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ABSTRACT

Many states are looking at education vouchers and asking whether a market solution can improve the quality of public education. The answer partially depends on how government and religion will interact and whether states' constitutions or the religion clauses in the United States Constitution will permit voucher plans to include religious schools. This information brief examines the constitutionality of education vouchers under state and federal law. It discusses Minnesota's relevant constitutional provisions, constitutional challenges to education vouchers in other states, and federal constitutional provisions that are implicated in the discussion. A conclusion is that if government supplies or lends equipment or material, it must be to the religious-school students and their parents. If government supplies teaching or administrative services, the personnel who supply the services must not be subject to control of the religious school. If government supplies health, diagnostic, remedial, testing, or counseling services to students in a religious school, it must provide all but the most impersonal and limited services off the school campus. If government provides state payments for students to attend a religious school, the aid must flow to the students and parents; the students and parents must also be allowed to make individual choices about school attendance. Finally, if government funds aid programs that benefit religious schools, the age of the students is important because young students may be more likely to see state aid as a symbol of government endorsement of religion. A chart illustrates the permissible and impermissible forms of public aid to nonpublic schools. (LMI)

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Information Brief

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The Constitutionality of Education Vouchers under State and Federal Law

This information brief examines the constitutionality of education vouchers under state and federal law. The brief discusses (1) Minnesota's relevant constitutional provisions, (2) constitutional challenges to education vouchers in other states and (3) federal constitutional provisions that are implicated in this discussion. A chart at the end shows the permissible and impermissible forms of public aid to nonpublic schools.

Many states are looking at education vouchers and asking whether a market solution can improve the quality of public education. The answer in part lies in how government and religion will interact and whether states' constitutions or the religion clauses in the U.S. Constitution will permit education voucher plans to include religious schools.

Minnesota's Constitutional Provisions

The Minnesota Constitution in article 1, section 16, states "...[N]or shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries." Article 13, section 2 states that "In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught." To date, there is no Minnesota case that specifically discusses the permissibility of using public funds to provide education vouchers to elementary and secondary students attending public or nonpublic school. However, the Minnesota Supreme Court has permitted publicly funded transportation for parochial school children along with transportation for other school children.

In 1970, the Minnesota Supreme Court in *Americans United v. Independent School District No. 622*[1] upheld a state statute authorizing the use of public funds to transport students to

sectarian schools, finding that the statute served a legitimate secular purpose in promoting the safety and welfare of students required to attend school under the state's compulsory attendance law. The state court found the most troublesome issue in the case to be whether the statute violated article 13, section 2 of the state constitution, which prohibits the state from using public money to support parochial schools. The Minnesota court noted the significance of the U.S. Supreme Court holding in *Everson v. Board of Education*[2] that publicly financed transportation for parochial school children as part of a program for all school-age children did not violate the federal constitution. It also noted that *Everson* was simply persuasive with respect to constructing the state constitution. *Everson* was decided by a divided court and the impact of *Everson* was further diluted by the differences in language between the federal and state constitutions, especially in light of the more specific and restrictive limitations in the state constitution. The state court examined state cases[3] in which similar bussing provisions were struck down because transportation was held to be a direct benefit to parochial schools in violation of states' constitutional prohibitions against using public money to benefit religious institutions. The court also examined state cases[4] in which similar bussing provisions were sustained because students in parochial schools under compulsory attendance laws were found to be the real beneficiaries of public funds. Bussing was equated with providing public services like sewers, roads and sidewalks and parochial schools assumed a burden the general public would otherwise bear. The court then discussed the difficulty of drawing a line between legislation that provides funds for the general welfare and legislation designed to support religious institutions. It concluded that the Minnesota statute was a safety measure that entitled school children attending any schools to the same rights and privileges relating to transportation, and that any benefit to sectarian schools was purely incidental and inconsequential.

The court refused to offer an opinion as to whether direct health and safety aid to parochial schools students in the form of medical, dental and nursing services "stands on a different footing from subsidies which go to the heart of the learning process." It offered the caveat that "the limitations contained in the Minnesota Constitution are substantially more restrictive than those imposed by the U.S. Const. Amend. I." Finally, the court as constituted in 1970, judged that legislation similar to the contested bussing statute brought the state "to the verge of unconstitutionality."

