

To: Andrew Hoover, ACLU-PA Legislative Director
From: Sara Rose, ACLU-PA Staff Attorney
Date: February 9, 2011

Re: Legal analysis of constitutionality of SB 1, which provides tuition vouchers for elementary and secondary students to attend private schools

Question Presented: Does SB 1, which provides state-funded tuition vouchers to students for use at private schools, including sectarian schools, violate the Pennsylvania Constitution?

Short Answer: Yes. The Commonwealth's appropriation of funds for tuition vouchers to be used by students at private schools, including sectarian schools, would violate three separate provisions of the Pennsylvania Constitution:

- First, providing tuition vouchers to students who attend sectarian schools violates Article III, Section 15, which prohibits the appropriation or use of funds raised for the support of public schools to sectarian schools, and Article III, Section 29, which prohibits appropriations to sectarian institutions.
- Second, providing publicly funded tuition vouchers to individual students and/or parents violates Article III, Section 29, which bars appropriations made for educational purposes to any person except for higher educational purposes.
- Third, providing public funds, through tuition vouchers, to private schools violates Article III, Section 30, which prohibits appropriations to educational institutions that are not under the absolute control of the Commonwealth unless the appropriation is supported by a super-majority of the elected members of each house.

Overview of SB 1

Senate Bill 1 would amend the Public School Code of 1949 by adding an article that creates a program for providing tuition vouchers to eligible students through what are called "Opportunity Scholarships." The tuition voucher program would initially provide vouchers to low-income students attending a "persistently low-achieving school" that they could use at any

public and participating private school in the Commonwealth but would eventually provide vouchers to all low-income students in the Commonwealth.¹ Because this memorandum is limited to analyzing the constitutionality of vouchers for private schools, only the facts applicable to that part of the legislation will be discussed.

Students who wish to obtain a voucher for tuition at a private school must apply to the Education Opportunity Board, which is established under the Department of Education. Students must also apply for enrollment directly to the private school they wish to attend. Upon receipt of written confirmation of enrollment from the private school, the Commonwealth will provide a tuition voucher in the form of a check to the parents of the student recipient. The check must be used by the parents for payment of tuition at the private school in which the student has enrolled.

The amount of the tuition vouchers will be equal to 100% of the Commonwealth's share of the resident school district's total revenue per average daily membership of the prior school year. It appears that, for every eligible student who receives a tuition voucher, the Commonwealth will reduce the funds it provides to that student's resident school district by the amount of the tuition voucher.

SB 1 specifies that the Pennsylvania Supreme Court shall have exclusive jurisdiction to hear any challenge or to render a declaratory judgment concerning the constitutionality of the tuition voucher program.

¹ To participate, a private school must meet the applicable requirements of Title VI of the Civil Rights Act of 1964 and certify that it (1) "does not discriminate in admission policies or practices for opportunity scholarship recipients on the basis of measures of achievement or aptitude or status as a handicapped person, provided, however, that an applicant may be required to meet established eligibility criteria for participation in magnet schools or in schools with specialized academic missions; and (2) the nonpublic school is in full compliance with all Federal and State laws."

Legal Analysis

Although the U.S. Supreme Court has held that the Establishment Clause of the First Amendment to the U.S. Constitution does not prohibit the government from providing vouchers to students even if those students choose to use the vouchers to pay tuition at sectarian schools,² the Pennsylvania Constitution contains three provisions that bar the legislature from appropriating funds to individual elementary and secondary students or their parents as well as to private elementary and secondary schools. Such appropriations are prohibited regardless of whether the funds are appropriated to the schools or the students themselves or whether the funds flow to sectarian or nonsectarian schools. Article III, Sections 15 and 29 prohibit the appropriation of funds to sectarian schools and institutions. Article III, Section 29 also bars the appropriation of funds to individuals for educational purposes, except for higher educational purposes. Article III, Section 30 prohibits the appropriation of funds to educational institutions that are not under the absolute control of the Commonwealth unless two-thirds of the elected members of each house vote in support of such an appropriation.

I. Article III, Sections 15 and 29 Prohibit the Legislature from Appropriating Funds for Tuition Vouchers that Are Used to Attend Sectarian Schools.

