

Friends of the Court

NSBA amicus briefs filed in 2004-05

By Julie Underwood

In the past few years, NSBA has filed amicus briefs on cases covering a wide variety of school law issues, including special education, religion, school finance, and vouchers, among others. A list of these cases can be found below; following are brief accounts of each.

DIVERSITY

Comfort v. Lynn School Committee

2004 WL 2348505 (1st Cir. Oct. 20, 2004) (opinion withdrawn and *en banc* reh'g granted)

Under the student assignment plan in Lynn, Mass., all students are allowed to attend their neighborhood schools. Race becomes a factor when a student attending a racially imbalanced school seeks to transfer to another school. The transfer is permitted only if it will not

increase the imbalance at either the sending or the receiving school.

While the court agreed with Lynn's school board that achieving racial and ethnic diversity in its school populations is a compelling interest, it concluded, using Supreme Court's *Grutter*, 539 U.S. 306 (2003), and *Gratz*, 539 U.S. 244 (2003), decisions as guidance, that the district's student assignment plan is not narrowly tailored to achieve this goal.

The 1st U.S. Circuit Court of Appeals concluded that the plan could not be deemed narrowly tailored because it "makes race decisive and forgoes individu-

alized consideration of transfer applications." The court pointed to several additional failings of the plan under the "Grutter/Gratz test," namely that the plan (1) places an undue burden on students who are not members of the favored racial or ethnic group; (2) relies on racial balancing rather than the "critical mass" of minority and nonminority students approved in *Grutter* and *Gratz*; and (3) fails to satisfy the *Grutter/Gratz* requirement that use of race-based student assignment be time limited.

NSBA joined other national education groups in appealing the court's ruling that the school district's use of race as a factor in its student assignment plan violates the 14th Amendment's Equal Protection Clause. The appellate brief argues that school boards and communities have a compelling interest in the educational benefits that accrue from racially and ethnically diverse classrooms, and should retain the discretion to use race as a factor

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Bush v. Holmes, 886 So.2d 340 (Fla. App. 2004), appeal filed, (Fla. Dec. 15, 2004) (No.04-2323)

LEADERSHIP Insider

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The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards and the school boards of the District of Columbia, Hawai'i, and the U.S. Virgin Islands.

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The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

when formulating policies aimed at achieving such diversity.

Current status

The case is before the 1st U.S. Circuit Court of Appeals for an *en banc* hearing. Briefs have been filed with the 1st Circuit. The case is pending a decision.

Bottom line

When fashioning a student assignment plan, pay careful attention to both the compelling state interest and the narrowly tailored requirements set forth by the Supreme Court in *Gruiter* and *Gratz*.

EMPLOYMENT

Jackson v. Birmingham Board of Education

309 F.3d 1333 (11th Cir. 2002), *cert. granted*, 124 S.Ct. 2834 (2004)

Roderick Jackson, a physical education teacher and girls' basketball coach with the Birmingham (Ala.) Public Schools, complained to his supervisors that the district violated Title IX by providing unequal funding and inferior access to sports facilities and equipment to the girls' basketball program. After he complained, he began receiving negative performance evaluations and was not offered a coaching contract for the following year.

Jackson sued the school board, claiming retaliation in violation of Title IX. The district court dismissed the suit. The 11th U.S. Circuit Court of Appeals affirmed, finding that neither Title IX nor its implementing regulation implies a private right of action for retaliation by individuals who, although not themselves victims of gender discrimination, are victims of retaliation because they complained about gender discrimination suffered by others.

The Supreme Court accepted the case for review. The question before the Supreme Court is whether the Birmingham school district's alleged retaliation against Jackson affords him the right to sue as a victim of gender discrimination.

The board's case relies heavily on *Alexander v. Sandoval* (532 U.S. 275 (2001)), a recent Supreme Court decision that set tighter conditions for interpreting statutory provisions for the right of individuals to sue. There the Court ruled that it would not recognize such a right unless a law specifically includes one or contains no other remedy for illegal conduct, such as a threatened funding cutoff, or unless the legislative history shows that Congress

clearly meant to create a right to sue.

