FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

CASE IN FOCUS

Indiana Supreme Court Upholds Constitutionality of Vouchers for K-12 Education

*By Leslie Davis Hiner**

In a landmark 5-0 decision, Chief Justice Brent Dickson of the Indiana Supreme Court delivered a clear and decisive opinion supporting the constitutionality of vouchers for K-12 education. On March 26, 2013, the Court ruled that the constitutional prohibition against using public funds to benefit religious institutions does not apply when public funds are used by parents for primary or secondary education provided by a religious institution.

I. Education Reform in Indiana

Indiana has a long history of education reform. In 1987, the Indiana legislature passed the most "sweeping educational overhaul" in the country.[1] Gov. Bob Orr's education agenda, the A+ Plan, included such bold reforms as financial rewards for most improved schools and penalties for schools promoting students who failed to meet new, strictly defined levels of achievement.

A voucher plan was not included in A+ Plan. This was probably because the authors feared a constitutional challenge.

Vouchers allow parents to choose where to spend money the state has allocated for their children's education; tuition funding may be used at a school of the parents' choice, including private religious schools. Private school choice was first envisioned by Nobel laureate economist Milton Friedman in 1955.[2] Whereas government may fund education, Friedman argued it is unwise for government to maintain a monopoly position in providing educational services. Dr Friedman believed that a public education monopoly would follow the path of all monopolies, offering an increasingly inferior product for an increasingly greater cost.

Indiana's attempts to adopt private school choice in years following the A+ Plan failed. As a result, in 1991, a local businessman and philanthropist, J. Patrick Rooney, created the nation's first privately funded scholarship program.[3] Determined to serve the needs of poor children living in the inner city of Indianapolis who were assigned to chronically failing public schools, Mr. Rooney's Choice Charitable Trust Scholarship program drew a strong demand for the scholarships.

Yet legislators remained unconvinced that such a program funded by the state could withstand a constitutional challenge. Then in 2002, the United States Supreme Court ruled in *Zelman v. Simmons-Harris* that publicly funded vouchers for K-12 education did not offend the United States Constitution because the choice of a voucher was voluntary and the parent, not the state, made the decision to choose a sectarian or non-sectarian school.[4]

Emboldened by the *Zelman* decision, Indiana legislators renewed their interest in creating publicly funded vouchers for K-12 education, passing the Choice Scholarship Program.[5] Called "the nation's broadest private school voucher system," Indiana once again enacted the most sweeping education reform in the country.[6]

II. Constitutional Challenge

Perhaps recognizing that a challenge to vouchers in federal court could fail after *Zelman*, on July 1, 2011, Indiana State Teachers Association leaders, teachers, and parents filed suit in state court seeking declaratory and injunctive relief from Indiana's private school voucher system, in *Meredith v. Daniels*.[7] The court also granted intervenor status to two parents expecting to use vouchers to pay in part for their children's tuition at private schools in Indiana.

Plaintiffs argued three points under the Indiana Constitution: 1) that Article 8, Section 1 restricts the General Assembly from adopting any educational system other than a "general and uniform system of Common Schools" and that private schools are not part of a "uniform system";[8] 2) that Article 1, Section 4 restricts the General Assembly from allowing vouchers paid with public funds to be used at religious institutions where children will be trained in religious beliefs, thus compelling support from citizens to "attend, erect, or support any place of worship, or to maintain any ministry" against their consent;[9] and 3) that Article 1, Section 6 restricts the General Assembly from allowing money "drawn from the state treasury, to be used for the benefit of any religious or theological institution."[10]

III. Trial and Supreme Court Decisions

On January 13, 2012, Judge Michael Keele of the Marion Superior Court granted defendant-intervenors' motion for summary judgment and denied plaintiff's motion for summary judgment.[11] Appellant's verified joint motion to transfer appeal to the Indiana Supreme Court was granted March 16, 2012. The case then proceeded as if it were originally brought before Indiana's Supreme Court.

The Indiana Supreme Court affirmed Judge Keele's lower court decision.[12] Both the trial court and Supreme Court relied on historical documentation of the 1851 revision of the Indiana Constitution.

A. Article 8, Section 1

In 1851, during the Constitutional Convention, an amendment to prohibit public funding of schools other than district or township schools was defeated; the trial court noted that Indiana's practice of funding private schools, including those offering religious

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Pennsylvania Supreme Court Permits Waivers for Future Negligence by Third Parties

*By Michael I. Krauss & Samantha Rocci**

On April 25, 2013, in *Bowman v. Sunoco*, a divided Pennsylvania Supreme Court held that Pennsylvania public policy does not prohibit waivers of liability for future negligence by a non-contracting party.[1] The implications of this decision are significant.

