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The Left's Legal War on Children

The war against school choice hurts the very children it is supposed to help.

By Jason Bedrick
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Nearly 60 years after Milton Friedman proposed a system of universal school choice in his seminal essay "The Role of Government in Education," his vision is more popular than ever — and opponents of school choice are taking every measure to fight it.

In a recent survey by *Education Next*, half of those polled expressed support for universal school vouchers, and 60 percent favored giving tax credits for individual and corporate donations to scholarship organizations that help low- and middle-income families pay private-school tuition. Moreover, a recent Friedman Foundation survey found that support for school-choice tax-credit laws was highest among groups that traditionally vote for Democrats, including low-income Americans (67 percent), younger people (74 percent), blacks (72 percent), and Hispanics (80 percent).

That popularity has translated into political success. The number of private-school choice programs has more than tripled in the last decade, from 15 in 2004 to 51 programs in 24 states and Washington, D.C., today. In that time span, the number of students attending a private school with a voucher or tax-credit scholarship has grown from just under 100,000 to over 300,000.

Much of that growth has occurred in just the last few years. Since 2011, dubbed "The Year of School Choice" by the *Wall Street Journal*, states have adopted 24 new school-choice laws and expanded 33 existing choice programs. None have been legislatively repealed.

With school choice winning in state legislatures and the court of public opinion, opponents of choice have turned to the courts to stop them. Left-wing groups like the American Civil Liberties Union, Americans United for Separation of Church and State, the Southern Poverty Law Center, the teachers' unions, and the Florida School Boards Association have filed a bevy of lawsuits in recent years to stem the school-choice tidal wave. Perversely, these organizations' lawsuits would harm the very populations that they claim to want to help.

There are currently active anti-school-choice lawsuits in Alabama, Colorado, Oklahoma, Louisiana, and North Carolina, plus two in Florida. Last month, a judge dismissed a third lawsuit

by the Florida Education Association because it could not demonstrate harm and therefore lacked standing. Lower courts in Oklahoma and North Carolina recently struck down those states' special-needs voucher and low-income voucher, respectively. Those decisions are being appealed.

Earlier this year, a federal judge tossed out a challenge to Alabama's school-choice law, which absurdly claimed that the law violated the equal-protection clause because it failed to rescue all children from low-performing public schools. The judge held that the "equal protection" the plaintiffs sought was, "in effect, equally bad treatment." A second lawsuit challenging Alabama's school-choice law on procedural grounds is pending appeal.

What follows is a summary of three of the main types of legal challenges that school-choice laws currently face.

BLAINE AMENDMENT CHALLENGES

The most common anti-school-choice legal challenge claims that such laws unconstitutionally fund religious education with public money.

In 2002, the U.S. Supreme Court held in *Zelman v. Simmons-Harris* that school-voucher programs are consistent with the First Amendment's Establishment Clause when they serve a secular purpose and are neutral with respect to religion, and when aid goes to parents, who then choose where their child attends school. Thus any public money that flows to a religious institution does so only as a result of the choice of a child's parents. In this sense, a parent who uses a school voucher is constitutionally no different from a person who regularly hosts Bible studies in his Section 8 subsidized apartment or uses SNAP funds to purchase food for a religious feast.

Since this decision closed the door to challenges under the U.S. Constitution, opponents of school choice turned to the historically anti-Catholic "Blaine Amendments" contained in most state constitutions. During the late 19th century, Senator James Blaine of Maine, a nativist, sought to amend the U.S. Constitution to forbid state aid to religious schools, fearing that Catholic immigrants would want government funds for their parochial schools. At that time, public schools were de facto nondenominational Protestant schools. Though Blaine's effort was unsuccessful at the federal level, most states adopted some version of his proposed amendment, often in addition to an earlier constitutional provision prohibiting the "compelled support" of religion.

State supreme courts have differed in their interpretation of the Blaine Amendments. Some courts have closely tracked the U.S. Supreme Court's First Amendment jurisprudence, as the Indiana Supreme Court did last year in unanimously upholding the state's voucher law. However, the Arizona Supreme Court had previously struck down two voucher laws under that state's Blaine Amendment.

