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Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

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THE SUPREME COURT SPEAKS ON SCHOOL VOUCHERS

Overview

In the 1980's and early-1990's public school systems began to explore new ways to promote and expand school choice. Magnet schools, open enrollment schools, theme schools, alternative schools, charter schools, and other options were created. In some states student opportunity scholarships and other tuition assistance programs were put in place to make choice both attractive and financially possible for many parents. The expectation was that school and program options (mostly within public school systems, i.e., intra-district) would meet the needs, abilities, and interests of children. Moreover, it was hoped that new options would correct inequities where they existed.

As public education moved into the early 2000's the public's interest in school choice remained in tact. At the *federal level* the newly enacted No Child Left Behind Act contains specific requirements for establishing school choice options. For example, where a school fails to make adequate yearly progress toward meeting specific student academic progress goals for two years, parents must be given notice that they can send their children to another higher performing school in the school district. In addition, school systems must enact policies allowing students who either attend a school that is dangerous or who are the victims of violent crime at school to transfer to another school within the school system.

At the *state level*, fueled by statewide legislative initiatives to hold individual schools (administrators and teachers) *accountable for student academic progress*, school choice (coupled with proposals for scholarships, tuition vouchers, and tax credits) became a subject of heated debate among policy makers. At the same time, many parents looked to school choice as a way to move their children out of "low performing" schools and into "high performing" schools. School choice, said these parents, will create "equal access to quality educational opportunities for all children."

Emerging Issues

More often than not, today's debate regarding school choice focuses on *ten basic questions*. These questions are *(1)* Is school choice defined narrowly or broadly (e.g., will choice options include private schools)? *(2)* Are religious schools eligible to receive students? *(3)* Are all students in a school district eligible to participate in a

choice program, and on what criteria is eligibility determined? *(4)* Will students who choose to leave their neighborhood school have access to free transportation? *(5)* How will parents pay for tuition and other costs? *(6)* Do federal, state, and local taxes support school choice programs? *(7)* Will money be directly distributed to parents, on what criteria will accountability for spending be based, and who will be responsible for the auditing process? *(8)* Are participating schools required to automatically admit new "choice students?" *(9)* How will school choice impact on special education students? (*10*) Will choice programs create constitutional and/or legal problems in the states where they are initiated?

The above questions also raise a number of potential policy issues, especially where school choice is linked to public money-supported assistance (e.g., student scholarships and vouchers) for students transferring from public to private schools (including religious schools). On June 27, 2002, the United States Supreme Court took an opportunity to address some of these issues when it decided Zelman, et al. v Simmons-Harris, et al. (2002).

Zelman v Simmons-Harris (2002)

The State of Ohio established the Ohio Pilot Scholarship Program as a part of a broad effort to enhance educational opportunities of students. More specifically, the intent of the Pilot Program was to create school choice by providing tuition aid (up to $2,250) for students enrolled in the Cleveland City School District. The funds were made available to parents according to financial need, and could be spent at eligible public or private schools (both religious and non-religious). For students who decided to remain in the Cleveland City Schools the tuition aid money could be spent on tutorial assistance, or they had the option of enrolling in a community school or a magnet school in the District.

In the 1999-2000 school year, none of the public schools adjacent to the Cleveland City School District participated in the Pilot Program. Fifty-six private schools participated in the Program of which forty-two were affiliated with a religious group. In total sixty percent of the students who participated in the Pilot Program were from low income families, and ninety-six percent of the students who elected to leave the public schools were enrolled in private schools with a religious affiliation. The number of students in the Program was projected to double in the 1999-2000 school year.

Initially, a group of Ohio taxpayers filed suit in state court. Ultimately, the Ohio Supreme Court held that the Pilot Scholarship Program violated certain procedural requirements of the Ohio Constitution. The state legislature immediately met, rectified the procedural deficiencies, but left the substantive aspects of the Program intact.

Plaintiffs next took their case into a federal district court where the primary focus changed from school choice to school vouchers. In federal court plaintiffs claimed that the Pilot Program violated the Establishment Clause of the First Amendment of the United States Constitution, which requires separation of church and state. This court granted a preliminary injunction, which was stayed pending review by the United States Court of Appeals for the Sixth Circuit. In December 1999, the Sixth Circuit affirmed the district court decision, finding that the Ohio Pilot Scholarship Program had a primary effect of advancing religion in violation of the Establishment Clause. Subsequently the United States Supreme Court granted certiorari.

The Supreme Court Speaks

In Zelman, the United States Supreme Court had to answer the following question: Does the Ohio Pilot Scholarship Program have a primary effect of either advancing or inhibiting religion? By a vote of 5 to 4 the

high court held that it did not. In an opinion written by Chief Justice Rehnquist, the majority relied on past decisions where issues of religion and public assistance came together. Of particular importance were Mueller v Allen (1983), Witters v Department of Social Services (1986), Zobrest v Catalina Foothills (1993), and Agostini v Felton (1997), wherein the Court sanctioned the concept of "neutral educational assistance programs."

