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CHOICE IN EDUCATION: PART II LEGAL PERILS AND LEGAL OPPORTUNITIES

INTRODUCTION

Americans increasingly are turning to reforms based on parental choice of schools as the best solution to America's education crisis.[1]

In New York City's East Harlem, for example, granting parents a choice of public schools has boosted that district's student achievement from last to sixteenth among the city's 32 school districts. Wisconsin last year enacted legislation allowing 1,000 low-income Milwaukee youngsters to use state education funds for tuition in private schools. The tiny New Hampshire town of Epsom took a giant step for choice by adopting the nation's first property tax abatement to encourage parents to pursue education alternatives outside public schools. And in Chicago, 27 low-income parents and children filed a lawsuit demanding the opportunity to opt out of abysmal public schools.

While political support has been growing for educational choice, a number of legal questions concerning choice remain as serious impediments. Most recently, a Wisconsin court of appeals struck down that state's choice program on a procedural technicality, although the program is continuing pending appeal to the Wisconsin Supreme Court.

1 The choice options available and efforts across the nation to promote education choice are discussed in *Choice in Education: Part I – How Choice Works*, Heritage Foundation *Backgrounder* No. 760, March 21, 1990. (Also available in Spanish as "Manual Sobre la Libertad de Elegir Escuela, Parte I: Como Funciona la Opción", Translation No. 37, October 10, 1990.) Since Part I was released, significant developments include the nation's first private school "voucher" law in Wisconsin and an Oregon initiative that would have provided state income tax credits for students who opt out of public schools.

Two clear lessons emerge from the litigation against choice programs:

1) That any ambitious education choice program that includes private schools will be challenged vigorously in the courts by the public school administrators and teacher organizations who feel most threatened by competition from the private sector; and

2) That choice programs that are carefully crafted and aggressively defended stand a good chance of surviving such legal challenges.

Advocates of choice in education thus should recognize that a sound legal framework and strategy are essential to success. In designing education choice programs, therefore, policy makers should study the record of federal and state court challenges to choice and ensure their proposals satisfy several essential criteria. Among them:

- The program should not discriminate in favor of religiously affiliated schools;
- The program should place the decision of where funds are used in the hands of individual students and parents; and
- The program should not create a permanent and pervasive state influence in religiously affiliated schools.

Litigation may be a major weapon in the anti-choice arsenal, but it can be neutralized by a thorough understanding of the law by advocates of choice. Indeed, the legal weapon even can be used to choice's advantage.

Checklist for a Successful Education Choice Program

For Religiously Affiliated Schools:

- ✓ Do not provide general subsidies.
- ✓ Provide funds only on the basis of parental decision to enroll children.
- ✓ Make non-sectarian schools equally eligible.
- ✓ Create no financial incentive to attend religious schools
- ✓ Limit government regulation to ensuring secular educational objectives are accomplished
- ✓ Keep direct government involvement with schools as little as possible.

For private schools:

- ✓ Require schools receiving public funds directly or through vouchers to abide by a policy of non-discrimination on the basis of race, national origin, gender, or handicap.

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THE POTENTIAL LEGAL HURDLES FACING CHOICE PLANS

The principal potential legal obstacles to education choice are federal anti-discrimination requirements and the "establishment" clause of the First Amendment. In addition, state constitutions and statutes may present problems that prompt legal challenges to choice programs.

These potential obstacles do not mean, of course, that education choice proposals are unlawful. On the contrary, most choice programs, regardless of how broad they are, can pass legal muster if they are carefully crafted. What choice proponents need to do to achieve success is to give very thorough consideration to legal ramifications in designing their programs. This requires no sacrifice of basic policy objectives. Since choice necessarily expands educational opportunities and parental control, which are values deeply embedded in America's constitutional tradition, any legal challenge will at worst present no more than a conflict between competing constitutional values, from which a well-designed choice program should emerge intact.

1) Discrimination

Critics of education choice often contend that it will promote segregation. This claim draws upon the history of schemes in the 1960s that were devised to evade the requirement to desegregate public schools. Such schemes led the Supreme Court to rule in 1968 that "freedom of choice" plans could present constitutional difficulties if they were designed to perpetuate discrimination.[2]

Today's choice proposals, of course, have no such discriminatory intent. Their objective is not to avoid integration, but to expand educational opportunities. Indeed, one argument raised by opponents of the Oregon ballot initiative that was defeated at the polls last November and would have allowed both public and private school choice was that it would have allowed black youngsters to attend white schools in the suburbs. Choice programs, in fact, are likely to be of most benefit to economically disadvantaged youngsters in the inner city, who are predominantly from minority ethnic groups. Private schools in the inner city, moreover, are often more racially diverse than public schools.[3]