I. Background

The plaintiff worked as a private security guard with Allied Barton Security Services. As a condition of her employment, she signed a "Workers' Compensation Disclaimer." This "disclaimer" purported to waive plaintiff's right to sue any of Allied's clients for damages related to injuries that were covered under the state's Workers' Compensation Act.[2] Subsequently, while guarding one of Sunoco's refineries, plaintiff slipped on snow or ice and was injured. After collecting workers' compensation benefits, she proceeded to sue Sunoco for negligence, asserting that its negligent failure to clear the ice in an obscure location was the proximate cause of her injury.

During discovery, Sunoco learned of the Workers' Compensation Disclaimer, and invoked it in its motion for summary judgment. Plaintiff responded that the waiver contained in the disclaimer violated Pennsylvania's public policy, particularly as clearly embodied in the first sentence of section §204(a) of the Pennsylvania Workers' Compensation Act, which reads: "No agreement, composition, or release of damages made before the date of any injury shall be valid or shall bar a claim for damages resulting therefrom; and any such agreement is declared to be against the public policy of this Commonwealth."[3]

Finding that the disclaimer did not violate public policy as articulated in §204(a), the trial court granted Sunoco's motion and dismissed plaintiff's suit.[4] On appeal, the Superior Court affirmed, ruling that plaintiff waived only her right to sue third-party customers for damages that were covered under workers' compensation. While she waived those rights, she still retained the right to receive damages through Workers' Compensation, the protection of which *is* a

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instruction, was left intact. Simply put, when there was an opportunity to specifically prohibit the funding of private and religious schools, the authors of Indiana's 1851 constitution passed.

The Supreme Court, relying on *Bonner ex rel Bonner v. Daniels*, interpreted Article 8, Section 1, to impose a duty to encourage educational improvement *and* to establish a system of common schools.[13] The court reasoned that the word, "and" between the two phases was deliberate and was intended to express two duties.

Giving weight to the fact that citizens voted to ratify the constitutional language currently in dispute, which remains unaltered since the affirmative vote for the constitution in 1851, Chief Justice Dickson determined that the General Assembly has not one but two duties regarding education: 1) to provide a "general and uniform system" of tuition-free common schools open to all, and 2) to "encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement."[14]

Furthermore, the court stated that the phrase, "by all suitable means" could mean only that the General Assembly had broad discretion, within the constitution, to determine policy for encouraging educational improvement.

Both the trial court and Supreme Court were not persuaded that the school voucher program infringed upon the constitutional duty to maintain tuition-free public schools open to all. The Supreme Court found that the school voucher program does not conflict with or alter the system of public schools, and because it falls under the constitutional duty to "encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement," it also does not fall under the directive to be uniform, common, open to all, or tuition-free.

B. Article 1, Section 4

Prohibition against compelled support of religious institutions was considered in 1851 to apply to support of houses of worship, and more specifically, to prohibit direct taxation of individuals for the purpose of a sectarian objective. The trial court noted that under Indiana's voucher plan, general tax revenues were used to fund the education of children through direct aid to families who would choose a school. The families, not the state, would voluntarily choose a school, which could be secular or sectarian; it would be impossible for the state to advance a sectarian objective because the family, not the state, would choose.

The Supreme Court, noting that there is very little discussion of Article, 1 Section 4 in historical documents, interpreted this section using the text as its primary source for guidance. Comparing Sections 4 and 6 of Article 1, the court distinguished the two; Section 4 prohibits the state from compelling individuals to support a place of worship or ministry and Section 6 limits government taxing and spending for certain purposes. The court furthermore considered the terms "worship" and "ministry" to be related specifically to "ecclesiastical function" and, as such, Section 4 acts to preserve religious liberty.[15] The court did not support plaintiff's expansive view of Section 4.

C. Article 1, Section 6

Finally, plaintiff argued that vouchers convey an unconstitutional benefit to religious institutions. To this point, the court relied on its prior decision in *Embry v. O'Bannon*.[16] In *Embry*, the court upheld a "duel enrollment" program, which allowed private religious school students to also enroll in public schools for certain services. Whereas this allegedly conveyed a financial benefit to the private schools, any such benefits were ruled by the court to be incidental to the state's larger mission of providing educational services to children. Furthermore, again citing that selecting a school is a private, individual choice under Indiana's school voucher plan, the court distinguished Indiana's constitutional provision from other state constitutions that have more restrictive language.

