



Contact: Rick Esenberg
Tel. 414-727-6367
Cell: 414-213-3957
FAX: 414-727-6385
Email: rick@will-law.org

FOR IMMEDIATE RELEASE

WILL RELEASES REPORT ON LEGAL HISTORY OF SCHOOL CHOICE

Wants to counter misinformation from choice opponents

April 22, 2013, Milwaukee, WI – The Wisconsin Institute for Law and Liberty (“WILL”) has released a report, “The Story of School Choice – Constitutional Challenges and Victories,” that provides a brief – but thorough – description of relevant Supreme Court cases on school choice. It seeks to rebut the unfounded attacks on the school choice program that have been coming from the usual roadblocks to education reform.

Ever since Governor Walker announced his school choice plan, opposition forces have questioned the program’s constitutionality. These are expressed, not as claims that school choice violates the state or federal constitution, but as a vague raising of “questions” and identification of “issues.” There is a reason for such obfuscation. As the report shows, there are no questions and there is no issue regarding the constitutionality of choice expansion.

The report can be found below the press release and on [WILL’s website](#). The report follows-up from a published [op-ed written by WILL](#).

As always, WILL remains vigilant in its defense of the Constitution, the rule of law, and truth in public discourse.

The Wisconsin Institute for Law & Liberty is a non-profit, public interest law firm promoting the public interest in constitutional and open government, individual liberty and a robust civil society. Further inquiries may be directed to Mr. Esenberg at rick@will-law.org.

###



**The Story of School Choice -
Constitutional Challenges and Victories**

Rick Esenberg
CJ Szafir

April 22, 2013

I. Overview

Although challenged numerous times over the years in state and federal court, the Milwaukee School Choice Program (“Choice Program”) has survived several lawsuits and expanded in scope. The major legal challenges to the Choice Program have centered on the following issues:

- Wisconsin’s restrictions on using public money for private purposes;
- The First Amendment’s Establishment Clause that separates church and state (as well as a comparable provision in the Wisconsin Constitution); and
- Whether schools participating in the Choice Program are to be considered “district” schools under the Wisconsin Constitution.

II. Restrictions on using public money for private purposes (i.e. the public purpose doctrine)

Although the public purpose doctrine is not expressly set forth in the Wisconsin – or United States – Constitution, it is a longstanding principle that the Wisconsin courts have recognized and enforced. It states that the government can only make public expenditures for public purposes.¹ When public expenditures go to private entities, the Wisconsin courts have required that the money be monitored and subjected to a certain level of accountability so that the state can ensure that a public benefit is being pursued.²

It is generally agreed - by both proponents and opponents - that the purpose of the voucher program is to improve education and that is a valid public purpose. However, challengers of the Choice Program have argued that the Choice Program violates the public purpose doctrine because the legislature and Department of Public Instruction (“DPI”) do not have “adequate supervision and controls” over the school vouchers.³

In 1992, in response to a lawsuit against the Choice Program, the Wisconsin Supreme Court, in *Davis v. Grover*, upheld the Choice Program on public purpose doctrine grounds.⁴ They concluded that the Choice Program 1) pursued a clear public purpose of educating children and 2) had adequate supervision. At the time of the *Davis* case, government supervision of the Choice Program included a requirement that the State Superintendent report on students participating in the Choice Program and compile data on academic achievement, attendance, dropout rates, and discipline.⁵ In addition, the non-partisan Legislative Audit Bureau was mandated to perform financial and performance evaluations on the program.⁶ Since the *Davis* case was decided, supervision and government controls of the Choice Program have changed.

¹ *Davis v. Grover*, 166 Wis.2d 501, 540 (1992).

² *Id.*

³ *Id.* at 541.

⁴ *Id.*

⁵ *Id.* at 544.

⁶ *Id.*

Currently, private schools participating in the Choice Program are subjected to the same state education laws as other private schools, containing certain mandates regarding instruction, curriculum, and attendance.⁷ Furthermore, these schools must submit annual financial reports to the DPI to prove their stability.⁸ Private schools participating in the program must meet certain school attendance and graduation requirements, though they only have to report whether the requirement was met and not the percentage of students meeting the requirement.⁹

Most importantly, parents participating in the Choice Program still have the ability to hold schools accountable. If their child is not obtaining an adequate education, then the parent can leave the school and take their voucher elsewhere.