The Pennsylvania Constitution contains two provisions specifically barring the use of public funds to support sectarian, or religious, schools. The lack of any restriction under SB 1 on the use of tuition vouchers at private sectarian schools violates both of these provisions.

Article III, Section 15 commands that:

No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.

² See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Under SB 1, money that the Commonwealth would otherwise distribute to individual school districts will be diverted to tuition vouchers based on the number of eligible students in the school district who are awarded vouchers for use at a private school or public school outside of his or her district. If any student uses a voucher to pay tuition at a religious school, such use will violate the state constitution's ban on the appropriation or use of "money raised for the support of the public schools of the Commonwealth" for the support of a sectarian school. There is no case law in Pennsylvania upholding the appropriation of public funds to sectarian schools. Indeed, only two Pennsylvania Supreme Court cases have interpreted Article III, Section 15, and both of those cases concerned the provision of bus transportation to sectarian school students.³ Although, in both cases, the Pennsylvania Supreme Court upheld a statutory requirement that local school districts provide free bus transportation to private school students, the Court's opinions in those cases made a clear distinction between bus transportation and instruction. In *Springfield School District v. Delaware County*, for example, the Court held that the statute requiring school districts to provide bus transportation to private-school students within a certain geographic area did not violate Article III, Section 15 because "no state monies reach the coffers of these church-affiliated schools" and because simply providing bus transportation did not constitute support of sectarian schools.⁴ Relying on its prior decision in *Rhoades*, the Court reasoned that "transporting a child at public expense to a parochial school cannot 'be regarded as supporting a place of worship'" because "the buses are operated for the benefit of the children

³ See *Rhoades v. Abington Twp. Sch. Dist.*, 424 Pa. 202, 226 A.2d 53 (1967); *Springfield Sch. Dist. v. Dept. of Educ.*, 397 A.2d 1154, 1171 (Pa. 1970).

⁴ 397 A.2d at 571-72.

who ride it (sic) and not for the benefit of the church.”⁵ In *Rhoades*, the Court likened providing bus transportation to private-school students to providing services, such as police and fire departments, to churches.⁶ According to the Court, the primary purpose of bus transportation is to ensure the safety of students.⁷

By contrast, tuition vouchers constitute direct payments from the state to sectarian schools. Although SB 1 contemplates a situation in which voucher checks are sent to parents, who then sign the checks over to the schools at which their children have enrolled, the funds are not distributed to the parents until the state receives written confirmation of enrollment from the private school in which the child has enrolled and the funds are earmarked for payment of tuition at a particular school. The idea that the funds flow to private schools from the parents of the student instead of the state is a legal fiction, and courts in other states have held that voucher checks that are sent to private schools via students’ parents are no different than direct payments by the state to those private schools.⁸ Accordingly, under SB 1, funds raised for the support of

⁵ *Id.* at 572 & n.20. In *Rhoades*, Justice Musmanno explained that buses were not places of worship because “[t]he general gayety, levity and juvenile frivolity which prevails among children riding any transportation vehicle rules out the solemnity of a place of worship.” 226 A.2d at 63.

⁶ *Id.* at 64-65, 69.

⁷ *Id.* at 66, 69. Justice Musmanno also noted that providing bus transportation to private school students would be “salubrious and educational for the children in that public and nonpublic school children will mingle, converse and soon learn that children are the same everywhere.” *Id.* at 66. By contrast, SB 1 would further separate children by increasing private school attendance.

⁸ See *Opinion of the Justices to the Senate*, 514 N.E.2d 353, 356 (Mass. 1987) (holding that senate bill providing for tax deduction for public and non-public elementary and secondary school tuition, textbooks, and transportation expenses amounted to use of public money in support of non-public schools, in violation of Massachusetts Constitution, and explaining that “the form of payment is not dispositive on the issue whether the payment is prohibited”); *Almond v. Day*, 89 S.E.2d 851 (Va. 1955) (holding that educational grants to orphans of veterans violated

public schools will be appropriated to sectarian schools in every case in which a student uses a voucher to pay tuition at a sectarian school, in violation of Article III, Section 15.

