

**Rutgers School of Law - Newark
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***SETTING THE STAGE
FOR INFORMED, OBJECTIVE DELIBERATION
ON SCHOOL CHOICE***

Invitational Meeting November 22-23, 2002

“What We Know, and What We Need to Know, About School Choice”

BACKGROUND PAPER

The recent decision of the United States Supreme Court in *Zelman v. Simmons-Harris*,¹ upholding the school voucher program implemented in the Cleveland public school district, has brought school choice to the forefront of educational issues. In the months ahead, policy makers in New Jersey and other states will be pressed to consider in earnest what additional choice options, if any, should be offered to students and their parents. The decisions reached could fundamentally alter the manner in which states provide and finance their educational programs, and could have other major policy implications as well. Given the potential consequences, it is essential that policy makers be informed by the best possible legal and educational policy research, and by the best expert opinion on educational practices and student outcomes.

The Rutgers-Newark Institute on Education Law and Policy has embarked on a project, entitled “Setting the Stage for Informed, Objective Deliberation on School Choice,” designed to establish a framework and a forum for informed and objective consideration of the legal, fiscal and educational policy issues relating to school choice. The project is proceeding with keen awareness of the complexities of education policy in New Jersey, in light of the state’s long history of urban education reform under *Abbott v. Burke* and the crucial implementation efforts in which state and local officials are engaged. Nevertheless, the project is proceeding on the premise that all forms of choice

¹ 122 S. Ct. 2460 (2002).

should be given full consideration -- not only private school voucher programs such as the one at issue in *Zelman*, but all of the variations on the theme: intradistrict and interdistrict public school choice programs; charter schools; supplemental services such as private tutoring; and tax incentives for education. The goal is to make a meaningful contribution to the quality of the school choice debate, not to advocate for any particular conclusion.

The project is in three parts: (1) an invitational meeting, entitled “What We Know, and What We Need to Know, about School Choice,” at which experts from New Jersey and around the country will discuss the state of the governing law, experience to date, and issues to be considered in formulating school choice policy;² (2) a study and report on school choice policy directions, including a review of relevant legal and social science literature; evaluation of New Jersey’s school choice experience to date and the role currently played by choice in the state’s educational system; consideration of New Jersey’s system of school finance and of *Abbott v. Burke* and their ramifications for choice programs; a survey of school choice programs in other states and published evaluations of those programs; on-site observation of selected programs; and interviews with policy makers and officials of schools, districts and states implementing choice programs, and with proponents of innovative approaches to school choice; and (3) a multi-faceted program, in collaboration with the Public Education Institute, to disseminate the results of the study and engage policy makers and the public in discussion of school choice issues, including print and electronic publication of the report; a discussion board on the Institute’s web site; distribution of a “School Choice Discussion Package,” consisting of multiple copies of a short, reader-friendly version of the report, a discussion guide and a presentation tool (such as a videotape or PowerPoint presentation) designed to stimulate discussion; and presentation of a series of high-level, intensive discussion sessions with key officials and staff of state executive and legislative branches and representations of professional, civic and parent organizations.

² This invitational meeting, scheduled for November 22-23, 2002, is supported by grants from the Prudential Foundation, the Fund for New Jersey, the Geraldine R. Dodge Foundation, the Schumann Fund for New Jersey, and the MCJ Foundation.

In this paper, we provide background information that we hope will stimulate discussion at our invitational meeting. We set forth some of the facts, some of the prevailing law, and some – though certainly not all – of the questions we hope to address, on several broad topics: *Zelman v. Simmons-Harris*, state constitutional law, New Jersey’s “thorough and efficient” clause and *Abbott v. Burke*, school choice in New Jersey, tax incentives for education, and No Child Left Behind.

Zelman v. Simmons-Harris

The school choice debate did not start with *Zelman*, but because that decision sparked this project, we begin our discussion there. In *Zelman*, the United States Supreme Court rejected a claim that a program in the Cleveland school district that, among other things, gave taxpayer-funded vouchers to students to attend private religious schools violated the Establishment Clause of the First Amendment of the United States Constitution. The Court premised its ruling on two main grounds: first, that the program was part of a broad school choice effort that was of neutral design, with the secular purpose of helping low-income students in a failing school district; and second, that there was no direct aid to religious institutions, since taxpayer funds flowed to parents, who exercised “true private choice” in directing those funds to parochial schools.

