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## State high court has tough questions about vouchers

*Justices hear debate on Opportunity Scholarships, with the fate of other voucher programs riding on the court's decision.*

By Ron Matus

TALLAHASSEE - The Florida Supreme Court heard arguments Tuesday over the constitutionality of the state's first school voucher program in a case fraught with race, religion and potential impact on other state programs.

While busloads of children gathered outside, lawyers tangled for 70 minutes over the legality of Opportunity Scholarships, the program signed into law by Gov. Jeb Bush in 1999 that allows students in failing public schools to attend private schools at state expense.

Opponents, led by the state's teachers union, say vouchers illegally drain money from public schools and channel state money to religious institutions.

The language chosen by the framers of Florida's Constitution "reflects the recognition of the important value to society of the common school ... where children from all walks of life learn together," said John West, lead attorney for the plaintiffs.

The state argued that vouchers are driven by a nonreligious purpose: to throw a lifeline to children in the worst schools and to improve those schools through competition.

If religion benefits, it's incidental, supporters say.

"The Opportunity Scholarship program is in aid of Florida's children, period," said Florida Solicitor General Christopher Kise, one of

three lawyers who argued the case for the state.

Justices interrupted the lawyers early and often, posing sharp questions about the two sections of the state Constitution at issue.

"Hot bench," said Steve Gey, a Florida State University constitutional law professor who attended the hearing.

The justices appeared to be more skeptical about vouchers than he had expected, Gey said. And they surprisingly focused little attention on the church-state question - a big issue nationally - and more on constitutional language mandating a "system of free public schools."

"They really didn't let go of it," Gey said.

About 700 students participate in the voucher program, most of them black or Hispanic. But the court decision could ripple far beyond them.

The Opportunity Scholarship program is the first and only statewide voucher program in the country and a key plank in Bush's education revamp. Voucher supporters, including religious groups and conservative think tanks, have rallied to its defense, while a long line of liberal groups including the NAACP and American Civil Liberties Union have fought to kill it.

Supporters say if the court rules against Opportunity Scholarships, other state programs

will fall because they, too, channel state money to institutions with religious ties.

Among them: the state's two other voucher programs, including McKay scholarships for students with disabilities; the new prekindergarten program, which leans heavily on religious providers; Medicaid funding to hospitals with religious affiliations; and probation and rehabilitation programs run by the Salvation Army.

Many of the children attending Tuesday's rally received vouchers through the other programs. Altogether, more than 28,000 students use vouchers.

"Hopefully they aren't collateral damage," said former state Senate President John McKay, who attended the hearing and for whom McKay vouchers are named.

Many of the 1,500 people attending the rally, organized by a host of minority groups, were black or Hispanic. Polls have shown strong support for vouchers among minorities.

"Opportunity. That's why I'm here," said Lucille Stromas, 69, a black Pensacola resident whose grandchild received a voucher.

Because seating in the courtroom was limited to 100 people, voucher supporters began lining up at 6 a.m. for the 9 a.m. hearing. The first 30 were black.

After a late-night trip, Stromas got up at 4 a.m. to make sure she got a seat.

As the hearing proceeded, voucher supporters flooded the street and plaza between the front steps of the Supreme Court building and the state Capitol. Many had traveled overnight in buses to take part in a highly choreographed ceremony, complete with matching red T-shirts and protest signs that sagged in the sticky Tallahassee heat.

"What do we want? School choice! When do we want it? Now!" the crowd roared.

Inside, the debate was more subdued, but lively by Supreme Court standards.

Justice Harry Lee Anstead asked whether Opportunity Scholarships could open the door to a universal voucher system in which parents could get state money to send their children to the private school of their choice.

Kise, the solicitor general, said no.

"That may raise other constitutional questions," he said, without elaborating.

But given a similar question later, Barry Richard, the state's lead attorney, wouldn't shut the door.

It's up to the Legislature to determine how much money it allocates to public education, he said, and there is nothing in the Constitution to prevent it from giving money to private schools.

"So wait," said Chief Justice Barbara Pariente. If the Legislature spent 90 percent of the state education budget on private schools, that would be okay?

"Yes your honor," Richard said.

Pariente followed by citing *Brown vs. Board of Education*, the seminal 1954 U.S. Supreme Court ruling that ended segregated schools.

If Richard's interpretation had been in vogue after *Brown*, she said, "we would have had all of the white students in a system of private schools and left the public schools for the minorities."

Richard said that brings up an equal protection issue, which he was not prepared to answer.

But "you touch on the quintessential point," he said. "Percentages are a decision for the Legislature."

The justices didn't ignore the church-state question.

The state Constitution prohibits state money from being used "in aid of" religion. But whether the line is clearly drawn is also key to the debate.

More than half of the Opportunity Scholarship recipients are enrolled in religious schools. West, the plaintiffs' attorney, said many of the schools "have, as a major part of their program, religious training and instruction."

His argument drew a series of questions from Justice Raoul Cantero.

"You would argue that funds cannot be used to send Johnny to St. Mary's school, regardless of whether St. Mary's even had a religion class?" he asked.  
No, West said.

The critical question isn't whether the school is church affiliated but "what the funds are going for."

One legal observer said the court's focus on the school-funding question could mean it is looking for the least controversial grounds on which to find the voucher program unconstitutional.

"The court operates in the real world," said Tim McLendon, a professor of constitutional law at the University of Florida. "To hold the voucher program unconstitutional is going to some extent not be well received by the other branches of state government."

A ruling on nonreligious grounds might be "less of a red flag," he said.

A decision is expected in the coming months.

