



Eastern Region Office  
P. O. Box 40008  
Philadelphia, PA 19106  
215-592-1513 T  
215-592-1343 F

Central Region Office  
P. O. Box 11761  
Harrisburg, PA 17108  
717-238-2258 T  
717-236-6895 F

Western Region Office  
313 Atwood St.  
Pittsburgh, PA 15213  
412-681-7736 T  
412-681-8707 F



**TESTIMONY SUBMITTED  
BY SARA J. ROSE, STAFF ATTORNEY  
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA  
TO  
HOUSE DEMOCRATIC POLICY COMMITTEE  
IN OPPOSITION TO SENATE BILL 1 (SCHOOL VOUCHERS)  
ERIE, PENNSYLVANIA  
MARCH 15, 2011**

Chairman Sturla and members of the committee, thank you for the opportunity to participate in today's hearing on Senate Bill 1, which authorizes state-funded tuition vouchers for low-income students to attend non-public elementary and secondary schools. My name is Sara Rose. I am a staff attorney with the American Civil Liberties Union of Pennsylvania, and I am here today on behalf of the 18,000 members of the ACLU of Pennsylvania. Founded in 1920, the ACLU is one of the nation's oldest civil-rights organizations and currently boasts half a million members nationwide. ACLU activity in Pennsylvania dates to the 1930s.

The ACLU of Pennsylvania opposes SB 1, and our opposition is grounded in two key principles. First, SB 1 violates the state constitution because it would provide funding to sectarian schools and to individuals for educational purposes. Second, SB 1 funnels state funding to institutions that can and do discriminate against students and parents.

Two provisions of the state constitution bar the Commonwealth from funding religious schools. Article III, Section 15 states:

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.

Under SB 1, state funding that would otherwise go to the school district where a student resides will instead follow the student to a private school. If that school is religiously based, it is a violation of Article III, Section 15.

There are no Pennsylvania cases upholding state appropriations for religious schools under Section 15. The closest cases are two state supreme court cases upholding a state law requiring school districts to provide bus transportation for private-school students,<sup>1</sup> but in those cases, the courts ruled that providing transportation is a safety measure equivalent to providing firefighting services to churches. In *Springfield School District v. Delaware County*, for example, the Court held that a 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.

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.

The state constitutional bar on funding sectarian schools is also found in Article III, Section 29 of the Pennsylvania Constitution, which states:

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....

With this language, the state constitution again provides a roadblock for SB 1. The Pennsylvania Supreme Court has used Section 29’s predecessor to strike down

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<sup>1</sup> 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).

appropriations for sectarian health organizations,<sup>2</sup> assistance to low-income seniors,<sup>3</sup> and state reimbursement for sectarian hospitals.<sup>4</sup> Although the state supreme court has more recently ruled that payments to reimburse religious homes for the care of foster children do not violate Section 29 because they represent a governmental duty rather than a charitable or benevolent purpose,<sup>5</sup> no such distinction exists with respect to vouchers. Payments to religious schools are clearly for an educational purpose and are thus barred by Section 29.

The authors of SB 1 have suggested that requiring a parent to endorse a check from the state government to a sectarian school avoids constitutional entanglements because the government funds that flow to sectarian schools will result from the choices of parents and not the government. But while that procedure may avoid violating the federal Establishment Clause,<sup>6</sup> it does not immunize the voucher program from scrutiny under the Pennsylvania Constitution, which explicitly bars government aid to sectarian institutions for educational purposes.

Indeed, since the U.S. Supreme Court held that a Cleveland voucher program did not violate the federal Establishment Clause in 2002, every state to consider the issue of whether state-funded voucher programs violate their state constitutions has concluded that they do.<sup>7</sup> Both the Florida and Arizona Supreme Courts have struck down voucher

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<sup>2</sup> See *Collins v. Kephart*, 271 Pa. 428, 117 A. 440 (1921).

<sup>3</sup> See *Busser v. Snyder*, 282 Pa. 440, 128 A. 80 (1925).

<sup>4</sup> See *Collins v. Martin*, 290 Pa. 388, 139 A. 122 (1927).

<sup>5</sup> See *Schade v. Allegheny County Institution Dist.*, 386 Pa. 507, 126 A.2d 911 (1967).