The facts presented in *Zelman* were as follows: In 1995 a federal district court had ordered that the Cleveland City school district, which was among the worst performing in the nation, be placed under state management.³ Among the reform initiatives adopted in response to this ruling was the Pilot Project Scholarship Program,⁴ which provides vouchers to low-income students to fund up to 90% of the cost of private school tuition, up to \$2,250, and to other students to fund up to 75% of tuition costs, up to \$1,875. Low-income students have priority over others. Students may choose to use their vouchers at any participating school. Participating schools are prohibited from

³ The Court quoted the finding of a state auditor that Cleveland’s schools “were in the midst of a ‘crisis that is perhaps unprecedented in the history of American education.’” 122 S. Ct. 2463, quoting *Cleveland City School District Performance Audit 2-1*(Mar. 1996). More than two-thirds of the high school students failed to graduate, and of those who did, “few could read, write, or compute at levels comparable to their counterparts in other cities.” *Id.*

⁴ Ohio Rev. Code. Ann. §§3313.974-3313.979.

discriminating on the basis of race, religion, or ethnic background;⁵ and are prohibited from teaching “hatred.”⁶ Public schools in adjacent districts also may participate in the program as receiving schools, and students who choose to remain in the Cleveland public schools may receive subsidies for private tutors.⁷ In the 1999-2000 school year, 56 private schools participated in the program, of which 46 (82%) were religiously affiliated; and more than 3,700 students participated, most of whom (96%) were enrolled in religiously affiliated schools. No public schools have chosen to participate in the program.⁸

QUESTIONS: Would different facts have led to a different result in *Zelman*? Since it appears that the element of potential participation by public schools in adjacent districts was important to the Court’s ruling, would the ruling be equally applicable (and, thus, would a publicly funded voucher program be equally free of federal establishment clause concerns) if there were no provision for participation by public schools? Since it also appears that the fact that state funds went directly to parents, rather than schools, was important, would the Court’s ruling be equally applicable to a program in which funds were paid directly to the religious school designated by each parent? Would *Zelman* apply if the program were in a school district that was not considered “failing”? if it did not give priority to low-income students? if participating schools were not prohibited from discriminating on the basis of race, religion or ethnic background?

State Constitutional Law

With the Supreme Court having settled the question of conformity with the United States Constitution, attention has turned to the state courts and state constitutional provisions. In August, a state trial court in Florida ruled that that state’s school voucher program, the Florida Opportunity Scholarship Program,⁹ violated the provision of the

⁵ §§3313.977(A)(1)(a)-(c).

⁶ Participating schools must agree not to “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.” §3313.976(A)(6).

⁷ §3313.976(D), 3313.979(C).

⁸ 122 S. Ct. at 2464.

⁹ Fla. Stat. §229.0537.

Florida Constitution prohibiting public aid for sectarian institutions.¹⁰ However, in July, the Ninth Circuit Court of Appeals ruled that a similar provision of the Washington State Constitution did not justify excluding theology students from that state's Promise Scholarship Program, as such exclusion infringed on those students' First Amendment rights to free exercise of religion.¹¹ Lawsuits have been filed recently in a Washington state court, challenging a provision prohibiting that state's public universities from allowing student teaching in religious schools, and in a Maine state court, challenging the exclusion of religious schools from that state's "tuitioning" program, both on the ground that the state constitutional provisions supporting these exclusions are in conflict with the First Amendment of the United States Constitution.

New Jersey's Establishment Clause¹² has been construed to be "less pervasive" than the federal Establishment Clause,¹³ and New Jersey courts thus far have looked to United States Supreme Court precedent for guidance. This is largely because, in cases where state establishment clause claims have been raised, federal claims have been raised as well. As a result, the New Jersey Supreme Court rarely, if ever, has construed the state clause in a vacuum.¹⁴ The Court has noted, however, that "state Constitutions may provide more expansive protection of individual liberties than the United States

¹⁰ *Holmes v. Bush*, 2002 WL 1809079 (Fla. Cir. Ct. 2002). The constitutional provision, Article I, Section 3, states, "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."

¹¹ *Davey v. Locke*, 299 F.3d 748, 760 (9th Cir. 2002).

¹² New Jersey's establishment clause, Article I, section 4 of the state constitution, provides, "There shall be no establishment of one religious sect in preference to another; no religious or racial test shall be required as a qualification for any office or public trust."

¹³ *Clayton v. Kervick*, 56 N.J. 523, 267 A.2d 503 (1970), vacated on other grounds, 403 U.S. 945 (1971).

¹⁴ *See, e.g., American Civil Liberties Union of New Jersey v. Schundler*, 168 F. 3d 92 (3d Cir. 1999); *Porta v. Klagholz*, 19 F. Supp. 2d 290 (D.N.J. 1998); *Resnick v. East Brunswick Bd. of Ed.*, 77 N.J. 88, 389 A.2d 944 (1978); *Everson v. Bd. of Ed. Twp. of Ewing*, 133 N.J.L. 350, 44 A.2d 333 (E. & A. 1945), *cert. denied* 330 U.S. 855 (1947); *Fox v. Bd. of Ed. Twp of West Milford*, 93 N.J. Super. 544, 266 A.2d 471 (App. Div. 1967).