In addition, unlike money spent by school districts on bus transportation for private-school students, money appropriated to sectarian schools will be used for religious purposes, such as worship services and religious education. This distinction was of central importance to the *Rhoades* majority, which considered **“the fact that the transportation of students is ... ‘so separate and indisputably marked off’ from functions in any sense associated with religion” to be “ultimately persuasive” to its holding** that requiring school districts to provide bus transportation to private schools did not violate the federal or state constitutions.⁹

Thus, SB 1 lacks the saving characteristics of the school transportation laws. The U.S. Supreme Court’s decision in *Zelman* does not affect the analysis under the Pennsylvania Constitution because Article III, Section 15 is more restrictive than the federal Establishment Clause in that, unlike the Establishment Clause, it specifically prohibits public funds from being appropriated to or used for the support of sectarian schools.¹⁰ **Indeed, other states with similar**

Virginia Constitution’s prohibition on appropriating public funds to private schools even though the grants were made to the orphans themselves).

⁹ *Id.* at 70 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947)). Justice Roberts’ opinion was joined by Justices Jones, Eagan and O’Brien. Justices Bell and Cohen would have held the statute invalid under the predecessors of Article III, Sections 15 and 29. Justice Musmanno, although his opinion is reported first, wrote for himself alone.

¹⁰ The legislative history surrounding the adoption of the predecessor to Article III, Section 15 at the 1874 Constitutional Convention reveals that the delegates were concerned about public funds flowing to private schools, the vast majority of which were run by religious orders. *See* II Debates of Constitutional Convention (1873) at 439 (Remarks of Mr. Darlington) (object of amendment was “to preclude any portion of the public money being appropriated to the support of exclusively religious schools, whether Quaker, Catholic, or what you will.” “Every school to which money would be appropriated, no matter how raised, whether by the state or by taxation in a school district should be for public schools ... It was to make the provision of the section so clear upon that point that there could never be any question upon it in the future ...”). Delegates

constitutional provisions have concluded since the *Zelman* decision that vouchers for private schools violate their state constitutions.¹¹ Significantly, no state court has upheld tuition vouchers for private schools against challenges brought under their state constitutions since *Zelman*.

Article III, Section 29 commands that:

No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denomination and sectarian institution, corporation or association: Provided, that appropriations may be made for pensions of gratuities for military service and to blind persons twenty-one years of age and upwards and for assistance to mothers having dependent children and to aged persons without adequate means of support and in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology.

specifically rejected the notion that the Constitution should allow the legislature and local authorities latitude in educating particular groups of children. Although one delegate argued that, “If as the gentleman from Philadelphia says, they can get Protestant vagrants educated in the Protestant Home cheaper than they can elsewhere, and Catholic vagrants at the Catholic Home ... I am perfectly willing to let them do it ...” (VI Debates at 84) (Remarks of Rep. Broomall), that argument was rejected by the Convention, and an amendment was adopted specifically prohibiting the appropriation to or use of public funds to support sectarian schools.

¹¹ See *Cain v. Horne*, 202 P.3d 1178 (Az. 2009) (holding that state-funded program providing tuition vouchers to students with disabilities and foster children that could be used at private or public schools violated Arizona Constitution provision barring the “appropriation of public money made in aid of any church or private or sectarian school, or any public service corporation”); *The Constitutionality of School Vouchers in Hawaii*, Haw. Att’y Gen. Op. 03-01 (2003), available at <http://hawaii.gov/ag/main/publications/opinions/2003> (concluding that tuition vouchers for private schools would violate Hawaii Constitution provision barring the appropriation of public funds “for the support of or benefit of any sectarian or private educational institution”); see also N.M. Att’y Gen. Op. 10-06, available at <http://www.nmag.gov/Opinions/Opinion.aspx?OpID=1123#CompleteOpinion> (concluding that state law requiring payment of public money for textbooks provided to students attending private schools, including sectarian schools, likely violated New Mexico Constitution provisions barring funds raised for educational purposes to be used for “the support of any sectarian denominational or private school, college or university”).

Section 29 prohibits the legislature from appropriating funds for educational purposes to any sectarian institution as well as to any person. Accordingly, Section 29 bars the legislature from appropriating funds for a school voucher program either to students directly, regardless of whether they attend a sectarian school, or to the schools themselves if they are sectarian.

