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## SCHOOL VOUCHERS: WILL THEY UNDERMINE AMERICAN PUBLIC SCHOOLS? ESTABLISHING A CONTEXT FOR DEBATE

*Michael F. DiPaola*<sup>\*</sup>

Although the United States Constitution is silent on access to education, the founding fathers believed it the responsibility of the states to educate their citizens. In a letter to James Madison in 1787, Thomas Jefferson wrote, "Above all things, I hope the education of the common people will be attended to; convinced that on his good sense we may rely with the most security for the preservation of a due degree of liberty."<sup>1</sup>

The founding fathers believed that the American people had a responsibility to educate children in order to achieve the goals of our democracy. The education of all children is a vital public interest and a shared responsibility. They believed schools would:<sup>2</sup>

1. Prepare people to become responsible citizens. In the 1996 presidential election, in the voting population ages 25-44: twenty (20) percent of high school dropouts, forty (40) percent of high school graduates, fifty-seven (57) percent of those with some college education, and sixty-eight (68) percent of college graduates voted.<sup>3</sup>
2. Improve social conditions by reducing crime, violence, and social ills. Over half of the people in prison are high school dropouts. Seventy (70) percent of prisoners score in the two lowest literacy levels of the National Adult Literacy Survey.<sup>4</sup> Those prisoners have some reading and writing skills but are not adequately equipped to perform tasks like writing a letter explaining an error on a credit

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1. PAUL R. FORD, 4 THE WRITINGS OF THOMAS JEFFERSON 480 (1894).

2. See generally Wendel Pierce, *Education's Evolving Role*, AMERICAN EDUCATION, May 1975; see generally Robert E. Potter, THE STREAM OF AMERICAN EDUCATION (1967).

3. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF EDUCATION, THE CONDITION OF EDUCATION IN 2000 33 (2000).

4. NATIONAL INSTITUTE FOR LITERACY, FACT SHEET: CORRECTIONAL EDUCATION; <http://novel.nifl.gov/nifl/facts/correctional.html> (last visited Nov. 9, 2002).

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card bill or understanding a bus schedule.<sup>5</sup>

3. Promote cultural unity. In 1998, thirty-seven (37) percent of students in kindergarten through 12th grade (K-12) belonged to minority groups, a fifteen (15) percent increase since 1972.<sup>6</sup> By the end of the 1990s, over twenty (20) percent of the K-12 student population will be children of immigrants, due primarily to the growth of our Hispanic and Asian immigrant populations.<sup>7</sup>

4. Help people to become economically self-sufficient. The earnings differential between young adults with different levels of educational attainment are dramatic. For example, in 1998, those who completed a 4-year college degree earned fifty-six (56) percent more than those with a high school diploma and one hundred (100) percent more than those with a graduate equivalency diploma (GED).<sup>8</sup>

5. Enhance individual happiness and enrich individual lives.

Despite the early support from influential leaders, public schools were not widely established until after the War Between the States.<sup>9</sup> From colonial times through the middle of the 19th century, some American children were educated in a hodgepodge of institutions and arrangements, many of them church sponsored.<sup>10</sup> “By 1827, all of the original [thirteen] 13 States and all but two of the additional [eleven] 11 states that had since joined the union, made some provision for public or popular education, either through State constitutions or by legislation.”<sup>11</sup>

However, many children were excluded from educational opportunities altogether. Schools typically excluded females, African Americans, Native Americans, poor white children who did not belong

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5. *Id.*

6. U.S. DEP'T OF EDUCATION, *supra* note 3, at 9.

7. *Id.*

8. *Id.* at 34.

9. *See* POTTER, *supra* note 2, at 267 *passim*.

10. *See generally* POTTER, *supra* note 2 (information taken generally from the first one-third of the book).