Nonetheless, choice programs must comport with the applicable state and federal nondiscrimination requirements. Federal law, for instance, prohibits discrimination on the basis of race, sex, or handicap in any programs or activities receiving federal assistance. In the 1984 *Grove City* case, the Supreme Court ruled that even federal scholarship aid funnelled directly to students exposes

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2 *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

3 See, e.g., Clint Bolick, *Changing Course: Civil Rights at the Crossroads* (New Brunswick, N.J.: Transaction Books, 1988), p. 108.

private schools to regulatory coverage.[4] Under such circumstances, federal law now provides that the entire educational institution – and not just the portion of the program receiving federal aid – is subject to federal regulation.

The precise scope of federal nondiscrimination regulations has never been fully defined, however, in the context of federal or state funding of non-public education through tuition reimbursement (vouchers) or tax credits. The threshold requirement that triggers these regulations is that the schools are "recipients" of federal funding, a rather vague term that usually is broadly construed. In practice, the likelihood of federal regulatory coverage depends on whether federal funds are included in the choice program. It might also depend on whether the program involves direct payments to the schools, or vouchers (which normally would trigger regulation), or indirect aid in the form of reduced tax liability to parents (which may not).

A recent opinion letter by the U. S. Department of Education,[5] confirms that to the extent private schools in choice programs are deemed recipients of federal funds, some regulations would apply.[6] These regulations consist typically of general nondiscrimination requirements, which most private schools easily satisfy. The letter concludes, however, that more onerous statutes would not apply to choice programs, such as the Education of the Handicapped Act (EHA),[7] a federal grant program that obligates states to provide extensive special services and programs to severely handicapped children.

States may also have nondiscriminatory requirements that apply to recipients of public funds. Any program that provides for direct payment of state funds to private schools would likely trigger such requirements.

The Lessons. Because of the uncertainty concerning the applicability of federal anti-discrimination requirements, lawmakers would be wise to make sure that the statutory language creating a choice program involving the payment of public funds to private schools should be accompanied by a general requirement of non-discrimination on the basis of race, sex, or handicap. Although the precise parameters of such obligations will have to await future court decisions, the inclusion of a general non-discrimination mandate will increase the odds of a successful defense of choice plans.

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4 *Grove City College v. Bell*, 465 U.S. 555 (1984).

5 Letter to Governor Tommy G. Thompson from Assistant Secretaries of Education Robert R. Davila and Michael Williams (undated).

6 The regulations in some instances apply special, less-onerous provisions to private schools. See, e.g., 34 C.F.R. 104.39 (rules for private school regarding nondiscrimination on the basis of handicap).

7 20 U.S.C. 1400, *et seq*.

2) Desegregation

A related issue is desegregation. By allowing parents to choose the best schools for their children regardless of racial composition, the effect of education choice on efforts to attain racial balance is uncertain. This leads some critics to argue that choice is discriminatory.

The opposite is true. Choice can provide the financial means to afford equal educational opportunities to all of America's children.[8] In particular, choice plans targeted to inner-city low-income youngsters can provide educational benefits that decades of forced busing have failed to produce.

The issue of desegregation may arise in many statewide choice plans since a number of ongoing court orders involving desegregation remain in effect. But the Supreme Court's decision last month in the Oklahoma City busing case suggests that school districts have wide latitude to adopt programs that are in the educational interest of their school children, even if it means less racial balance.[9] Meanwhile, in jurisdictions in which no desegregation orders are in effect, plaintiffs challenging a choice law must prove it was adopted with discriminatory intent. This is a very difficult standard to meet.[10]

The Lessons. To reduce the probability of challenge, choice plans should be designed to ensure that they provide equal opportunity. A requirement of nondiscrimination should accompany programs in which direct payments are made to private schools. In tuition tax credit programs, provisions should be included to allow low-income families to participate. Though such provisions are not legally mandatory, they will help defuse arguments that the program is designed to benefit only those who can already afford private schools.

Most choice programs will help most significantly those who now lack choice – mainly low-income families whose children attend the worst schools. Against this real-world backdrop, claims of discrimination mounted by the public education establishment and its allies are likely to ring hollow in courtrooms.

3) The Religion Conundrum

When an education choice program extends to religiously affiliated schools, opponents will raise objections ostensibly based on the "establishment" clause of the First Amendment. Most well-crafted education choice programs, however, should survive this legal thicket. But the journey through the thicket can be challenging.

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8 See, e.g., Bolick, *Changing Course*, p. 104-112.

