1-1-2012

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MINNESOTA'S TUITION TAX DEDUCTION: AN EFFECTIVE MEANS OF PROMOTING NONPUBLIC ALTERNATIVES TO PUBLIC EDUCATION

Tad Jude*

The State of Minnesota has traditionally provided substantial economic support to local public school districts and is among the national leaders in such statistics as state share of education funding and per capita state and local expenditures for public education. But because it has long recognized the benefit of alternatives to its fine system of public education, Minnesota has also been an innovator in promoting a wide range of educational opportunities. For instance, Minnesota stands virtually alone in its support of parents who choose nonpublic elementary and secondary education for their children. Through a variety of means, including the provision of secular instructional materials, shared time programs, transportation help and the availability of a state income tax deduction to help defray tuition and instructional materials cost, Minnesota supports parental choice in education.

Our state's cultural heritage includes the strong commitment to parents' involvement in their children's education that is characteristic of Scandinavians, Germans and Irish. In addition, our legislature has wanted to ensure that meaningful and varied educational opportunities are available to students regardless of their parents' economic status. The state's abiding interest has been a well-educated citizenry.

This essay sets out the legislative and judicial history of Minnesota's attempts to provide a realistic opportunity for parents to choose a nonpublic education for their children. The discussion centers largely on Minnesota's tuition tax deduction, which has recently withstood constitutional attack.¹ It concludes that Minnesota has found a constitutionally valid, politically acceptable, and morally justifiable method of promoting viable educational alternatives to the public school system.

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I. LEGISLATIVE AND JUDICIAL HISTORY OF MINNESOTA'S TUITION TAX DEDUCTION

Minnesota has long been the home of strong nonpublic schools. Although nonpublic enrollment has declined somewhat since its peak in the mid-1960's, more than 90,000 Minnesota school children attended nonpublic schools during the 1983-84 school year. The percentage of Minnesota elementary students opting for nonpublic education climbed to 11% in 1983, the highest percentage in over a decade. The percentage of students enrolled in nonpublic education varies significantly between different regions of the state. The City of St. Paul historically has had the greatest percentage of students in nonpublic schools. In contrast, Minnesota's Iron Range, where local public schools are much smaller and few nonpublic schools exist, exhibits much lower percentages. Although the number of public schools has been dropping steadily during the era of declining enrollments and consolidation, the number of nonpublic schools representing a variety of religious affiliations has actually grown and now stand at 622, a 37% increase from 1974.

While Minnesota offers a fairly wide range of benefits to parents and students who choose nonpublic schools, two major programs provide most of the support. Minnesota Statutes §123.931 entitles nonpublic students to receive nonsectarian educational materials and access to health care services. This program was created in 1975 and has not been directly attacked in the courts. The legislature has appropriated approximately $6.8 million for these purposes for each of the 1985-86 and 1986-87 school years. The maximum per pupil allocations for 1985-86 are $44.22 for secular textbooks, $15.04 for health care services, and $78.13 for guidance counseling.

More attention and discussion, however, has been focused on Minnesota's state income tax deduction. Since 1955, the state has allowed parents with children attending nonpub-
lic elementary and secondary schools to deduct from their gross income a portion of their tuition and transportation costs. This controversial policy of giving tax relief for non-public educational expenses has been attacked from several quarters, in particular by the Minnesota Civil Liberties Union (MCLU) and, in one version, was ruled unconstitutional by the Minnesota Supreme Court. Subsequent amendments re-established its constitutionality and the most recent version of the deduction was upheld in 1983 by the United States Supreme Court.

When first enacted, a deduction of $200 per child was allowed for education related expenses of parents who sent their children either to public or nonpublic schools. Although revisions of the law were discussed several times, no changes were enacted until 1971. A three-tier credit specifically for nonpublic school costs was substituted for the deduction. Deductions historically had had varying effects on specific taxpayers because of our state's highly progressive tax rate structure and relatively high income tax burden. Convincing arguments were made in the legislature that credits were income neutral, providing low, moderate, and high income Minnesotans the same dollar amount in tax relief.

