

# cape Council for American Private Education outlook

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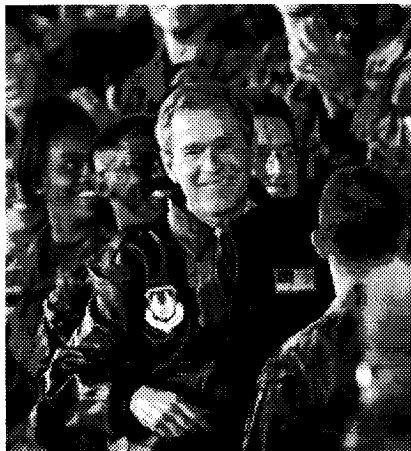
## President Proposes Education Tax Credit

### Up to \$2,500 to Parents With Children in Failing Schools

In a move consistent with his commitment to leave no child behind, President Bush earlier this month proposed an education tax credit to help children trapped in failing public schools transfer to a school that works, whether public or private.

Under the president's proposal, which was part of the 2003 budget he announced February 4, parents would be allowed to take a tax credit for 50 percent of the first \$5,000 of qualifying education expenses for each child enrolled in a public school identified for school improvement under the No Child Left Behind Act. Qualifying education expenses include tuition and fees associated with attendance at a private school or at a public school outside the child's district. Other expenses covered include transportation, academic tutoring, special needs services, books, comput-

ers, supplies, equipment, room and board, uniforms, and supplementary items and services. In states where home schools are considered schools under



President George W. Bush meets with troops at Elgin Air Force Base in Florida February 4, the day he announced his FY 03 budget. (White House photo)

state law, costs associated with home schooling would also be covered.

The tax credit would be refundable, which means parents who are so poor that they pay no taxes would still receive the full benefit.

The U.S. Department of Education estimates that about 4.5 million students are currently enrolled in schools that fail to meet state standards. If approved by Congress, parents whose children attend schools that are not making "adequate yearly progress" under the No Child Left Behind Act would be able to take the credit for expenses incurred during the 2002-03 school year.

The administration estimates the tax credit will cost \$3.5 billion over the next five years.

The Bush proposal is part of a package of initiatives designed to offer par-

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## Supreme Court to Hear Ohio Voucher Case Feb. 20

With the right of low-income parents to choose their children's schools at stake, the U.S. Supreme Court is set to hear arguments this month in the Cleveland voucher case.

Matchless in its implications for school choice since *Pierce v. Society of Sisters*, which in 1925 resulted in the high court striking down an Oregon law designed to outlaw attendance at private schools, the case of *Zelman v. Simmons-Harris* presents the court with a related and no less momentous legal matter: whether states can provide parents with

government-funded vouchers for tuition at religious schools.

The significance of the case is reflected in the legal stalwarts assembled to argue it, both in person and through briefs. Aligned in support of the voucher program are U.S. Solicitor General Theodore B. Olson, former solicitors general Charles Fried and Kenneth W. Starr, former New York City Mayor Rudolph W. Giuliani, and an impressive assortment of attorneys, scholars, and associations that support school choice.

In his brief for the United States,

Mr. Olson noted that Ohio established the voucher program in response to the "catastrophic and well-documented failure of Cleveland's inner-city public schools." He said the program provides children "an opportunity to avoid the debilitating, life-long consequences of a

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**Bush continued from page 1**

ents a way out of failing schools. The president's budget includes \$200 million to promote growth in charter schools, which, according to a White House document, would support approximately 1,800 new and existing charter schools. It also includes a \$100 million program to help charter schools in acquiring and renovating school facilities. Another \$50 million would be available for a school choice demonstration fund to

**The Bush Proposal in Brief**

- *tax credits to help parents choose alternative schools for children in failing public schools*
- *credit to cover 50 percent of up to \$5,000 in alternative school expenses*
- *covered expenses include tuition, fees, books, computers, supplies, transportation, etc.*
- *credit is refundable*

support research on the effects of school choice. And \$25 million would be used for grants to help states and school districts establish public school choice programs.

Bush's budget also provides a tax break for teachers. Under the proposal, a teacher could take up to \$400 in out-of-pocket classroom expenses and professional training costs as an "above-the-line" deduction starting in tax year 2004.

House Education and the Workforce Committee Chairman John Boehner (R-OH) expressed strong support for the education tax credit proposed by the president. "Regardless of income or other factors, parents with children in chronically failing schools should be able to choose the best school possible for their children," Boehner said. "Low-income parents in disadvantaged communities with failing schools should have the same education choices that affluent parents have." The chairman went on to say that giving parents choice will "energize the public education system and spur struggling schools to succeed."

**Court continued from page 1**

failed education" and gives the children of low-income families in Cleveland "an opportunity to obtain the same level of education available to children elsewhere in the state." The decisive issue before the court, according to Olson, is whether the Ohio law "has the forbidden effect of advancing religion," in violation of the Establishment Clause of the First Amendment.