NSBA's amicus brief argues that the Court should not find a private right of action for Jackson as a "bystander advocate" who already has many other legal avenues for pursuing relief. Additionally, creating a new cause of action under Title IX is unnecessary to fulfilling the purposes of the legislation.

Current status

Briefs have been filed with the Supreme Court and oral arguments were held on Nov. 30, 2004. The case is pending a decision. (During oral arguments Justice O'Connor, who voted with the majority in the 2001 case but has been a strong supporter of women's rights on the Court, seemed skeptical that Jackson was a victim of discrimination. She also was curious whether private lawsuits or threatened funding cutoffs would be more effective in obtaining the intended purpose of Title IX.)

Bottom line

This case does not involve a school's accountability for compliance with Title IX's nondiscrimination obligations, nor does it question teachers' rights to express their views on matters of public concern. These rights and obligations, as well as the legal means to enforce them, already exist and will not be affected by the Court's decision.

The only issue at stake is whether the Court should give individuals a right to sue schools when that right is not set forth explicitly in the statute. The Court's decision on this issue under Title IX will have implications for other statutes affecting school boards as well, potentially subjecting schools to litigation never contemplated by the law.

IDEA

J.S. ex rel. N.S. v. Attica Central Schools

386 F.3d 107 (2nd Cir. 2004), *petition for cert. filed*, 73 USLW 3401 (U.S. Dec. 30, 2004) (04-899)

This case was brought by the parents of six students, alleging that the Attica (N.Y.) Central Schools had denied them a free appropriate education under the Individuals with Disabilities Education Act. The parents allege a systemwide failure to meet substantive and procedural obligations, such as notifying parents of meetings, providing parents with legally

required progress reports, and providing appropriate training to school staff.

The school district made a motion to dismiss the case, arguing the court did not have the authority to hear the case since IDEA requires that parents “exhaust” their administrative remedies before filing a case in court—something the parents did not do.

Both the district court and the 2nd Circuit Court of Appeals ruled against the district, finding that the suit was not subject to IDEA’s exhaustion of remedies because the students complained of systemic violations incapable of administrative resolution.

The court also allowed the students’ claims under Section 504 of the Rehabilitation Act and Section 1983 of the U.S. Code (a civil rights claim), finding that these claims were based on the same alleged systemic violations and so fell under the “futility exception” to the administrative exhaustion requirement. The school district has petitioned the Supreme Court to review this case.

Current status

The petition for certiorari is pending in the Supreme Court. Certiorari petition briefs were due in the Supreme Court by March 7, 2005.

Bottom line

The administrative exhaustion requirement under IDEA is intended to ensure that disputes about placement of students

and provision of a free, appropriate public education are settled at the earliest point possible without the time, expense, and adversarial atmosphere of court proceedings. It provides an opportunity for parents to raise problems and for school districts to resolve those problems as quickly as possible. If parents can skip this requirement and go straight to court simply by alleging “systemic” violation, then IDEA’s emphasis on early resolution of disputes will be impaired and districts will more frequently be forced to defend their actions in court.

The reauthorization of IDEA re-emphasized that parents and schools should resolve these matters as quickly as possible and in a setting outside the courtroom. IDEA also added a requirement for an informal meeting—a resolution session—of parents and the district before to a due process hearing in an effort to settle differences at the earliest possible stage.

Weast v. ex Schaffer ex rel. Schaffer

377 F.3d 449 (4th Cir. 2004)

Brian Schaffer, a special education student in Maryland’s Montgomery County Public Schools (MCPS), and his parents challenged his initial Individualized Education Program (IEP) in a due process hearing. After a series of decisions by the hearing officer, the federal district court, and the 4th Circuit Court of Appeals, MCPS appealed the district

court’s ruling that IDEA places the burden of proof on the school district.

