Summary of Constitutional Analysis of School Voucher Legislation

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We have reviewed the September 3, 2010 Memorandum, "Indiana's Constitution and Student Scholarships" (attached at Tab A), prepared for the Foundation for Educational Choice by the Institute for Justice. The Memorandum concludes that a scholarship or "voucher" program giving parents the option to use the voucher at private schools they choose (including religious or sectarian schools) does not violate either the United States or the Indiana Constitution.

We believe the Memorandum's conclusion is correct. The following briefly summarizes our analysis of the Federal and Indiana constitutional objections commonly raised by opponents of school voucher initiatives in our State. None of these objections survives scrutiny.

First Amendment of the United States Constitution

Opponents of programs affording parents the option to use vouchers at sectarian schools long argued that this violates the Establishment Clause of the First Amendment to the United States Constitution. As the Memorandum notes, this argument was definitively rejected by the United States Supreme Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). *Zelman* involved a Cleveland voucher program under which the overwhelming number of vouchers was being used at religious schools. The Supreme Court held this did not violate the Establishment Clause, as the State provided vouchers on a neutral basis and decisions to use them at sectarian institutions were private parental choices. The Court reaffirmed that constitutional validity turns on who makes the choice on how to use State assistance, not statistical analysis of what percentage of private choices were being made to use vouchers at religious schools.

Zelman was foreshadowed by Supreme Court decisions in the 1980s. *Mueller v. Allen*, 463 U.S. 388 (1983), upheld State tax deductions for private school tuition and other costs, even though over 90% of such costs were incurred by parents sending children to religious schools. *Witters v. Wash. Dep't of Social Servs. for the Blind*, 474 U.S. 481 (1986), upheld a State program of vocational assistance grants to the blind, even though the recipient was using his grant to attend a Christian college for pastoral or other religious training. Thereafter, the Court cited *Mueller* and *Witters* in stating: "In other cases involving indirect grants of aid to religious institutions, we have found it important that the aid is made available regardless whether it will ultimately flow to a secular or sectarian institution." *Bowen v. Kendrick*, 487 U.S. 589, 608-09 (1988).

For Establishment Clause purposes, voucher programs are also analytically indistinguishable from familiar Federal and State educational assistance programs whose constitutional validity is unquestioned. These include Federal Pell Grants, which recipients may use at sectarian institutions, such as the University of Notre Dame. On the State level, as the Memorandum notes, several programs (including the Twenty-first Century Scholars Program and the Frank O'Bannon Grants) provide student assistance that may be used at the recipient's option at religious colleges and universities, such as Anderson University. School voucher programs, as *Zelman* has now made clear, are equally permissible.

This is not the first time that this issue has been before the General Assembly. When a voucher bill was proposed in the 1990s, the author of this Summary testified to a Senate Committee that, based on *Mueller*, *Witters* and *Bowen v. Kendrick*, the United States Supreme Court would hold such a program constitutional. The bill's opponents, including some Committee members, disagreed. *Zelman* shows that Senators who believed the earlier bill constitutional were correct.

Religion Clauses of the Indiana Constitution

The Indiana Constitution has two provisions that, as the Memorandum states, are "analogues" to the First Amendment's Establishment Clause. One is Article 1, Section 4:

> No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.

The other provision is Article 1, Section 6:

> No money shall be drawn from the state treasury, for the benefit of any religious or theological institution.

The Memorandum provides a scholarly review of the genesis of such provisions, also found in other State constitutions. It is correct in concluding that these Indiana constitutional provisions are not violated by a voucher program in which school choices are made by parents.

As to Article 1, Section 4, neither its language nor any Indiana case supports an argument that the voucher proposal is a "preference" to "any creed, religious society, or mode of worship," or compels anyone without consent "to attend, erect, or support, any place of worship" or "maintain any ministry." A sectarian school is not a "creed," "religious society" or "mode of worship;" and only strained, unnatural usage could label it a "place of worship" or "ministry." Further, the voucher bill creates no "preference" either among religious schools or in favor of such schools generally. Any preference is the result of private parental choice; and parents choosing to use a voucher at a sectarian school obviously "consent" to attendance at and support of that school.

The claim that *other* taxpayers are being "compelled" to "support" religious schools without their "consent" (assuming a school can be called a "place of worship" or "ministry" at all) depends on viewing a voucher program as use of public funds to benefit religious schools. Hence, this Article 1, Section 4 "support" argument is identical to claiming a voucher program violates Article 1, Section 6 by using State money to "benefit" a religious institution. Our State Supreme Court has made clear, however, that an Article 1, Section 6 attack of this sort will fail.