Constitution.”¹⁵ Especially in the field of public education, the New Jersey Supreme Court has parted ways with its federal counterpart.¹⁶

In addition to establishment clauses, pertinent state constitutional provisions include “compelling clauses,” providing that no taxpayer may be compelled to support religion, and “public purpose clauses,” providing that public funds must be used for public purposes.¹⁷

New Jersey’s compelling clause¹⁸ was construed in *Resnick v. Bd. of Ed. Twp. of East Brunswick*,¹⁹ in which a taxpayer challenged a school district’s rent of classrooms to churches and a synagogue, for limited use during non-school hours, in the same manner that it rented space to other nonprofit organizations. The rental rate was somewhat below the district’s cost of maintaining the premises. The Supreme Court found that this arrangement violated the compelling clause, because the district’s expenses were not “fully reimbursed.” Thus, the Court appears to have ruled that there can be no public subsidy of religious activity, however slight. However, because the Court found the rental arrangement to be otherwise permissible, as it had the secular purpose of benefiting all nonprofit community groups, and was separate from the public school function and of limited duration, it permitted the district to cure the compelling clause problem by raising the rent so that all costs would be fully covered. Such a cure may not be available in the voucher context, where students receive religious instruction as part of their publicly funded education.

¹⁵ *Right to Choose v. Byrne*, 91 N.J. 287, 300, 450 A. 2d 925, 930 (1982).

¹⁶ *Compare Robinson v. Cahill*, 62 N.J. 473, 482, 509 *cert. denied. sub nom. Dickey v. Robinson*, 414 U.S. 976 (1973), *with San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹⁷ For a review of state constitutional provisions bearing on school choice programs, *see Kemerer*, “After *Zelman*: Spotlight on State Constitutional Law,” *Teachers College Record*, July 8, 2002, <http://tcrecord.org>.

¹⁸ New Jersey’s “compelling clause,” Article 1, section 3 of the state constitution, states: “No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.”

¹⁹ 77 N.J. 88, 104; 389 A. 2d 944, 951 (1978).

No cure was permitted, or suggested, in *Chittenden Town Sch. Dist. v. Dept. of Ed.*,²⁰ in which the Vermont Supreme Court struck down a provision of a state program that allowed students to use state funds to attend parochial schools. The Court reasoned that, in light of the compelling clause in the Vermont Constitution,²¹ it could not rely on federal establishment clause analysis alone, and held that the provision amounted to compelled support for worship, and therefore was impermissible.

With respect to the “public purpose” provision of the New Jersey Constitution,²² the state’s courts have stated a willingness to defer to the legislature on the issue of what programs fulfill a public purpose, and have ruled that the provision is to be construed broadly, to include any “activity which serves as a benefit to the community as a whole, and which, at the same time is directly related to the functions of government.”²³ Specifically, the Supreme Court has held that public funding of privately managed charter schools did not violate the public purpose clause.²⁴ This ruling rested, however, on the fact that money spent on charter schools was in fact spent on public schools, and thus begs the question whether the ruling would be the same in a case involving an arguably more “private” purpose.

QUESTIONS: Are New Jersey courts likely to follow *Zelman*, and continue to construe the state’s establishment clause coextensively with its federal counterpart, if presented with a challenge to a voucher program? Can the state constitutional provisions barring public funding of religious institutions be reconciled with the First Amendment

²⁰ 169 Vt. 310, 738 A. 2d 539 (1999), *cert. denied* Andrews v. Vermont Dept. of Ed., 528 U.S. 1066 (1999).

²¹ Vermont’s compelling clause, Vt. Const., charter I, article 3, provides: “[N]o person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience....”

²² The public purpose clause, Article VIII, section 3, paragraph 3 of the New Jersey Constitution, provides: “No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever.”

²³ In re Grant of Charter School Application of Englewood on the Palisades Charter School, 320 N.J. Super. 174, 228, *modified*, 164 N.J. 316, 753 A.2d (2000), quoting Bryant v. City of Atlantic City, 309 N.J. Super. 596, 611, 707 A.2d 1072 (App. Div. 1998); Roe v. Kervick, 42 N.J. 191, 207, 199 A.2d 834 (1964).

²⁴ In re Grant of Charter School Application of Englewood on the Palisades Charter School, 164 N.J. 316 (2000).

free exercise clause? Even if they can, is there nevertheless an overriding federal policy against exclusion of religious institutions from publicly funded programs?