The parents argued that because IDEA obliges a school district to provide a disabled student with a free, appropriate public education, the law imposes on the district the burden of proving that an IEP meets this obligation. The 4th Circuit Court rejected this argument, finding that the group or class benefiting from the statute is not relieved of its burden of proving a violation “merely because [the] statute confers substantive rights on it.”

The court also rejected the parents’ contention that the school district should bear the burden because of its advantages in expertise and resources. Any such advantages are more than made up for by IDEA’s procedural safeguards, the court concluded. Finally, the court rejected the parents’ argument that Congress’s silence on the matter when enacting IDEA must have signaled its intent to assign the burden to school districts. Had Congress intended to, the court held, it would have done so expressly.

Bottom line

The circuit courts are split on the issue of burden of proof in due process hearings. As of now, four federal circuit courts assign the burden to parents (the 1st, 5th, 6th, and 10th circuits), and four circuits assign it to school districts (the 2nd, 10th, 8th, and 9th circuits). The reauthorization of IDEA added a required “resolution session” prior to due process hearings but has



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not made clear the burden of proof in the hearings.

RELIGION

Elk Grove U.S.D. v. Newdow 124 S. Ct. 231 (2004)

Michael Newdow, the noncustodial parent of a child attending school in Elk Grove, Calif., objected to his daughter having to listen to the recitation of the Pledge of Allegiance by her classmates. School district policy, consistent with state law, required teachers to lead willing students in saying the pledge each school day. Newdow asserted that the policy violated the Establishment clause of the 1st Amendment because the pledge includes the words “under God.”

In a 8-0 decision (Justice Scalia recused himself from the case.), the Court held that Newdow lacked standing to challenge

Elk Grove’s policy. Having disposed of the case on the standing issue, the Court declined to address the merits of Newdow’s Establishment Clause claim. In dicta, or nonbinding statements, however, the Court characterized recitation of the pledge as “a patriotic exercise designed to foster national unity and pride” in “the ideals that our flag symbolizes.”

Justice Stevens delivered the Court’s opinion, joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Chief Justice Rehnquist, Justice O’Connor, and Justice Thomas wrote separate concurrences that set forth their positions on the Establishment Clause issue.

Bottom line

The decision on the issue of standing is good for school boards. Schools should not be the referee when custodial and noncustodial parents express conflicting wishes. The dicta in this case are noteworthy:

Justice O’Connor’s concluded that the pledge’s reference to God constitutes what the courts call “ceremonial deism,” “simply not religious in character.”

Watch for more Pledge of Allegiance cases to work their way through federal courts, though, because the Establishment issue won’t be going away any time soon. Newdow has already filed a new case, which adds additional plaintiffs and defendants to avoid the standing problems.

McCreary County, Kentucky v. ACLU

354 F.3d 438 (6th Cir. 2004), *cert. granted*, 125 S.Ct. 310 (2004)

A copy of the Ten Commandments was displayed in the McCreary County, Ky., courthouse, and copies were displayed in the schools in Harlan County, Ky. After a lawsuit was filed challenging the displays, other secular historical and

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legal documents were added to the displays. Despite the additions, the district court issued a preliminary order prohibiting “similar displays.”

The county and school district then erected new displays containing more secular historical and legal documents along with the Ten Commandments. The new display at the courthouse included an explanation of the role of the other documents in establishing the American system of law and government. The school displays contained a school board resolution addressing the historical context of the display and the board’s desire to create an open forum for citizens to post additional historical documents.

The district court nonetheless found the displays violated the Establishment Clause and ordered that they be removed. On appeal, the 6th U.S. Circuit Court of Appeals agreed that the displays were unconstitutional because they had a religious purpose and conveyed a message of religious endorsement by the government.

However, it took issue with the district court’s conclusion that the Supreme Court’s decision in *Stone v. Graham*, 449 U.S. 39 (1980) established a clear rule that displaying the Ten Commandments in a public setting is unconstitutional. McCreary County and the Harlan County School District filed separate petitions for review with the Supreme Court. The Court granted the county’s request for review and is holding the school district’s petition in abeyance.

