

# BACKGROUND

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## Department of Justice Uses Decades-old Court Order to Squash Educational Opportunity in Louisiana

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### Abstract

*On August 22, 2013, the United States Department of Justice filed a motion in federal court to stop Louisiana from issuing school vouchers to low-income children in numerous school districts. DOJ is basing the suit on decades-old desegregation orders that treat Louisiana as if it were the same state it was nearly 40 years ago—something that the United States Supreme Court recently rejected in the case of Shelby County v. Holder. Ironically, DOJ’s action will prevent low-income and minority students from accessing the successful Louisiana school choice program, which empowers children, underserved in their assigned public schools, to attend schools of choice that match their learning needs. Vague, open-ended, and stale court orders should not be used to prevent educational innovation and opportunity.*

On August 22, the United States Department of Justice (DOJ) filed a motion in the U.S. District Court for the Eastern District of Louisiana, asking a judge to stop the state of Louisiana “from awarding any school vouchers...to students attending school in districts operating under federal desegregation orders.”<sup>2</sup> DOJ alleges that the Louisiana Student Scholarships for Education Excellence Program (“the school choice program”), which provides vouchers to low-income children in failing public schools to attend a private or high-performing public school of their choice, “impede[s] the desegregation process” that began almost 40 years ago.

By exploiting decades-old court orders, DOJ is asking a federal court to prevent Louisiana from giving students and parents the opportunity to leave failing schools. This strategy will negatively

### KEY POINTS

- On August 22, the U.S. Department of Justice filed in federal court to block the State of Louisiana from issuing vouchers as a part of its highly successful school choice program.
- The Louisiana school choice program has helped students, particularly minority children, of all races escape failing underperforming schools: About 8,000 children currently use the scholarships to attend a qualifying private school or high-performing public school of choice.
- The Louisiana Scholarship Program provides vouchers of approximately \$5,300 to low-income children (from families below 250 percent of the federal poverty line) to attend a qualifying public or private school of choice.
- DOJ is relying on 40-year-old open desegregation orders to block this successful program, and the Supreme Court in *Shelby County v. Holder* recently invalidated a law that was “based on 40 year-old facts having no logical relationship to the present day.”

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affect all students in Louisiana, but low-income and minority students—those who benefit the most from school choice—will be hit particularly hard.

Specifically, the Department of Justice is requesting the court to enjoin the state from awarding vouchers to children from any of the 34 school districts currently under federal desegregation orders—and, potentially, any other school district “not currently operating under desegregation orders to the extent that the State’s actions are shown to support, result in, or foster segregation or discrimination.”<sup>3</sup> By cherry-picking data, DOJ is steamrolling Louisiana students in a misguided effort to derail a highly successful, race-neutral voucher program intended to improve the education of Louisiana students.

Despite its shameful history of segregation, Louisiana in 2013 is very different from the Louisiana of decades ago, and the school choice program is just one way that Louisiana is helping students of all races to succeed. These stale desegregation orders were intended to stop official government discrimination by school administrators decades ago—not to impede school choice in the 21st century. DOJ’s reliance on these orders to prevent educational innovation and parental choice would place Louisiana in a state of permanent federal receivership analogous to the scheme recently struck down by the U. S. Supreme Court in *Shelby County v. Holder*.<sup>4</sup>

### **The Louisiana Student Scholarships for Educational Excellence Program**

In 2008, the Louisiana Student Scholarships for Educational Excellence Program was started as a scholarship program for students living in New Orleans. Under Governor Bobby Jindal’s leadership, the New Orleans program was expanded statewide in 2012 to include any Louisiana student from a low-income family (below 250 percent of the federal poverty line) who would otherwise be assigned to

a failing school rated “C,” “D,” or “F” on the state’s accountability system. The average voucher amount is approximately \$5,300.<sup>5</sup>

Through the school choice program, qualifying children can receive a voucher to attend a private or high-performing public school of choice. Approximately 8,000 children currently use the scholarships to choose a school that their parents determine better matches their learning needs and provides a higher quality education.

