

Bush v Holmes

(Supreme Court of Florida; 2006)

Full citation

[John Ellis 'Jeb' Bush, etc., et al., v. Ruth D. Holmes, et al., 919 So.2d 392 \(2006\)](#)

Forum

Supreme Court of Florida

Date of decision

5 January 2006

Summary of decision

In this decision, the Florida Supreme Court held that a voucher program providing public funds to students to obtain private education failed to comply with article IX, section 1 of the [Florida Constitution](#), which requires the state government to make adequate provision for education through a uniform system of free public schools.

Significance to right to education

This decision confirms Florida's constitutional obligation to provide high quality, free public education – a duty that cannot be discharged by funding unregulated private schools through a voucher or scholarship program. The decision is consistent with principle that the State has the primary responsibility for ensuring that the right to education is upheld regardless of whether the provider is public or private, and that the State must ensure that private providers meet minimum educational standards.

Issues & keywords

Education financing; Voucher programmes; Educational freedom; Regulation of private schools; Privatisation; Religious schools; Civil & political rights

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Context

In 1999, the Florida legislature enacted a nation-wide school voucher programme, called the Opportunity Scholarship Program (OSP), which allowed students from low performing public schools to transfer to higher performing public schools or participating private schools. If a student decided to attend a private school, the cost of tuition would be paid directly to parents in the form of a voucher. The student would then be able to redeem the voucher with any participating private school.

The [Florida Constitution](#) obliges the state to “make adequate provision for the education of all children residing within its borders”. Adequate provision includes a “uniform, efficient, safe, secure, and high quality system of free public schools that allow students to obtain a high quality of education” (article IX, section 1). The Constitution also guarantees freedom of religion and provides that no state funds can directly or indirectly be spent in aid of any church or ‘sectarian institution’, which would include religious private schools (article I, section 3).

Article IX, section 1 of the Florida Constitution

Public education — (a) The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

Facts

Parents of children in Florida public schools and other organisations (the plaintiffs), filed a lawsuit against the Governor of Florida, Jeb Bush, and others, challenging the constitutionality of the OSP under the US and Florida constitutions.

According to the plaintiffs, because many private schools engage in religious instruction, vouchers are a means of circumventing Constitutional prohibitions on indirect state funding of religious institutions (article I, section 3). They also argued that the OSP violated the states’ obligation to provide free, high quality public education under the Florida Constitution (article IX, section 1).

Initially the trial court found that the OSP violated the education provision of the Florida Constitution, reasoning that this provision mandated that the state government must provide high quality education by funding only public schools, and not private schools. The defendants appealed the decision to the Court of Appeal, which overturned the trial court and concluded that that the state is not limited to funding only public schools, but may constitutionally fund voucher schemes.

The case was sent back to the trial court, which again found for the plaintiffs, reasoning that the OSP violated the religious freedom provision of the Florida Constitution, as it amounted to a means of indirectly funding religious schools. The defendants appealed this decision to the Court of Appeal, and an eight-judge majority upheld the trial court’s decision that the OSP is unconstitutional under the religious freedom provision. The defendants then appealed to the Florida Supreme Court.

Issue

The primary questions before the Supreme Court were, in relevant part:

1. Whether the OSP violates the establishment clause of the First Amendment of the US Constitution, which prohibits the state from making “any law respecting an establishment of religion”;
2. Whether the OSP violates article I, section 3 of the Florida Constitution, which prohibits the state from directly or indirectly funding religious institutions; and
3. Whether the OSP violates article IX, section 1 of the Florida Constitution, which requires the state to maintain a uniform, efficient, safe, secure, and high quality, public education system.

Decision

In its majority decision, the Supreme Court concluded that the OSP violates article IX, section 1 of the Florida Constitution – the education provision – because it inappropriately diverts public funds, earmarked for the public education system, to private schools.