Current status

The case is pending a decision in the U.S. Supreme Court. Oral arguments were held March 3, 2005.

Bottom line

Although the Supreme Court will not address the specific facts of the school district’s display, its decision on the constitutionality of the county courthouse displays will affect legal standards by which school displays or other materials containing religious symbols and references will be judged.

In addition, the county has specifically asked the Court to determine whether the test devised in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), should be eliminated and a new test developed.

The NSBA brief does not take a position on the posting of the Ten Commandment; rather, it asks the Court to devise a clear and consistent analysis for Establishment cases.

Bannon v. School District of Palm Beach County

387 F.3d 1208 (11th Cir. 2004)

A student participating in a high school beautification project painted a mural on a 4-by-8 foot construction panel erected in the school corridor. The mural contained Bible verses, included the words “Jesus” and “God,” and depicted a cross. The principal ordered the student to cover these items after the project’s faculty sponsor expressed concern about the religious content. The student sued for violation of her free speech and free exercise of religion rights.

The district court and the 11th U.S. Circuit Court of Appeals held that district’s beautification project was a nonpublic forum and that messages on the murals constituted school-sponsored speech. Therefore, the court concluded, the principal acted for legitimate educational reasons when ordering the students’ work removed because it violated the school’s policy of neutrality on religious matters. By the court’s analysis, the principal had a legitimate educational interest in avoiding religious debates that could be disruptive to the educational process.

Bottom line

This case illustrates the difficulties schools face in balancing the religious and free speech rights of individuals with prohibition against establishment of religion. In cases where expressive activity, religious or otherwise, would be perceived as sponsored by the school, it is important that administrators maintain their discretion to limit speech based on legitimate educational interests.

Child Evangelism Fellowship v. Montgomery County Public Schools

373 F.3d 589 (4th Cir. 2004)

Elementary school teachers in Maryland’s Montgomery County Public Schools (MCPS) distributed materials from various groups, such as 4-H and the Boy Scouts, in the informational folders young children take home to parents. District officials refused to include materials about Good News Clubs, concerned that they would violate the Establishment Clause by implying an endorsement of religious activity. Child Evangelism Fellowship (CEF) sued.

The 4th U.S. Circuit Court of Appeals, relying on *Good News Club v. Milford Cen-*

tral School, 533 U.S. 98 (2001), concluded that MCPS could not demonstrate a compelling governmental interest, based on Establishment Clause concerns, to justify its discrimination against the viewpoint expressed in the CEF materials.

Addressing the contention that the classroom distribution “would create a perception of endorsement or coercion by government officials,” the court held that distributing the flyers during “noninstructional” time at the end of the school day obviated any suggestion the distribution was part of the curriculum or was integrated into the teacher’s instruction.

Turning to the issue of whether distribution would have an unconstitutional coercive effect on students, the court pointed out that coercion would occur only if the “government [were] granting preferential treatment to a religious organization” and if the activity could be characterized as a religious exercise or religious worship. CEF would receive no preferential treatment because it would be just one of many organizations whose materials were distributed. The flyers could not be characterized as religious exercise or worship because they were merely invitations.

Finally, the court rejected the district’s argument that the teachers’ active participation raised endorsement and entanglement concerns. The teachers’ role would be a minimal administrative activity that treats a variety of school-related and non-school-related materials equally.

Bottom line

Schools must treat the distribution of materials without regard to their content, including those that originate from religious organizations. If the policy is to distribute informational materials from non-school groups, religious groups may not be excluded. In addition to the 3rd Circuit, courts in the 4th, 6th, and 9th circuits, as well as several federal district courts, have reached similar conclusions.

Child Evangelism Fellowship of New Jersey v. Stafford Township Board of Education

386 F.3d 514 (3rd Cir. 2004)

The case was brought by an evangelical group, the Child Evangelism Fellowship, which sought access to elementary school students. At issue in this case is whether the elementary school in New Jersey’s Stafford Township School District must: (1) have teachers distribute promotional materials for the CEF’s after-school

club, the Good News Club; (2) allow CEF to place posters promoting the club on the school walls; and, (3) allow CEF to staff an informational table at back-to-school night.