Enacted with the leadership of then Governor Wendell R. Anderson, a member of the Democratic Farmer Labor Party, these changes marked a significant increase in state tax relief:

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>$4,153,700</td>
</tr>
<tr>
<td>1979</td>
<td>$2,505,000</td>
</tr>
<tr>
<td>1980</td>
<td>$3,250,000</td>
</tr>
<tr>
<td>1981</td>
<td>$3,250,000</td>
</tr>
<tr>
<td>1982</td>
<td>$4,109,800</td>
</tr>
<tr>
<td>1983</td>
<td>$3,493,992</td>
</tr>
</tbody>
</table>

6. Minnesota's first elementary/secondary tuition and transportation deduction law was passed as Chapter 741, Laws of Minnesota, 1955.
9. The amount allowed under the 1971 law as a credit was the least of the following amounts:
   (a) $50.00 for a kindergarten student, $100.00 for an elementary school student, and $140.00 for a secondary school student, limited by the number of months enrolled,
   (b) the amount paid by the parents for education cost, or
   (c) the restricted maintenance cost per pupil unit in average daily attendance, multiplied by the percentage of average public school state foundation aid, limited to the number of months the child was enrolled.
help to parents who chose the nonpublic school alternative. But they also elicited immediate reaction. As the MCLU'S attack on the constitutionality of these changes made its way to the Minnesota Supreme Court, the United States Supreme Court decided several cases which sharpened the guidelines for the resolution of the controversy over the public support of nonpublic education.

In its attempt to strike a balance between the Free Exercise and Establishment Clauses of the First Amendment, which if extended to their logical limits would create insoluble conflicts, the United States Supreme Court constructed a three-prong test in Lemon v. Kurtzman: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion.; finally, the statute must not foster 'an excessive governmental entanglement with religion.' Applying this test in Committee for Public Education v. Nyguist, the Court seemed to alter the second prong from a "primary effects test" to an "any effects test," or so thought the Minnesota Supreme Court. Bound by its understanding of these precedents, the Minnesota Supreme Court reluctantly held that the tax credit provided constitutionally impremissible financial support to nonpublic, sectarian schools.

Although the court was unanimous in finding the tax credit unconstitutional, four justices of the seven-member court did not participate in the decision. Moreover, Justice Todd, writing for the court, and Justice Yetka, concurring specially, criticized their own holding. Because these criticisms raise some of the values at the heart of the debate, I will quote them at some length. Justice Todd emphasized the equal protection problems which the binding precedents seemed to create.

We would be remiss if we failed to comment upon the

12. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. Const. amend. I.
13. 403 U.S. at 612-613.
14. 413 U.S. 756 (holding unconstitutional a New York statute which provided tax relief to parents of children attending nonpublic schools by allowing them to subtract from their gross income a specified dollar amount that decreased as gross income increased).
15. MCLU v. Minnesota, 224 N.W.2d at 353.
abject failure of our courts and the parties involved in this litigation to recognize that the major problem being dealt with here is society's concern for the children involved. Surely the goal of our society is to provide the best possible educational opportunities to all our youth. . . . Suffice to say, it should be a proper legislative goal to provide equal opportunity to all children to have available to them the resources of all public school facilities and to avoid the denial of any of these services to them merely on the fact that their parents, in the exercise of their freedom of choice and freedom of religion, have chosen to have their children attend classes at a nonpublic school. To deny access to the services and facilities of the public schools on a part-time basis to these students would seem to create a special class of children, namely, those attending public schools, in violation of the tenets of the equal protection of the laws. 16

Justice Yetka was equally pointed in emphasizing the socio-economic impact of the holding.

I do not fear that the legislation at issue in the instant case would somehow foster the establishment of any religion. There is a distinction between actively supporting a religion or religions, and offering private education the chance to exist and to be available to all parents—poor or middle class, as well as the wealthy—who choose to exercise the right to send their children to nonpublic schools.