Although the Pennsylvania Supreme Court upheld payments for juveniles committed to sectarian homes for dependent children on the ground that providing care was a “governmental duty” rather than a “charitable or benevolent purpose” prohibited by Article III, Section 29, the reasoning is inapplicable to educational expenditures like the proposed tuition voucher bill.¹² Unlike payments to the foster homes in *Schade*, the purpose of the proposed voucher bill is clearly “educational” rather than arguably charitable or benevolent, and hence squarely within the prohibition of Article III, Section 29.

II. Article III, Section 29 Bars the Legislature from Appropriating Funds to Individuals for Educational Purposes.

Section 29’s restriction on charitable, educational or benevolent appropriations to persons is illustrated by the Pennsylvania Supreme Court’s decision in *Busser v. Snyder*.¹³ In that case, the Court struck down a statute established to provide financial assistance to low-income senior citizens, holding that the statute violated the predecessor to Article III, Section 29 because it appropriated funds for charitable or benevolent purposes to people meeting specific criteria.¹⁴ That the funds flowed through a state agency before being distributed to individuals was of no

¹² *Schade v. Allegheny County Institution District*, 386 Pa. 507, 126 A.2d 911 (1956).

¹³ 128 A. 80 (Pa. 1925).

¹⁴ *Id.* at 82-86. The provision allowing payments to “aged persons without adequate means of support” was added after the *Busser* decision.

consequence to the Court’s decision, which reasoned that the funds were “nonetheless a gift directly to the individual, even though it pauses for a moment on its way thither in the hands of the agency.”¹⁵ Under SB 1, the proposed tuition vouchers are no different from the financial assistance that was struck down in *Busser*. Even though the money is appropriated to a state agency rather than individuals themselves, the language of SB 1 sets out the criteria that the executive branch must use in distributing the funds, making it an appropriation to the persons designated as beneficiaries in the legislation. And the money is clearly appropriated for an educational purpose. Indeed, in 1963, the Legislature deemed it necessary to amend Article III, Section 29 in order to permit scholarship grants to students for higher education.

III. Section 30 Requires a Super-Majority to Appropriate Funds to Any Educational Institution Not under the Absolute Control of the Commonwealth.

Article III, Section 30 commands that:

No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each House.

In 1995, the Pennsylvania Supreme Court invalidated line-item appropriations in the General Appropriation Act, holding that the appropriations violated Section 30 because they were earmarked for specific charitable institutions and did not constitute reimbursement for services rendered by the entity for performing a governmental duty.¹⁶ Although the legislature technically appropriated the funds to an executive branch agency, the Court held that the funds were in fact intended for specific charitable recipients and the agency was merely a pass-through

¹⁵ *Id.* at 84.

¹⁶ *Common Cause of Pa. v. Pennsylvania*, 668 A.2d 190, 204 (Pa. Cmwltth 1995).

because of the numerous restrictions that the legislature placed on the agency's discretion in deciding how to disburse the funds.¹⁷ Given the significant restrictions that SB 1 places on the Education Opportunity Board's discretion in distributing the funds appropriated to the voucher program, a court would likely find that the funds are appropriated to the schools that ultimately receive them, rather than the Board. In addition, private schools are by definition not under the absolute control of the Commonwealth. The only basis on which Section 30 may not apply is if the private schools are found to be performing a governmental duty. It is difficult to see, however, how a sectarian school could be held to perform a governmental duty when the Commonwealth would be prohibited by both the state and federal constitutions from carrying out the same course of religious instruction or from using religion as a criterion in determining admission. Accordingly, it is likely that a court would hold SB 1 to violate Article III, Section 30 unless it is passed by two-thirds of both houses.

Conclusion

The tuition voucher program, as put forth in SB 1, would violate at least three provisions of the Pennsylvania Constitution. The provision of the bill allowing students to use state funds to attend sectarian schools would violate Sections 15 and 29 of Article III. In addition, simply providing state funds to individual students for educational purposes violates Article III, Section 29. Finally, unless SB 1 is passed by two-thirds of both houses, it is likely that it will be held to violate Article III, Section 30 by appropriating funds to educational institutions that are not within the absolute control of the Commonwealth.

¹⁷ *Id.* at 204-206.