Nevertheless, the Arizona court upheld the state's school-choice tax-credit law because tax credits do not constitute public funds. The U.S. Supreme Court later ruled likewise in *ACSTO v. Winn* (2011), holding that funds do not become "public money" until they have "come into the

tax collector's hands." In that sense, tax credits are constitutionally no different from tax deductions or exemptions. For example, no reasonable person believes that a church is "publicly funded" because its donors receive charitable-donation tax deductions or because the church itself receives a 100 percent property-tax exemption.

Last month, the New Hampshire Supreme Court rejected a Blaine Amendment challenge to the state's school-choice tax-credit law, holding that none of the plaintiffs had standing to sue since the law did not harm them. School-choice tax-credit laws have a perfect record so far in states' high courts and the U.S. Supreme Court.

Earlier this year, Arizona's education-savings-account law also survived a Blaine Amendment challenge, despite the state supreme court's previous hostility toward vouchers. The court ruled that the law was constitutional because parents can spend the funds on a wide variety of educational expenses beyond tuition — and a significant number of families did not spend any of the funds on tuition.

UNIFORMITY-CLAUSE CHALLENGES

The Florida public-school establishment is suing to repeal the Sunshine State's 13-year-old school-choice tax credit and its new education savings accounts under the state's Blaine Amendment and its "uniformity clause," which mandates 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 previously struck down the state's voucher program under this provision in *Bush v. Holmes* (2006), on the grounds that the vouchers "divert[ed] public dollars" from "the sole means set out in the Constitution for the state to provide for the education of Florida's children."

In other words, the Florida Supreme Court interpreted "uniform" to mean "exclusive." That reading would be strained even if not for the fact that the very same sentence of the Florida Constitution explicitly authorizes the state to create "other public education programs that the needs of the people may require." Further straining credulity, the court interpreted the latter clause to refer only to junior colleges and adult-education programs.

Both the dissenters and two of the five justices in the *Holmes* majority have since been replaced, so it's unclear how the new bench is likely to rule. It remains to be seen whether it has the will to eliminate the nearly 70,000 scholarships going to mostly minority, low-income families.

Following the U.S. Supreme Court, the Florida Supreme Court may find that the plaintiffs do not have standing to challenge the school-choice tax-credit law because it does not utilize public funds. Moreover, since the *Holmes* decision also interpreted "uniform" to mean that all schools must teach the same curriculum, it would appear to outlaw the state's public charter schools, which are not required by Florida statute to teach the state curriculum. The far-reaching consequences, combined with the fact that *Holmes* contradicts the plain meaning of the state constitution, may be enough to persuade the new bench to overturn or at least narrowly limit the *Holmes* precedent.

SEGREGATION CHALLENGES

Last year, the U.S. Department of Justice attacked Louisiana's voucher law, claiming that it thwarted the DOJ's efforts to desegregate public schools. Ludicrously, the initial brief pointed to only two examples: a school that "lost six black students as a result of the voucher program," thereby "reinforcing the school's racial identity as a white school in a predominantly black school district," and a disproportionately black school that "lost" five white students. The shift in the racial makeup of each of these schools was less than 1 percent, yet that was too much for the racial bean counters at the DOJ.

Worse, Louisiana's vouchers were restricted to low-income families with children assigned to failing public schools. More than 85 percent of the voucher recipients were black. The *Washington Post* condemned the DOJ's lawsuit as "appalling," noting that "rules to fight racism" were being "used to keep students in failing schools."

The absurdity of the DOJ's lawsuit was further exposed when two studies by researchers at the University of Arkansas and Boston University revealed that the net effect of the voucher program was to improve racial integration. The DOJ eventually backpedaled somewhat, dropping its demand that it have authority to approve or deny every single voucher, but a federal judge ruled that the state must fork over data about the race of participating students, which the DOJ could use in future challenges.

FUTURE SCHOOL-CHOICE LAWFARE

Defenders of the public-school monopoly have had limited success in their lawfare against school choice, despite a few painful decisions. As the courts continue to uphold choice programs, opponents will likely shift to using regulation to strangle choice programs and turn to more targeted legal challenges, like the DOJ's threats against Milwaukee's voucher program over special-needs enrollment. When crafting school-choice laws, wise legislators will consult in advance with the experts at the Institute for Justice, the Goldwater Institute, the Pacific Legal Foundation, or the Becket Fund for Religious Liberty to ensure that their legislation is well designed to withstand the inevitable legal challenge.

As ever, eternal vigilance is the price of educational liberty.

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