The strict scrutiny that legislation, such as that struck down today, must undergo appears far beyond the degree of protection necessary to insure that our nation will be free from a "state religion" or religious persecution of its citizens. Rather, our legislature appears now to be barred from making any reasonable effort to insure that nonpublic education will survive except for the very wealthy. However, the highest court in our land has spoken, and this court and our legislature must adhere to its word. 17

At the request of Governor Anderson, the legislature reacted quickly to this ruling by amending the tax credit law. 18 The new language permitted all parents with children who were either elementary or secondary students to claim a tax deduction for any tuition, text book, or transportation costs

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16. 224 N.W.2d at 354.
17. 224 N.W.2d at 354-55.
incurred in meeting compulsory attendance laws. The costs of materials used for religious education were explicitly excluded from the deduction. Under the legislation, the tax deduction could not exceed $500 for students in kindergarten through grade six, or $700 for students in grades seven through twelve. The bill also expanded the deduction to include educational and transportation costs incurred in sending the children of Minnesota parents to schools located in Wisconsin, North Dakota, South Dakota, and Iowa.

Although a return to a deduction as opposed to a credit format meant income-based help to parents—those who pay a higher tax rate get more benefit—many legislators felt that the change was necessary to break visibly with the law held unconstitutional. Moreover, income tax deductions mean more to taxpayers in Minnesota than in most states. Our top state income tax rate during the late 1970’s reached 18%, highest in the country and double that of most states. In any event, continuing help to parents, even if uneven, was seen by many legislators as an important signal to parents struggling to send their children to the school of their choice. Continued encouragement of educational choice was also seen as a good way to foster constructive competition between the public and nonpublic educational systems, with higher quality education for all the result.

The MCLU moved quickly to block the re-establishment of the tax deduction in federal district court, arguing with heavy reliance on Nyquist that the deduction had the primary effect of advancing religion. A three judge panel, one judge dissenting, found the deduction constitutional. The court distinguished the statute in Nyquist from the Minnesota statute on three grounds. First, although the New York statute was in form a tax deduction, it operated as a tax credit because its benefit decreased proportionally as gross income increased. The Minnesota statute was a true deduction, reducing the tax base by an amount directly related to the amount expended, thus increasing the tax benefit as gross income increased. Second, the Minnesota deduction was extended to parents of children enrolled in any elementary or public school, whereas the New York relief was restricted to parents of children attending only nonpublic schools. Third, the Minnesota deduct-
tion had been unchallenged since first enacted in 1955 and was essentially the same deduction mechanism found in the federal tax code to encourage private contributions to religious organizations. The New York statute was of much more recent vintage and created what was in substance a tax credit.

A second attack, destined to go all the way to the United States Supreme Court, was launched in *Mueller v. Allen*.\(^2\)\(^3\) Plaintiffs advanced the same argument rejected by the court in the previous case brought by the MCLU, but offered statistical evidence tending to show that in the 1979-80 school year, of the nearly 91,000 students whose parents were eligible for the deduction, at least 82% and perhaps upward to 96% attended sectarian schools. Similar figures were presented for the 1978-79 school year. The statistics, they reasoned, demonstrated that the statute is not a "tax measure providing broad relief to the general public, but is directed toward and has the primary effect of advancing religion."\(^2\)\(^3\) William Kampf, a St. Paul attorney who argued the case for the plaintiffs, was quoted as saying that the law provided a "discount or rebate" on nonpublic school tuition.\(^2\)\(^4\) Thus, plaintiffs attempted to circumvent the statute's facial neutrality and to bring it within the proscription in *Nyquist* by showing its actual effects. Plaintiffs also argued that enforcement of the statute would impermissibly entangle the government in religious affairs.

As in *Roemer*, the court found that the statute met the "primary effects test," because the benefits of the deduction were sufficiently neutral and wide spread, and religious institutions benefited only incidentally and indirectly. As to the entanglement argument, the Court noted that eligibility for the deduction would be on a case-by-case audit of individual taxpayers, with deductibility of tuition payments being determined by the purely secular requirements of "nonprofit status, compliance with compulsory attendance laws, and adherence to state and federal civil rights statutes."\(^2\)\(^5\) There would be some risk of entanglement where an auditor needed to determine whether the expenses claimed for textbook and other materials met the secular purpose requirement, but it

\(\begin{align*}
22. & \quad 514 \text{ F. Supp. 998 (D. Minn. 1981).} \\
23. & \quad \textit{Id.} \text{ at 1001.} \\
24. & \quad \text{Minneapolis Star, at 2, col 2 (April 19, 1983).} \\
25. & \quad \text{Mueller v. Allen, 514 F. Supp. at 1003.}
\end{align*}\)
would be minimal, according to the court.\textsuperscript{26}