New Jersey's "Thorough and Efficient" Clause and *Abbott v. Burke*

New Jersey's constitutional mandate that the state shall maintain a "thorough and efficient system of free public schools,"²⁵ and its Supreme Court's long devotion to guaranteeing equal educational opportunity, warrant special mention. The thrust of the Court's numerous rulings in *Robinson v. Cahill*²⁶ and *Abbott v. Burke*²⁷ has been that students in the state's poor urban districts have the right to the same educational opportunity as their richer counterparts. To effectuate that right, the Court has ordered parity funding between urban and suburban districts and adoption of specific educational reforms. In response, the state legislature has appropriated hundreds of millions of dollars per year for the last several years to achieve parity and approved bonding of billions more for school facilities improvement; and the state department of education has adopted core curriculum content standards and required districts to adopt whole school reform, early childhood education programs, and other supplemental programs. *Abbott* has become synonymous with urban education reform in New Jersey, as a result of many years of litigation, and continued strong interest of the New Jersey Supreme Court. *Abbott* implementation also has become a priority of the state's executive branch with the current administration. In 2000, New Jersey lawyers and judges overwhelmingly selected *Abbott* as the most important state court decision of the twentieth century; in 2002, *The New York Times* described it as "the most significant education case since the

²⁵ Article VIII, Section 4, paragraph 1 of the New Jersey Constitution states: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."

²⁶ 62 N.J. 473 (1973), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973).

²⁷ 100 N.J. 269, 495 A.2d 376 (1985) (*Abbott I*); 119 N.J. 287, 575 A.2d 359 (1990) (*Abbott II*); 136 N.J. 444, 643 A.2d 575 (1994) (*Abbott III*); 149 N.J. 145, 693 A.2d 417 (1997) (*Abbott IV*); 153 N.J. 480, 710 A.2d 450 (1998) (*Abbott V*); 163 N.J. 95, 748 A.2d 82 (2000) (*Abbott VI*); 164 N.J. 84, 751 A.2d 1032 (2000) (*Abbott VII*); 170 N.J. 537, 790 A.2d 842 (2002) (*Abbott VIII*).

[United States] Supreme Court’s desegregation ruling nearly 50 years ago”; and the New Jersey Supreme Court has referred to *Abbott*’s principles as “inviolable.”²⁸

The impact of *Abbott* on school choice policy is far from clear. School funding in New Jersey, both its high levels of expenditure on urban education reform and its formula for state aid to local districts, is largely driven by *Abbott*; maintaining those levels of expenditure and *Abbott*’s funding priorities in the context of a substantial school choice program could be a challenge. Additionally, the question of whether *Abbott*’s programmatic requirements would be imposed on public schools in non-*Abbott* districts, on charter schools or on private schools accepting *Abbott* students under a school choice program is unsettled. The Appellate Division of the Superior Court of New Jersey recently held that charter schools were not required to implement *Abbott* reforms, since they were not entitled to receive *Abbott* funding, but offered that, if they were to receive *Abbott* funding, that would “impose upon those schools the corollary demanding regulatory framework governing *Abbott* districts,” even though, as the charter schools argued, such a result would be contrary to charter schools’ goal of fostering “an alternative vision for schooling” and of gaining “autonomy from State or district regulation.”²⁹ Like the United States Supreme Court in *Zelman*, the Appellate Division in this case focused on the “optional” nature of charter schools and the fact that the parents sending their children to those schools did so as a “voluntary choice.”³⁰

QUESTIONS: In light of *Abbott*, is there room in New Jersey for substantially expanded school choice? To what extent can the state’s budget, with the *Abbott*-driven priority given to urban education reform, accommodate school choice programs in substantially different form, or of substantially greater magnitude, than those already in existence? Are some forms of school choice more consistent with the principles of *Abbott* than others? Should all schools participating in choice programs be required to implement the *Abbott* reforms even if they are not public schools in *Abbott* districts? If

²⁸ In re Grant of Charter School Application of Englewood on the Palisades Charter School, 164 N.J. 316, 323, 753 A.2d 687, 691 (2000).

²⁹ In re 1999-2000 *Abbott v. Burke* Implementing Regulations, N.J.A.C. 6:19A-1.1 *et seq.*, 348 N.J. Super. 382, 440, 792 A. 2d 412, 447 (App. Div. 2002).

³⁰ *Id.* at 448.

not, should the state department of education nevertheless have an obligation to ensure that *Abbott* students attending those schools receive a “thorough and efficient” education? What oversight mechanisms should be used for this purpose? Are there legal impediments to such mechanisms, such as (if choice programs include religious schools) the prohibition of excessive governmental entanglement with religion?³¹ Even if there are, do the principles of *Abbott* require such accountability? If they do, can these apparently conflicting mandates be reconciled?

School Choice in New Jersey

Four types of school choice programs are currently available to public school students in New Jersey (though not all types to all students): charter schools, a pilot interdistrict public school choice program, intradistrict choice programs and county vocational magnet programs.³² New Jersey has no publicly funded voucher program, and there is no pending legislation to create one.

