School Vouchers: Legal and Constitutional Issues

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Agenda

• Introductions
• National Policy Landscape
• Federal Action
• The Wisconsin Experience
• The Indiana Experience
• The Colorado Experience
• Questions
Presenters

Moderator
Josh Cunningham - Policy Specialist, Education Program, NCSL

Speakers
Anne Sappenfield - Senior Staff Attorney, Legislative Council, Wisconsin
Allen Morford - Attorney, Legislative Services Agency, Indiana
Julie Pelegrin - Deputy Director, Legislative Legal Services, Colorado
Private School Choice

School Voucher
- State-funded scholarships for qualifying students to attend private schools—often religious—that meet minimum state standards

Personal Tax Credits
- Parents receive a tax credit for private school expenses incurred. These are mostly used to reimburse parents for private school tuition but can also be applied to other related expenses such as transportation costs

Tax Credit Scholarships
- Individuals/Businesses receive a tax credit for donations to non-governmental scholarship-granting organizations
- These organizations issue scholarships to qualifying students for private school tuition
National Policy Landscape

- 12 states have school voucher programs
- 12 states have tax credit scholarship programs
- 40 states have considered legislation on vouchers and/or tax credit scholarships since 2011

Map: Vouchers and Tax Credit Scholarship Laws
- School Vouchers
- Tax Credit Scholarships
- Both

Source: NCSL, 2013
Federal Legal Overview

Establishment Clause:

"Congress shall make no law respecting an establishment of religion"

— U.S. Const. amend. I

- Establishment Clause challenge to Minnesota's tax deduction for certain public and private school expenses incurred including private school tuition
- Applied the 3-part test (Lemon v. Kurtzman)\(^1\) required for a statute to comply with Establishment Clause
- Relevant precedent: The state is not providing aid directly to religious schools. The aid goes to the parent who has a free choice to use the benefit for secular or non-secular education.

\(^1\) Lemon v. Kurtzman, 403 U.S. 602 (1971)

- Challenge to Ohio's pilot voucher program in Cleveland
- In 1999-2000 school year, 96% of participating students were enrolled in a religiously affiliated private school
- Ohio taxpayers claimed the program violated the Establishment Clause of the First Amendment
- Court held that the program is constitutional
  - The program was enacted for the secular purpose of providing educational assistance to poor children
  - Parents exercise a private choice to use a voucher at religious schools
  - The government's role ends with the disbursement of benefits to parents
Student Name ________________________

Please provide a narrative discussing the student’s character, leadership, community involvement, perseverance, citizenship, school achievement, personal accomplishments, spiritual life, and extracurricular interests. The child’s age will be appropriately considered. If you prefer, you may include the narrative on a separate piece of paper.

Optional Addendum: In addition to the narrative, you may attach up to three letters of recommendation, written using the same guidelines as the narrative, from individuals who know the student well.
Federal Legal Overview

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION v. WINN, 562 F. 3d 1002 (2011)

– Challenge to Arizona’s scholarship tax credit program by Arizona taxpayers

– Claim: School tuition organizations in Arizona give scholarships to students of a particular faith and limit the use of those scholarships to schools of that faith

– Court ruled that taxpayers do not have standing to sue because a tax credit is not a government expenditure; and thus, they can claim no harm

– No ruling was made as to the compliance with the Establishment Clause
Wisconsin Legislative Council

Wisconsin School Choice Programs

Presentation by Anne Sappenfield
Senior Staff Attorney
In Governor Tommy Thompson’s State of the State address in January, 1989, he announced the school choice program:

“Some of our students, particularly those in Milwaukee’s central city neighborhoods, are being left behind. They are not receiving the quality of education they need to one day get a good job, or to maximize their potential. We must do better, we cannot be content with the status quo, nor can we be complacent when we know that not all of our children are receiving the best possible education.

Wisconsin is a leader…and it’s time for us to take the lead in giving students and parents a choice in education.”
Milwaukee Parental Choice Program [s. 119.23, stats.]

- Established in 1990
- The program began with 7 private schools and 300 students
- Today, 112 private schools participating
- In September, 2012, almost 25,000 students were enrolled in voucher schools
Racine Parental Choice Program [s. 118.60, Stats.]

