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Opinion No. 13-27

Constitutionality of School Voucher Program

QUESTION

Does the school voucher program proposed by an amendment to Senate Bill 196/House Bill 190 of the First Session of the 108th Tennessee General Assembly (hereinafter "HB190") violate either the United States or Tennessee Constitution, specifically the Establishment Clause of the First Amendment of the United States Constitution or article XI, section 12 of the Tennessee Constitution?

OPINION

The proposed amendment to HB190 is defensible from a facial constitutional challenge.

ANALYSIS

HB190, the "Tennessee Choice & Opportunity Scholarship Act," would create a school voucher program applicable to certain Tennessee K-12 students. Under the provisions of the amendment proposed to HB190, a copy of which is attached to this opinion, an "eligible student" is defined as one who (1) is zoned to attend or enrolled in a public school that is in the bottom five percent of schools in overall achievement as determined by the State Board of Education, (2) meets certain age requirements, (3) is a member of a household whose annual income during the year prior to initial receipt of a scholarship met the requirements for a free or reduced price lunch under federal law, and (4) was previously enrolled in a Tennessee public school during the two semesters immediately preceding the semester in which the student receives a scholarship, is enrolling in a Tennessee school for the first time, or received a scholarship in the previous school year. HB190, § 3(2).

A "participating school" is defined as a non-public school that seeks to "enroll eligible students." *Id*. § 3(4). A participating school must:

(1) voluntarily agree to participate;

(2) annually provide notice to the Tennessee Department of Education ("the Department") of an intent to participate;

(3) be identified as a category I, II, or III school pursuant to State education laws and regulations, and comply with all applicable health and safety codes;

(4) annually administer state assessments as provided by State law, or nationally recognized educational progress tests approved by the State Board of Education ("the Board");

(5) provide parents the results of the school's students' annual assessments;

(6) provide the Department with student information regarding graduation rates and other data required by the Department;

(7) comply with non-discrimination policies;

(8) not discriminate against students with special education needs;

(9) accept the scholarship amount provided as payment in full for the cost of tuition and fees that would otherwise be charged by the school;

(10) agree to allow scholarship students to remain enrolled in the school for the entire school year at no additional cost if the school withdraws from the program during the school year;

(11) submit to the Department a financial audit of the school;

(12) demonstrate financial viability to repay any finds that may be owed to the State by filing with the Department financial information or an appropriate surety bond; and

(13) require any person applying as a teacher or any other position requiring close proximity to children to submit to a criminal background check.

Id. § 4. HB190 requires the Department to develop procedures necessary for administering the program. In administering the program, the Department must:

(1) provide notice to parents of student eligibility and participating schools;

(2) accept applications from parents of eligible students and award scholarships to eligible students;

(3) determine and approve school and student eligibility, and conduct a random selection process to award scholarships if the number of applications exceeds the number of scholarships available;

(4) create a standard application;

(5) establish application and participation timelines for students and schools;

(6) remit scholarship payments to participating schools on behalf of scholarship recipients; and

(7) annually publish student achievement and progress information for each participating school.

Id. § 5(a). The maximum annual amount an eligible student may receive is to be equal to the lesser of either the cost of tuition and fees that would otherwise be charged by the school or the amount representing the per pupil state and local funds generated and required through the Basic Education Program (BEP) for the local education agency ("LEA") in which the student resides and is zoned to attend. *Id*. §§ 7(a) & (b).

HB190 provides for the number of scholarships to increase over the first four years of implementation, with no more than 5,000 scholarships awarded for the 2013-2014 school year, no more than 7,500 scholarships awarded for the 2014-2015 school year, no more than 10,000 scholarships awarded for the 2015-2016 school year, and no more than 20,000 scholarships awarded for the 2016-2017 school year and thereafter. *Id*. § 8.

