Editorial

"A "DEFEAT" POINTING TO VICTORY FOR SCHOOL CHOICE"

By
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On December 11th (2000) the Federal Court of Appeals for the 6th Circuit handed school choice advocates a victory disguised as a defeat. On a 2-1 vote, and against a furious dissenting opinion, the Court majority ruled against the Cleveland school voucher program on church/state separation grounds and based its decision and reasoning squarely on the very controversial ***Nyquist*** case decided by the U.S. Supreme Court in 1973. This ensures that the current Supreme Court will accept the inevitable appeal of the school voucher decision and will issue a full opinion. That spells trouble for the anti-voucher forces. All of the Supreme Court's decisions in government-aid-to-education cases in recent years have upheld programs that make aid neutrally available to all qualifying students and schools, including students or schools that happen to be affiliated with religion.

School voucher programs that permit religious schools to participate are not new. The best-known examples are the GI Bill of Rights and Pell Grants at the higher education level and the federal Child Care Development and Block Grant program at the preschool level.

The Cleveland voucher program was enacted in 1995 by the State of Ohio in response to persistent lobbying by low-income families for an alternative to the intractably disastrous Cleveland public schools. Under the program, a voucher worth up to $2,250 may be used at any accredited school participating in the program, including public schools in districts bordering the Cleveland district, as well as private religious and private nonreligious schools. (No bordering public school district has ever chosen to participate.) Of the 56 schools in the program, 46 (i.e., 82%) are affiliated with one religion or another.

There are serious problems with the Circuit Court's reasoning in this case. The 1973 ***Nyquist*** opinion on which the court relies so strongly dealt with a statute that limited aid participation to private schools, whereas the Cleveland voucher legislation invites the participation of both private and public schools. Moreover, the express purpose of the legislation in ***Nyquist*** was to protect the public schools from a possible infusion of students from the financially strapped private schools, whereas the express purpose of the Cleveland voucher legislation is to offer students and parents an alternative to the public schools themselves. Additionally, the ***Nyquist*** case held that unsegregated "direct aid (to a religious institution) in whatever form is invalid." However, the Supreme Court emphatically announced in its 1997Agostini decision that "We have departed from the rule. . . that all government aid that directly assists the educational function of religious schools is invalid."

There are problems with the Circuit Court's reasoning that go beyond mere reliance on ***Nyquist***. The Court makes a point of the fact the some of the schools in the voucher program even require, alarmingly, that "all learning take place in an atmosphere of religious ideals." This issue was squarely addressed by the Supreme Court in its June, 2000 decision in ***Mitchell v. Helms*** when it stated: "Nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs . . . This doctrine, borne of bigotry, should be buried now." The Circuit Court goes on to state that under the voucher program there are not "numerous private citizens who are free to direct the aid (to a nonreligious school)," because "the majority of the choices available to parents and students are religious institutions." The Court's inability to cite any legal authority for this supposed "majority of choices" standard is understandable, as none exists. The Court was also unable to cite a single instance of a parent in the program not being able to enroll a child in a nonreligious school.

In 1999 the Ohio Supreme Court issued a nonbinding opinion that ***Nyquist*** was no longer good law and that the Cleveland voucher program did not violate the Establishment-of-Religion Clause in the U.S. Constitution. Eleventh months earlier, in June, 1998, the U.S. Supreme Court declined to review (and therefore let stand) the almost identical school choice program by an 8-to-1 vote. With the appeal in the Cleveland case to this same U.S. Supreme Court pending, school choice supporters now find the landscape exactly as they have wanted it.

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