<sup>6</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

<sup>7</sup> 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"); *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006) (holding that state-funded voucher

programs in their states, and the attorneys general of New Mexico and Hawaii have concluded that voucher programs, if enacted, would violate their state constitutions.<sup>8</sup>

Like the voucher programs in Arizona and Florida, a system of state-funded vouchers in Pennsylvania would violate the state constitution even if no state funds flowed to religious schools. Article III, Section 29 prohibits the appropriation of public funds to persons for educational purposes. This prohibition against providing vouchers or scholarships for educational purposes is so clear that voters had to approve a constitutional amendment in 1963 to allow the state to make appropriations for scholarship grants or loans for higher educational purposes. Extending such grants to elementary and secondary students through a voucher program must be put to the same process of voter ratification if such appropriations are to comport with the state constitution.

In addition to the state constitution's clear prohibition on appropriating state funds to private religious schools or to individuals who intend to use the funds for elementary or secondary education, Article III, Section 30 of the Pennsylvania Constitution requires that any appropriation to a private educational institution be passed by a two-thirds majority of each house:

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program violated state constitutional provisions requiring that free education be provided through system of free and uniform system of public schools).

<sup>8</sup> See *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").

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.

Accordingly, even assuming for argument's sake that the voucher program did not violate any other provisions of the state constitution, the measure would nevertheless have to be approved by super majorities in each house. The Pennsylvania Supreme Court has recently interpreted Section 30 to require such super majorities whenever the legislature earmarks funds for particular charitable or educational recipients.<sup>9</sup> This is so even if the legislature technically appropriates the funds to an executive branch agency as long as there are restrictions imposed on the agency's discretion in deciding how to disburse the funds.<sup>10</sup>

Along with these constitutional concerns, the ACLU of Pennsylvania also opposes SB 1 because it provides state funding for private schools that can and do discriminate against children and families for a wide variety of reasons, including disability, ethnicity (specifically, language skills), religion, gender, sexual orientation, gender identity or expression, marital status and familial status. There is no language in SB 1 banning such discrimination against students.

In the 1980s, a lawsuit was filed against the archdiocese of Philadelphia accusing the archdiocese of racial discrimination.<sup>11</sup> The Pennsylvania Commonwealth Court ruled that parochial schools are not "public accommodations" and thus do not fall under the jurisdiction of the Pennsylvania Human Relations Act, the state's non-discrimination law.

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<sup>9</sup> *Common Cause of Pa. v. Pennsylvania*, 668 A.2d 190, 204 (Pa. Cmwlth 1995).

<sup>10</sup> *Id.* at 204-206.

<sup>11</sup> *See Roman Catholic Archdiocese of Philadelphia and St. Stephen's Parish v. the Pennsylvania Human Relations Commission*, 119 Pa. Commw. 445, 548 A. 2d 328 (1988).

With the exception of denying admission based on race,<sup>12</sup> religious schools are free to discriminate.

In addition, state law does not protect people from discrimination on the bases of sexual orientation, gender identity or expression, familial status, or marital status. Lesbian, gay, bisexual, and transgender (LGBT) parents and students from non-traditional families are susceptible to discrimination when applying to or attending private schools. In recent sessions, there have been bills introduced to add these protected classes to the PHRA, but they have failed to pass. SB 1, meanwhile, contradicts the spirit of those bills by providing state funds to private schools that discriminate.

The ACLU of Pennsylvania agrees with the sponsors of SB 1 that access to a quality education is a civil-rights issue. Most students who are getting an inadequate education are low-income and many are racial and ethnic minorities. But SB 1 presents civil rights problems of its own, particularly for students with disabilities, LGBT children and parents, children of minority religions, and non-English speakers.

The ACLU of Pennsylvania applauds the authors of SB 1 for exploring new methods for increasing the quality of education for students who are not currently receiving the education they deserve. But SB 1 is not the answer. This legislation is plagued with constitutional and civil-rights problems. For all of these reasons, the ACLU of Pennsylvania opposes SB 1.

Chairman Sturla, thank you for the opportunity to testify today, and thank you for taking the time and effort to hold these hearings. I will take questions after the other members of the panel have testified.

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<sup>12</sup> 24 Pa. Cons. Stat. § 15-1521.