Charter Schools

Forty-eight charter schools currently operate in New Jersey, of which 38 are located in or serve students from *Abbott* districts.³³ In total, 15,605 students are attending charter schools in New Jersey in the 2002-03 school year. In accordance with the

³¹ In *New Jersey State Bd. of Higher Ed. v. Shelton Coll.*, 90 N.J. 470, 448 A.2d 988 (1982), the New Jersey Supreme Court rejected a claim by a religious college that the licensing requirements of the State Board of Higher Education violated both the establishment and entanglement clauses, stating that the constitution permits “minor, unobtrusive state supervision of religiously oriented schools.” *Id.* at 997-98, quoting *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976). Similarly, in *South Jersey Catholic School Teachers Org. v. St. Theresa of the Infant Jesus Church Elementary School*, 150 N.J. 575 (1997), the Court rejected the Catholic church’s claim that allowing its teachers to organize a union would violate its free exercise rights, and held that the teachers’ collective bargaining rights, explicit in the state constitution, outweighed the church’s free exercise rights in this circumstance. *Id.* at 592. By analogy, the requirement to maintain a thorough and efficient system of education could be held to outweigh free exercise claims by religious schools participating in a choice program.

³² This paper does not address home schooling. According to the New Jersey Department of Education, an estimated 2,920 students in New Jersey receive home-based education.

³³ Charter school growth in the State, which was robust in the initial five years of the program, has slowed. Seven charter schools in Trenton consolidated into three schools, and nine others have surrendered their charters or had them revoked. See New Jersey Public Charter Schools Association *Charter Schools and Accountability*, <http://www.njcpsa.org>.

governing statute, charter schools are operated by nonprofit organizations free of control of local school boards, under grant of authority by the State Board of Education.³⁴

Private schools are ineligible for charter status, but charter school boards may contract with private entities to operate their educational programs; and two in the state currently are run by private, for-profit entities. Existing public schools may convert to charter schools if a majority of parents and teaching staff sign a petition supporting the change, although to date no schools have converted.

Charter schools in New Jersey are exempt from many of the laws governing public schools, such as those providing for teacher tenure and public review of budgets, but they must meet the state's core curriculum content standards, participate in the statewide assessment program, and comply with requirements relating to civil rights and student health and safety as well as accounting standards.³⁵

Charter school funding for 2002-03 is \$104.07 million. Funding comes from local school district budgets; districts must budget and send to charter schools the per-pupil share attributable to each student. This share is 90% of the "maximum T&E amount,"³⁶ plus any federal funds attributable to the student and any categorical state aid, such as early childhood or supplemental instructional aid.³⁷

In 1997, several local school districts challenged the constitutionality of the state charter school act. They argued that the act improperly delegated legislative authority to private entities in violation of the New Jersey and federal constitutions; that the failure to provide for a plenary hearing to contest the grant of a charter violated the districts' rights to procedural due process and equal protection; and that diversion of funds to charter schools, to the detriment of public school districts, violated the districts' rights to equal

³⁴ N.J.S.A. 18A:36A-1 *et seq.*

³⁵ N.J.S.A. 18A:36A-11; N.J.A.C. 6A:11-2.2(b).

³⁶ The Commissioner of Education sets a "core" amount of per pupil spending every two years, known as the "T&E" amount, based on what he or she believes is an appropriate expenditure to meet core curriculum content standards and thus provide a thorough and efficient education to each student. Districts may spend five percent above the T&E amount (the "T&E maximum amount") or five percent below it. *See* N.J.S.A. 18A:7F-1 *et seq.*

³⁷ N.J.S.A. 18A:36A-12.

protection. The New Jersey Supreme Court affirmed the dismissal of all the districts' claims, but ruled that the Commissioner of Education must consider a charter school's economic impact whenever a district makes a preliminary showing that satisfaction of thorough-and-efficient education requirements would be jeopardized, and further ruled that the Commissioner must assess the "potentially segregative effect" that a charter school's enrollment could have on a district, before the school opens and then annually.³⁸

Interdistrict public school choice

In September 2000, the state department of education began a five-year pilot interdistrict public school choice program.³⁹ Under the program, districts may apply to become "choice districts," *i.e.*, receiving districts for non-resident students who choose to attend their schools. Choice districts set a number of seats to be opened to non-resident students, and, if the number of applications exceeds the number of openings, they must administer lotteries, although sibling preference may be granted. Any student in kindergarten to grade 9 who has been enrolled in a New Jersey public school for at least one year may apply to enroll in a choice district. Sending districts may limit their students' enrollment in choice districts to two percent of the students per grade level per year.

