their contention. That precedent merely states that junior colleges

and adult education happen to fall within the meaning of "other public education programs," not that they are the *only* programs that do so.

But though fabricated out of thin air, the court nevertheless used its new exclusivity doctrine to stop the legislature from running its publicly-funded K-12 voucher program for a general student population. Fortunately, as already noted, donations to private school scholarship organizations are not public funding, and so the court's newly invented constraint has no bearing on Florida's education tax credits.

The exclusivity doctrine may compel the state government to create one and only one publicly funded K-12 school system of its own, but it most certainly does not compel all Floridian children to use it. It does not prohibit parents from choosing private schools. It does not prohibit businesses from donating to educational charities. And it does not prohibit the legislature from setting tax policy in such a way as to reduce the penalties for those private decisions. The plaintiffs themselves repeatedly admit that neither the donors, nor the private schools, nor the scholarship granting non-profits, nor the low-income families themselves are under the thumb of state officials. Not a single donation is made, nor a single scholarship awarded, nor a single child educated at a private school except as the result of the independent decisions of Florida parents, businesses, and charities. The system is private, autonomous, and voluntary—and Florida's constitution is designed to limit the power of government not the rights and freedoms of the people.

Not only is the scholarship tax credit policy consistent with Article IX, Section 1 of the state constitution, it has been proven to *advance* that constitutional mandate. It improves the academic performance of the low-income, mostly minority students who use scholarships to attend private schools, and also that of their peers who stay in the public schools. By doing so, it diminishes the inequality in achievement that would otherwise exist in Florida's public schools. Furthermore, the program has been shown to save the state money, advancing the constitutional exhortation for "efficiency."

In short, the plaintiffs are not harmed by this program and the children and taxpayers of Florida are helped by it. So why are the major players in the state-run school system suing to kill it? To put it bluntly, this lawsuit has been brought by monopolists to protect their monopoly. Regardless of the legal outcome, the very fact that this suit was filed serves to lift the veil on the true nature of America's school monopolists. They're not fooling anyone anymore—perhaps not even themselves.

*Andrew J. Coulson directs the Cato Institute's Center for Educational Freedom and co-authored the Institute's amicus brief in the* ACSTO v. Winn *U.S. Supreme Court case.*