Both the use and legality of voucher-type programs have been vigorously debated and have engendered much scholarly commentary as well as various legal challenges to voucher initiatives that have been adopted by several states. *See, e.g*., 1 Education Law § 1.30, *Vouchers* (Apr. 2011); Amelia A. Ragan, Comment, *The Universal School Vouchers Roadblock: Constitutional & Public Policy Barriers to School Choice in Georgia*, 3 J. Marshall L.J. 423 (2010); Jill Goldenziel, *Blaine's Name in Vain*: *State, Constitutions, School Choice, and Charitable Choice*, 83 Denv. U.L. Rev. 57 (2005); Peter H. Hanna, Note, *School Vouchers, State Constitutions, and Free Speech*, 25 Cardozo L. Rev. 2371 (Aug. 2004). Voucher programs may take various forms which will impact the legal review of their validity. As one commentator noted:

> Voucher programs are created when the state allows individual students and their parents to determine which school the student will attend and allocates a specific sum of money that can be used for part or full payment for the student to attend that school. A program may provide that payment is to be given directly to the school or that the voucher will go directly to the student or parent who then designates the ultimate recipient. Voucher programs may be designed to include secular private schools or all private schools, including sectarian ones, that otherwise meet certain academic or other qualifications. Other voucher programs may be designed such that they limit participation in the program to public schools.
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> Legal challenges to voucher programs may be of different types. The first is a challenge to a program that allows public school students to use a voucher to attend any school—public or private, secular or sectarian. Such a program may raise Establishment Clause concerns. . . . Other programs may permit vouchers, but expressly exclude sectarian schools from participating in them. These programs may be challenged on the basis of Equal Protection and Free Exercise

> claims. Substantive due process rights of parents to direct the education of their children as well as free speech claims have also been raised in the voucher context, although without success. State constitutional issues may be asserted as well. In addition to voucher legislation or proposed legislation, voucher proposals have appeared on various ballot initiatives, so far also without success.

1 Education Law § 1:30, *Vouchers*.

The amendment to HB190 creates a limited voucher program. This program restricts the number of voucher scholarships available, rising to a maximum of 20,000 per year by the 2016-2017 school year and thereafter, and qualifies both the students and schools that may be eligible for participation. HB190, §§ 3(2), 4 & 8. Among other things, vouchers are only available to students of a household whose annual income meets the requirements for a free or reduced price lunch under federal law, thus evidencing a legislative intent to only provide vouchers to economically disadvantaged students. Id. § 3(2). And, although a "participating" non-public school that may admit students who have been awarded a voucher scholarship must meet several qualifying requirements, such a school may include a religiously affiliated educational institution. *See id*. § 4.

HB190 as proposed to be amended is defensible from a facial constitutionally challenge.[1] Initially, HB190 does not violate the Establishment Clause of the First Amendment of the United States Constitution.[2] In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the United States Supreme Court considered whether an Ohio school voucher program violated the Establishment Clause. This clause, applied to the states through the Fourteenth Amendment, prevents a State from enacting laws that have either the "purpose" or "effect" of advancing or inhibiting religion. *Zelman*, 536 U.S. 639, 648-49 (quoting *Agostini v. Felton*, 521 U.S. 203, 222-223 (1977)). The Ohio voucher program reviewed by the Court was enacted for the purpose of providing educational assistance to poor children in a failing public school system. *Id*. at 643-48. The Court therefore directed its attention to the question of whether the Ohio program had the forbidden "effect" of advancing or inhibiting religion. The Court concluded that Ohio's voucher system, which had as its primary purpose the assistance of economically disadvantaged students and was "neutral in all respects toward religion," did not run afoul of the Establishment Clause. *Id*. at 651-63. The Court reasoned:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and

[1] This opinion does not address any possible "as applied" challenges since this Office cannot anticipate all possible factual situations in which HB190, if enacted, might be applied. A facial challenge must establish that no set of circumstances exist under which a statute would be valid whereas an "as applied" challenge presumes the statute is generally valid but asserts that the application of the statute to the challenger's specific factual circumstances is unconstitutional. *See generally Waters v. Farr*, 291 S.W.3d 873, 921-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part).

[2] The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U.S. Const., amend. 1.

> independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Id. at 652.

HB190 is defensible against an Establishment Clause challenge for the same reasons articulated in *Zelman*. HB190 is designed to provide assistance to students in need, and the students receiving such need select from qualifying participating nonpublic schools which may or may not have a religious affiliation. Thus, like the Ohio voucher system in *Zelman*, HB190 by its terms primarily intends to provide aid and school choice to economically disadvantaged students and at best only incidentally would benefit a qualifying sectarian school. Thus, for the same reasons stated in *Zelman*, HB190 should be sustained against any facial Establishment Clause challenge. *See id*. at 651-63 (citing *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 13-14 (1993); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 489 (1986); *Mueller v. Allen*, 463 U.S. 388, 400 (1983)).