According to the state department of education, in the first year of the program, ten districts were designated choice districts, and eight actually accepted choice students. Ninety-six students participated in the program in that year. In the second year, 11 districts were designated choice districts and 308 students from 52 sending districts participated. Of those students, 74% are reported to be white, 13% black, and 13% Hispanic.⁴⁰

³⁸ In re Grant of the Charter School Application of Englewood on the Palisades Charter School, 164 N.J. 316 (2000). The State Board of Education has adopted regulations requiring analysis of charter schools' potentially segregative effect. See N.J.A.C. 6A:11-2.1 *et seq.* Following this ruling, in August 2002 the Red Bank Board of Education challenged a decision of the Commissioner of Education allowing expansion of a charter school in its district, claiming the expansion would have a racially segregative effect and impair its ability to deliver a thorough and efficient education. The State Board of Education rejected the board's claims and dismissed the appeal.

³⁹ N.J.S.A. 18A:36B-1 *et seq.* The program will automatically expire in June 2005 if it is not reauthorized.

⁴⁰ *Interdistrict Public School Choice Program Annual Report and Second Annual Report*, New Jersey State Department of Education.

Choice districts receive state aid, called “school choice aid,” for each non-resident student enrolled under the program. The aid is calculated based on each district’s T&E amount. Per-pupil choice aid amounts in 2000-01 were between \$7,199 and \$9,071.⁴¹ Choice districts also receive other state categorical aid, such as early childhood aid and supplemental instruction aid, attributable to the student. Transportation is the responsibility of the choice districts, which receive state aid to offset this expense.⁴² A choice district may not reject a student on the ground that the cost of educating the student would exceed the amount of school choice aid it would receive for the student. However, it may reject a student if either that student’s individualized educational program (IEP) could not be implemented in the district, or that its implementation would create “an undue financial or administrative burden on the district.”⁴³

The State Legislature has appropriated \$1.6 million in school choice aid for the first two years of the program, and has authorized \$3 million annually for the third through fifth years of the program.⁴⁴ The aid is outside current spending caps and is generally available in the current budget year. Sending districts have reported little or no impact on their budgets. However, in contrast with the charter school program, the fiscal impact of the pilot interdistrict choice program on sending districts is only the state categorical aid, not 90 percent of the per-pupil budget share.

County Vocational Magnet Schools

Counties in New Jersey are authorized to establish vocational school districts and vocational schools serving high school and adult students.⁴⁵ Pursuant to this authority, for many years county vocational boards of education in every New Jersey county have operated vocational, technical and occupational programs. Currently, they operate 1,300 programs in 60 schools, and serve approximately 64,000 students, including approximately 8,000 *Abbott* students.⁴⁶ The programs have a variety of formats,

⁴¹ Source: New Jersey Department of Education, <http://www.state.nj.us/njded/choice/genfo.htm>.

⁴² N.J.S.A. 18A:36B-9.

⁴³ N.J.S.A. 18A:36B-7(c).

⁴⁴ N.J.S.A. 18A:36B-12(a).

⁴⁵ N.J.S.A. 18A:54-1 *et seq.*

⁴⁶ New Jersey Council of County Vocational-Technical Schools, “A New Look at Vocational-Technical Education in New Jersey,” <http://www.njccvts.org>.

standards and requirements. Vocational boards may establish and implement their own admissions criteria, as long as they comply with racial balance requirements generally applicable to school districts.⁴⁷ They are funded according to a formula based on a combination of need-based state aid, county funding, and contribution from each student's resident district.⁴⁸

A recent phenomenon in vocational school districts is the development of schools, sometimes called "career academies," designed to prepare students for highly skilled postsecondary vocational and/or technical education programs.⁴⁹ Though they are created within the legal framework of vocational school districts, these schools are unlike traditional "vo-tech" schools, in that they are small, selective, specialized schools or programs with college preparatory curricula. They are attractive to many parents and students because they offer accelerated, specialized programs similar to those offered by private schools. As a result, they have been subject to charges of adverse economic impact and of "creaming" the best students.

Intradistrict Magnet School Programs

The second type of magnet school program in New Jersey is intradistrict, exemplified by the Montclair school district's school choice program. In Montclair, students in kindergarten through grade 8 may choose from among seven elementary schools and three middle schools, each with its own structure and curricular focus. One school offers a Montessori curriculum; another focuses on international studies. There is also a school for gifted and talented students, and a school emphasizing basic skills. Middle school students may apply to a school for performing arts. There is one comprehensive high school.⁵⁰

No provision of New Jersey law explicitly authorizes intradistrict choice programs of any kind, including magnet school programs. Montclair developed its

⁴⁷ See N.J.S.A. 18A:36-20; N.J.A.C. 6:4-1 *et seq.*

⁴⁸ N.J.S.A. 18A:54-20.1.

⁴⁹ See N.J.A.C. 6:43-3.3.

⁵⁰ See Montclair Public Schools website, <http://www.montclair.k12.nj.us>.

magnet system in response to a court ruling ordering the board of education to formulate a plan to achieve racial balance in every school in the district. To comply with that order, and with federal and state mandates concerning racial balance, the district uses a complex student assignment procedure. The composition of each school is determined based on student choice as well as space availability, sibling placement, individual students' special needs, and gender balance. Ninety-two percent of the students are assigned to their first-choice schools, 96 percent are assigned to at least their second choice, and each school's racial composition reflects the racial makeup of the community (approximately 35 percent minority).