Constitutional Challenges in Other States

The few state courts—Massachusetts, Washington and Wisconsin—that have considered the issue of public funding of education vouchers have reached conflicting conclusions. Arguably, this is because states' constitutions are worded differently, voucher programs are designed differently and judges have differing perspectives about the relationship between the state and religion.

Massachusetts

In 1970, the Supreme Judicial Court of Massachusetts[5] advised the House of Representatives that a proposed bill that would authorize $100 in annual financial assistance

to every elementary and secondary school student in public or private school would violate that section of the state constitution that precludes any appropriation of public money from being authorized for the purpose of aiding any nonpublic school. The bill anticipated that the state would deposit the allotment for public school students in the general fund of the student's city or town of residence. The allotment for private school students was to be in the form of a state voucher that parents would endorse over to the private school. The bill specifically precluded schools from using the allotment "to subsidize courses of religious doctrine or worship." The judges rejected the contentions of parents of private school students that they were entitled to a share of public tax funds and they were deprived of equal protection of the laws. In 1987, the same court advised the state senate that a proposed bill providing tax deductions for educational expenses modeled after the Minnesota statute upheld in *Mueller v. Allen*[6] (discussed below) would violate the state constitutional provision prohibiting grants to institutions or schools not publicly owned or under the exclusive control of public officers and agents.

Washington

In 1973, the **Washington** State Supreme Court in *Weiss v. Bruno*[7] struck down the state's newly enacted voucher program that provided financial assistance to needy and disadvantaged students in grades one through twelve attending public and private schools. The year-round program made grant funds available to both public and private students. However, because only private school students paid tuition during the school year and had need of the funds, ninety-one percent of the funds went to Catholic schools. The court held that the program violated both the establishment clause of the first amendment (discussed below) and the more stringent state constitutional provision requiring that all schools maintained and supported by public funds be free from sectarian control or influence.

The court's opinion discusses several questions often raised in discussions about educational vouchers.

- Does denying state aid to individuals impair their rights to exercise their religion? The court framed the question not in terms of whether a student may attend a private religious school, but whether the state may subsidize the student's attendance at that school. The court found no element of coercion that would deny a student the right to freely exercise the student's religion. The court held that the free exercise clause was not involved.

- Does awarding a money subsidy to parents lessen any state benefit to private sectarian schools? The court observed that a direct financial grant, which enables students to pay tuition and remain in private school, provides the school with significant support.

- Is a neutral state aid program made constitutional by treating all public and private students alike? The court ruled that state aid to sectarian schools, which violates the state's constitutional mandate that "all schools maintained

> or supported wholly or in part by public funds shall be forever free from sectarian control or influence," cannot be made permissible by combining it with state aid to public schools. In other words, using public funds to benefit private sectarian schools violates the state constitution, regardless of whether the benefit is indirect or incidental and regardless of whether schools other than sectarian schools also benefit.

The court did not discuss whether the state's voucher program violated that portion of the state constitution that prohibits public money from being appropriated for or applied to any religious worship, exercise or instruction, or for support of any religious establishment.

Wisconsin

Only **Wisconsin** has a voucher program that withstood a constitutional challenge and continues to operate. In 1992, the Wisconsin Supreme Court in *Davis v. Grover*[8] upheld Milwaukee's publicly funded voucher program. The legal challenge was based on Wisconsin's constitutional prohibition against private or local bills, the establishment of uniform school districts and the public purpose doctrine, which requires that public funds be spent only for public purposes. Religion was not an issue in the case because only nonsectarian private schools were eligible to receive state vouchers. In 1995, the state attempted to expand the voucher program by making private sectarian schools eligible for state payments. Parents and others filed a lawsuit in state district court to block the expanded legislation. The court stayed the expanded program pending resolution of the constitutional issues in *Jackson v. Benson*[9] but left unaffected about 1,500 Milwaukee students enrolled in previously existing private school choice programs.

Federal Constitutional Provisions

The religion clauses of the first amendment to the U.S. Constitution state that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The establishment clause forbids laws that establish religion and the free exercise clause forbids laws that prohibit the free exercise of religion. The general principle underlying the religion clauses is that the country will tolerate neither governmentally established religion nor governmental interferences with religion. The first amendment is binding on the states through the fourteenth amendment, which requires that people within a state receive equal protection of the laws.

