

The Taxpayer-Funded School Vouchers
Created by S.B. 1 Would Violate the Pennsylvania Constitution

I. INTRODUCTION

The taxpayer-funded vouchers created by S.B. 1, the Opportunity Scholarship and Educational Improvement Tax Credit Act (“the Act”), would violate the Pennsylvania Constitution. The Act would, among other things, provide taxpayer-funded tuition vouchers for a limited number of public school students to attend private schools—including religious schools—and by its third year the program could cost taxpayers up to \$1 billion. The Pennsylvania courts have never upheld the use of taxpayer dollars to fund religious education, and instead have made clear that the state constitution prohibits such a regime.

The individuals and organizations co-signing this document strongly support the right of every child in Pennsylvania to receive a quality public education. We likewise believe that any education legislation considered by the Legislature must not violate the Pennsylvania Constitution and instead should further the fundamental democratic principles that unite our Commonwealth.

S.B. 1 violates the Pennsylvania Constitution and should not be approved by the General Assembly. The Act’s constitutional problems are summarized below. A more detailed analysis follows.

Violation of Article III, Section 15: No Taxpayer Money for Sectarian Schools. In authorizing the use of taxpayer funds to finance sectarian schools, the Act violates Pennsylvania Constitution Article III, Section 15, which provides 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.” The Pennsylvania Supreme Court has distinguished mere incidental support—such as funding transportation to religious schools—from the use of taxpayer funds to pay for actual religious education. The Act improperly authorizes the latter, and it is irrelevant under state law that the money goes to parents before it is paid to religious schools. Although supporters of S.B. 1 contend that Article III, Section 15 offers no greater protection than does the federal Establishment Clause, the decisions of the Pennsylvania Supreme Court illustrate that Article III, Section 15 provides broader protection than does federal law and would indeed apply to invalidate the Act.

Violation of Article III, Section 29: Impermissible Appropriation of Taxpayer Funds. The Act is unconstitutional because it authorizes the appropriation of taxpayer funds both to sectarian institutions and to individuals for educational purposes. Article III, Section 29 provides that “[n]o appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational or sectarian institution, corporation or association.” Moreover, taxpayer-funded vouchers do not fit within the “governmental duty” exception to this provision. The Commonwealth’s duty is to provide all school-age Pennsylvania residents with a public education, not to subsidize the private-school enrollment of a select few. If anything, taxpayer-funded vouchers interfere with the government’s duty: private schools financed by vouchers need not comply with state testing, certification, or non-discrimination requirements, and taxpayer-funded vouchers reduce the funds available for public education.

Violation of Article III, Section 30: Supermajority Required When Taxpayer Money Goes to Schools Not Under the Commonwealth’s Control. The Act authorizes the appropriation of taxpayer funds to educational institutions not under the Commonwealth’s absolute control. Article III, Section 30 provides that “[n]o 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 public schools of the State, except by a vote of two-thirds of all the members elected to each House.” The private schools financed by taxpayer-funded vouchers are not under the Commonwealth’s control, let alone its “absolute control”: the Commonwealth does not accredit religious schools, does not devise or approve private-school curricula, does not test the academic progress of private-school students, and does not certify the credentials of private-school teachers. Moreover, private schools need not comply with the full range of federal and state laws that otherwise protect Commonwealth citizens from improper discrimination.

Violation of Article I, Section 3: No Interference with Religious Freedom. Given the modest size of the vouchers and the high cost of non-sectarian private schools, most low-income families have little choice but to redeem the taxpayer-funded vouchers at sectarian schools—where students will receive religious education that may conflict with the religious faith of these students and their families. Article I, Section 3 of the Pennsylvania Constitution provides that “no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience.” The Act violates these protections by, in essence, forcing low-income voucher recipients to expose their children to religious education and compelling taxpayers to support religious education. Although the Pennsylvania Supreme Court suggested, in the 1970s, that Article I, Section 3 provides no greater protection than does the federal Establishment Clause, the Court would likely take a different position today, since recent decisions stress the need to examine state constitutional provisions independently of their federal counterparts.

The experience of other states confirms that taxpayer-funded vouchers raise serious constitutional concerns. Even after the U.S. Supreme Court held, in 2002, that the federal Establishment Clause permits certain taxpayer-funded school vouchers, many state courts and Attorneys General—including those in Arizona, Colorado, Florida, Hawaii, and New Mexico—have concluded that taxpayer-funded vouchers contravene the requirements of state constitutions.¹ When tested in court, S.B. 1 would likely fare no better.