III. *The Establishment Clauses of the First Amendment of the U.S. Constitution and Wisconsin Constitution.*

United States Constitution: The Establishment Clause of the First Amendment of the United States Constitution states that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁰ The Fourteenth Amendment makes it applicable to state governments.¹¹ The United States Supreme Court has interpreted these amendments to mean that state governments cannot pass laws that have “either the purpose or effect of advancing or inhibiting religion.”¹²

When determining whether the Establishment Clause has been violated, the courts will look to whether the law advances religion or religious causes. Specifically, according to the Court, there is no Establishment Clause violation when the law: 1) has a non-religious legislative purpose, 2) includes a primary effect that neither advances nor inhibits religion, and 3) does not create excessive entanglement between government and religion.¹³ In school choice litigation, the second point is particularly important.

In *Jackson v. Benson*, the challengers of the Choice Program, including the Milwaukee Teachers’ Union, challenged the amended Milwaukee School Choice Program, which expanded the voucher program to include religious schools in the City of Milwaukee. The Milwaukee Teachers’ Union accused the amended Choice Program of violating the Establishment Clause because the publicly-funded vouchers are used to promote religious private schools.

However, in 1998, the Wisconsin Supreme Court disagreed and held that there was no Establishment Clause violation. First, the Court stated that the purpose of the Choice Program was non-religious (i.e. secular).¹⁴ The purpose of the program is to provide low-income parents with a chance to educate their

⁷ Wis. Stat. 119.23(7)(am)

⁸ Wis. Stat. 119.23(7)(e)

⁹ *Id.*; 118.165(7)(a)

¹⁰ U.S. Const. Amend. I

¹¹ *Jackson v. Benson*, 218 Wis. 2d 835, 854 (1998)

¹² *Agostini v. Felton*, 521 U.S. 203, 223 (1997).

¹³ *Jackson*, 218 Wis.2d at 856.

¹⁴ *Id.*

children in a private school in Milwaukee.¹⁵ The program gives these children a chance to escape the failing schools in the Milwaukee Public School (MPS) system.

Second, in determining whether the effect of the program advances or inhibits religion, the court held that the expected benefit of the Choice Program was neutral with respect to religion.¹⁶ The amended Choice Program gave no unique benefit to religious schools that was not already given to non-religious schools. The court stated that whether religious or nonreligious schools benefitted from the Choice Program was entirely up to the parents who control the destination of the vouchers.

In addition, the laws regulating the Choice Program also prevent any school from advancing a religious agenda on the students participating in the Choice Program. Religious schools cannot require these students to participate in any religious activity while in school.¹⁷ Moreover, when there are limited enrollment spots in a religious school in the Choice Program, these schools cannot choose their students with any religious criteria.¹⁸

But the Court was also concerned regarding what would happen if religious schools were *prohibited* from accepting students in the Choice Program. A Choice Program that would discriminate against religious schools could be viewed as “inhibiting religion” which is also forbidden in the First Amendment. Ultimately, the current program is completely blind towards religion; it does not promote it and it is not hostile towards it.

This decision is consistent with U.S. Supreme Court decisions which have held that there is no violation of the Establishment Clause when a government voucher program is neutral towards religion.¹⁹ In 2002, the United States Supreme Court weighed in on an Ohio school choice plan for low-income students in Cleveland to attend religious and nonreligious schools in the city.²⁰ The Court held that there was no Establishment Clause violation because government assistance programs that are neutral as to where the money goes does not advance or inhibit religion.

Moreover, in *Mueller v. Allen*, the Supreme Court upheld a Minnesota state program that allowed individuals to make tax deductions for education expenses, which included tuition for religious schools. Much like the Wisconsin Supreme Court’s reasoning in upholding the Milwaukee School Choice Program, the U.S. Supreme Court determined that the tax deduction plan benefited parents that have children enrolled at any schools in the district and religious schools only benefit when parents make the decision to send their children to religious schools.²¹

¹⁵ *Id.*

¹⁶ *Id.* at 856.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 482 (1986) (rejected an Establishment Clause challenge to a training program when a student went to a religious school to be a pastor); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (rejected a challenge to a federal program that allowed sign-language interpreters to assist deaf children enrolled in religious schools).

