School Choice Litigation Status

(as of June 2002)

The Institute for Justice is committed to defending parental choice programs whenever they are attacked in court. The following is a summary of the challenges so far.

Jackson v. Benson (Milwaukee)

IJ represented Parents for School Choice and individual families as intervenors/defendants in defense of the Milwaukee Parental Choice Program, which allows low-income youngsters to use a share of their public school funds as full payment of tuition in participating private religious or nonsectarian schools. The program was challenged by the teachers' union, American Civil Liberties Union, National Association for the Advancement of Colored People, People for the American Way, Americans United for Separation of Church and State and others. The lawsuit charged violations of the First Amendment and the Wisconsin Constitution.

In June 1998, the Wisconsin Supreme Court upheld the program against all challenges and lifted an injunction against the program's expansion to religious schools. The U.S. Supreme Court declined to review the decision. In the 2001-2002 school year, 10,882 children enrolled in the program.

Simmons-Harris v. Goff; Simmons-Harris v. Zelman (Cleveland)

In the first round of Ohio litigation, IJ represented Hope for Cleveland's Children and individual families as intervenors/defendants in defense of the Cleveland scholarship program, which provides low-income youngsters with scholarships up to $2,250 (90 percent of tuition) for participating religious or nonsectarian private schools. The program was challenged in state court on a variety of state and federal constitutional grounds, including religious establishment, by the National Education Association, American Federation of Teachers, ACLU, People for the American Way, Americans United and others.

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In May 1999, the Ohio Supreme Court upheld the constitutionality of the scholarship program, in which approximately 4,000 children are now participating. The Court decisively rejected the argument that scholarships violate the First Amendment's establishment clause and a similar provision of the state constitution. The Court did, however, rule that the program had been passed by the legislature in violation of the state constitution's single-subject rule because it had been attached to the state's biennial budget. The Court stayed the effect of its ruling until June 30 to allow the legislature time to reenact the program in a proper manner. The legislature did so, and Governor Taft signed the bill into law.

The same parties that filed the first lawsuit then filed another lawsuit in the United States District Court for the Northern District of Ohio, repeating their federal establishment clause claim that was rejected by the Ohio Supreme Court. They also asked the court to issue a preliminary injunction, halting the program before the start of the school year. In this round of the litigation, IJ represents five Cleveland families participating in the scholarship program as intervenors/defendants.

One day before the start of school in August 1999, Judge Solomon Oliver granted the plaintiffs' request for a preliminary injunction. Three days later, in reaction to the nationwide outcry over his decision, Judge Oliver modified his order, allowing those students who had participated in the program last year to continue in the program for one semester while the litigation proceeded. The 794 school children new to the program, however, remained out of luck. In early November, the U. S. Supreme Court stayed the preliminary injunction, allowing the program to resume operation in its entirety.

On December 20, 1999, Judge Oliver granted the plaintiffs' motion for summary judgment, holding that the program violated the First Amendment's establishment clause. He stayed the injunction, however, pending appellate review. IJ appealed to the U. S. Court of Appeals for the Sixth Circuit, which struck down the program 2-1 on December 11, 2000. The Sixth Circuit declined IJ's petition to hear the case en banc in February 2001 but granted IJ's motion to stay its mandate so that the program could continue operating while IJ seeks U. S. Supreme Court review. IJ petitioned the U.S. Supreme Court in May 2001 to review the Sixth Circuit's decision. The White House counsel also petitioned the U. S. Supreme Court in July 2001 to review the case. On September 25, 2001, the Court announced that it would hear arguments in the case during the 2001-2002 term. On February 20, 2002, the Court heard oral arguments in the case. The Court is expected to rule in June 2002.

Holmes v. Bush; FEA v. State Board of Education (Florida Opportunity Scholarships)

As part of Governor Jeb Bush's A+ Plan for Education, all Florida public schools are now graded on a scale of A to F. Students assigned to schools receiving an F grade for two years in any four-year period are eligible for opportunity scholarships, which may be used at public schools graded "C" or better as well as private or religious schools. On June 22, 1999, the day after

Governor Bush signed this plan into law, the ACLU, National Education Association, People for the American Way and others challenged the Opportunity Scholarship Program in state circuit court in Tallahassee, alleging violations of the federal and state constitutions. A second lawsuit involving similar claims was filed shortly thereafter by the American Federation of Teachers in the same court. The two cases have been consolidated.

IJ represents five Pensacola families participating in the Opportunity Scholarship Program as well as the Urban League of Greater Miami, Inc. as intervenors/defendants in the litigation. On March 14, 2000, Leon County Circuit Court Judge L. Ralph Smith ruled that the Opportunity Scholarship Program violates Article IX, Section 1 of the Florida Constitution. That provision requires the state to provide an adequate system of free public schools. While nothing in the constitutional language explicitly prohibits aid from reaching students in private schools, Judge Smith concluded that the constitutional mandate to establish public schools implicitly forbids the state from furthering the education of children in other ways. He thus concluded that public funds could not be used to educate children in private schools, even though thousands of Florida students are currently educated in private schools at public expense through programs for students with disabilities and at-risk youth.

In October 2000, First District Court of Appeals for the State of Florida overturned the trial court's decision, emphatically disagreeing with its reasoning. The court stated, "[N]othing in [the Constitution] clearly prohibits the Legislature from allowing the well-delineated use of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary." It added that the Constitution "does not unalterably hitch the requirement to make adequate provision for education to a single, specified engine, that being the public school system." The teachers' unions have appealed this ruling to the Florida Supreme Court. In April 2001, the Florida Supreme Court declined to review that ruling and sent the case back to the trial court for further proceedings.

Because of a potential conflict, Judge Smith was disqualified from the case and a new judge, Kevin Davey, was assigned. On January 2, 2002, the Plaintiffs filed a second partial summary judgment motion, this time arguing that the Opportunity Scholarship Program violates Article I, Section 3 of the Florida state constitution, which provides that "No revenue of the State . . . shall ever be taken from the public treasury directly or indirectly in aid of any church or religious denomination, or in aid of any sectarian institution." Judge Davey agreed that the best course would be for him to wait until the Supreme Court hands down its ruling in the Zelman case before attempting to resolve the Plaintiffs' latest challenge. A hearing on the Plaintiffs' summary judgment motion is scheduled for July 9, 2002, but the Defendants and Intervenors have asked Judge Davey to reschedule it to enable the parties to analyze the Zelman decision and determine what impact that decision should have on the challenge to Florida's school choice program.

The Florida Department of Education recently announced the latest scores on Florida's standardized test, and, as a result of those scores, nearly 9,000 children at ten different schools have just become eligible to participate in the Opportunity Scholarship Program.