¹ See, e.g., *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (taxpayer-funded vouchers violated Arizona Constitution’s prohibition against the “appropriation of public money made in aid of any church or private sectarian school”); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (taxpayer-funded vouchers violated Florida Constitution’s requirement of a “uniform, efficient, safe, secure, and high quality system of public schools”); *Owens v. Colo. Congress of Parents, Teachers and Students*, 92 P.3d 933 (Colo. 2004) (taxpayer-funded vouchers violated Colorado Constitution’s requirement of local control over school instruction); Haw. Att’y Gen. Op. 03-01 (2003) (taxpayer-funded vouchers violate Hawaii Constitution’s prohibition on use of public funds “for the support of or benefit of any sectarian or private educational institution”), available at <http://hawaii.gov/ag/main/publications/opinions/2003>; N.M. Att’y Gen. Op. 10-06 (2006) (use of taxpayer funds to purchase textbooks for sectarian schools violates New Mexico Constitution’s prohibition on use of educational funds for “the support of any sectarian, denominational, or private school, college or university”), available at <http://www.nmag.gov/Opinions/Opinion.aspx?OpID=1123#CompleteOpinion>.

II. ANALYSIS

A. The Act Provides Taxpayer Funds to Sectarian Schools in Violation of Article III, Section 15.

The Act authorizes the transfer of taxpayer funds from public schools to pay students' tuition at sectarian schools. In so doing, it violates Article III, Section 15 of the Pennsylvania Constitution—entitled “Public school money not available to sectarian schools”—which 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.”

Under S.B. 1, private-school vouchers would be funded with “money raised for the public schools.” The legislation provides that when a voucher is redeemed by a student currently enrolled in public school, the state will subsequently deduct the funds allocated to that voucher from the public school district that the student would otherwise have attended. And when those funds finance that student's religious-school tuition, they necessarily go to the “support of [a] sectarian school.”

The Pennsylvania Supreme Court has repeatedly concluded that the state constitution prohibits taxpayer-funded schools from engaging in sectarian education. In particular, the Court has announced that Article III, Section 15 draws a clear line between (1) the use of taxpayer funds to support purely secular activities at religious institutions, which the state constitution permits, and (2) the use of taxpayer funds to support actual religious education, which the state constitution prohibits.

First, in *Hysong v. School District of Gallitzin Borough*, 30 A. 482 (Pa. 1894), the Supreme Court upheld a school district's employment of nuns only because they did not engage in sectarian teaching. *See id.* at 483 (noting “the absence of proof that religious sectarian instruction was imparted . . . during school hours” (quotations omitted)).

Second, in *Rhoades v. School District of Abington Township*, 226 A.2d 53 (Pa. 1967), the Court upheld a law requiring public-school districts to transport private or religious school students because, among other things, a school bus serves a “secular, public purpose.” *Id.* at 63. A majority of the Court found it “ultimately persuasive” that “the transportation of students is ‘so separate and indisputably marked off’ from functions in any sense associated with religion.” *See id.* at 70 (concurring opinion of Roberts, J., joined by Jones, Eagen, and O'Brien, JJ.).

Third, in *Springfield School District v. Department of Education*, 397 A.2d 1154 (Pa. 1979), the Court held that Article III, Section 15 is implicated when “state funds flow to the sectarian school or institution.” *Id.* at 1171. The Pennsylvania Constitution permits public funding of transportation to sectarian schools, explained the Court, only because “no state monies reach the coffers of these church-affiliated schools.” *Id.*

Applying the Pennsylvania Supreme Court's mandates, the Commonwealth Court has likewise distinguished between the (permissible) use of taxpayer funds for student transportation and the (unconstitutional) use of taxpayer funds for actual religious education. In *School District of Pittsburgh v. Commonwealth*, 382 A.2d 772 (Pa. Commw. Ct. 1978), the Court held that the

government may transport students to religious schools “because the transportation of students is an activity wholly without religious significance.” *Id.* at 777. Unlike money spent by school districts on transportation, however, taxpayer money appropriated for tuition to sectarian schools will be used to support the school’s existence and its religious education—activities of obvious “religious significance.”

The requirements of Article III, Section 15 cannot be avoided merely because taxpayer funds are disbursed initially to parents, who in turn transfer those funds to religious schools. Inclusion of a middleman does not cure the constitutional maladies, as the legislature may not “do the thing indirectly which the Constitution prohibits it from doing directly.” *See Common Cause of Pa. v. Com.*, 668 A.2d 190, 203 (Pa. Commw. Ct. 1995) (quoting *Busser v. Snyder*, 128 A. 80 (Pa. 1924)), *aff’d*, 677 A.2d 1206 (Pa. 1996). For the same reason, the legislature cannot evade these requirements by initially appropriating voucher funds to an agency: “The gift is not to the [agency], but to the particular persons selected by the Legislature to receive it. The [agency] cannot use the money; it merely passes it on to the selected class. It is nonetheless a gift directly to the individual, even though it pauses for a moment on its way thither in the hands of the agency.” *Busser*, 128 A. at 84.