This same analysis would equally apply to any challenge under the Establishment Clause of the Tennessee Constitution, and thus HB190 should withstand any facial challenge under that provision. Tennessee's Establishment Clause states "that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship." Tenn. Const., art. I, § 3.

The Tennessee Supreme Court has characterized the Tennessee's Establishment Clause as "practically synonymous" with the religion clause of the First Amendment. *Carden v. Bland*, 199 Tenn. 665, 672, 288 S.W.2d 718, 721 (1956). However, the Supreme Court also observed that Tennessee's Establishment Clause is "broader and more comprehensive in its guarantee of freedom of worship and freedom of conscience." *Carden*, 288 S.W.2d at 721. As the Tennessee Court of Appeals explained in discussing religious guarantees under article I, section 3:

> While the Court has characterized Tenn. Const. art. I, § 3 as "substantially stronger" than the Religion Clauses in the First Amendment, it has not, as yet, explained directly how the degree of protection of religious liberties afforded by Tenn. Const. art. I, § 3 differs from the First Amendment's protections. . . .
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> *The Tennessee Supreme Court has never held that Tenn. Const. art. I, § 3's protection of the right of conscience and free exercise of religion are more expansive than the Free Exercise Clause of the First Amendment. To the contrary, the Court has consistently construed and applied the free exercise protections in Tenn. Const. art. I, § 3 using the same principles employed by the United States Supreme Court to interpret the Free Exercise Clause of the First Amendment.* Thus, for the purpose of this opinion, we conclude that the degree

> of protection that Tenn. Const. art. I, § 3 provides for the religious freedoms of the Native Americans is the same as that provided by the Free Exercise Clause of the First Amendment.

State ex rel. Commissioner of Transportation v. Medicine Bird Black Bear White Eagle, 63 S.W.3d 734, 761-62 (Tenn. Ct. App. 2001) (emphasis added). This same analysis should apply as well to the establishment provisions of article I, section 3. *See Entman v. City of Memphis*, 341 F. Supp. 2d 997, 1000 (W.D. Tenn. 2004).

Thus, although the Tennessee Supreme Court has suggested that Tennessee's Establishment Clause might provide greater protection than the federal Establishment Clause, Tennessee courts have to date interpreted Tennessee's religious protections using the same principles employed by federal courts in construing the Establishment Clause of the First Amendment of the United States Constitution. In the context of examining HB190, Tennessee's Establishment Clause, similar to its federal counterpart, states that "no preference shall ever be given, by law, to any religious establishment or mode of worship." Tenn. Const., art. I, § 3. Again, and as recognized by the United States Supreme Court in *Zelman*, a statute like HB190 that at best incidentally might support a religiously affiliated educational institution does not provide a "preference" for any religious establishment. *See Zelman*, 536 U.S. at 651-63. It is thus likely that a Tennessee court would apply the analysis and conclusions reached in *Zelman* to uphold HB190 from a facial challenge under Tennessee's Establishment Clause.

In this regard, Tennessee's Constitution lacks a provision adopted by other states that expressly bans the use or appropriation of any public money to support any religious instruction or establishment. These provisions, referred to as "Blaine Amendments" after former United States House Speaker and presidential candidate James Blaine, place much greater restraints on a state's ability to provide any public funds to a religiously affiliated educational institution. As one commentator has explained:

> [The Blaine Amendment] was based upon the 1875 proposal of Speaker of the House James Blaine to amend the United States Constitution. At that time, the First Amendment had not yet been interpreted to apply to the states through the Fourteenth Amendment, so Blaine's amendment would have worked to ensure that "not one dollar of money appropriated to [support schools], no matter how raised, shall be appropriated to the support of any sectarian school."
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> While seemingly a legitimate goal, Blaine's amendment was motivated by political ambitions of becoming president and anti-Catholic animus spurred from conflict between Catholic immigrants and the Protestant controlled school system. If enacted, the Amendment would have prevented Catholic schools from receiving public funds and forced Catholic students into Protestant public schools. Falling four votes shy of the necessary supermajority in the Senate, the federal Blaine Amendment failed; yet over the next two decades almost thirty states enacted variations of the Blaine Amendment. Today, thirty-seven state constitutions contain some version of the Blaine Amendment.

. . . .

> The Georgia Attorney General has interpreted the Blaine Amendment to provide broader protection to Georgia citizens than the Establishment Clause. Therefore, while the United States Supreme Court's ruling in *Zelman* may have foreclosed a finding that school vouchers are unconstitutional under the Establishment Clause, that ruling would not hinder a state court finding that school vouchers violate the broader, more encompassing Blaine Amendment.