Despite high demand—there are approximately five applicants for every available scholarship—this is not the first time the school choice program has come under attack. In May, the Louisiana Supreme Court ruled that funds dedicated for public education could not be used to finance the scholarship program. The program was saved when Governor Jindal subsequently allocated \$40 million from a separate funding stream to fund the scholarships.

There is significant room for improvement in Louisiana’s educational performance, particularly among poor and minority students. According to the National Center for Education Statistics, only 11 percent of black fourth graders and 10 percent of black eighth graders are proficient in reading. Furthermore, only 14 percent of low-income fourth and eighth graders are proficient in reading. Access to scholarships to attend a private school provides students with the opportunity to make greater academic progress.

### **Federal Suit Against the School Choice Program**

Sadly, Louisiana has not always treated its students equally. Decades ago, DOJ sued a number of segregated school districts in the state and obtained court orders requiring them to comply with non-discrimination requirements. One such court order, which DOJ is relying upon to shut down the school choice program, was issued in the 1975 case

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1. Danielle Dreilinger, *It’s Time to Revisit School Desegregation Orders, Black Education Group Says*, THE TIMES-PICAYUNE (August 27, 2013).  
2. United States Memorandum in Support of Its Motion for Further Relief, *Brumfield v. Dodd*, No. 71-1316, slip op. (E.D. La. 2013), available at [http://media.nola.com/education\\_impact/other/US%20DOJ%20petition%20vouchers%20deseg.pdf](http://media.nola.com/education_impact/other/US%20DOJ%20petition%20vouchers%20deseg.pdf).  
3. *Id.*  
4. *Shelby County v. Holder*, 570 U.S. \_\_\_\_ (2013).  
5. THE FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE, LOUISIANA STUDENT SCHOLARSHIPS FOR EDUCATIONAL EXCELLENCE PROGRAM (2013), available at <http://www.edchoice.org/School-Choice/Programs/Student-Scholarships-for-Educational-Excellence-Program.aspx>.

of *Brumfield v. Dodd* and remains in effect after 38 years.<sup>6</sup> In that case, a federal judge ordered Louisiana to comply with a host of certification requirements and prevented the state from providing funds to “any racially discriminatory private school.” The court left the case open “for the purpose of issuing such further supplemental orders as may be necessary...” In other words, a federal court has retained open-ended authority over Louisiana schools on the theory that these school districts still need special supervision because of their long-past misdeeds.

Across the nation, vague and open-ended orders like the one stemming from *Brumfield v. Dodd* have persisted for decades, regardless of whether they still serve the best interests of those they were intended to help. Although over 200 medium-to-large school districts were released from desegregation orders between 1991 and 2009,<sup>7</sup> many of these cases remain open despite the fact that officially sanctioned discrimination disappeared long ago. These orders are a heavy club that can be used, as DOJ is now attempting to use them, to beat back policy innovation. These decades-old orders are analogous to the Voting Rights Act’s coverage formula that was recently invalidated by the United States Supreme Court in *Shelby County v. Holder*. Such orders should not justify the current use of extreme legal remedies to thwart state policies—particularly those designed to help students of all races.

As in *Shelby County*, the onerous receivership scheme in Louisiana rests on one-sided data and stereotypes. For instance, DOJ argues that “the loss of students through the voucher program reversed much of the progress made toward integration.”<sup>8</sup>

DOJ cites as an example that in the 2012–2013 school year, the Celilia Primary School “lost six black students as a result of the voucher program... reinforcing the school’s racial identity as a white school in a predominantly black district.” But the

Celilia Primary School was 30.1 percent black; the loss of only six students in a school with over 700 students would have a negligible impact on the racial makeup of the school.

DOJ also references Independence Elementary School, which “lost five white students as a result of the voucher program and, thus, increased its black student percentage away from the district-wide black student percentage, again reinforcing the racial identity of the school as a black school.”<sup>9</sup> But the Independence Elementary School is 61.5 percent black, and the loss of only five students would result in an almost imperceptible change in the school’s racial makeup.

What is conspicuously absent from DOJ’s filing is consideration of instances where black students used vouchers to leave failing, predominately black schools or white students used vouchers to leave failing, predominately white schools. In these cases, the school choice program furthers desegregation efforts. DOJ also fails to consider the potentially irreparable harm caused by assigning *any* student to a failing school. In fact, the data show that school choice helps all students and can even advance desegregation efforts and minority achievement.