In defending S.B. 1, its supporters have observed that the U.S. Supreme Court upheld a taxpayer-funded program against a *federal* Establishment Clause challenge in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and have asserted that Article III, Section 15 of the Pennsylvania Constitution provides no greater protection than the Establishment Clause. *See* Written Testimony of Philip Murren, Esq. to the Senate Education Committee, Feb. 16, 2011, *available at* <http://www.piccola.org/education/2011/021611/Murren.pdf> (“Murren Testimony”). But the latter claim—that Article III, Section 15 mirrors the Establishment Clause—ignores the Pennsylvania Constitution’s text and legislative history, contradicts key state court decisions, and flouts elementary rules of construction.

In fact, Article III, Section 15 restricts the use of taxpayer funds more strictly than does the federal Establishment Clause. Arguing otherwise, S.B. 1 supporters rely on an isolated quote from *Springfield* which states that “the limitations contained in our constitution do not extend beyond those announced by the United States Supreme Court in interpreting the first amendment to the federal constitution.” Murren Testimony at 5 (quoting 397 A.2d at 1170). But this selective quotation omits crucial words from the beginning of that sentence, which links it to an entirely different provision: “[W]e have earlier held that *the provisions of Article I, Section 3* of our constitution do not exceed the limitations in the first amendment’s establishment clause.” *Id.* (emphasis added).

As detailed below in Part D, it is doubtful that the Pennsylvania Supreme Court would rule today that Article I, Section 3 is coextensive with the federal Establishment Clause. But even if the Pennsylvania Supreme Court would hold that Article I, Section 3 provides no more protection than does the Establishment Clause, the Pennsylvania Supreme Court has *not* made a similar ruling as to Article III, Section 15. Indeed, the discussion in *Springfield* of Article III, Sections 15 and 29 turned not on their relationship to the federal Establishment Clause, but on the Court’s observation that those two provisions are triggered only “when state funds flow to the sectarian school or institution.” *Id.* at 1171. For in *Springfield*—and unlike in the scheme that would be created by S.B. 1—“no state monies reach[ed] the coffers of the[] church-affiliated schools.” *Id.*

The argument that the Pennsylvania Constitution provides no greater protection than does the federal Establishment Clause has another fatal flaw: it would necessitate reading several constitutional provisions out of existence. S.B. 1 supporters argue that three distinct clauses—Article I, Section 3; Article III, Section 15; and Article III, Section 29—are each coextensive with the federal Establishment Clause, and thus that these three distinct clauses have identical meanings. Such an interpretation—three separate clauses, one identical meaning—would contravene the fundamental rule of construction that each provision of a law must be given independent effect. *See, e.g.* Statutory Construction Act of 1972, 1 Pa.C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all of its provisions”); *Com. v. Driscoll*, 401 A.2d 312 (Pa. 1979) (“We must assume that the legislature intends every word of the statute to have effect”).

In sum, the Pennsylvania courts have permitted the government to transport students to sectarian schools only because those schools received no taxpayer dollars and because transportation alone has no religious significance. Conversely, the Act’s taxpayer-funded voucher program would divert millions—if not a billion—taxpayer dollars to the coffers of sectarian schools, which would use these taxpayer funds to provide religious education. This arrangement violates not only the plain language of Article III, Section 15, but also its intent: to ensure that taxpayer funds are not funneled away from public schools to support religion.

B. The Act Authorizes the “Appropriation” of Taxpayer Funds to Individuals for Educational Purposes and to Sectarian Institutions in Violation of Article III, Section 29.

The taxpayer-funded vouchers created by S.B. 1 would also constitute an improper appropriation in violation of Article III, Section 29 of the Pennsylvania Constitution. Subject to exceptions not relevant here, that provision commands, “No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational or sectarian institution, corporation or association.”

Taxpayer-funded vouchers would violate this provision in two ways, since vouchers appropriate funds to both (1) a person, for educational purposes, and (2) a sectarian institution. As to the former, the plain language of this article prohibits appropriations “to any person” for educational purposes, and the word “person” includes “a group or class of persons.” *See Busser*, 128 A. at 84. As to the latter, taxpayer-funded vouchers constitute an appropriation to sectarian institutions, for the reasons discussed above in Part A.