• Racine County contains the City of Racine, the 5th largest city in Wisconsin
• Program established in 2011
• 11 schools participated in 2012-13
• Cap on students of 250 in 2011-12, 500 in 2012-13; no cap thereafter
Eligibility of Students

• Family income at or below 300% of the poverty level ($70,900 for a family of 4)

• Typically, the student attended a school in the Milwaukee or Racine district or attended a choice school in the previous year

• Students are selected for enrollment at random, but preference may be given to siblings of students
Requirements for Schools

- Comply with discrimination laws
- Comply with health and safety laws applicable to public schools
- In general, all teachers and administrators have at least a bachelor’s degree
- Accredited by an organization recognized in the statutes
- Provide required hours of instruction
Requirements for Schools

• In general, may not charge tuition
• Provide specified information to parents and to the Department of Public Instruction
• Submit to an independent financial audit
• Administer statewide student assessments
• Adopt academic and high school graduation standards
Requirements for Schools

• Meet at least one of the following standards (for students in the choice program):
  – At least 70% of the students advance one grade level
  – The private school’s average attendance rate is at least 90%
  – At least 80% of the students demonstrate significant academic progress
  – At least 70% of the families of students meet parent involvement criteria established by the private school
Funding

• For both programs, the state directly pays 61.6% of the cost, and the school district pays 38.4% through a reduction in its state general aid.

• The current state aid payment is $6,442 per full-time student.

• In 2012-13, the total cost of the Milwaukee program was $154.6 million; the total cost of the Racine program was $3.2 million (500 students).
The original program was challenged on the grounds that it was a private law, that it violated Wisconsin’s Uniformity Clause and that it violated the Public Purpose Doctrine.

When challenged, the program only allowed nonsectarian schools.

The program was upheld.
The Uniformity Clause, Wisconsin Constitution art. X, sec. 3:

- The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such school shall be free and without charge for tuition to all children between the ages of 4 and 20 years.
Davis v. Grover

• The Court noted prior holdings “that the requirement for uniformity applies to…the ‘character of instruction’ given…” [p. 473, citations omitted]

• The plaintiffs argued that the choice schools were “district schools” that offered a different “character of instruction” [Id.]

• The Court found that the statute unambiguously refers to “private schools” and that public funding did not convert them to district schools [pp. 473-474]

• The Court found that the Legislature must provide the opportunity to receive a free and uniform basic education [p. 474]
Davis v. Grover

The Court held:

“The legislature has fulfilled its constitutional duty to provide for the basic education of our children. Their experimental attempts to improve upon that foundation in no way denies any student the opportunity to receive the basic education in the public school system.” [p. 474]
Davis v. Grover

The Public Purpose Doctrine

• Not an express provision of the Wisconsin Constitution
• Public expenditures must be made only for public purposes [p. 474]
• The Court held that the oversight by the State Superintendent and the level of accountability that would be required by parents constituted “sufficient and reasonable controls to attain its public purpose.” [p. 476-477]
Jackson v. Benson
218 Wis. 2d 835, 578 N.W.2d 602 (1998)

- After major changes were made to the program, it was again challenged as a private law and as a violation of the Uniformity Clause and Public Purpose Doctrine.
- One change was to add sectarian schools, so *Jackson* addresses whether the program violates the First Amendment of the U.S. Constitution and the Wisconsin Establishment Clause.
- The program was found to be constitutional.
Jackson v. Benson

The Establishment Clause of the U.S. Constitution

• **Secular purpose:** “The purpose of the program is to provide low-income parents with an opportunity to have their children educated outside of the embattled Milwaukee Public School System.” [p. 612.]

• **Primary effect of advancing religion:** First, the program “provides a neutral benefit to beneficiaries selected on religious-neutral criteria” and does not create an incentive to undertake religious education. Second, parents choose to send their children to private school and, therefore, direct the state educational funding for their children to those schools [p. 618.]
Jackson v. Benson

The Establishment Clause of the U.S. Constitution

- *Excessive government entanglement:* The Court considered performance, reporting and auditing requirements and compliance with nondiscrimination, health and safety rules and concluded “[t]he State’s regulation of participating private schools, while designed to ensure that the program’s educational purposes are fulfilled, does not approach the level of constitutionally impermissible involvement.” [pp. 619-620.]
Jackson v. Benson

The “benefits clause” of the WI Constitution (art. I, s. 18): “…nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”

- Equivalent of the U.S. Constitution’s Establishment Clause; question is “whether the program’s principal or primary effect advances religion.” [p. 621.]
- Basically the same analysis as the Establishment Clause analysis. [Ibid.]
- The Court also noted that “Wisconsin has traditionally accorded parents the primary role in decisions regarding the education and upbringing of their children.” [Ibid.]
Jackson v. Benson

The “compelled support clause” of the WI Constitution (art. I, s. 18): “…nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry without consent.…”

- Plaintiffs argued that taxpayers were compelled to support religious institutions [p. 622.]
- Not a violation because the program does not compel students to attend sectarian private schools and does not require them to participate in religious activities [p. 623.]
A couple of closing policy thoughts…

• How much can the state require of private schools receiving state funds before running afoul of the prohibition against excessive governmental entanglement?