9 *Board of Education of Oklahoma City Public Schools vs. Dowell*, No. 89-1080 (Jan 15, 1991).

10 *Washington v. Davis*, 426 U.S. 229 (1976). This standard does not apply if the state itself is obligated under a desegregation order.

Although the First Amendment's language is simple – "Congress shall make no law respecting an establishment of religion" – its application is extremely complex. A common sense interpretation of the clause would not suggest any difficulty. Aid to parents who wish to send their children to religiously affiliated schools does not "establish" religion. Yet this is not the way in which the clause is applied by courts.

The U.S. Supreme Court's decisions regarding the clause are confusing and contradictory since the Court for years has been divided bitterly over establishment clause issues. In 1989, for instance, the Court decided that a religious creche inside a county courthouse violates the clause while a Chanukah menorah displayed with a Christmas tree outside a government office building does not; this decision, moreover, elicited five different opinions from the nine justices.[11] Prospects for successful defense of education choice programs before the Supreme Court have increased with the resignation of Justice William Brennan, who was the Court's strongest critic of the use of public funds in religiously affiliated schools. Although the outcome of any particular case is by no means certain, the Court's new composition and its relevant precedents suggest that *bona fide* education choice programs will withstand constitutional scrutiny even if they involve sectarian schools.

The Supreme Court has constructed three tests for "establishment clause" cases, under which the challenged legislation must satisfy each. The legislation:

1) Must serve a secular legislative purpose;

2) In its "primary effect" must neither advance nor inhibit religion; and

3) Must not foster an "excessive entanglement" between government and religion.[12]

The first part of this test is easily satisfied in education cases by the state's interest in a well-educated citizenry.[13] The second and third tests, however, often collide in what Supreme Court Chief Justice William Rehnquist describes as a "'Catch-22' of [the Court's] own creation,... whereby aid [to sectarian schools] must be supervised to ensure no entanglement but the supervision itself is held to be an entanglement," a result "far afield from the concerns which prompted adoption of the First Amendment."[14]

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11 *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S.Ct. 3086 (1989).

12 *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

13 See, e.g., *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

14 *Aguilar v. Felton*, 473 U.S. 402, 420-421 (1985)(Rehnquist, J., dissenting).

Cases involving aid to religiously affiliated schools or to parents who patronize them have run an erratic course. The Court, for example, upheld a program that reimbursed parents for school transportation expenses, including those incurred in connection with sectarian schools,[15] but it struck down policies reimbursing nonpublic schools for the costs of teacher salaries, textbooks, instructional materials, and teacher-prepared examinations.[16] Similarly, it invalidated a direct loan of instructional materials to nonpublic schools, while upholding textbook loans to individual students.[17]

The dividing lines in the Supreme Court are best seen in three cases. In the first of these, the 1983 *Mueller v. Allen* decision, the Court upheld by a five to four vote a Minnesota tax deduction program that provides state income tax benefits for various educational expenses incurred in public or private schools, including tuition in religiously affiliated schools. The majority found it relevant that the credit was only one facet of the state's overall program to achieve an equitable distribution of the tax burden; that the credit was available to defray expenses in all schools, public or private; and that the only contact the state had with religious schools was to ensure that textbooks for which credits were claimed did not advance religious doctrine. The Court emphasized that the program did not impermissibly advance religion because "aid to parochial schools is available only as a result of decisions by individual parents."[18]

The second decision was handed down two years later, in *Aguilar v. Felton*. The Court struck down on a five to four vote the use by New York City of federal remedial education funds to pay public school employees to teach educationally deprived low-income students on-site in the parochial schools the children attended. The Court held the First Amendment was violated since public aid was funneled into a "pervasively sectarian environment," which required a "permanent and pervasive state influence" to protect against the use of public funds for religious indoctrination.

The third significant decision was the 1986 *Witters v. Department of Services for the Blind*,[19] in which the Court ruled unanimously that public funds for the vocational training of the blind could be used at a Bible college for ministry training. The Court found several aspects of the program relevant to its holding. The use of funds depended on the decisions of individual students. The funds were available for public or private schools. The program created no financial incentive to attend parochial schools. And there was no evidence that a substantial portion of the funds would flow to religious education. The decision in *Witters* suggests that in fu-

15 *Everson v. Board of Education*, 330 U.S. 1 (1947).
16 *Lemon v. Kurtzman*, *op. cit.*; *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973).
17 *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977).
18 *Mueller v. Allen*, *op. cit.*, p. 399.
19 474 U.S. 481 (1986).

ture the Court will not subject voucher-type arrangements (as in *Witters*) to more stringent scrutiny than tax deductions (as in *Mueller*) as long as the use of funds depends on the independent decisions of parents or students.