### Policy Implications

Over 90 percent of the 5,000 vouchers awarded through the school choice program went to minority children during the 2012–2013 school year.<sup>10</sup> As the *The Times-Picayune* reports:

Almost all the students using vouchers are black...said [State Education Superintendent John White]. Given that framework, “it’s a little ridiculous” to argue that students’ departure to voucher schools makes their home school systems less white.... [White] also thought it ironic that rules set up to combat racism were

6. *Brumfield v. Dodd*, 405 F. Supp. 338 (E.D. La. 1975).

7. Sean F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, J. OF POL’Y ANALYSIS & MGMT., Dec. 2011, available at <http://cepa.stanford.edu/sites/default/files/reardon%20brown%20fades%20JPAM%20final%20jan%202011.pdf>.

8. *Id.*

9. *Brumfield*, *supra* note 2..

10. Allie Bidwell, *Justice Department Attempts to Block Louisiana School Voucher Program*, U.S. NEWS & WORLD REPORT, Apr. 26, 2013 available at <http://www.usnews.com/news/articles/2013/08/26/justice-department-attempts-to-block-louisiana-school-voucher-program> (last visited August 29, 2013).

being called on to keep black students in failing schools.<sup>11</sup>

According to a review of the existing academic literature conducted by the Friedman Foundation for Educational Choice, school choice actually reduces segregation:

Eight empirical studies have examined school choice and racial segregation in schools. Of these, seven find that school choice moves students from more segregated schools into less segregated schools. One finds no net effect on segregation from school choice. No empirical study has found that choice increases racial segregation.<sup>12</sup>

If the DOJ's suit is successful, it would devastate school choice in the Pelican State. Twenty-two out of 34 school districts under federal desegregation orders have students, the vast majority of whom are black, currently using scholarships to leave their assigned public schools to go to better quality schools.<sup>13</sup>

### **Allow Choice to Flourish**

A 2013 survey by the Black Alliance for Educational Options and the Louisiana Federation

for Children found that 92.5 percent of the parents of Louisiana scholarship recipients were happy with their children's new school, and 93.6 percent were happy with their children's academic process.<sup>14</sup> When the government strips parents of the freedom to choose the best education options for their children, it is taking away the family's hope for a better future for those children.

Virginia Walden Ford, a pioneer of the school choice movement and one of the second wave of 135 students to integrate Little Rock's Central High School in 1966, put it best: "We didn't fight to get into buildings. We fought to get a quality education. The idea that some people would force kids to stay in failing public schools makes no sense. School choice provides opportunities for children to get a quality education."<sup>15</sup> DOJ and the federal courts would do well to learn from Ford: Civil rights laws and the Constitution must not be applied in a way that harms the very students they were intended to help.

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11. Danielle Dreilinger, *U.S. Government Sues to Block Vouchers in Some Louisiana School Systems*, THE TIMES-PICAYUNE, Aug. 24, 2013, available at [http://www.nola.com/education/index.ssf/2013/08/us\\_government\\_files\\_to\\_block\\_s.html](http://www.nola.com/education/index.ssf/2013/08/us_government_files_to_block_s.html).
  12. Yehoshua Bedrick, *DOJ Lawsuit Would Keep Black Kids in Failing Schools*, Jay P. Greene blog, August 25, 2013, <http://jaypgreene.com/2013/08/25/doj-lawsuit-would-keep-blacks-in-failing-schools/> (last visited August 29, 2013).
  13. Dreilinger, *supra* note 11.
  14. LOUISIANA FEDERATION FOR CHILDREN, LOUISIANA SCHOLARSHIP PROGRAM: PARENTAL SATISFACTION SURVEY RESULTS, February 2013, available at <https://s3.amazonaws.com/LouisianaFederationforChildren/Parental+Satis+Survey/2013+Parental+Satisfaction+Survey.pdf>.
  15. Virginia Walden Ford, Remarks at School Choice: An Enduring Legacy of Little Rock and the Civil Rights Struggle, Aug. 22, 2011.