Heading for a Fall

State restrictions on voucher programs rest on shaky foundation

by JOSHUA DUNN

In June 2015, the Colorado Supreme Court struck down a successful voucher program in Douglas County, invoking a provision of the state constitution that harks back to an era of widespread prejudice against Catholics. But because of the court's reliance on this discriminatory provision, its decision could well be overturned by the U.S. Supreme Court—clearing the way for voucher programs across the country.

When the Supreme Court ruled in 2002 that school vouchers did not violate the federal Constitution, Robert Chanin, the chief counsel for the National Education Association, promised to bring the battle to the state courts. School choice opponents, he said, would rely not on "lofty" First Amendment principles, but on what he termed "Mickey Mouse provisions" contained in state constitutions. Colorado's supreme court used one such provision, the state Blaine Amendment, to kill the Colorado voucher program in *Taxpayers for Public Education v. Douglas County School District* this June.

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Blaine Amendments, which prohibit public funding of religious schools, were added to some three dozen state constitutions beginning in the late 1800s, sparked by pervasive anti-Catholic sentiment. Colorado's amendment forbids "any appropriation" to support "any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school...controlled by any church or sectarian denomination." The court said that "this stark constitutional provision makes one thing clear: A school district may not aid religious schools."

The school district argued that the court should consider the ignominious history of Blaine Amendments in its deliberations, but the court refused to do so, saying it only needed to rely on the clause's "plain" meaning.

The Douglas County scholarship program awarded money to individual students, allowing their parents to decide where to send their children. More than 90 percent chose religious schools. Other states with Blaine Amendments, such as Wisconsin, have upheld voucher programs because the aid was given to families and only indirectly to schools. But Colorado's court held that the Douglas County program "constitutes aid to 'support or sustain'" religious schools, going so far as to call it a "recruitment program" for such schools. By finding that even indirect aid counts as an appropriation to religious schools, the court rendered the amendment even more discriminatory and increased the odds that the U.S. Supreme Court will intervene.

Justice Allison Eid, writing for the dissenters, pointed out the absurdity of the majority's reasoning, noting that their interpretation "is so broad that it would invalidate the use of public funds to build roads, bridges, and sidewalks adjacent to such schools, as the schools, in the words of the plurality, 'rely on' state-paid infrastructure to operate their institutions."

Taken to the extreme, this reasoning could yield even stranger results. Religious institutions rely on police and fire departments. If a gunman should open fire at a Catholic school, would the police be forbidden to respond? Or, if a fire were to break out at a synagogue, would the fire department have to ignore it and allow the flames to engulf the building?

Douglas County school officials will likely take their case to the Supreme Court, where they will have a smorgasbord of lofty constitutional provisions to choose from, including freedom of speech and equal protection. Their primary argument, though, will be grounded in the First Amendment's guarantee of free exercise of religion. The Supreme Court has consistently held that the free exercise clause forbids "laws that...impose disabilities on the basis of religion," and Colorado's Blaine Amendment clearly imposes such a disability. If the Court strikes down the amendment as a violation of free exercise, school choice advocates are likely to challenge voucher-program bans that are based on other "Mickey Mouse" clauses in state constitutions. Litigators will argue that these provisions—including "uniformity" and "local control" clauses—also impose disabilities based on religion. Voucher supporters can only hope that Mickey Mouse will have the opportunity to meet the Constitution.

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