

December 10, 2015

## Florida's voucher programs may still face challenges



By Jessica Bakeman

TALLAHASSEE — Florida voucher programs that allow students from low-income families and those with disabilities to attend private schools are still vulnerable to challenges from advocates of traditional public school, despite the state's incremental wins in court this week.

A Leon County Circuit Court judge ruled Monday that two public education advocacy groups — Citizens for Strong Schools and Fund Education Now — do not have legal standing to challenge the constitutionality of a tax credit scholarship program through which corporations get a 100 percent credit for donations to nonprofits that grant scholarships to help low-income students attend private schools.

But under Judge George Reynolds' ruling, the plaintiffs may still argue that the tax credit program is contributing to the overall unconstitutionality of the education system, as part of a broader lawsuit filed in 2009 that targets the state's funding record and policies regarding testing, charter schools and teacher evaluations, in addition to the voucher programs.

And while Reynolds denied the group's request for a summary judgment in their challenge of the McKay Scholarship Program for Students with Disabilities, the plaintiffs will still have a chance to make their case against the program when they go to trial for the larger lawsuit in March.

The Associated Press first reported Reynolds' ruling.

The plaintiffs plan to appeal the judge's decision that they lack legal standing to challenge the tax credit program; their appeal will follow one from the Florida Education Association, a statewide teachers union whose similar challenge of the tax credit program was also blocked by Reynolds. But the advocacy groups and the union are fighting an uphill battle.

In Florida and nationally, traditional public school

advocates oppose tax credit scholarship programs, arguing they divert money from public schools to relatively unregulated private schools, some of which offer religious instruction. But because the state granting the tax credit never collects the revenue, taxpayers can't argue they've been harmed by how the money is spent, according to court precedents, including in a 2011 U.S. Supreme Court case on an Arizona tax credit program.

However, while courts have denied standing to opponents, they haven't ruled on the merits of the programs, said Josh Cunningham, a school choice policy expert with the National Conference of State Legislatures.

"On the state level, there are state constitutional provisions that don't exist on the federal level. So there is an opportunity for someone to challenge the state program on the state court level," Cunningham said.

While acknowledging that the plaintiffs may still argue against the tax credit program as part of their larger case, the state's main nonprofit organization that grants scholarships funded by the tax credits celebrated the judge's decision.

"When taxpayers say they're being harmed by this program, because this money is being spent inappropriately, the judge says the money never touches the state treasury," said Doug Tuthill, president of Step Up for Students, which provides scholarships to more than 75,000 children.

The groups' argument "was more political and emotional than it was legal and rational," he said.

An attorney for the FEA said Monday's ruling doesn't impact the union's own challenge of the tax credit scholarship, the cap for which was set at \$447 million this year and will grow to \$559 million in 2016-17. FEA leaders expected Reynolds would rule the same way on the advocacy groups' standing as it did in the union's case. But the union hopes an appeals court will disagree with Reynolds.

Monday's "ruling is consistent with what Judge Reynolds ruled in our case, so the fact that, in a separate circuit court action, he has ruled essentially the same way that we are appealing really won't have an impact on the appellate court," said Ron Myer, an attorney representing FEA.

However, the groups have a better chance of challenging the McKay program, through which taxpayer dollars are appropriated by the Legislature and disbursed by the state Department of Education to parents of children with disabilities who use the money to pay for private school tuition.

That being said, while it's easier procedurally to

challenge the McKay program, it's much more difficult politically to target a program that helps nearly 30,000 children with disabilities.

Steve Hicks, president of the Coalition of McKay Scholarship Schools, which represents nearly 1,300 private schools that serve the scholarship recipients, acknowledged the program is vulnerable to the challenge.

"There is actually probably a better chance for them to come against McKay because the money flows directly from the state of Florida," he said.

"The other side of that is the outrage by the community of disabled people in the event that someone was going to file a lawsuit directly at the McKay scholarships," he said. "That's the reason why we've been able to hide out in the shadows of all of this and not have that program challenged."

Both the tax credit and the McKay scholarship programs were created under former Gov. Jeb Bush, a Republican whose current presidential campaign is based partly on his education reform record in Florida.

One of the attorneys who filed the advocacy groups' broader lawsuit six years ago was Jon Mills, a former

Democratic state House speaker who helped write the constitutional language requiring "adequate provision ... for a uniform, efficient, safe, secure, and high quality system of free public schools."

But Mills, who is also a former dean of the University of Florida's law school, backed out of the case last year. He now works for Boies, Schiller & Flexner LLP. David Boies, who leads the firm, also chairs the board of the Partnership for Educational Justice, a group led by reporter-turned-reformer Campbell Brown that is challenging teacher tenure laws in New York.

Kathleen Oropeza, co-founder of Fund Education Now, said she was disappointed in the judge's rulings on Monday, but "it doesn't negate the fact that the entire system is going to trial in March.

"It's a very determined effort to privatize public education here," Oropeza said of the policies her group is challenging in the lawsuit. "This lawsuit is the last stand. It's the thing that gives people this unvarnished chance to have a voice, which is what's huge, because the state never expected it to go to trial."