The solicitor general also argued that any religious instruction taking place in religious schools chosen by voucher recipients under the program cannot be attributed to government action. The Cleveland scholarship program does not advance religion, but merely provides aid to parents on "neutral terms without regard to religion." Any benefit to religion is only the result of the "genuinely independent and private choices of aid recipients," who have other options. The fact that most parents in the program have chosen religious schools does not involve the state in advancing religion, as long as the decisions of parents to enroll their children in one school rather than another have been freely made. The brief cites a string of relatively recent Supreme Court rulings to support its position, including *Mitchell v. Helms* (2000), *Agostini v. Felton* (1997), *Zobrest v. Catalina Foothills Sch. Dist.* (1993), and *Witters v. Washington Dep't of Servs. for the Blind* (1986).

**Promise of Equal Opportunity**

In a brief submitted by the Institute for Justice (IJ) on behalf of voucher recipients, Charles Fried and Clint Bolick urged the court to help fulfill the "sacred promise for equal educational opportunities for all American schoolchildren" that it set forth nearly five decades ago in *Brown v. Board of Education*. The authors went on to say that to realize that promise, society must enlist every resource at its disposal. Just as private schools are often engaged by government to serve disabled students at public expense, it is sometimes necessary to "go outside the public schools to fulfill the goals of public education."

Continuing a theme from *Brown*, Fried and Bolick said some children

were once forced to bypass "good neighborhood schools to attend inferior schools because the children happened to be black; today, many poor children are forced to travel past good schools to attend inferior schools because the schools happen to be private."

The IJ brief called the Cleveland Pilot Project Scholarship Program part of a "rescue plan for children in one of the worst urban school systems in the country." When proposed, the plan invited a host of schools to educate children from low-income families. And while it is true that, at least so far, the rescue call has been answered mostly by religious schools, the court should not stake "a statute's constitutionality on the independent choices made by private third parties."

**Ohio Weighs In**

In the brief for the State of Ohio, co-authors Kenneth W. Starr and Ohio Attorney General Betty D. Montgomery said the state enacted the voucher program in 1995 because government officials concluded that "a child's prospect for receiving a decent education from Cleveland's public schools was dismal."

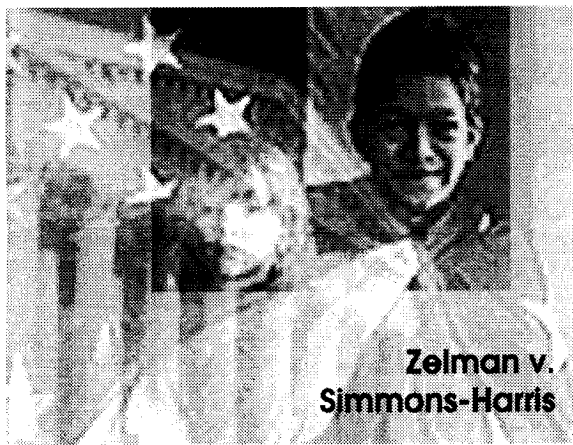
The authors provided the court with important details about the program. The program offers scholarships of up to \$2,250 to children who live within the boundaries of the Cleveland school district and attend grades K-8. Children from low-income families are given preference for the scholarships and may use them at participating private schools in Cleveland and at public schools in participating districts adjacent to Cleveland. Although neighboring school districts would receive for each scholarship student the scholarship amount plus the regular state per-pupil allotment, no district has yet agreed to participate in the program. The statute governing the program states that schools receiving scholarship students may not "discriminate on the basis of race, religion, or ethnic background."

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and must not "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." If the number of applicants to a school exceeds the number of slots in a given year, the school must first give preference to previously enrolled students,



**Zelman v.  
Simmons-Harris**

siblings of currently enrolled students, and low-income students. It must then fill any remaining slots by lot. In the 1999-00 school year, about 3,800 students were enrolled in the program and more than 2,100 were waiting to get in. In the same year, 56 private schools participated in the program, of which 46 were religiously affiliated.

According to the Ohio brief, researchers at Indiana University and Harvard University found that scholarship students had met or exceeded the performance of public school students on various academic measures. Research has also shown "that parents of scholarship students are significantly more satisfied with their children's schools than parents of public school students."

The brief's essential argument is that the program meets Establishment Clause requirements because it neutrally distributes scholarships to families who in turn direct the money to schools through "true, independent choice."

**BAEO, Becket, NAIS, USCCB**

A brief by the Black Alliance for Educational Options (BAEO) described the Cleveland case as "not about religion, but about educational policy and,

ultimately, politics." BAEO argued that the Ohio program is needed "To offer viable alternatives to economically disadvantaged students, and to promote healthy competition among Cleveland-area schools."

Kevin Hasson and his colleagues at the Becket Fund for Religious Liberty urged the court to abandon its tendency to treat aid to religious elementary and secondary schools as especially suspect. Their brief traces the practice of subjecting such aid to special scrutiny back to 19<sup>th</sup> Century "anti-Catholic and anti-immigrant nativism."