²⁰ *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

²¹ *Mueller v. Allen*, 463 U.S. 388, 393 (1983).

Wisconsin Constitution: The Establishment Clause of the Wisconsin Constitution prohibits: “any money be drawn from the treasury for the benefit of religious societies.”²² The Wisconsin Supreme Court has interpreted this in the same manner as the Establishment Clause of the U.S. Constitution, i.e. analyzing the purpose and effect of the law.²³ While religious schools may gain a benefit with more voucher students, the primary purpose of the expanded Choice Program is not to improve religious societies. The primary purpose is to help low-income children trying to leave the embattled MPS school district for a better educational opportunity.

IV. *Do private schools become “district school” for the purposes of the uniformity clause?*

The uniformity clause of the Wisconsin Constitution (Article 10, section 3) states that: “[T]he legislature shall provide by law for the establishment of *district schools*, which shall be as nearly *uniform as practicable*; and such schools shall be free and without charge for tuition”²⁴ (emphasis added). In other words, the legislature must establish public (i.e. district) schools and they must be made as uniformly as possible.

In *Davis v. Grover*, challengers of the law argued that the Choice Program violated the above mentioned uniformity clause. They argued that because a private school could theoretically be funded 100% by vouchers, those schools should be considered “district” schools. As a result, schools that are participating in the voucher program should follow the same rules and regulations as public schools.

However, in following longstanding precedent, the Wisconsin Supreme Court stated that private schools, even if 100% funded with public funds from the Choice Program, are not public (i.e. district) schools.²⁵ The giving of public funds to a private entity does not automatically imply that the private entity should be considered a public entity. In addition, the drafters of the Choice Program legislation consistently referred to voucher schools as “private” schools that receive state money, which indicates legislative intent for those schools to remain regulated as private schools.²⁶

V. *Summary*

➤ Public purpose doctrine:

- Improving our education system is a clear public purpose that benefits all of Wisconsin. We have an interest in getting our children out of failing schools and into schools that will help put them on the best path forward.

²² Wis. Const. Art 1 § 18.

²³ *Jackson*, 218 Wis.2d at 877.

²⁴ Wis. Const. Art. 10 § 3.

²⁵ The Wisconsin Supreme Court has never held that the “mere appropriation of public monies to a private school transforms the school into a public school.” *Davis*, 166 Wis.2d at 540.

²⁶ *Id.* at 538.

- The Choice Program is appropriately monitored and supervised to ensure that the taxpayers' money is furthering the purpose of improving our education system. There are state laws that regulate private schools and the DPI conducts financial evaluations - though this supervision of choice schools is properly limited to avoid excessive entanglement and to serve the state's interest in providing an educational alternative to low income families.
 - Perhaps most importantly, parents hold voucher schools accountable by carefully choosing where to send their children and, if the school is not providing a good enough education, the parents will choose to spend their voucher elsewhere.
- Establishment Clause:
- The decision to send public funds to religious schools is made by parents, not the state. The money flows from the state to the parents, who then decide where to send their children. Private, religious schools are prohibited from discriminating in admissions on the basis of religion and cannot force a voucher student to perform religious activities.
 - The Choice Program is completely neutral towards religious schools; it neither advances nor demotes religion.
 - The Supreme Court has long held that "total separation between church and state is not possible."²⁷
- Uniformity Clause:
- Simply giving public money to parents who, in turn, direct it to choice schools does not automatically turn those private schools into public schools. The same principle holds true for a doctor who treats patients on Medicare or a private university – say Marquette – with students who receive government scholarships. No one would think that the doctor or college have become organs of the state.
 - The courts have consistently held that voucher schools, even if 100% funded through vouchers, are not public schools. Voucher schools are private organizations that receive state funding through parents that qualify for the voucher program.

VI. Notice

Receipt of this packet does not establish an Attorney – Client relationship with the Wisconsin Institute for Law and Liberty ("WILL"), Attorney Rick Esenberg, Attorney CJ Szafir, or any of WILL's attorneys. This packet is for informational purposes only and should not be construed as legal advice, guidance, or counsel for the reader.

The Wisconsin Institute for Law & Liberty is a non-profit, public interest law firm promoting the public interest in constitutional and open government, individual liberty, and a robust civil society. Further questions can be directed to WILL at 414-727-9455.

²⁷ *Jackson*, 218 Wis.2d at 875.