The 3rd U.S. Circuit Court of Appeals ruled against the district, finding violation of CEF's free speech rights. Applying the test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), along with the endorsement and coercion tests, the court concluded that nothing in the access demanded by CEF would create an atmosphere of coercion, a perception of endorsement, or excessive entanglement between government and religion.

The court found the speech was private speech comparable to that in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). The court found that the district committed viewpoint discrimination based on religion because, had its distribution criteria been applied to all groups, it technically should have excluded secular groups as well. Those groups whose materials were distributed included groups promoting anything beyond "mundane recreational activities" and groups that "proselytize" in the loose sense in that they are recruiting members.

In particular, the district's criterion excluding all speech on "religion as a subject or category" was contrary to Supreme Court precedent that private religious speech is afforded the same constitutional protections as private secular speech. In addition to impermissibly excluding religious speech, the district also discriminated against the club's Christian orientation, because it distributed materials for non-sectarian groups, such as the Boy Scouts and the Girl Scouts, which profess a general faith in God.

Bottom line

Whatever access and support school districts provide to outside community groups cannot be denied to other groups on the basis of religion.

Wigg v. Sioux Falls School District

382 F.3d 807 (8th Cir. 2004)

Barbara Wigg teaches at Anderson Elementary School in the Sioux Falls (S.D.) School District. Citing Establishment Clause concerns, district officials denied her request to lead the after-school meetings of a children's Good News Club at Anderson Elementary School sponsored by the Child Evangelism Fellowship. Wigg

sued, alleging violation of her free speech rights.

The district court ruled that Wigg could participate in club meetings held at other schools, but not in the same school in which she taught. By participating in the meetings at another school, Wigg would not raise Establishment Clause concerns because a reasonable observer would not view her as a teacher conducting a class, but merely as a private citizen.

The 8th Circuit agreed that once Wigg went to another school, a reasonable observer would view her as any other private citizen exercising her right to religious freedom and speech. However, the appellate court went further, finding that no reasonable observer would mistake Wigg's participation even at her own school for the school's endorsement of religion, because the school day would have ended and participation would be limited to students who have their parents' permission to participate.

Bottom line

This ruling appears to unravel the widely understood rule that school employees, while otherwise free to express their religious views, must not participate in or lead religious activities at school with their students. The noninvolvement of teachers has been cited as a factor in most decisions upholding non-school-sponsored religious activities on school premises. Because this decision does not establish a bright-line Establishment Clause rule for school employees, look for successive rounds of incremental litigation intent on resolving factual variations like Wigg's.

Eklund v. Byron Unified School District

No. 02-3004 (N.D.Cal. Dec. 5, 2004), appeal filed, (9th Cir. Jan. 9, 2004) (No. 04-15032)

This case was brought after a California teacher used several role-playing activities to teach her eighth-grade students about Islam. The teacher, working from an instructional guide, had students experience everyday Islamic life by role-playing. She stressed that the activities were only role-playing and encouraged students to use Islamic names, recite a line from a prayer in class, and simulate the fasting of Ramadan by abstaining from a favorite food or activity for a day.

The parents contended that the classes were not simply teaching students about religion, but rather how to practice a reli-

gion. The parents sued the district, claiming the teaching practices violated the Establishment Clause because they amounted to impermissible teaching of religion, as opposed to teaching about religion.

The district court found in favor of the school district, deciding that the role-playing activities did not amount to the actual practice of religion, that students were not coerced to participate, and that the teaching practices did not constitute an endorsement of the religious tenets of Islam. The parents have appealed to the 9th U.S. Circuit Court of Appeals.

Current status

The case is pending a decision in the 9th Circuit. Briefs have been filed, but oral arguments have not yet been scheduled.