• Changes to the school landscape:
  – 71 of the 112 private choice schools in Milwaukee report that more than 90% of their enrollment is through the choice program
  – For about a quarter of the schools, it is 100% of the enrollment
  – Between 2005 and 2009, 11% drop in public school enrollment in Milwaukee [Vouchers a boon for private schools in Milwaukee, Racine counties, Journal Sentinel (May 4, 2013).]
Indiana Choice Scholarship Program

Presentation by: Allen Morford
Staff Attorney, Indiana Legislative Services Agency
* The Indiana Choice Scholarship Program was established in 2011.

* 9,135 students received Choice Scholarships in FY 2013.

* Average amount of Choice Scholarship was $4,083 in FY 2013.

* Value of Choice Scholarships for FY 2013 was $37.3 M.
To be eligible, a student must meet all of the following requirements:

* Have a legal settlement in Indiana;
* Be accepted to a Choice Scholarship participating school;
* Be between 5 and 22 years old;
* Be a member of a household with an annual income of not more than 150% of the amount required for the individual to qualify for the federal free or reduced price lunch program (EX: family of four = $65,352 (school year 2013/2014);
* Has been enrolled in a public school (grades 1 through 12 (Effective July 1, 2013, kindergarten through grade 12)) in a public school corporation for at least two semesters immediately preceding application for the Choice Scholarship Program; or received a Choice Scholarship award or an SGO Scholarship (Scholarship Granting Organization under the School Scholarship Tax Credit program) in a previous school year.
Expands pool of students who would be eligible for Choice Scholarships by adding:

- Children with disabilities who require special education with household income under 200% of the amount needed to qualify for free or reduced lunch.

- Students who reside in the attendance area of a failing school (has been assigned an "F" grade) and are members of a household with an annual income of not more than 150% of the amount required for the individual to qualify for the free or reduced price lunch program are eligible to receive the Choice Scholarship without first attending the failing school.

- Siblings of a student that has previously received a Choice Scholarship are eligible to receive the Choice Scholarship without first attending a public school.

Provides that a student who initially meets the income eligibility requirements and whose household income subsequently increases remains eligible for the scholarship if the student's household income does not exceed 200% of the amount necessary to qualify for the free or reduced price lunch program.

Provides that a Choice Scholarship student is eligible to receive as part of the Choice Scholarship any applicable amount that a school corporation would receive for the student as part of a Special Education Grant.

Changes to administration of program.
The least of the following:

* The amount of tuition or fees of the student

* An amount equal to:
  * 90% of the state tuition support amount for the school corporation in which the student would be required to attend if the student is a member of a household with income which would qualify for the federal free or reduced price lunch program; or
  * 50% of the state tuition support amount for the school corporation in which the student would be required to attend if the student is a member of a household with income which exceeds the amount necessary to qualify for the federal free or reduced price lunch program up to the amount necessary for the student to qualify for the Choice Scholarship.

* For grades 1 through 8; $4,500 (increases to $4,800 after June 30, 2014).

Note: after July 1, 2013, a Choice Scholarship student who requires special education is eligible to receive as part of the Choice Scholarship any applicable amount that a school corporation would receive for the student as part of a Special Education Grant under the Indiana school funding formula.
* Must meet certain criteria:

* Is accredited by the Indiana State Board of Education or other recognized accreditation agency;
* Administers the Indiana statewide testing for education progress (ISTEP);
* Participates in the Indiana State Board of Education’s school improvement program;
* May not discriminate on the basis of race, color, or national origin.

Participation in the program does not subject schools to regulation of curriculum content, religious instruction or activities; classroom teaching; or teacher and staff hiring requirements. (However, must meet certain minimum instructional requirements which correspond to the mandatory curriculum in Indiana public schools and nonpublic schools accredited by the Board of Education.)
Meredith v. Pence
984 N.E.2d 1213 (Ind. 2013); 2013 Ind. LEXIS 229

* Indiana Supreme Court upholds Indiana Choice Scholarship Program

* Challenge based on three issues:

  * Whether, Article 8, Section 1 of the Indiana Constitution, by directing the General Assembly “to provide, by law, for a general and uniform system of Common Schools”, prohibits the Choice Scholarship Program.

  * Whether the Choice Scholarship violates the Article 1, Section 4, of the Indiana Constitution, which provides: “[n]o preference shall be given, by law, or any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent”.

  * Whether the Choice Scholarship Program violates Article 1, Section 6, of the Indiana Constitution, which provides: “[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution”.
“It shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Commons Schools, wherein tuition shall be without charge, and equally open to all.”

* The General Assembly has two distinct duties:
  (i) encourage moral, intellectual, scientific, and agricultural improvement; and
  (ii) provide for general and uniform system of common schools.