11. Pierce, *supra* note 2, at 17.

to a church, and those who lived in rural area.<sup>12</sup> By the beginning of Andrew Jackson's first term in 1829, educational opportunities certainly were not universal, even in the cities. During that school year the New York Public School Society estimated that 24,200 of New York City's 52,300 children did not attend school.<sup>13</sup> Income and social class usually determined a child's options for an education.<sup>14</sup> Advocates for universal schooling pressed for the creation of publicly funded schools to educate all children.<sup>15</sup> Continued immigration and the schisms in traditional religious denominations (which created a proliferation of religious sects) both contributed to a real separation of church and state in every American state by 1840.<sup>16</sup>

By the end of the 1850s, many northeastern and mid-western states had established systems of free public schools.<sup>17</sup> By the end of the 19th century, free public schools became accessible to most children in the South and the West and education became compulsory in most states.<sup>18</sup> Throughout the 20th century, changes in the economy and social policy shaped the mission and goals of public schools,<sup>19</sup> but it took a long time for schools to become more inclusive.<sup>20</sup> In 1954, the Supreme Court ruling in *Brown v. Board of Education* signaled that all children are entitled to equal educational opportunities.<sup>21</sup> Yet, over a decade past before Congress enacted the 1964 Civil Rights Act<sup>22</sup> and the 1974 Education of Individuals with Disabilities Act,<sup>23</sup> which helped clarify what these "equal" educational opportunities should be. Successfully educating each and every child, no matter his circumstance or disability, became the charge of the public schools.<sup>24</sup> Thus, public schools face twin challenges to dispel inequities in education and ensure a basic level of

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12. See generally POTTER, *supra* note 2.

13. WILLIAM O. BOURNE, HISTORY OF THE PUBLIC SCHOOL SOCIETY OF THE CITY OF NEW YORK 111 (1870).

14. See POTTER, *supra*, note 2, at 24.

15. See *id.* at 119.

16. See *id.* at 109.

17. See Pierce, *supra* note 2, at 23, 29.

18. See *id.* at 24.

19. See *id.* at 28-29.

20. See *infra* notes 20-22.

21. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

22. Civil Rights Act of 1964, Pub. L. No. 88-352, § 407(a)(2), 78 Stat. 241 (1964).

23. Education of Individuals with Disabilities Act of 1970, Pub. L. No. 91-230, 84 Stat. 175 (codified as amended at 20 U.S.C. §§ 1400-1487 (2000)).

24. See *e.g.* Civil Rights Act of 1964, *supra* note 22; Education of Individuals with Disabilities Act of 1970, *supra* note 23.

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quality among schools.

Students' educational expectations have increased substantially in the past two decades. Increasingly, high school students are being advised by their parents, counselors, and teachers to go to college and growing numbers have taken that advice. The percentage of 12th-graders that definitely planned to complete a bachelor's degree increased from thirty-five (35) to fifty-six (56) percent between 1980 and 1997.<sup>25</sup> These increased aspirations, as well as changes in graduation requirements and course offerings, resulted in "today's high school graduates taking more courses and more difficult courses than they were in the early 1980s."<sup>26</sup> High school graduates earned an average of twenty-two (22) credits in 1982, as compared to twenty-five (25) credits in 1998, and took more demanding courses in mathematics and science.<sup>27</sup>

Many Americans believe that improving our system of education should be top priority for government at all levels. In his 1997 State of the Union Address, former President Clinton strongly endorsed public school choice.<sup>28</sup> He proposed that every state give parents the power to choose the right public school for their children.<sup>29</sup> He believed choice would foster competition and innovation that will make public schools better.<sup>30</sup> Since 1991, the popularity of school choice has grown among the general public.<sup>31</sup> In 1995, sixty-nine (69) percent of the public favored allowing students and their parents to choose which public schools in the community students attend, regardless of where they live; while less than half, forty-four (44) percent, favored allowing students and their parents to choose a private school over the public one.<sup>32</sup> In 1999, more children in grades 3-12 attended schools chosen by their parents (either public or private schools) than in 1993.<sup>33</sup>

Choice can be achieved in a number of ways. School choice models

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25. U.S. DEP'T OF EDUCATION, *supra* note 3, at 38.

26. *Id.*

27. *Id.*

28. See CNN Time, All Politics: The State of the Union, 1997, available at <http://www.cnn.com/ALLPOLITICS/1996/resources/sotu/transcripts/index5.html> (last visited Nov. 9, 2002).

29. *Id.*

30. *Id.*

31. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF EDUCATION, *Digest of Education Statistics, 1999: Chapter 1--All Levels of Education, Table 24*, available at <http://nces.ed.gov/pubs2000/digest99/d99t024.asp> (last visited Nov. 9, 2002).