In crafting their analysis, the five Justices heavily relied on the first two prongs of the *three-pronged* Establishment Clause standard created in Lemon v Kurtzman (1971). *Prong one* of Lemon asks the following question: Does the program have a clearly secular purpose? *Prong two* asks: Does the program have a primary effect that either advances or inhibits the free exercise of religion? To the majority, the Ohio Pilot Scholarship Program is "one of true private choice, consistent with the *Mueller* line of cases, and thus constitutional. It is neutral in all aspects towards religion…. It confers educational assistance directly to a broad class of individuals defined without reference to religion and permits participation of all district schools religious and non-religious… The only preference in the program is for low-income families." The Program was enacted for the sole purpose of providing educational assistance to poor children enrolled in a "failing public school system." What is more, in the Ohio Pilot Scholarship Program government money reaches a religious school "only by way of deliberate choices of numerous individual participants." Thus, any advancement of the recipient school's religious mission is incidental, and any endorsement of a religious message is perceived.

In a concurring opinion, Justice O'Connor said that she did not see the Zelman decision as marking a "dramatic break" from the Court's past Establishment Clause jurisprudence. In her view the parents who take advantage of the voucher program must show that their decision was truly an exercise of "private choice," and they have considered "all reasonable educational alternatives to religious schools that are available to parents."

In his concurring opinion, Justice Thomas saw Zelman as an "emancipation' decision. "Urban children," he said, "have been forced into a system that continually fails them." The Ohio Pilot Program gives them the educational opportunity that they have been denied.

In dissent, Justice Souter opined that the Ohio Pilot Scholarship Program was far from neutral. The criteria used to select eligible schools served as a disincentive for most private schools, and favored church-related schools. Thus, parental choice was not free choice. The selection available to parents was limited to schools most of which had a religious affiliation.

Post-Zelman Court Action

On August 6, 2002, The Palm Beach Press carried the following story: "Judge Rejects School Vouchers." Written by Mary Ellen Flannery and Kimberly Miller, the piece reports that a Leon County, Florida, Circuit Court Judge struck down Florida's school voucher statute. The statute requires rating public schools on academic performance, and assigning each school a letter grade (e.g., an "A"). Where a school is labeled an "F" (failing) school for two years, a student can transfer out of that low performing school to a higher performing school.

In the Judge's opinion, the voucher program violates the Florida Constitution, which does not allow public money to be spent on churches or other sectarian institutions (which includes religiously affiliated schools). The County Judge also banned use of public money supported vouchers at all non-religiously affiliated private schools as well, because these schools too are a part of the same state program. The court decision was stayed pending an appeal. It should be noted that as of this date twenty-two other states are considering some form of voucher plan.

Implications for Policy

Building sound public policy on one court decision, albeit a United States Supreme Court decision, is risky. Educational policy makers must proceed with caution and not over generalize the applicability of the Court's rationale in Zelman. The case was narrowly focused on the issues raised by one specific voucher program in the State of Ohio, an opportunity scholarship program intended to enable non-affluent parents to move their children out of "failing schools." In this writer's opinion, Zelman is neither a "school choice" case nor a "school voucher" case. It is not a "religion" case. Zelman is best characterized as an "enabling" case for parents, and an "equal access to educational opportunity" case for students.

In summary, four specific policy implications can be gleaned from the Supreme Court's decision in Zelman. As education moves toward 2003, policy makers are encouraged to:

- Establish school choice and financial assistance programs clearly intended and specifically designed to enable students isolated in low performing public schools to move to more effective schools.
- Explore school choice programs that present parents with a variety of alternatives (both public and private) from which to freely select.
- Not automatically eliminate religiously affiliated private schools from the alternatives available to parents.

Establish school choice and financial assistance programs (vouchers, opportunity scholarships) consistent with the constitutional and legal requirements of their state.

Resources Cited

Agostini v Felton, 117 S.Ct. 2010 (1987)

Mueller v Allen, 103 S.Ct. 3062 (1983)

Witters v Department of Social Services, 474 U.S. 481 (1986)

Zelman v Simmons-Harris, 122 S.Ct. 2460 (2002)

Zobrest v Catalina Foothills, 113 S.Ct. 2462 (1993)

No Child Left Behind Act (P.L. 107-110), 20 U.S.C. 6301 et. seq. (2002)

Flannery and Miller, "Judge Rejects School Vouchers," Section A, page 1, *The Palm Beach Press* (August 6, 2002).

Richard S. Vacca
Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author.