The U.S. Conference of Catholic Bishops (USCCB), a CAPE member organization, argued in its brief that the Ohio program is secular, neutral, and one in which

"religious schools may constitutionally participate while advancing the common good." According to USCCB, the case represents "an attack on the private decision-making of thousands of Cleveland parents seeking the best possible education for their children."

Another CAPE member, the National Association of Independent Schools (NAIS), told the court that the state's provision of funds directly to students rather than religious schools "insulates the government from an inference of support or sponsorship of religion." Further, said NAIS, the funds received by private schools in the Ohio program do not relieve those schools of costs they would otherwise have to bear. Students, not schools, are the program's primary beneficiaries.

**ACSI, NCEA, and State CAPEs**

In a brief filed on behalf of 18 national and state associations of religious and independent schools, including 10 state CAPE organizations and two national CAPE member organizations (the Association of Christian Schools International and the National Catholic Educational Association), Edward McGlynn Gaffney, Jr., of the Valparaiso University School of Law,

provided the court with "empirical data about the role that religious and independent schools play in the education of economically and educationally disadvantaged children in inner-city schools." The brief noted some positive effects of such schools:

"First, children attending religious and independent schools are well prepared to undertake the obligations of citizenship. Second, they advance beyond secondary education to undertake higher education, with important ramifications for the economic well-being of these students and for the republic. Third, religious and independent schools contribute powerfully to the public good by saving taxpayers billions of dollars in educational expenses."

In another line of argument, Gaffney pointed out the massive financial assistance the Ohio Legislature provided public school children in its efforts to improve the quality of education. He said such assistance helps to satisfy the court's standard that a program's beneficiary class be broad. "Under these circumstances, it is constitutionally permissible to include religious schools in a major effort to improve the quality of education for all children in Cleveland."

**Rudolph Giuliani**

Included in the pile of briefs presented to the court (over 40 have been filed) is one the justices are sure to review with particular interest. Former New York City Mayor Rudolph Giuliani teamed up with current Milwaukee Mayor John Norquist to submit a brief that said cities can succeed only by developing a "dynamic market" in K-12 education that will improve the performance of schools. The mayors said the stakes in the case are enormous. "It will decide whether the states, by injecting choice and competition into urban K-12 education, can create an effective market in K-12 schooling that succeeds in adequately educating most city children, an outcome America's cities desperately need in order to thrive again."

The court is scheduled to hear oral arguments February 20, and will likely issue a decision in early summer.



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## capenotes

Logic books define a fallacy as an invalid form of argument. The allure of a fallacious argument is that it appears valid, even though it isn't. One of the classic and common fallacies is called "negating antecedent and consequent." From "if p then q" people regularly, though incorrectly, attempt to deduce "if not p then not q."

Case in point: A clause in Section 9506(a) of the No Child Left Behind Act states that if students attend private schools that DO NOT receive funds or services under the act, those students ARE NOT required to participate in the assessment programs prescribed in the act. Given the seductiveness of fallacies, it should come as no surprise that some folks have attempted, by negating the antecedent and the consequent, to conclude that if students attend private schools that DO receive funds or services under the act, they ARE required to participate in the assessment programs prescribed in the act. Not so. Despite the appearance of plausibility, the reasoning is fallacious. And if the laws of logic are not enough authority to

invalidate the argument, how about the U.S. Department of Education?

CAPE has received clarification from the Office of Non-Public Education at USDE that the new assessment provisions in the No Child Left Behind Act, which, among other things, require public schools to test students annually in reading and math, do not apply to private schools, regardless of whether students in such schools receive services under the act.

As with any rule, there are certain exceptions. Individual private school students instructed under Title I have always been tested (often by Title I teachers) to measure the progress they make, and that practice will continue. Nothing has changed in that regard. (How those students are assessed is a matter of consultation between school district officials and private school officials.) But private school participation in the new wholesale tests required of public schools is NOT mandated under the new act, even for private schools in which students or teachers receive services under the act.

Lesson in logic concluded.

• Looking to start a Coverdell education savings account? CAPE has compiled the latest guidance from the IRS

into a single reference document. It's available on CAPE's Web site at <http://www.capenet.org/esa.html>.

• The U.S. House of Representatives last month approved a resolution (H.Res. 335) honoring the contributions of Catholic schools and recognizing the 28<sup>th</sup> annual Catholic Schools Week. According to the resolution, "Catholic schools ensure a broad, values-added education emphasizing the lifelong development of moral, intellectual, physical, and social values in America's young people." Sponsored by Rep. Bob Schaffer (R-CO), the resolution congratulates "Catholic schools, students, parents, and teachers across the nation for their ongoing contributions to education, and for the key role they play in promoting and ensuring a brighter, stronger future for this nation."

• "Arizona offers parents the most educational freedom, followed by New Jersey, Delaware and Florida." So says researcher Jay Greene in the second edition of the Education Freedom Index (EFI), which measures the extent of government-sponsored school choice offered to families in each state. To read the report and see where your state ranks when it comes to education freedom, visit [www.manhattan-institute.org](http://www.manhattan-institute.org).

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