Reportedly, while the Montclair district has achieved the goal of racial balance among its schools, it has not been able to equalize academic performance between minority and white students. The district has embarked on a ten-year plan to improve minority student performance. Moreover, substantial funding is needed to support the magnet system. Montclair receives state and federal aid for pupil transportation and other magnet-related costs.

QUESTIONS: In fashioning a state policy on school choice, issues abound relating to pupil eligibility, capacity of public or private receiving schools, impacts on participating students and on those who do not participate, and on their schools and districts; and program costs. Given the number and the diversity of schools and districts in the state, are there nevertheless policy reasons to limit expanded choice to students in under-performing schools or districts? Should students already enrolled in private schools be eligible for public subsidies? Similarly, are there policy reasons to limit expanded choice to lower-income students?

What is the impact of various choice options on educational programs in the schools from which students are drawn? Is there any measurable educational benefit -- or detriment -- to participating students, or to those who do not participate? What is the effect of such programs on racial and socioeconomic composition of schools and districts?

Further, the amount of the per-pupil subsidy should be considered. Is there a policy reason for the difference in funding formulas between the charter school program

and the interdistrict school choice pilot program? Does the difference have any significant practical or educational impact? If private schools are permitted to participate in a choice program, should funding be based on the tuition charged by the receiving school, the per-pupil cost in the district in which the participating student lives, the level of state aid received by that district, the participating student's family income, or some other measure? Should the per-pupil subsidy differ in amount based upon the level of an individual student's educational need?

For students to have true "choice," does the per-pupil subsidy need to be of a certain amount? If so, does that per-pupil cost effectively limit the scope of the program, considering state government budget constraints? Should private schools wishing to participate in a publicly-funded choice program have to accept the public subsidy as full tuition payment? Would providing meaningful choice to a substantially increased number of students require public subsidies for new or expanded school facilities?

Tax Incentives

New Jersey's tax laws include no provision for credits or deductions for private education, but a bill has been introduced to provide for income tax credits for contributions to nonprofit organizations that sponsor private voucher programs.⁵¹ Five states have enacted such provisions: Arizona, Florida, Illinois, Pennsylvania, and Minnesota.⁵² The Supreme Court in *Zelman* commented favorably on private school tuition tax credit and deduction programs, noting Minnesota's tax deduction program as an example of indirect aid that embodied parental choice, and which, despite the fact that nearly all beneficiaries were parents of parochial school students, was not skewed toward

⁵¹ A1594, introduced and referred to Assembly Education Committee January 8, 2002. An identical bill was introduced in the last session of the state legislature, and was not reported out of committee.

⁵² A.R.S. §43-1089 *et seq.* (Arizona); F.S.A. §220.187 *et seq.* (Florida); Il. St. Ch. 35 §5/201(m) (Illinois); 24 P.S. §12-1201 *et seq.* (Pennsylvania); Minn. Stat. 290.09 (22).

parochial schools.⁵³ Courts in Illinois and Arizona have upheld their states' tax credit provisions against establishment clause claims.⁵⁴

On the federal level, the Bush administration has proposed a new federal education tax credit. The proposed credit would cover 50 percent of the first \$5,000 of expenses incurred by a family to transfer a child from a failing public school to a school of choice, including sectarian and non-sectarian schools. The benefit would be provided to home schooling parents as well. Low-income families that do not pay taxes would receive a direct refund from the federal government.⁵⁵

Presumably, because of the voluntary nature of the tax incentives, these programs are free of "compelling clause" concerns. Presumably, also, the primary beneficiaries of these programs are not low-income families.

QUESTIONS: Considering the *Zelman* Court's emphasis on the benefits of Cleveland's voucher program for low-income families, does the class of persons benefiting most, or most directly, from a school choice program affect its legality? Has data been collected regarding the participants in the various state tax incentive programs, such as their income levels, the schools from which they are drawn, their academic performance? Are these programs tied in any way, by statutory mandate or other state policy, to public school improvement efforts?

No Child Left Behind

The Elementary and Secondary Education Act of 2001, popularly known as the "No Child Left Behind Act" ("NCLB"),⁵⁶ provides considerable support for public school choice. It does so primarily in two ways: first, by mandating that students in low-performing schools and unsafe schools be permitted to transfer to higher performing

⁵³ *E.g.*, 122 S.Ct. at 2465-66, citing *Mueller v. Allen*, 463 U.S. 388 (1983). In 2001, relying on *Mueller*, an Illinois appellate court rejected a challenge to the state's tuition tax credit program. The Illinois program gives parents a credit of 25% of the total costs of tuition and other costs at public or private schools, against state income tax. *Toney v. Bower*, 744 N.E. 2d 351 (Ill. App. 4 Dist. 2001).