The Pennsylvania Supreme Court has repeatedly held that similar programs violate Article III, Section 29 (or its predecessor). For example, the Court has invalidated the following appropriations:

- Taxpayer funding of religiously-affiliated hospitals and Duquesne University. *Collins v. Kephart*, 117 A. 440 (Pa. 1921).
- Taxpayer funding under the Old Age Assistance Act. *Busser*, 128 A. at 84 (Pa. 1925). Although the taxpayer funds went to a government agency before they reached particular individuals, the appropriation was “nonetheless a gift directly to the individual.” *Id.*

- Taxpayer funding of the Department of Welfare, to be distributed to private and religious hospitals. *Collins v. Martin*, 139 A. 122 (Pa. 1927).

The taxpayer-funded vouchers created by S.B. 1 do not fall within the “governmental duty” exception, under which the Pennsylvania Supreme Court has upheld certain appropriations. The Court has applied this exception only to payments “in the nature of reimbursement for services rendered by the entity for the purpose of performing a governmental duty.” *Common Cause of Pa. v. Com.*, 668 A.2d 190 (Pa. Commw. Ct. 1995), *aff’d*, 677 A.2d 1206 (Pa. 1996).² No case, however, has applied the “governmental duty” exception to appropriations for tuition at sectarian private schools.

There is no such case because the private education of a select group of students is not a governmental duty. Rather, the Pennsylvania Constitution directs the legislature to maintain a “thorough and efficient system of *public* education,” Pa. Const. Art. III, § 14 (emphasis added), and the legislature does so through the Public School Code, which provides for the education to every Pennsylvania resident of school age. *See* Public School Code of 1949, 24 P.S. § 1-101 et seq. Rather than facilitating a governmental duty, S.B. 1 would interfere with and undermine that duty by diverting funds from public schools to finance many of the newly-created vouchers.

Nor would the taxpayer-funded education offered by private schools resemble the system of public education that is the government’s duty. Even when they received taxpayer funds, private schools would be exempt from many of the core rules governing public schools, including academic testing, teacher certification, fiscal responsibility, and transparency in operations. In addition, participating schools would not serve all students; rather, they may discriminate against students with disabilities and English Language Learners, and need not provide these students with appropriate programs or services to address their unique needs. Participating schools also need not comply with other laws that protect student rights to religious freedom and freedom of association or expression, and which maintain school safety and prohibit bullying. *See Roman Catholic Archdiocese of Phila. v. Pa. Human Relations Comm’n*, 548 A.2d 328 (1988) (parochial schools are not “public accommodations” under Pennsylvania Human Relations Act and thus need not comply with state anti-discrimination law).

The unconstitutionality of this scheme is confirmed by the legislature’s earlier recognition that a constitutional amendment was necessary to allow the Commonwealth to provide grants or loans to students for higher education. In 1963, what is now Article III, Section 29 of the Pennsylvania Constitution was amended to create an exception for “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.” The accompanying legislation was designed to take effect only if the electorate approved this constitutional amendment. If, as S.B. 1 supporters claim, Article III, Section 29 permits all forms of taxpayer-funded school vouchers—including, as in S.B. 1, taxpayer-funded vouchers for students in secondary school—the addition of a specific exception for higher-education grants would have been unnecessary.

² *See also, e.g., Schade v. Allegheny County Inst. Dist.*, 126 A.2d 911 (Pa. 1956) (payments for the care of neglected and dependent children); *Com. v. Perkins*, 21 A.2d 45 (Pa. 1941) (unemployment benefits); *Schnader v. Liveright*, 161 A. 697 (Pa. 1932) (same).

C. The Act Authorizes the Distribution of Taxpayer Funds to Educational Institutions Not Under the Absolute Control of the Commonwealth, in Violation of Article III, Section 30.

Even if S.B. 1 were to comply with the constitutional provisions described above, it would still need to be approved by a supermajority vote. Article III, Section 30 of the Pennsylvania Constitution, entitled “Charitable and educational appropriations,” 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 public schools of the State, except by a vote of two-thirds of all the members elected to each House.”

This constitutional provision applies to S.B. 1 because private schools are not “under the absolute control of the Commonwealth.” As discussed above in Part B, private schools would be free from student testing, teacher certification, and numerous other laws designed to evaluate schools and protect their students. Moreover, religious schools are not accredited, licensed or monitored by the Commonwealth in any way. And although the same “governmental duty” exception from Article III, Section 29 also applies to Article III, Section 30, *see Penn. Ass’n of State Mental Hosp. Physicians v. Com.*, 437 A.2d 1297 (Pa. Commw. Ct. 1981), that exception does not apply to taxpayer-funded vouchers, for the reasons discussed above in Part B.