The district court's opinion was appealed and the Court of Appeals for the Eighth Circuit affirmed. The Supreme Court granted certiorari to resolve a conflict in the circuits. In an opinion handed down on June 29, 1983, the Court affirmed the court of appeals on a 5-4 vote and accepted the rationale on which that decision was based.\textsuperscript{27} Applying the \textit{Lemon} three-prong test, the Court held that the Minnesota statute has the secular purpose of ensuring that all students have the opportunity to become well-educated. It is in the best interests of the state to maintain the vitality of both sectarian and nonsectarian aims of nonpublic schools. In regulating the types of textbooks qualify for the deduction, the state is not excessively entangled in religious activities. Justice Rehnquist, writing for the Court, clearly distinguished the Minnesota statute from the New York law which the Court had found unconstitutional a decade earlier. In \textit{Nyguist}, he wrote, "public assistance amounting to tuition grants, was provided only to parents of children in nonpublic schools."\textsuperscript{28} By making the benefit available to all parents with children attending primary or secondary schools "without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution,"\textsuperscript{29} Minnesota broadened the scope of the deduction sufficiently to avoid violating the Establishment Clause of the First Amendment. Moreover, "by channelling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject."\textsuperscript{30} In short, the Court found the financial benefit afforded sectarian schools too attenuated to say that the primary effect of the facially neutral statute was the advancement of religion.

II. THE DISTRIBUTION OF BENEFITS UNDER MINNESOTA'S TAX DEDUCTION

In the wake of \textit{Mueller v. Allen}, I authored and the legislature approved, an increase in the amount of the deduction. In the 1984 omnibus tax bill the deduction was raised to $650 for kindergarten and elementary school students and $1,000 for secondary school students. Although the parents

\textsuperscript{26} Id.
\textsuperscript{27} Mueller v. Allen, 103 S.Ct. 3062 (1983).
\textsuperscript{28} Id. at 3068.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 3069.
of public school children also qualify for these deductions, many public school related organizations opposed the increase at legislative hearings. Americans United for Separation of Church and State was the most vocal of the opponents. The Minnesota League of Women Voters, the MCLU, the Minnesota Education Association, the Minnesota Federation of Teachers, and other organizations also fought the increase. The strongest proponent of the increase was the Citizens for Educational Freedom, a nonpublic school parent organization.

The number of Minnesota state income tax returns claiming the education deduction has risen steadily over the past six years. A sample of returns compiled by the Minnesota Department of Revenue shows a 20% increase in the use of the deduction between 1978 and 1982. In 1978, 33,050 returns claimed the deduction. This number had grown to 101,615 by 1982. A comparable increase in the amount of the deduction has also occurred. In 1978, state taxpayers deducted $19.3 million under this provision. By 1982, this had grown to $41.1 million. While the number of taxpayers taking the deduction has grown since 1980, the average deduction has actually declined. In 1978, the average deduction was $583.02. By 1982, it had fallen 30.6% to $404.61. This drop is attributable primarily to an influx of taxpayers claiming smaller deductions for expenses related to public education. Ironically, court challenges along with public debate has helped make the deduction more visible to the average Minnesota income taxpayer, their accountants, and lawyers.

Projections show the deduction growing in the years ahead without and legislative action to index or adjust the size of the deduction. According to the Tax Expenditure Budget prepared by the Minnesota Department of Revenue, $5.8 million in additional tax revenue will be forgone through this deduction in 1985. This will grow to $7.3 million in 1986, and to $7.7 million in 1987.31

CONCLUSION

Just as litigation has helped resolve the constitutional debate over Minnesota's tuition income tax deduction, the discussion has also helped to solidify its political support. Minnesota’s current Governor, Rudy Perpich, has just concluded a

successful drive to eliminate many income tax deductions and credits in the name of simplification. Significantly, Governor Perpich visibly avoided any effort to tamper with the tuition tax deduction, knowing of its strong support both within the legislature and among the public. While other states and the nation as a whole search for viable educational alternatives to the industrial model of public education, Minnesota has found one option that seems to work well for parents, regardless of income, and their children in both public and nonpublic schools.