A separate opinion in *Witters* by former Justice Lewis Powell, which may now represent the majority opinion of the Court, declared that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test."[20] If this standard were adopted in a majority opinion of the Court, it would sustain all *bona fide* education choice programs that do not discriminate in favor of religiously affiliated schools and which do not create excessive entanglement between the state and such schools. In this area as well, state constitutions may contain provisions that extend beyond the restrictions of the First Amendment, and choice proposals should take these into account.

The Lessons. The Supreme Court's record on choice cases suggests three principles to guide policy makers in crafting education choice programs:

1) The program should not discriminate in favor of religiously affiliated schools;

2) The program should place the decision of where the funds are used in the hands of individual students and parents; and

3) The program should not create a permanent and pervasive state influence in religiously affiliated schools.

If an education choice program satisfies each of these three criteria, it likely will survive a challenge under the U.S. Constitution. In this area as well, state constitutions may contain provisions that extend beyond the restrictions of the First Amendment, and choice proposals should take these into account.

While there can be no guarantees with respect to these legal issues – except that any meaningful education choice program will have to endure a lengthy legal battle – the odds appear to favor a triumph for well-crafted, well-defended programs designed to expand choice in education.

CONCLUSION: PROSPECTS FOR SUCCESS

The prognosis for choice in education is good precisely because the monopoly public school system is so bad. Americans increasingly recognize that it is impossible to progress and prosper as a nation as long as children are consigned to a defective public school monopoly. This understanding is gaining adherents where

20 *Ibid.*, p. 490-491 (Powell, J., concurring).

it counts the most: in the statehouses, in the business community, and especially among parents.[21]

Support is growing, particularly among low-income people of all races, for whom alternatives to public schools could be the difference between a life of poverty or a chance for success. As a result, parental choice is a key facet in the movement toward "empowerment" – policies designed to remove arbitrary barriers to opportunity and thereby to provide low-income Americans greater control over their own destinies.

The anti-choice forces are determined and powerful. They resist choice at every possible opportunity: in the policy arena, in the legislature, at the ballot box, and in the courtroom. But as the benefits of choice grow more apparent and the need grows more urgent, the anti-choice forces will encounter far more battles than ever before.

In the fight for parental choice, litigation is both an obstacle and a potential weapon. Those who support expanded educational opportunities through choice should not shy from courtroom battle, but instead should approach the task intelligently and with commitment. The results will be worth the effort.

21 See John E. Chubb and Terry M. Moe, *Politics, Markets and America's Schools* (Washington, D.C.: The Brookings Institution, 1990).

Appendix
Current and Recent Cases Involving School Choice

1) The Milwaukee Parental Choice Program

Proponents of education choice can draw some important lessons from the litigation surrounding this program, which was enacted by the Wisconsin legislature in spring 1990.[22]

The program provides approximately $2,500 to private, nonsectarian schools, to reimburse tuition costs for up to 1,000 low-income children in Milwaukee. Participating schools must comply with health and safety codes and nondiscrimination requirements, and must satisfy at least one of four performance standards (such as parental participation and student achievement). The schools may accept up to 49 percent of their students from those participating in the choice program, who are admitted on a random basis. The schools must provide certain financial and performance data. The program is the first choice program in the nation to pay full costs of education in private schools.

The public education establishment opened a two-front attack against the choice program. The teachers' unions, joined by the Milwaukee chapter of the National Association for the Advancement of Colored People,[23] filed a lawsuit challenging the program as unconstitutional under Wisconsin law.[24] Meanwhile, State Superintendent of Public Instruction Herbert Grover attempted to impose a wide array of regulations on the private schools, including special education requirements of the Education for the Handicapped Act, all federal constitutional rights of students, and all standards applicable to public schools (such as teacher certification and special programs). Such bureaucratic mandates could have bankrupted the private schools, and at the very least would have transformed them into institutions differing only in name from public schools.

To salvage the choice program, the parents and schools moved to intervene as defendants in the teachers' union lawsuit, and filed their own lawsuit challenging the superintendent's regulations. One complication for the parents was that the state attorney general was hampered in his ability to defend the statute, both be-

22 The author represents low-income parents and private schools who are participating in the program in defending the program against legal challenge.

23 The black community in Milwaukee, including all state legislators, the community newspapers, and the overwhelming majority of citizens, strongly supports the choice program. See, for example, Mikel Holt, "Civil Rights Center Enters Parental Choice Suit," *Milwaukee Community Journal* June 6, 1990, p.1.