Bottom line

The case illustrates the need for schools to be able to exercise control over curriculum content and teaching methodologies without having every educational decision become the subject of a lawsuit. It is important that courts issue a decision that sets clear guidelines to help schools determine constitutional bounds when teaching about religion, thereby avoiding or minimizing litigation that detracts from schools' primary mission of education.

SCHOOL FINANCE

Bradford v. Maryland State Board of Education

No. 94340058 (Cir. Ct. August 20, 2004), cert. granted, 861 A.2d 60 (Md. Nov. 5, 2004)

In 1994, the Baltimore City Public School System sued the state of Maryland, alleging the state was failing to provide students with the "thorough and efficient" education guaranteed by the Maryland Constitution. BCPSS filed a similar action the following year, and the cases were consolidated. In 1996, the parties entered into a consent decree providing for management improvements in BCPSS and substantial additional state funding for the district from 1998 to 2002.

The plaintiffs returned to court in 2000. The circuit court declared that the state was "still not providing the children of Baltimore City ... a constitutionally adequate education," that it had failed to comply with the 1996 consent decree, and that it needed to provide "additional funding of approximately \$2,000 to \$2,600 per

pupil” in 2001 and 2002.

The state then enacted the Bridge to Excellence in Public Schools Act (the Thornton bill), revamping the school financing scheme for all Maryland schools and dedicating an additional \$258.6 million to BCPSS. Since then the state has funded neither the Thornton bill nor the 2000 court order. It has also required BCPSS to eliminate a \$58 million structural budget deficit.

In 2004, the court found continued constitutional violation and declared that an additional \$225 million was necessary to enable BCPSS to achieve constitutional adequacy. The state department of education has appealed that ruling to the Maryland Supreme Court.

Current status

The case is pending a decision in the Maryland Supreme Court. Oral arguments were held March 7, 2005.

Bottom line

Adequacy of funding is probably the single most important issue in public education today. School finance adequacy cases, in which plaintiffs allege that the state has failed to provide sufficient funding to offer an adequate education to children in the state, are increasingly being challenged by state governments. The states argue that courts are overstepping their constitutional authority when they strike down funding schemes and order state legislatures to remedy the constitutional deficits by providing more funding to public education.

STUDENT PRIVACY

C.N. ex rel. J.N. v. Ridgewood Board of Education

319 F.Supp.2d 483 (2004), *appeal filed*, (3rd Cir. June 6, 2004) (04-2849)

The Ridgewood (N.J.) Public School System administered a voluntary, anonymous student survey that solicited information about students’ personal lives, including certain at-risk behavior such as substance abuse, sexual activity, stress, and depression. The aggregate results were used by a coalition of social service agencies to help plan student-related community activities and services.

After the survey was administered to middle and high school students, a group of parents sued, alleging violations of the 1st, 4th, 5th, and 14th Amendments, the

Family Educational Rights and Privacy Act (FERPA), and the Protection of Pupils Rights Amendment (PPRA).

The district court granted the school district’s motion for summary judgment on all claims. The 3rd U.S. Circuit Court of Appeals upheld the dismissal of the 5th Amendment self-incrimination claim but reversed the district court on all other claims and remanded the case back to the district court for further discovery on certain factual matters.

On remand, the parties consented to dismissal of the FERPA and PPRA claims in light of the U.S. Supreme Court’s decision in *Gonzaga University v. Doe*, which held that private parties have no right to sue to enforce FERPA. After completing further discovery, the district court dismissed the remaining claims. The parents again appealed to the 3rd Circuit.

Current status

The case is pending in the 3rd Circuit. Oral arguments were held April 1, 2005.

Bottom line

This case is about the appropriate balance between schools’ need for and use of student information and protection of individual and family privacy. By virtue of their educational mission and their obligation to care for children, public schools need to gather and use substantial amounts of information about students as individuals and in the aggregate. Such information is necessary for sound and informed decision making about students’ academic achievement and their health and safety.

Parents should be involved in this decision making, and schools must be careful to abide by federal and state laws protecting student and family privacy. But parents should not be able to preclude data collection that complies with these laws, especially when student participation is voluntary and anonymous.