32. *Id.*

33. *Id.*

vary from child transfers to other public schools within their district, as President Clinton proposed,<sup>34</sup> to possibly the single most divisive topic in education today: vouchers. President George W. Bush advocated vouchers during his Presidential campaign.<sup>35</sup> Vouchers allow parents to choose a public, private, or parochial school for their children to attend. The money to fund this education comes from the general public. Since more than eighty-five (85) percent of the private schools in the country are religious,<sup>36</sup> vouchers raise questions about the separation of church and state. Is it constitutional for tax money to flow to religious schools?

On June 10, 1998, the Wisconsin Supreme Court upheld the state's school voucher program, which explicitly permitted state subsidy of parochial education in the Milwaukee school district.<sup>37</sup> The Court found the program did not have the primary effect of advancing religion based on the two principles of neutrality (private and religious school choices operates within a broader range of educational options) and indirect aid (parents choose where the funds are spent).<sup>38</sup> The Court reasoned that aid in the form of vouchers was for the direct benefit of children. The benefit to religious schools was indirect.<sup>39</sup> In an 8-1 ruling, the Supreme Court of the United States refused to hear a challenge to the holding in *Jackson*.<sup>40</sup> Although the Court's refusal signified indecision or postponement more than endorsement, it encouraged other states to establish similar voucher programs.

In the spring of 1999, however, the Supreme Court of Maine held unconstitutional the use of tax dollars for tuition at religious schools.<sup>41</sup> The Ohio Supreme Court, in the summer of 1999, invalidated The Cleveland Scholarship and Tutoring Program on technical grounds of state law.<sup>42</sup> Yet, the Court ruled that inclusion of religious schools in the voucher program did not violate the United States Constitution's prohibition against a government establishment of religion.<sup>43</sup> The state

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34. See generally CNN Time, All Politics, *supra* note 27.

35. See Stephen Talbot, The War Over Vouchers, at <http://archive.salon.com/news/feature/2000/05/26/cleveland/index2.html> (last visited Nov. 9, 2002).

36. Steven Green, Vouchers and the Law, at <http://archive.salon.com/news/feature/2000/03/27/vouchers/index2.html> (last visited Nov. 9, 2002).

37. *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), cert. denied, 525 U.S. 997 (1998).

38. *Id.* at 615, 617.

39. *Id.* at 621.

40. See *Jackson*, 525 U.S. 997 (1998).

41. *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 144 (Me. 1999), cert. denied, 528 U.S. 947 (1999).

42. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999).

43. *Id.* at 211.

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legislature quickly reauthorized the program to cure its technical deficiencies.<sup>44</sup>

In June 1999, Florida lawmakers approved a plan to give students in the state's worst schools taxpayer-funded tuition payments to attend qualified public, private, or religious schools.<sup>45</sup> The Supreme Court of the United States in September 2001 reviewed The Cleveland Scholarship and Tutoring Program to determine whether the Constitution permits government-financed tuition vouchers to be used at religious schools.<sup>46</sup> The issue on appeal was the Sixth Circuit Court of Appeals' 2000 decision that the program was similar to a New York state tuition reimbursement program which the Supreme Court of the United States struck down in 1973.<sup>47</sup> That decision rejected arguments that the Cleveland vouchers were a neutral form of aid to parents that only indirectly benefited religious schools.<sup>48</sup> In 2001, the United States General Accounting Office (USGAO) concluded that no consistent evidence existed that voucher programs in Cleveland and Milwaukee positively affected student achievement.<sup>49</sup>

In the past two decades, the nation's public schools have made progress in improving the quality of elementary and secondary education. Some of these improvements include more rigorous course selection by high school students,<sup>50</sup> increased access to technology in public schools,<sup>51</sup> greater graduation rates,<sup>52</sup> and decreased student to teacher ratios.<sup>53</sup> Nonetheless, the poorer quality of school lessons (in comparison to those of other countries),<sup>54</sup> relatively low teacher

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44. See generally OHIO REV. CODE ANN. §§ 3313.974-3313.99. (Anderson 2002).

45. See generally FLA. STAT. ANN. § 229-591 (1999).

46. *Zelman v. Simmons-Harris*, 533 U.S. 976 (2001) (granting certiorari from *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000)).