24 The Wisconsin chapter of the National Education Association claims the program is unconstitutional since it is insufficiently regulated, it does not obligate the private schools to the requirements applicable to public schools, and it was passed as part of the budget bill. No federal constitutional claims were raised since the program does not include religiously affiliated schools.

cause he also had to defend the superintendent's regulations and because the superintendent publicly (and in court) opposed the choice plan.

Eventually, the lawsuits were consolidated, and the state circuit court in Madison ruled in favor of the parents on all issues. In November, the Wisconsin Court of Appeals ruled the program unconstitutional on a procedural technicality: the law was enacted as part of a budget bill rather than a free-standing bill. The case is on appeal to the State Supreme Court. Meantime, the choice program is operational, providing high-quality educational opportunities to several hundred economically disadvantaged children.

The Wisconsin experience makes clear that the battle for choice programs will not be easy. The education establishment will devote enormous resources to challenge choice programs in court, often on technicalities. But the fight also suggests that parents are in the best position to resist such efforts as full participants in the courtroom.

2) Kansas City

Creative advocates may find that education choice is not so much a legal problem as a legal solution. In a variety of contexts – from desegregation to unequal educational funding to unsafe schools to infringement of religious liberty – allowing students to opt out of public schools and take their share of educational tax dollars with them can provide a workable remedy for a wide range of legal problems facing the public schools.

One such effort is taking place in Kansas City, where a federal court over the past several years has invoked a variety of costly and coercive measures in an unsuccessful effort to achieve racial balance among students. A group of students responded by filing a suit in 1989 demanding the opportunity to use their tax dollars in well-integrated private schools.[25] If the case succeeds, it could provide the first voucher remedy in a school desegregation context – and thereby help students attain the equal educational opportunities that decades of failed busing have not achieved.

3) Chicago

In Illinois, 27 low-income parents and children, along with the education reform coalition TEACH America (a division of the City Club of Chicago), filed papers in Cook County Circuit Court last December demanding the right to use their share of state education tax dollars in private schools.[26]

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25 See Patricia King, "When Desegregation Backfires," *Newsweek*, July 31, 1989, p. 56.

26 See Amy Stuart Wells, "Chicago Parent's Suit Adds New Twists to Voucher Issue," *New York Times*, December 19, 1990.

The voucher proponents are attempting to join a suit filed the previous month by 47 Illinois school districts, who are challenging the state's system of education financing and seeking massive tax increases. This lawsuit is the latest in a long line of "tax equity" lawsuits that have led to increased funding but few educational benefits. Recent tax equity lawsuits were successful in New Jersey, Texas, and Kentucky.[27]

Both the school districts and the parents argue that the state is failing to ensure an "efficient" and "high-quality" system of education as guaranteed by the Illinois Constitution. But the remedies sought – more funding versus parental choice – pit against one another two dramatically different visions for the future of education.

4) Tennessee

Another potentially fruitful prospect for voucher remedies is in the area of religious liberty. In *Mozert v. Hawkins County Public Schools*,[28] a group of parents in Tennessee challenged the selection of textbooks by the county school board as an infringement of their religious beliefs. But rather than seeking to ban or replace the books, the parents sought to opt out of the public schools and to take their tax dollars with them. In a landmark ruling, the trial court agreed. Although the court of appeals overturned the ruling on other grounds, vouchers may provide a workable remedy in similar cases.

5) Possible Future Suits

Lawsuits involving issues of choice are likely to proliferate. The recently passed tax abatement ordinance in Epsom, New Hampshire, is subject to likely legal challenge.[29] Meanwhile, choice advocates are likely to find more opportunities to seek voucher remedies in litigation. Far from judicial "activism," as some conservative attorneys wrongly suppose, vouchers are nothing more than money damages for failure to provide a service – the most commonplace judicial remedy.

Prepared for The Heritage Foundation
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27 "Rich Schools, Poor Schools," *Washington Post*, October 14, 1898, p. A22.

28 647 F. Supp. 1194 (E.D. Tenn. 1986) and slip opinion (E.D. Tenn. Dec. 18, 1986), *reversed*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 U.S. 1029 (1988).

29 See, e.g., Fox Butterfield, "Tax Rebate in New Hampshire Town Poses Test For School Choice Issue," *New York Times*, January, 1991, p. B6.

30 Clint Bolick is director of the Landmark Legal Foundation's Center for Civil Rights, in Washington, D.C., and author of *Unfinished Business: A Civil Rights Strategy for America's Third Century* (San Francisco: Pacific Research Institute, 1990). The Center is involved in the Wisconsin, Illinois, and Epsom cases on behalf of pro-parental choice forces.