Religion: County Voucher Program Allows Public Funds to Subsidize Religious Education, Violating Colorado Constitution

Taxpayers for Public Education v. Douglas County School District, No. 13SC233 (Colo. June 29, 2015).

The Colorado Supreme Court has ruled that a county school voucher program is unconstitutional, agreeing with a taxpayer group that a county school district's voucher program improperly facilitated the use of tax dollars for religious education.

In 2011, the Douglas County School District (District) implemented its Choice Scholarship Pilot Program (CSP), a grant mechanism that awards taxpayer-funded scholarships to qualifying elementary, middle, and high school students. Those students can use their scholarships to help pay tuition at a participating private school, labeled a "Private School Partner." In order to qualify as a Private School Partner, the private school must satisfy certain requirements and must allow Douglas County to administer various assessment tests. The private school need not, however, modify its admission criteria, and the CSP explicitly authorizes Private School Partners to make "enrollment decisions based upon religious beliefs."

Following a lawsuit from Douglas County taxpayers, the trial court found that the CSP violated Colorado's Public School Finance Act of 1994, §§ 22-54-101 to -135, C.R.S. (2014), as well as various provisions of the Colorado Constitution. The trial court thus permanently enjoined implementation of the CSP. The court of appeals reversed, holding that the CSP did not violate the Colorado Constitution. The Colorado Supreme Court granted certiorari to determine, among other questions, whether the CSP comports with the Colorado Constitution.

HELD: Reversed and remanded, with instructions that the permanent injunction against the CSP be reinstated. The District's scholarship program violates the Colorado Constitution.

DISCUSSION: The District argued that the CSP did not fund religious schools; it merely provided funds to qualifying students, who could choose whatever school they wanted. And, although the CSP did not prohibit students from going to a religious school, the program did not require or even encourage such a decision.
The court found that the empirical evidence suggested quite the opposite: the vast majority of CSP monies were going to religiously-oriented institutions. At the time of the injunction hearing at the trial court, 271 scholarship recipients had been accepted to 23 different Private School Partners; 16 of which were religious in character. Furthermore, roughly 93% of scholarship recipients had enrolled in religious schools; of the 120 high school students, all but one chose to attend a religious school.

The Colorado Constitution features broad, unequivocal language forbidding the State from using public money to fund religious schools. Specifically, article IX, section 7—

entitled "Aid to private schools, churches, sectarian purpose, forbidden"— includes the following proscriptive language:

> Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever. . . .

This language, said the court "…makes one thing clear: A school district may not aid religious schools…..Yet aiding religious schools is exactly what the CSP does."

(By way of clarification, the court noted that, according to Black's Law Dictionary "sectarian" means "[o]f, relating to, or involving a particular religious sect; esp., supporting a particular religious group and its beliefs." Respondents contended that the language of section 7 was not plain at all, and that the term "sectarian" was actually code for "Catholic"):

> In so doing, Respondents charge that section 7 is a so-called "Blaine Amendment" that is bigoted in origin. See Taxpayers for Pub. Educ., ¶ 62 n.13 (describing Blaine Amendments as "state laws and constitutional provisions which allegedly arose out of anti-Catholic school sentiment"). They thus encourage us to wade into the history of section 7's adoption and declare that the framers created section 7 in a vulgar display of anti-Catholic animus.

The court declined to wade into such a whirlpool. "We need not perform such an exegesis to dispose of Respondents' argument. Instead, we need merely recall that "constitutional provisions must be declared and enforced as written" whenever their language is "plain" and their meaning is "clear." (citation omitted). As discussed, the term "sectarian" plainly means "religious." Therefore, we will enforce section 7 as it is written."

Also problematic for the court was the fact that schools could raise tuition charged to the enrolling CSP recipients, making the CSP monies (which averaged $4600 per student) a virtual gift to the school, over and above the fully-paid tuition.

> Most troubling is that the CSP does not forbid a Private School Partner from raising a scholarship recipient's tuition (or reducing his financial aid) in the amount of the scholarship awarded. Such conduct would pervert the program's "offset" approach and would instead result in the District channeling taxpayer money directly to a religious school. As the trial court found, one religious Private School Partner has already engaged in this very behavior.

Respondents also argued that a Colorado precedent, *Americans United for Separation of Church & State Fund, Inc. v. State,* 648 P.2d 1072 (Colo. 1982)—required that the

District's scholarship program be upheld. However, the program in *Americans United* differed in several critical dimensions—first and foremost, the monies under that program were expressly prohibited from going to any institution which was "pervasively sectarian"—in other words, the school's educational function had to be "clearly separable" from its religious mission. This was not the case with the District's CSP program.

Finally, Respondents asserted that invalidating the CSP would violate the First Amendment, and pointed to US Supreme Court (*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and Tenth Circuit precedent. But those cases relied on the Constitution's Establishment Clause, which was a far less prolix, and more ambiguous, provision than the very specific prohibitions contained in section 7 of the Colorado Constitution. .

> Had Petitioners claimed that the CSP violated the Establishment Clause, *Zelman* might constitute persuasive authority. But they did not. Rather, Petitioners challenged the CSP under article IX, section 7 of the Colorado Constitution. By its terms, section 7 is far more restrictive than the Establishment Clause regarding governmental aid to religion, and the Supreme Court has recognized that state constitutions may draw a tighter net around the conferral of such aid. See *Locke v. Davey*, 540 U.S. 712, (2004) As such, *Zelman's* reasoning, rooted in the Establishment Clause, is irrelevant to the issue of whether the CSP violates section 7.

The Colorado Supreme Court, en banc, reversed and remanded.

LINK (last accessed July 2, 2015).