* Distinguished from Bush v. Holmes, 919 So. 2d 392 (Fla. 2006).
  * Article IX, Section 1(a), of the Florida Constitution reads, in relevant part: “It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made 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.…”

Court found that the Choice Scholarship Program does not alter the structure or components of the public school system.
"no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent."

Plaintiffs contend that no person shall be compelled to “support” any place of worship, including by the compelled payment of taxes.

Court held that Article 1, Section 4, is a restraint upon government compulsion of individuals to engage in religious practices absent their consent. To limit the government’s taxing and spending related to religious matters, the framers crafted Article 1, Section 6.
"No money shall be drawn from the treasury, for the benefits of any religious or theological institution."

Questions:

A. whether the program involves government expenditures for benefits of the type prohibited by Section 6; and
B. whether the eligible school at which the parents can use the vouchers are "religious or theological institutions" as envisioned by Section 6.

Court held:

(1) that the Choice Scholarship Program does not provide a direct benefit to religious or theological institutions; and
(2) that in light of the prevailing social, cultural, and legal circumstances when the Indiana Constitution was enacted, Article 1, Section 6 was not intended to prohibit government support of primary and secondary education which at the time included a substantial religious component.
Indiana Choice Scholarship Program

Presentation by: Allen Morford
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The Colorado Experience
Random Constitutional Provisions

- State constitutions often include provisions that impose requirements and restrictions on the state public school system.

- Constitutionality may not depend on whether voucher program is available to religious schools.
Article IX, Section 15:

School districts - board of education. The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.
Each district with at least 8 low-performing schools must participate

Vouchers available to low-income, low-achieving students

Parent enters into a contract with the school district; school district pays the parent, who endorses the check to the private school

Voucher in the amount of tuition or a percentage of the district’s per pupil revenues, whichever is less
Owens v. Colorado Congress of Parents, Teachers and Students, 92 P.3d 933 (Colo. 2004)

- Plaintiffs’ claims included violation of Article II, Section 4; Article V, Section 34; and Article IX, Section 7 – clauses that prohibit using public funds to support sectarian schools

- But Colorado Supreme Court ruled vouchers unconstitutional as a violation of local control under Article IX, Section 15
Art. VIII, Section 13(B):
- The State Board of Elementary and Secondary Education annually adopts the minimum foundation program (MFP) funding formula for public schools
- The legislature must fully fund the formula
- The appropriated moneys must be distributed to the public schools in Louisiana

- Legislature creates the Course Choice Program
  - Requires the Department of Education to transfer moneys from a parish or city school system’s allocation under the MFP to a private school to fund vouchers
  - HELD: Violation of Art. VIII, Section 13(B), which allows distribution of moneys only to public schools
Douglas County School District
Choice Scholarship Program

- Relatively high-income school district
- Relatively high-performing school district
- Charter school friendly; homeschool friendly
- District Board adopts Choice Scholarship Program to provide more choices for parents
District contracts with 23 private schools located within and outside district - religious and nonsectarian

Up to 500 students allowed to enroll in the private school of their choice – religious or nonsectarian

To participate, students must:
- Be district residents;
- Have resided in the district for at least one year; and
- Have been enrolled in the district during the 2010-11 school year
Douglas County School District
Choice Scholarship Program

- Students participate in Choice Scholarship Program by enrolling in a charter school created solely for the purpose of contracting with and monitoring the participating private schools
- Each participating student receives a voucher worth up to $4,575
Article II, Section 4:

- **Religious freedom.** ...No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

No Violation:

- Program is facially neutral – no preference to any religion
- Families choose to attend religious schools; school district does not require attendance at religious school
Article IX, Section 7:
- Aid to private schools, churches, sectarian purpose, forbidden. Neither the general assembly, nor any school district...shall ever...pay from any public fund or moneys whatever, anything...to help support or sustain any school [or] academy...controlled by any church or sectarian denomination whatsoever....

No Violation:
- Moneys go to religious schools only because of parental choice
- The voucher benefits the student and family; any aid to religious schools is incidental
Article IX, Section 8:

- Religious test and race discrimination forbidden – sectarian tenets. No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state...; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatsoever. No sectarian tenets or doctrines shall ever be taught in the public school....

No Violation:

- Participation in the program does not convert a private school to a public school
- Parents choose to enroll the student in a religious school, they are not required to do so
Colorado Constitution

- **Article V, Section 34:**
  - Appropriations to private institutions forbidden. No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

- **No Violation:**
  - Prohibition applies only to the General Assembly, not to school districts
  - Voucher benefits students; aid to institutions is incidental
  - Aid serves a public purpose:
    - Greater choice to families
    - Improvement through competition
    - Greater return on educational spending
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