⁵⁴ *Toney v. Bower*, 744 N.E. 2d 351 (Ill. App. 4 Dist. 2001); *Kotterman v. Killian*, 972 P.3d 606 (Ariz.), *cert. denied* 528 U.S. 921 (1999).

⁵⁵ See R. Holland and D. Soifer, "Bush Proposes Education Tax Credits," *School Reform News* (April 2002).

public schools or receive supplemental educational assistance; second, by providing funding to encourage states to adopt voluntary public school choice programs.⁵⁷

Consequences for low-performing schools and unsafe schools

To identify “low-performing schools,” NCLB requires states to adopt uniform systems of school and district accountability that will allow measurement of “adequate yearly progress.” Each state may create its own system of measurement, but the systems must be based primarily on standardized test performance and they must measure progress at the school, district and state levels. States must disaggregate, address and monitor student progress by specific subgroups, including economically disadvantaged students, major racial or ethnic groups, student with disabilities, and students with limited English proficiency. States, districts, and schools must report performance data by these subgroups in the form of “report cards.”⁵⁸

If a district as a whole fails to make adequate yearly progress for two consecutive years, it will be required to develop an improvement plan. If it still has failed to make adequate progress two years later, the state must allow students to transfer to schools in other districts, and it must provide transportation. Within any district, if a school fails to make adequate progress for two consecutive years,⁵⁹ it must develop a plan for improvement, and its students must be permitted to transfer to other public schools within the district, with transportation provided by the district. If a school fails to make adequate progress for three consecutive years, students must again be offered the opportunity to transfer to another school within the district, and “supplemental educational services” (tutoring) must be offered to low-achieving students.⁶⁰

⁵⁶ Pub. L. 107-110 (2001).

⁵⁷ This is by no means a full summary of NCLB’s provisions. Among the many published summaries and commentaries on the act, see Education Commission of the States, *No Child Left Behind Policy Briefs on Low-Performing Schools and School Choice*, www.ecs.org; and Learning First Alliance, *Major Changes to ESEA in the No Child Left Behind Act*, www.learningfirst.org.

⁵⁸ Title I, Part A, §1111.

⁵⁹ According to the United States Department of Education, an estimated 8,600 schools nationwide, and 274 in New Jersey, fall into this category.

⁶⁰ Title I, Part A, §1116. More drastic consequences result if schools continue to make adequate progress. After four consecutive years, the district must take additional corrective action, such as replacing staff, implementing a new curriculum, decreasing management authority, extending the school day or year, or

With respect to “unsafe schools,” NCLB requires each state to establish its own definition of “persistently dangerous” elementary and secondary schools in consultation with local school districts. Students who attend such schools, or who are the victims of violent crime (also as defined by the states) on the grounds of the schools they attend, must be permitted to transfer to safe public schools, including charter schools, in the same district.⁶¹

Promotion of voluntary school choice programs

NCLB provides for grants to states and school districts and charter schools for development of school choice options. Its provisions include grants for “innovative programs,” to support charter schools, magnet schools and public school choice options; charter school programs, for planning, program design and implementation; credit enhancement initiatives for charter schools, to help offset the costs of acquiring, constructing and renovating facilities (this program has not been funded); “voluntary public school choice,” to “provide greater public school choice options”; and magnet school assistance, to assist in establishment or operation of magnet schools in districts under court-ordered or voluntary desegregation plans designed to increase racial balance.⁶²

In June 2002 the New Jersey Department of Education submitted a consolidated state grant application to the U.S. Department of Education for grants relating to school choice and other educational improvement efforts under NCLB. In July 2002 the funding application was approved. New Jersey will receive funds in the amount of \$425 million for NCLB-related programs in fiscal year 2002.⁶³

QUESTIONS: Consistent with NCLB, to the extent that New Jersey considers any expansion of school choice programs, should it focus its attention on public school

changing the school’s organizational structure. After five consecutive years, the district must take “significant alternative governance actions,” such as allowing state takeover, hiring a private management contractor, or converting to a charter school.

⁶¹ Title IX, Part E, Subpart 2, §9532.

⁶² Title V, Parts A-C, §§5101-5301.

⁶³ See NJDOE website, <http://www.nj.gov/njded/grants/nclb/app>.

choice options rather than public funding of private schools? Should it increase its support for the charter school program? Should it increase its support for interdistrict choice programs? Should it promote collaborative efforts between urban and suburban districts? Should the state initiate a broad effort to promote school choice for its urban students, or at least those in low-performing and persistently dangerous schools; or should it direct districts to respond to transfer requests by eligible students but make minimal additional efforts to promote choice?