VOUCHERS

Bush v. Holmes

886 So.2d 340 (Fla. App. 2004), *appeal filed*, (Fla. Dec. 15, 2004) (No.04-2323)

In 1999, the governor of Florida signed into law a school voucher bill. Under the law, tuition vouchers became available to students from “academically distressed” school districts, allowing them to attend private nonsectarian or sectarian schools. Soon after it was enacted, the law

was challenged by a coalition of taxpayers, the state PTA, NAACP, and other civic and education groups, which charged that it violated various provisions of the Florida and federal constitutions.

In the latest ruling in this continuing litigation, the Florida Court of Appeals ruled the voucher program is unconstitutional under Article I, Section 3 of the Florida Constitution, which forbids the state from providing any aid to religious institutions. The court rejected the state’s argument that its constitution provides no greater restrictions on taxpayer support of public institutions than does the federal Establishment Clause.

Concluding that the language of the state and federal provisions is not synonymous, the court stated: “For a court to interpret the no-aid provision of article I, section 3 as imposing no further restrictions on the state’s involvement with religious institutions than the Establishment Clause, it would have to ignore both the clear meaning and intent of the text and the unambiguous history of the no-aid provision.”

The court pointed out that while the voucher program satisfies the federal Establishment Clause under the three-pronged *Lemon v. Kurtzman* test, the state constitution’s “no aid” provision contains a broader prohibition against expenditure of state revenues which imposes an additional restriction.

The court also found without merit the state’s argument that the state constitution violates the Free Exercise Clause of the U.S. Constitution. Citing *Locke v. Davey*, 124 S. Ct. 1307 (2004), the Florida court pointed out that the U.S. Supreme Court has concluded that the U.S. Constitution does not require a state government to subsidize religious instruction whenever it subsidizes nonreligious instruction.

The appellate court has sent this decision to the Florida Supreme Court for expedited consideration as a “question of great public importance.”

Current status

The case is pending in the Florida Supreme Court. Briefs were due by Feb. 28, 2005.

Bottom line

Vouchers involve a substantial diversion of public funds from public education to pay for private religious education. With the 2002 Supreme Court ruling in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002),

clearing some of the federal constitutional impediments to vouchers, the focus of the debate has shifted to state constitutions. Voucher laws and legislation are an ongoing source of social, political, educational, and legal disputes in many states.

Locke v. Davey
540 U.S. 712 (2004)

The State of Washington provides college and university scholarships through the Promise Scholarship program for low- and middle-income students who have achieved academic excellence in high school. The scholarship funds can be used to attend any public or private college or university in the state, including those that are sectarian.

Joshua Davey applied for and was selected for a scholarship. He enrolled at Northwest College, a school affiliated with the Assembly of God, seeking a degree in pastoral ministries. His request

for funds was denied because of his stated intention to pursue a degree in pastoral ministries. The rationale given was the Washington Constitution, which provides that “[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.”

Davey filed suit, claiming that the scholarship program’s bar on providing theology students with public funds violated his 1st Amendment right to free exercise of religion. At issue for the U.S. Supreme Court was whether state constitutions could draw a more stringent line of separation between church and state than the federal constitution by prohibiting even indirect funding of religion.

In a 7-2 decision, the Supreme Court upheld the state’s actions. Chief Justice Rehnquist delivered the majority’s opinion. Justices Scalia and Thomas dissented. After reviewing Washington’s Constitution

and the operation of the scholarship program, the Court found nothing that suggested animus toward religion. As a result, the Court rejected the argument that the state constitutional provision exhibited hostility toward a religion. The Court found that Washington’s scholarship program accommodated all religions by allowing students to use the funds to attend religious schools and even study theology; the sole restriction was on study for the clergy.

Bottom line

The case upheld the state constitutional provision providing a greater separation of church and state than the one afforded by the federal Establishment Clause. Thirty-seven states have constitutional provisions similar to Washington’s. These provisions remain an important legal bulwark against state voucher campaigns.

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