The court was furthermore persuaded that the benefits language of Article 1, Section 6, if unconstitutional under plaintiff's theory, would also "cast doubt" on the constitutionality of long-standing state programs using taxpayer funds for college tuition.[17] Under numerous programs, including the Frank O'Bannon Grant Program and the Twenty-First Century Scholars Program, students are awarded scholarships, which might otherwise be named "vouchers," to attend public or private religious colleges.

The Supreme Court scoffed at the idea that religious or theological institutions could receive no benefit whatsoever from government, citing police protection,

streets, sidewalks and other examples. Whereas a religious institution may receive substantial benefits, these benefits are more properly attributable to the public rather than the religious institution. The public is protected by the police, and uses the streets and sidewalks to get to their chosen religious institution. The court determined that benefits to the religious institution are "ancillary and indirect."[18]

Creating a new test for determining whether government expenditures violate Article 1, Section 6, the court stated:

> We hold today that the proper test for examining whether a government expenditure violates Article 1, Section 6, is not whether a religious or theological institution substantially benefits from the expenditure, but whether the expenditure directly benefits such an institution.[19]

In creating this test, the Supreme Court also clarified the language in *Embry*. The term, "substantial benefits" used in Embry was not intended to establish a line to divide what is too much or too little state benefit to a religious institution; it was not meant to create a constitutional line of demarcation.

The Supreme Court held the following regarding Article 1, Section 6:

> First, the voucher program expenditures do not directly benefit religious schools but rather directly benefit lower-income families with school-children by providing an opportunity for such children to attend non-public schools if desired. Second, the prohibition against government expenditures to benefit religious or theological institutions does not apply to institutions and programs providing primary and secondary education.[20]

IV. Twist of Fate

The 2011 November elections delivered two new defendants: Mike Pence succeeded term-limited Mitch Daniels as governor, and Dr. Tony Bennett was defeated for re-election as Superintendent of Public Instruction. In an ironic twist of fate, Dr. Bennett was defeated by a plaintiff in this case, Glenda Ritz. Mrs. Ritz could not be both plaintiff and defendant, pursuant to Indiana Appellate Rule 17(C)(1):"When a public officer who is sued in an official capacity dies, resigns or otherwise no longer holds public office, the officer's successor is automatically substituted as a party."

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Endnotes

1. Jim Mellowitz, *Indiana Assembly Session Ends*, Chicago Tribune News, May 4, 1987, Special to *The Tribune*, *available at* http://articles.chicagotribune.com/1987-05-04/news/8702020989_1_school-days-education-reform-tax-increases .

2. Milton Friedman, *The Role of Government in Education in* Economics and the Public Interest Robert A. Solo ed., 1955).

3. Fritz Steiger, *Putting Children First*, Imprimis, Sept.1999, at 7.

4. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

5. Vouchers provided under the *Choice Scholarship Program*, Ind. Code §§ 20-51-4-1 to 11; Pub. L. No. 92-2011, § 10, 2011 Ind. Acts 1024.

6. Deanna Martin, *Indiana Lawmakers Approve Nation's Largest School Voucher Program*, Huffington Post, July 2, 2013, http://www.huffingtonpost.com/2011/04/27/indiana-education-reform_n_854575.html.

7. Meredith v. Daniels, No. 49D07-1107 -PL-025402 (Super. Ct. Ind. Aug. 15, 2011).

8. Ind. Const. art. 8, § 1:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

9. Ind. Const. art. 1, § 4:

> No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.

10. Ind. Const. art. 1, § 6:

> No money shall be drawn from the treasury, for the benefit of any religious or theological institution.

11. Meredith v. Daniels, No. 49D07-1107 -PL-025402 (Ind. Super. Ct. Jan. 13, 2012).

12. Meredith v. Pence, ___N.E.2d ___, No. 49S00-1203-PL-172 (March 26, 2013).

13. Bonner *ex rel* Bonner v. Daniels, 907 N.E.2d 516 (Ind. 2009).

14. Ind. Const. art. 8, § 1.

15. *Meredith v. Pence*, No. 49S00-1203-PL-172 , at *14.

16. Embry v. O'Bannon, 798 N.E.2d 157 (Ind. 2003).

17. *Meredith v. Daniels,* No. 49D07-1107 -PL-025402, at *9.

18. Meredith v. Pence, No. 49S00-1203-PL-172, at *16.

19. *Id.*

20. *Id.* at 21.