Judge Pariente, writing for the majority, stated:

“The [Florida] Constitution prohibits the state from using public monies to fund a private alternative to the public school system, which is what the OSP does. Specifically, the OSP transfers tax money earmarked for public education to private schools that provide the same service—basic primary education. Thus ... the OSP diverts funds that would otherwise be provided to the system of free public schools that is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children.”

Furthermore, because private schools lack public oversight and are not subject to the uniformity requirements of the public school system, the Court reasoned that providing vouchers for students to attend private schools could not be an adequate substitute for a public school system under the language of article IX, section 1(a). The section obliges the state to make adequate provision for “uniform” public schools. In Florida, private schools are not regulated by the state in two key areas – certification of teachers and curriculum standards – and therefore, vouchers cannot satisfy the requirement of a uniform system of education.

Commentary

This decision confirms Florida’s obligation to provide high quality, free public education – a duty that cannot be discharged by indirectly funding private schools through a voucher programme.

The **Florida Supreme Court was the first state-level court-of-last-resort in the US to invalidate a voucher programme as unconstitutional because it inappropriately diverts public funds to private schools**, rather than on grounds of religious freedom. Since the decision, a number of other state supreme courts have made similar decisions, including Louisiana (see ‘Related cases’).

Although the Court did not cite international law, its decision and reasoning are consistent with international principles on the right to education. In particular, according to [General Comment No. 13](#) of the Committee on Economic, Social and Cultural Rights (CESCR), the State has the primary responsibility for ensuring that the right to education is upheld. The State must ensure that private providers meet minimum standards – a duty that Florida has not satisfied by choosing not to regulate curriculum and the certification of teachers in private schools.

The Court avoided the question of whether the OSP violates the religious freedom provision of the US and Florida constitutions, and instead ruled it unconstitutional on the basis of the education provision. This provision is unique to the Florida Constitution – a similar provision is not in the US Constitution – and the Court consequently eliminated the possibility that the decision could be overruled by the US Supreme Court. In 2002, the US Supreme Court issued a ruling in a similar case (*Zelman v Simmons-Harris*) challenging the validity of an Ohio school voucher programme under the establishment clause First Amendment of the US Constitution, and did not find that voucher programmes necessarily amounted to unconstitutional funding of religious institutions (see ‘Related cases’).

Related cases

[Zelman v Simmons-Harris 536 U.S. 639 \(2002\)](#)

In this case, the US Supreme Court ruled that an Ohio voucher programme did not violate the freedom of religion clause of the First Amendment to the US Constitution. Under the ‘private choice test’ developed by the court, a voucher programme is constitutional if it has a valid non-religious purpose; aid goes directly to parents and not to schools; a broad class of benefiting students is covered; the programme is religiously neutral; and there are adequate non-religious options available to students.

[Ford v Browning 988 So.2d 621 \(Fla. 2008\)](#)

After the Florida Supreme Court’s decision in *Bush v Holmes*, the Taxation and Budget Reform Commission (TBRC) proposed constitutional amendments that would have permitted the state government to fund voucher subsidies for religious and other private schools in Florida. The Supreme Court held that the TBRC exceeded its authority, and ordered that the proposed amendments be removed from the election ballot.

[Louisiana Federation of Teachers v Louisiana 118 So.3d 1033 \(LA 2013\)](#)

In this case, the Louisiana Supreme Court held that Louisiana’s ‘Minimum Foundation Program’ (a fund established under the Louisiana Constitution which allocates educational funding to schools) could not be used to provide funding to private schools by way of a voucher programme. The Court recognised that resources constitutionally reserved for public schools cannot be allocated to private entities.

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Additional Resources

Harvard Law Review (2007). [Recent cases: Bush v. Holmes, 919 So. 2d 392 \(Fla. 2006\)](#).

Jamie S. Dycus (2 February 2006). [Lost Opportunity: Bush v. Holmes and the Application of State Constitutional Uniformity Clauses to School Voucher Programs](#).

Richard W. Garnett and Christopher S. Pearsall (1 January 2005). [Bush v. Holmes: School Vouchers, Religious Freedom, and State Constitutions](#).