D. By Essentially Forcing Low-Income Families to Redeem the Taxpayer-Funded Vouchers at Sectarian Schools, the Act Violates Article I, Section 3.

The scheme of taxpayer-funded vouchers created by S.B. 1 also likely undermines the state constitutional protection of religious freedom. Article I, Section 3 of the Pennsylvania Constitution provides that “no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience.”

Although the Pennsylvania Supreme Court has previously suggested that this provision is no broader than the federal Establishment Clause, the Court would not necessarily embrace such a narrow interpretation today. Before 1974, Pennsylvania courts interpreted this provision independently of the federal Establishment Clause. In 1974, the Pennsylvania Supreme Court stated, in *dicta*, that the state constitution’s religious freedom clause “does not transcend the protection of the First Amendment of the United States Constitution.” *Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 366–67 (Pa. 1974). And in 1979, the Court acknowledged its statement in *Wiest* “that the provisions of Article I, Section 3 of our constitution do not exceed the limitations in the first amendment’s establishment clause.” *Springfield*, 397 A.2d at 1170 (citing *Wiest*).

But when the court made that statement, the U.S. Supreme Court interpreted the Establishment Clause to prohibit voucher-type programs. *See Sloan v. Lemon*, 413 U.S. 825 (1973) (invalidating Pennsylvania’s non-public school tuition reimbursement program). Since then, the Pennsylvania Supreme Court has had no occasion to revisit *Wiest*, which itself offered no authority for construing the state and federal provisions identically. *Wiest* also predated the current rules governing interpretation of the Pennsylvania Constitution; since then, the Pennsylvania Supreme Court has stressed that “it is both important and necessary that we undertake *an independent analysis* of the Pennsylvania Constitution, each time a provision of

that fundamental document is implicated.” *Com. v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) (emphasis added).

Today, the Pennsylvania Supreme Court would likely recognize that taxpayer-funded voucher schemes such as S.B. 1 constrain many participants’ religious freedom and compel taxpayers to support religious education. According to the U.S. Department of Education, more than three-fourths of American private schools are sectarian, and these schools enroll over 80% of all non-public school students. They do so, in significant part, because non-religious schools typically cost nearly three times as much as religious schools. *See, e.g.* National Center for Education Statistics, *Digest of Education Statistics* tbl. 59 (in 2008, average annual costs were \$6,018 for Catholic schools, \$7,117 for other religious schools, and \$17,316 for non-sectarian private schools), available at http://nces.ed.gov/programs/digest/d09/tables/dt09_059.asp. Unsurprisingly, the vast majority of voucher students also attend religious schools; in Cleveland, the figure reached 96%. *See Zelman*, 536 U.S. at 647.

The Act would inevitably produce the same results in Pennsylvania. Even if an individual voucher equaled the average amount spent on a Pennsylvania public-school student (\$7,472.76 in 2008–09), it still would enable low-income parents to send their children *only* to religious schools. Thus, the Act would benefit low-income families only if they were willing to subject their children to mandatory participation in the religious instruction and exercises typical in sectarian schools.

Although provisions permitting students to opt out of religious instruction would be unlikely to cure these problems (given the high risk of peer pressure), S.B. 1 lacks even that minimal protection. Indeed, sectarian schools routinely oppose even modest efforts to permit voucher students to opt out of religious instruction. These schools, moreover, acknowledge that religious themes pervade all of their academic instruction, such that no student could truly opt out. While many sectarian schools may believe that their programs benefit when religion is all-encompassing, such pervasive sectarianism also ensures that taxpayer-funded vouchers will inevitably expose participating students to religious instruction that may differ from that of the family’s faith. The decision to sign up for religious instruction will likely arise out of monetary constraint, not meaningful choice, and the Act would compel taxpayers to support such instruction.

III. CONCLUSION

S.B. 1 violates multiple provisions of the Pennsylvania Constitution. First, the use of taxpayer funds to support sectarian schools would violate Article III, Section 15. Second, the provision of taxpayer funds to individual students for educational purposes and to sectarian institutions would violate Article III, Section 29. Third, unless passed by two-thirds of both Houses, the Act would violate Article III, Section 30 by providing funds to private educational institutions outside the Commonwealth’s control. Finally, by establishing a government benefit that for practical purposes is available to low-income families only at sectarian schools, S.B. 1 also would likely violate the religious freedom protections of Article I, Section 3. We urge the General Assembly to avoid these serious Constitutional violations.

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