Public money for private schools: Supreme Court considers the constitutionality of vouchers

By **Sharon McCloskey** - 2/25/2015 - in Law and the Courts Print This Article

State Supreme Court justices refused to let a surprise snowstorm force yet another rescheduling of arguments in the private school voucher case, opening the courtroom on time Tuesday morning to a less-than-full gallery.

Determined to resolve challenges to the state's recently enacted "Opportunity Scholarship Program" long before the next school year begins, the high court took the case directly in October to review Superior Court Judge Robert H. Hobgood's August decision declaring the program unconstitutional and fast-tracked it for argument this month.

Snow and ice slowed that process down a bit, forcing a cancellation of argument set for last Tuesday, but the justices were ready with questions yesterday about the viability of a voucher program that funnels taxpayer funds to private schools.

The challenged law, enacted as part of the 2013 state budget, allows the state to appropriate more than $10 million in public money to award qualifying low-income families $4200 per child for use at private schools.

Those schools, which can range from religious schools with several students to a home school of one, are not subject to state standards relating to curriculum, testing and teacher certification and are free to accept or reject students of their own choosing, including for religious or other discriminatory reasons.

> *"North Carolina's voucher program is unique. No other voucher program in the country allows the receipts of vouchers by private schools that can be unaccredited; employ unlicensed uncertified teachers — including teachers who don't even have a high school diploma; employ teachers and staff without performing a criminal background check; teach no science or history; teach only the recitation of religious texts; and discriminate against students with disabilities. In the absence of standards, North Carolina stands in a class of its own."*
>
> — Burton Craige
>
> on behalf of challengers in the *Hart* case

In December 2013, groups that included taxpayers and the state and local school boards filed two separate lawsuits, alleging that the law violates state constitutional provisions requiring the expenditure of public funds exclusively for public schools, and contending that a voucher program wholly devoid of standards fails to meet the state's obligation to provide all children with a "sound basic education" and thus does not satisfy the constitution's "public purpose" provision.

Judge Hobgood agreed with the challengers and temporarily blocked implementation of the program this past August, but state appellate courts later allowed monies to flow to families already approved for vouchers for the current school year while the cases proceeded in the courts.

The Supreme Court has likewise allowed the application process for vouchers next year to move forward while it considers the appeal.

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Does the funneling of public school funds to private schools violate provisions of the state constitution that require such funds to be used "exclusively" for public schools?

That was the first question put to the justices yesterday.

The courts should not have even needed to address that issue, Assistant Attorney General Lauren Clemmons argued for the state, because the restriction on public school use applies only to funds specifically appropriated for public schools.

"No funds for the scholarships are taken from the public schools," Clemmons said, referring to the General Assembly's appropriation of $10 million from the state's General Fund for the program.

"And that should have been the end of the case."

But Burton Craige, an attorney for some of the law's challengers, pointed out that lawmakers went out of their way to move that public money around – appropriating it from the General Fund and then putting it in the budget for the state university system.

"This money, which is going for elementary schools, middle schools and high schools – the legislators have plunked it in the UNC budget," he said, leaning into the lectern and facing the justices with a quizzical look.

"Perhaps because this is such a totally unprecedented thing they're trying to do here."

Noah Huffstetler, representing Sen. President Phil Berger and House Speaker Tim Moore, argued that, source aside, the voucher money does not go directly to private schools – rather it's sent to parents, who then use it to send their child to the private school of their choice.

But don't the schools get to choose the children, Justice Robin Hudson asked, pointing out that they can reject applicants for discriminatory reasons and prompting this exchange:

> Justice Hudson: "In this case, it's undisputed that the private schools receiving the scholarship funds are not required to be accredited, not required to employ teachers or principals who are licensed or have particular credentials, not subject to any requirements regarding the curriculum, not required to provide a minimal amount of instructional time, and not prohibited from discriminating against applicants on the basis of religion. That's an undisputed part of the trial court's order, and you're not disputing that now?"
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> Huffstetler: "That's right."

But sending public funds to such unaccountable private schools also violates the public purpose provision of the state constitution, former Supreme Court Justice Robert Orr told the court.

"This provision might be the single most important constitutional limitation on government that we have," Orr argued on behalf of the school boards, "because it tells the General Assembly, 'if you are going to tax the citizens and spend the money, then you must do that for public purposes only.'"

Orr pointed out that when enacting the voucher law, the General Assembly made absolutely no findings of fact as to its purpose.

Certainly, Burton Craige added, sending public money to private schools wholly devoid of standards does not satisfy any public purpose and does not meet the state's obligation to provide K-12 students with a "sound basic education."

As he reminded the justices:

> North Carolina's voucher program is unique. No other voucher program in the country allows the receipts of vouchers by private schools that can be unaccredited; employ unlicensed uncertified teachers — including teachers who don't even have a high school diploma; employ teachers and staff without performing a criminal background check; teach no science or history; teach only the recitation of religious texts; and discriminate against students with disabilities. In the absence of standards in this voucher program, North Carolina stands in a class of its own.

Justice Paul Newby asked why, though, voucher schools should be treated differently than other alternatives to public schools, like home-schools or other private schools that likewise aren't subject to such standards.

"The public purpose clause changes the equation," Craige said.

"We have 700 private schools in North Carolina, we've got 50,000 home schools. But what the public purpose clause says is when taxpayer funds are flowing in to those schools, the state has an affirmative obligation to see that those funds are actually educating children."

Newby then pointed out the private schools do have end-of-year testing obligations and must report to the General Assembly about how their students compare to others.

He then asked what leeway lawmakers had otherwise to help poor and struggling students, particularly in the face of suggested evidence that children of the same socioeconomic background who go to public schools are less likely to go on to college.

"North Carolina has many fine private schools," Craige answered.

"The problem with this legislation is that these funds flow to all private schools, regardless of quality. So at one end of the spectrum we've got Ravenscroft, Greensboro Day School, where the tuition is for or five times what a $4200 voucher can buy, and at the other end you have hundreds of unaccredited schools, mostly religious schools. Under the public purpose clause the legislature can't hand over millions of dollars based upon the blithe assumption that anything that calls itself a school is providing a real education."

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