



Credits Crunched

Arizona rulings hit scholarships and special education vouchers

By MARTIN R. WEST

Arizona reemerged this year as the central front in the legal conflict over private school choice, with three cases challenging four programs decided within six weeks. Plaintiffs included the state's teachers unions, the Arizona School Boards Association, the American Civil Liberties Union of Arizona, and the

People for the American Way. The Institute for Justice, which coordinated the defense of Cleveland's school voucher program in the landmark 2002 *Zelman* case, intervened on behalf of program beneficiaries in each case.

While the participants were familiar, the challenges were in other respects unusual. Two of the cases involved programs offering tax credits for donations to scholarship funds, which have elsewhere avoided legal challenge since a favorable ruling from the Arizona Supreme Court in 1999. Equally uncharacteristic was litigation involving voucher programs for students with special needs and those in foster care. Politically popular and seemingly consistent with the practice of private placement under the federal Individuals with Disabilities Education Act, special-education voucher programs in Florida, Georgia, Ohio, and Utah have not faced court challenge.

The longest-running of the cases, filed in federal court in 2000, alleged that Arizona's individual tax-credit program violates the establishment clause of the U.S. Constitution by permitting organizations to provide scholarships to students that can be used only at religious schools. This, plaintiffs argued, means that participating parents lack "true private choice" as defined by *Zelman*. Defendants responded that the program offers choice to both taxpayers claiming the credit and parents accepting scholarships, thus achieving "a double attenuation separating the state and religion." They also asserted that the program must be evaluated in light of the full range of choices available to Arizona parents, including interdistrict transfers and ample charter schools.

A Ninth Circuit panel that included the famously liberal Stephen Reinhardt sided with the plaintiffs. While it did not deem scholarship tax credits generally unconstitutional, the decision, if not overturned on appeal, will prevent religious organizations from participating in similar initiatives nationwide—including a parallel program for corporate donations upheld by an Arizona appellate court just weeks earlier.

The irony in the Ninth Circuit outcome is that the tax-credit mechanism, which Arizona adopted in order to avoid legal

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challenges, created a new pitfall; there is little doubt that a program that offered vouchers directly to parents instead would now be acceptable as a matter of federal law. Still, the value of tax-credit programs in states with strong constitutional prohibitions on aid to religious schools was confirmed by the near-simultaneous invalidation of Arizona's new voucher programs.

The Arizona Supreme Court ruled in *Cain v. Horne* that voucher programs vio-

late the aid clause of the Arizona Constitution, which states, "No tax shall be laid or appropriation of public money made in aid of any...private or sectarian school." The court rejected the notion that vouchers aid students rather than schools, arguing that such an interpretation "would nullify the Aid Clause's clear prohibition." It thus ignored the state's argument that the clause would still ban grants to private schools for such purposes as teacher salaries even if the complaint were dismissed.

The court also failed to distinguish the programs from other Arizona policies through which beneficiaries use public funds to attend private and religious schools. Foster children, for example, become eligible at the age of 16 for grants of \$5,000 to be used at the college of their choice. And more than 1,000 special-education students annually are educated in private settings at public expense because their school districts could not meet their needs. If government officials, whose behavior the constitution is clearly intended to constrain, are able to make this choice, it is hard to see why parents should not also be able to do so.

Seven years after *Zelman*, court challenges continue to shape the pace and trajectory of choice-based reform in Arizona and elsewhere. The constantly evolving nature of the complaints suggests that opponents' objections are politically—not legally—motivated. It is unfortunate that they are succeeding in getting the courts to revisit policy decisions made by more representative bodies.

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