Regan, 3 J. Marshall L.J. at 438-39.

Several state jurisdictions with Blaine Amendments or similar constitutional language have invalidated school voucher programs on the basis that these programs transgressed these constitutional limits. *See, e.g., Cain v. Horne*, 202 P.3d 1178, 1180-84 (Ari. 2009) (en banc); *Bush v. Holmes*, 919 So.2d 392, 410-11 (Fla. 2006). *See also Moore v. Tungipahoa Parish School Board*, No. 12-31218, 2013 WL 141791 at *2 (5th Cir., Jan. 14, 2013); *id.* at *8 (Dennis, J., dissenting) (both noting that a Louisiana trial court had found a Louisiana voucher program violated Louisiana's Constitution by diverting public funds to private schools and that this decision had been appealed to the Louisiana Supreme Court). Several states lacking a Blaine-type provision have generally sustained voucher programs against state and federal constitutional challenges. *See, e.g., Taxpayers for Public Education v. Douglas County School District*, Nos. 11CA1856 & 11CA1857, 2013 WL 791140 (Colo. Ct. App., Feb. 28, 2013) (petition for rehearing or appeal may be pending); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

Finally, HB190 is defensible against a facial challenge under the Education Clause of the Tennessee Constitution, which provides as follows:

> The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.

Tenn. Const., art. XI, § 12. In *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993) (*Small Schools I*), the Tennessee Supreme Court held that the Tennessee Constitution guarantees to the school children of the State the right to a free public education and imposes upon the General Assembly the obligation to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students. In so finding, the court concluded that under Tennessee's Constitution local control of public schools was not a rational basis for a funding scheme that created substantial disparities in students in various school districts resulting in discriminatory treatment among the students in these various districts. *Id.* at 152-57. *See also Tennessee Small School Systems v. McWherter*, 894 S.W.2d 734, 734-35 (Tenn. 1995) (*Small Schools II*). The Court nonetheless emphasized that, absent such disparate treatment, the Tennessee Constitution affords the Legislature

flexibility in determining how the obligation to provide a free public education to the State's schoolchildren is accomplished, stating:

> The constitution, therefore, imposes upon the General Assembly the obligation to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students. *The means whereby this obligation is accomplished is a legislative prerogative.*
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> . . . .
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> The defendants would use the flexibility of means granted by the constitution to avoid the certainty of responsibility. The record of the 1977 convention shows clearly that the delegates recognized that the responsibility for designing and maintaining a free public school system rested on the General Assembly and that the General Assembly needed flexibility in meeting that responsibility.
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> . . . .
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> The essential issues in this case are quality and equality of education. The issue is not, as insisted by the defendants and intervenors, equality of funding. Some factors that bear upon the quality and availability of educational opportunity may not be subject to precise quantification in dollars. Other obviously significant factors include geographical features, organizational structures, management principles and utilization of facilities. Nor is the issue sameness. The defendants contend that the requirement that the system provide substantially equal educational opportunities would "squelch innovation." Given the very nature of education, an adequate system, by all reasonable standards, would include innovative and progressive features and programs. . . .
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> The power of the General Assembly is extensive. *The constitution contemplates that the power granted to the General Assembly will be exercised to accomplish the mandated result, a public school system that provides substantially equal educational opportunities to the school children of Tennessee. The means whereby the result is accomplished is, within constitutional limits, a legislative prerogative.*

Small Schools I at 140-41, 151, 156 (emphasis added).

HB190 provides the parents of a limited number of Tennessee schoolchildren attending the public schools in the bottom five percent in terms of scholastic achievement the voluntary choice of utilizing a voucher program to attend a private school that is subject to state educational requirements. In light of the Tennessee Supreme Court's recognition of the General Assembly's constitutional flexibility in the field of education, the program created by HB190 should be defensible to a facial challenge based upon article XI, section 12, of the Tennessee Constitution. *See Small Schools I* at 140-56. *See also* Tenn. Att'y Gen. Op. 12-68 (opining that article XI, section 12 is not violated by allowing an LEA to sponsor a charter school).

This Office is aware of no other possible facial constitutional infirmities to the passage of HB190 as proposed to be amended. Accordingly HB190 should be defensible from a facial constitutional challenge.

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