Embry v. O'Bannon, 798 N.E.2d 157 (2003), rejected an Article 1, Section 6 challenge to dual-enrollment programs, under which public funds were used to provide secular education services to parochial students (such as buying computers, and paying teachers to teach certain classes in parochial schools). The Court held this did not unconstitutionally "benefit" religious schools. Noting the "obviously significant educational benefits" to Indiana children and the "benefit [to] the State by furthering its objective to encourage education for all Indiana students," the Court

found that benefits to parochial schools "would be, at best, relatively minor and incidental benefits of the dual enrollment programs." *Id.* at 167. It concluded:

> Indiana case law . . . has interpreted Section 6 to permit the State to contract with religious institutions for goods or services, notwithstanding the possible incidental benefit to the institutions, and to prohibit the use of public funds only when directly used for such institutions' activities of a religious nature. Because the dual-enrollment programs . . . do not confer substantial benefits upon any religious or theological institution, or directly fund activities of a religious nature, such dual-enrollment programs do not violate Section 6.

Id.[1]

The voucher proposal is even less subject to Article 1, Section 6 objection than the program upheld in *Embry*. That program involved direct use of public funds, at the State's direction, at religious schools. By contrast, the voucher proposal does not require or even encourage using a voucher at a parochial school; any such use is a private parental choice – which, under the U.S. Supreme Court's *Zelman* decision, is a constitutionally dispositive distinction by itself.

Further, for Article 1, Section 6 purposes (just as for Establishment Clause purposes), voucher programs are analytically identical to State educational assistance programs of undoubted constitutional validity. As noted, these include the Twenty-first Century Scholars Program and the Frank O'Bannon Grants, providing assistance that a student may choose to use at religious institutions such as the University of Notre Dame or Anderson University.

Education Article of the Indiana Constitution

Article 8, Section 1 of the Indiana Constitution provides:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Claims that a voucher proposal would violate this provision are also unfounded.

A key point is that voucher legislation would *not* be adopted as part of the General Assembly's duty to provide "for a general and uniform system of Common Schools." Nor would it alter any feature of that Common School system. Common Schools (*i.e.*, public schools) would continue to exist; would continue to charge no tuition; and would continue to be open on an equal basis to all who choose to attend them. The Common School system would continue to be as "general

[1] Justice Dixon's lead opinion in *Embry* thought it was unclear whether Article 1, Section 6's phrase "religious or theological institution" was even intended to apply to parochial schools. While other Justices did not doubt the provision's application to such schools, the entire Court agreed there was no constitutional violation.

and uniform" as before. Also voucher legislation would not transform private schools (sectarian or otherwise) into "Common Schools." Private schools would remain private, not "public."[2]

Thus, Article 8, Section 1's Common Schools provision has no bearing on the constitutional validity of voucher legislation. The General Assembly is not acting under that provision in adopting such legislation; and the legislation itself does not change any aspect of the Common Schools system, much less alter any constitutionally required feature.[3]

As the Memorandum explains, voucher legislation would instead be adopted under the General Assembly's power, also found in Article 8, Section 1, "to encourage, by all suitable means, moral, scientific, intellectual, and agricultural improvement." Under the constitutional provision, this is one of two duties – the other being to provide the Common Schools system – by which the Legislature is to promote "[k]nowledge and learning" being "generally diffused" throughout our State, which the 1851 Framers deemed "essential to the preservation of a free government."

It is plain under the constitutional text, as the Memorandum notes, that these are separate duties, joined by the conjunctive "and," through which the General Assembly is to promote that objective. As the Memorandum also notes, other sections of the Education Article show that our Constitution's drafters knew how to confine expenditures to public schools when they wanted to. *See* Article 8, Section 3 (income of the Common School fund "shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever").

Hence, it mangles Article 8, Section 1 to argue the General Assembly's sole means of promoting "moral, scientific, intellectual, and agricultural improvement" under Article 8, Section 1 is to provide for the Common Schools system. No Indiana case law supports that theory, which would contradict established principles for proper construction of constitutional language.

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For these reasons, we agree with the Memorandum's conclusion that a scholarship or voucher program under which parents may use a voucher at private schools of their choosing (including sectarian schools) does not violate either the United States or the Indiana Constitution.

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[2] The contrary view has been expressly rejected under comparable constitutional provisions. *See Davis v. Grover*, 480 N.W.2d 460 (Wis. 1982) (private schools accepting vouchers do not become "district schools" subject to Wisconsin constitutional provision that "[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years").

[3] Even when this Common Schools provision does apply, our Supreme Court has viewed it as granting considerable legislative flexibility. *See Bonner v. Daniels*, 907 N.E.2d 516 (Ind. 2009) (provision does not require General Assembly to provide public education of any particular standard of quality); *School City of Gary v. State ex rel. Gary Artists League, Inc.*, 253 Ind. 697, 256 N.E.2d 909 (1970) ("general and uniform" does not mean "identical"; upholding school legislation applying only to cities with populations of over 90,000). Other litigation has focused on the "tuition shall be without charge" requirement. *Compare Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481 (Ind. 2006) ("activities fee" violated requirement) *with Chandler v. South Bend Community Sch. Corp.*, 160 Ind. App. 592, 312 N.E.2d 915 (1974) (textbook rental charge did not violate requirement).