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The 'neovoucher strategy' (and why it didn't work in New Hampshire)

By: Valerie Strauss – June 21, 2013

"Neovouchers" is the term that Kevin Welner, director of the National Education Policy Center at the University of Colorado Boulder School of Education, has given to private school tax credit programs. Earlier this week, a judge in New Hampshire ruled that the part of tax-credit program that allows public money to be used for religious school education violates the state constitution. Here's a piece by Welner on what happened in New Hampshire that has ramifications beyond that state's borders.

By Kevin Welner

If I wrote a lousy screenplay, I probably shouldn't then complain about how awful the play is as I watched the actors reciting their lines. So I was amused to see advocates complaining about how a judge in New Hampshire this week struck down that state'sneovoucher law insofar as it funds religious schools.

Here's what happened. A year ago, then-governor John Lynch of New Hampshire vetoed a bill (Senate Bill 372) that set up a system whereby money that businesses owe to the state in taxes could be diverted to private organizations that would repackage the money and hand it out as private school vouchers (which I've called "neovouchers"). Some of the funded schools would be secular, some would be religious, and up to 25% would be homeschoolers.

The governor and opposition lawmakers cited the cost to the state budget as well as the bill's doubtful constitutionality. But the New Hampshire legislature decided to override the veto.

Not surprisingly, the law was challenged by civil liberties groups and others. And not surprisingly, it was found to be unconstitutional.

This displeased those who advocate for neovoucher policies and who had hoped that the New Hampshire court wouldn't understand and apply the so-called "tax expenditure doctrine." This doctrine looks at the practical effect of tax credits and thus treats them as analogous to direct government expenditures (both are charges made against the state treasury). In fact, the entire legal appeal of the convoluted neovoucher mechanism is built around courts not understanding that doctrine.

The law was struck down because New Hampshire's state constitution includes language called a "no-aid clause" that expressly declares: "no money raised by taxation shall ever be granted or applied for the use of schools or institutions of any religious sect or denomination." N.H. CONST. pt. II, art. 83.

To normal readers, that might seem like a prohibition against vouchers. But if you're a neovoucher advocate, the strategy is supposed to unfold as follows:

1. State X's constitution prohibits tax money being spent to support religious institutions, which rules out vouchers funded directly through State X's general fund.
2. Legislators design a system that houses voucher funds outside the state general fund, giving large tax credits (sometimes 100%) to taxpayers who could 'donate' money (otherwise owing to the state) to private corporations that then pool the money and hand out the neovouchers.
3. Courts are blinded to the reality that neovouchers are essentially the same thing as vouchers – a distinction without a difference. So the courts are supposed to say, "the constitution may prevent a direct expenditure of tax money, but these clever fellows have found a way to make that provision meaningless, so let's go ahead and declare the system to be constitutional."

This is how the Arizona law was upheld by conservative justices in the U.S. Supreme Court and Arizona Supreme Court. In both cases, the courts held that the Arizona neovoucher approach involved spending by private individuals, not by the state. If there's no state spending, then the state constitution does not prevent financial support for religious schools. In fact, taxpayers were ultimately prevented from even launching a legal challenge.

But the neovoucher strategy didn't work in New Hampshire, where the court – interpreting that state's constitution – was not bound by the earlier decisions. The Nashua Telegraph, in an editorial after the ruling, explained the court's decision as follows:

> The law attempted to skirt this constitutional restriction by laundering the money through third-party 'scholarship organizations.' But the court wisely saw through this charade. It ruled that no matter how you cut it, tax dollars that would have been used to fund normal government operations were being used to support religious schools.

Let's return to the 'lousy screenplay' issue noted above. New Hampshire's neovoucher advocates wrote a law designed to divert putative state tax money to private schools, including private religious schools, notwithstanding a clear "no-aid clause" in the New Hampshire Constitution. These advocates also wrote the law to include "severability" language, meaning that courts that find part of the law to be unconstitutional are instructed to do their utmost to allow that unconstitutional portion to be severed from the rest of the law – to allow the rest of the law to go into effect.

So what happened? Sure enough, the court applied the no-aid clause to find that a voucher system cannot fund private schools, whether set up with direct funding or through a tax credit scheme. And sure enough, the court applied the severability language to allow the legislation to stand when applied to fund attendance at non-religious schools (and presumably home schools).

My own judgment is that it's poor policy to set up such a neovoucher system, even as applied to non-religious schools. But I don't see how the authors of this law can legitimately complain that the court's decision on Monday discriminates against

religious people and institutions. (Institute for Justice attorney Richard Komer raised that complaint.)

If you write a law that violates the state constitution in a rather apparent way and that includes a severability clause, how grieved should you be when a court points out the violation and then bends over backwards to apply your own severability preference? Was this result really unforeseeable?