47. *Simmons-Harris*, 234 F.3d at 953 (citing *Comm. Pub. Educ. v. Nyquist*, 413 U.S. 756, 761-70 (1973)).

48. *Id.* at 959.

49. U.S. General Accounting Office, School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee, GAO-01-914, available at <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=d01914.txt&directory=/diskb/wais/data/gao> (last visited Nov. 10, 2002).

50. U.S. DEP'T OF EDUCATION, *supra* note 3, at 38.

51. *Id.* at 71.

52. See generally NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF EDUCATION, THE CONDITION OF EDUCATION 1999 (1999), at <http://nces.ed.gov/pubs99/condition99/indicator-59.html> (last visited Nov. 10, 2002).

53. U.S. DEP'T OF EDUCATION, *supra* note 3, at 69.

54. See U.S. DEP'T OF EDUCATION, *supra* note 52, at <http://nces.ed.gov/pubs99/condition99/indicator-16.html> (last visited Nov. 10, 2002).

salaries,<sup>55</sup> and aging school buildings<sup>56</sup> have tempered this progress. These factors may contribute to lower confidence among parents and the general public in the quality of public elementary and secondary education.

In 1999 more than half of children in grades 3-12 had parents who reported they were very satisfied with the learning environment at the public schools their children attended.<sup>57</sup> In a national poll conducted in the fall of 2001, equal proportions of people polled (forty-eight (48) percent) said they opposed and supported vouchers.<sup>58</sup> Thirty-nine (39) percent of the voucher supporters surveyed stated that they “would withdraw their support if the program would result in the loss of public school tax dollars.”<sup>59</sup> Over eighty (80) percent of all respondents wanted private schools that “accept vouchers to be held publicly accountable for academic standards, admission requirements, financial disclosure, and test scores.”<sup>60</sup>

Available data from 1995 and 1996 shows that school districts with the largest concentrations of children living in poverty spent considerably less per student than districts with smaller concentrations.<sup>61</sup> In 1995 and 1996, public school districts serving metropolitan areas spent more per student for instruction, support services, and capital outlay combined than did other districts.<sup>62</sup> The recent rise of real personal income per capita has paralleled the increase in public revenue for education per elementary or secondary student.<sup>63</sup> During the 1990s, however, revenue as a percentage of personal income, adjusted for the number of students and population size, decreased slightly, indicating that a somewhat smaller percentage of personal income funds elementary and secondary education.<sup>64</sup> Will vouchers further deplete the resources public schools need to meet high public expectations?

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55. *Id.* at <http://nces.ed.gov/pubs99/condition99/indicator-25.html> (last visited Nov. 10, 2002).

56. *See* U.S. DEP'T OF EDUCATION, *supra* note 3, at 75.

57. *See id.*, at 72.

58. Karla Scoon Reid, *Poll Finds Support for Vouchers Wanes if Public Schools Affected*, EDUCATION WEEK, Oct. 3, 2001, at 7.

59. *Id.*

60. *Id.*

61. *See generally* U.S. DEP'T OF EDUCATION, *supra* note 3, at 103.

62. *Id.* at 176.

63. *Id.* at 177.

64. *Id.* at 178-79.



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The Supreme Court's decision, which is expected in July,<sup>65</sup> will address the constitutional issues, but will not answer many remaining questions. Will giving parents a choice of any public or private school for their children energize public schools or weaken them further? Does the implementation of voucher programs send a clear message that we are giving up on public education? Will the long cherished ideal of offering every child equal access to quality public schooling be abandoned? Will America start treating access to learning like a commodity rather than a public ideal? Will free market pressures force public schools to streamline their operations in order to compete with decentralized, less regulated private schools? Will vouchers produce a large underclass of students-including many of those with special education requirements-trapped within a system without enough resources to meet their needs? How do vouchers reconcile with the federal laws requiring children with identified physical and educational disabilities to be provided an appropriate education in the least restrictive environment? In an attempt to improve public schools and provide equity in educational opportunities most states have adopted educational standards, accompanied by systematic assessments to measure outcomes, but are private schools held to the same standards?

These answers to these questions will reveal the impact of vouchers upon public schools across the nation.

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65. The Court handed down a decision on June 27, 2002, after the author completed this paper. *See Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002).