



# U-turn on Vouchers

*Florida courts uphold tax credits*

by JOSHUA DUNN

In January, the Florida Supreme Court dismissed a legal challenge to the state's Tax Credit Scholarship Program, thereby preserving financial aid opportunities for thousands of low-income students to attend private schools.

The decision marked an about-face for the court. In 2006, the court had struck down the state's Opportunity Scholarship Program, a voucher program for students trapped in failing public schools (see "Florida Grows a Lemon," *legal beat*, Summer 2006). But left unchallenged at the time was the Florida Tax Credit Scholarship Program, which provides scholarships for students of limited means to attend private schools. Unlike state-subsidized voucher programs, which are funded by collected tax revenues, this program bypasses state coffers by giving corporations a dollar-for-dollar tax break when they contribute to a scholarship funding organization. Started in 2001, the program has become extremely popular, growing to serve almost 100,000 students, most of them minorities, during the 2016–17 school year. Naturally, the state teachers union wants to kill the program.

In 2014, the Florida Education Association (FEA) and co-plaintiffs challenged the program in *McCall v. Scott*, alleging that it violated both the state constitution's anti-Catholic Blaine Amendment and the uniformity provision of its education clause. First, however, the union had to establish that it had legal standing. The doctrine of standing requires that, in order to sue, a party must demonstrate a special injury. The state argued that the plaintiffs did not even allege a special injury and did not identify any constitutional violation of the legislature's taxing and spending authority; hence, they did not have standing. The trial court agreed and dismissed the case.

On appeal, the teachers union fared no better. In August 2016, the state's First District Court of Appeals upheld the trial court's decision. The court noted several defects in the union's argument. The only injury alleged by the union was the diversion of funds from public schools to private schools via the scholarship program. But legally, there was no diversion of funds, since the state never collected the revenue.

By the same token, tax exemptions to sectarian institutions do not allow taxpayers to allege that church funds are, in fact, misappropriated state funds. Quoting a prior state supreme court ruling, the court noted the salient distinction between an exemption and a direct subsidy: "In the case of a direct subsidy, the state forcibly diverts the income of both believers

and non-believers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by churches." Siding with the union in *McCall v. Scott* would thus imply that the state has a claim on the funds of all tax-exempt institutions.

The court pointed out that even if it ignored the distinction between an exemption and a subsidy, the union would still lose, since its allegations of harm were speculative. The union's argument assumed that, without the tax credit, the taxpayers would pay the full credit amount in taxes, state revenues would increase, and the legislature would appropriate those funds to the public schools in a manner beneficial to the unions. "This argument is founded entirely on supposition," the court wrote. In short, the unions were asking the court to gaze into "a cloudy crystal ball."

After that loss, the union appealed to the state supreme court. But the teachers' former ally abandoned them. In January 2017, the court issued a two-paragraph decision upholding the appellate court's judgment and denying jurisdiction, owing to the FEA's lack of standing.

What accounts for the change in the court's thinking on school choice? In addition to the legal shortcomings identified by the appellate court, the scale and popularity of the tax program clearly played a role. The state voucher program served only 763 students and commanded little political support when it was struck down in 2006. In contrast, the Tax Credit Scholarship Program has a deep well of support across the political spectrum. In January 2016, for example, thousands of protesters, including Martin Luther King III, gathered in Tallahassee to call on the union to drop its lawsuit. King told the crowd that "this is about justice; this is about righteousness; . . . this is about freedom—the freedom to choose for your family and your child." Striking down a program that helps nearly 100,000 low-income families would have risked a major backlash. Changing course was both good politics and good law.

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