www.nytimes.com
The New York Times ON THE WEB

December 12, 2000

A Ruling Voids Use of Vouchers in Ohio Schools

By JODI WILGOREN

A federal appeals court declared a Cleveland school voucher program unconstitutional yesterday, upholding a lower court ruling that the use of public money to send thousands of children to parochial schools breaches the First Amendment's separation of church and state.

The 2-to-1 decision, which included a vitriolic exchange among the judges, sets the stage for a United States Supreme Court showdown on one of the most contentious issues in education politics today. It comes a month after voters in Michigan and California roundly rejected school voucher programs in ballot initiatives and is the most significant legal decision yet on the question.

"We certainly hope everyone will get the message," said Robert H. Chanin, general counsel for the National Education Association, the nation's largest teacher's union, who argued the case for a group of parents and teachers challenging the vouchers. "The message is, let's focus on improving the public schools and stop playing around with vouchers as a panacea."

In the ruling, Judge Eric L. Clay of the United States Court of Appeals for the Sixth Circuit said the Cleveland program did not present parents with a real set of options, because few nonreligious private schools and no suburban public schools had opened their doors. In 1999-2000, 96 percent of the 3,761 voucher students attended sectarian schools, receiving up to $2,500 each to offset tuition.

"This scheme involves the grant of state aid directly and predominantly to the coffers of private, religious schools, and it is unquestioned that these institutions incorporate religious concepts, motives and themes into all facets of their educational planning," wrote Judge Clay, a 1997 Clinton appointee who was joined in the opinion by a 1991 Bush appointee, Judge Eugene E. Siler.

"There is no neutral aid when that aid principally flows to religious institutions," the decision said, "nor is there truly `private choice' when the available choices resulting from the program are predominantly religious."

Voucher supporters promised to appeal the ruling and expressed confidence about their chances at the high court, which has hinted at its openness to vouchers in recent years with several 5-to-4 decisions allowing public money to be used in parochial schools for textbooks, transportation and teachers' aides.

"The day of reckoning is drawing closer," said Clint Bolick, a lawyer for the Washington-based Institute for Justice, which helped defend the voucher program. "This decision is a disaster for every schoolchild in America, but it will be short-lived."

Students in the Cleveland program will probably be allowed to finish the year at their current schools, lawyers for both sides said. The Supreme Court has already intervened once in the case, to allow voucher recipients to remain in parochial schools pending the appeal, and an extension of that order is expected.

"Whatever I have to do to keep her there, I'm going to do that," said Roberta Kitchen, guardian for Toshika Bacon, who uses a voucher to attend a Christian school.

"If it means borrowing, second job, go further into debt, having to juggle my bills around," Ms. Kitchen said, "whatever I need to come up with that tuition."

Cleveland's voucher program, which gives precedence to low-income families, has been in litigation since it began in 1995 and has long been seen by both sides as the likely test case bound for the Supreme Court. The justices have already declined to review the nation's oldest and largest voucher program, which began in Milwaukee in 1990 and was upheld by the State Supreme Court in 1998. In Florida, the legal battle over a statewide voucher program has focused so far on the mandate to provide public education, not the church-state question; a state appellate judge's ruling that the program is acceptable is being appealed to the Florida Supreme Court.

Apart from the constitutional disputes, the battle over vouchers concerns the very definition of the public-school system. A coalition of corporate philanthropists and impoverished parents back vouchers as a free-market solution to what they see as the failure of inner-city schools; the teachers' unions have spent millions of dollars fighting vouchers, which they and many educators believe would drain resources from the schools that most need them.

Vouchers were a main point of fissure in the education debate of this fall's presidential campaign. Vice President Al Gore vehemently opposes the use of any public money for private schools, while Gov. George W. Bush of Texas wants to give children in consistently failing schools $1,500 in federal money to use however they like, including for tuition.

Yesterday's ruling in the Cleveland case, Simmons-Harris v. Zelman, comes a year after a lower- court federal judge struck down the program, saying it had "the effect of advancing religion through government-sponsored religious indoctrination."

Judges Clay and Siler acknowledged in their opinion that vouchers had been "the subject of intense political and public commentary, discussion and attention in recent years" but said they could not take part in the "academic discourse on practical solutions to the problem of failing schools."

Instead, they based their opinion largely on a 1973 Supreme Court ruling in a New

York case, Committee for Public Education v. Nyquist, which rejected a tuition-reimbursement program for parents of private school students. Yesterday's ruling also pays close attention to the concurring opinion of Justice Sandra Day O'Connor — widely seen as the swing vote on vouchers — in a case from last term, Mitchell v. Helms, which upheld the purchase of computers for parochial schools.

"The voucher program at issue constitutes the type of `direct monetary subsidies to religious institutions' that Justice O'Connor found impermissible," the Sixth Circuit judges said. "To approve this program would approve the actual diversion of government aid to religious institutions in endorsement of religious education, something `in tension' with the precedents of the Supreme Court."

Judge James L. Ryan, appointed to the bench by President Ronald Reagan in 1985, submitted a sharp dissent accusing his fellow judges of "nativist bigotry" and denouncing the quality of Cleveland's public schools. He argued that the Supreme Court's rulings since the Nyquist case suggested a shift in thinking on subsidies to private and parochial schools and called the majority opinion "absurd" and "meritless."

"In striking down this statute today, the majority perpetuates the long history of lower federal court hostility to educational choice," Judge Ryan wrote, going on to call the ruling "an exercise in raw judicial power having no basis in the First Amendment or in the Supreme Court's Establishment Clause jurisprudence."

Judge Ryan's harsh words prompted the same from his colleagues. The majority complained of "hyperbole" and "gratuitous insults," saying "it is the dissent and its rhetoric which should not be taken seriously."

Gov. Bob Taft of Ohio, a Republican, declined to comment on the case, other than to express disappointment, as did the state's top education official, Susan Tave Zelman, who is named as a defendant. Neither Cleveland's mayor, Michael R. White, nor Barbara Byrd-Bennett, the chief executive officer of the Cleveland Municipal School District, could be reached for comment.

Betty D. Montgomery, Ohio's attorney general, released a statement saying, "The voucher pilot program empowers low-income Cleveland- area families whose children are trapped in a failing public school system."

As thousands of Cleveland families wondered how the decision might affect them, the combatants in the nation's voucher wars unleashed a sheaf of faxes celebrating or criticizing the latest legal salvo.

"This is a great early Christmas present for America's public schools and our constitutional principles," Barry W. Lynn, executive director of Americans United for Separation of Church and State, said in a press release.

The Center for Education Reform, a conservative group in Washington, described the Cleveland program as a "lifeline for thousands of disadvantaged young people."

"We've always believed and continue to believe that parents are a child's first teacher," said the group's president, Jeanne Allen. "And as such they and only they should decide where and how their children are educated."

On the other side was Ralph G. Neas, president of People for the American Way Foundation, who hailed the ruling as "a victory for the First Amendment and a victory for public education."

But it was a defeat for Mr. Bolick of the Institute for Justice. "The same Constitution that guarantees educational opportunities has been turned on its head to subvert them," he said.