Originally, people believed that the religion clauses in the U.S. Constitution required state and federal government to remain strictly neutral in matters of religious theory, doctrine and practice. More recently, people have accepted that government accommodation of religion is a more appropriate posture than strict neutrality. In accommodating religion, or not accommodating it, government recognizes that there are necessary interrelationships between itself and religion: churches receive community police and fire protection; churches are exempt from state and federal property taxes; government may not include religious prayer or instruction in public schools. To decide whether government accommodation of religion

is required, permitted or prohibited, government and courts must reconcile the inevitable tension between the establishment clause and the free exercise clause and between separation of church and state and neutrality toward religion.

Alleged violations of the establishment clause, which prohibits Congress from establishing religion, are generally analyzed under a three-part test first announced by the U.S. Supreme Court in 1971 in *Lemon v. Kurtzman*.[10] Under the test, a government action violates the establishment clause if it **(1)** has a **nonsecular purpose or (2)** exerts **nonsecular primary effects or (3)** creates **excessive church-state entanglement**. Although some Supreme Court justices have questioned the Lemon test and suggested alternative establishment clause tests, including a coercion test[11] and an endorsement test,[12] the Lemon test is still the applicable law.

Secular Purpose

Courts usually have little difficulty in finding an adequate secular purpose to satisfy the first part of the Lemon test. Arguably, using educational vouchers to make educational institutions more efficient is a sufficient purpose to satisfy the secular purpose test.

Primary Effect

Courts have more difficulty with the second part of the Lemon test that requires that the primary effect of a statute neither advance nor inhibit religion. Under the second part of the test, court decisions about whether government may provide services, materials or privileges to nonpublic schools and their students under circumstances that require some degree of contact with religion may seem arbitrary. The U.S. Supreme Court has upheld some forms of nonpublic school aid and struck down others as the chart on page 8 indicates.

An educational voucher plan that includes sectarian schools must meet the following criteria to be permissible under the second part of the Lemon test: any benefit to sectarian schools is remote, indirect and incidental; the plan's secular impact is sufficiently separable from any religious impact; and the benefitted class is sufficiently broad. This primary effect standard is violated when government aid to religious institutions does not flow from the direct private choices of individuals but is the result of government action; or religious practices, such as nominally voluntary religious exercises, are inseparable from secular benefits; or a benefit that theoretically is available to everyone is, predictably, claimed principally by members of particular religions.

The Supreme Court is more likely to uphold an educational voucher plan where state aid is available to parents of public and nonpublic students alike, and there is no preference for private sectarian schools. In *Mueller v. Allen*,[13] the U.S. Supreme Court upheld Minnesota's plan to give tax deductions to parents for tuition and other costs they incurred in educating their children at nonprofit schools, public and nonpublic. The fact that public school students who paid tuition constituted only a small portion of those who benefitted from the deduction did not matter because state aid flowed through genuinely free, private decisions based on a

neutral statute. In contrast, in *Committee for Public Education v. Nyquist*[14] the Court struck down a tax relief program for parents of New York nonpublic school students where parochial school students composed 80 percent of the benefitted class. The Court found the benefits were tuition grants available only to parents of nonpublic school students and not a genuine tax deduction.

In *School District v. Ball*,[15] the Court examined the actual effect of programs in which a school district provided classes at public expense to private school students in classrooms leased from the private schools. The Court found that 40 of the 41 participating schools were sectarian and, therefore, publicly paid teachers could become involved in religious instruction, the programs conveyed a symbolic union between church and state and the programs subsidized religious schools by assuming part of the responsibility for teaching secular subjects. The Court ruled that the programs violated the second part of the Lemon test because the effect of the programs was to subsidize the secular functions of sectarian institutions.

The *Mueller* holding is consistent with *Witters v. Washington Department of Services for the Blind*,[16] in which a blind person used a state vocational education voucher for the visually handicapped to attend a private religious college for training as a pastor, missionary or youth director. The Court ruled that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the Lemon v. Kurtzman test, because any aid to religion results from the private choices of individual beneficiaries." The Court found no empirical evidence to suggest that a significant portion of the state aid would flow to religious institutions; Witters was the only known beneficiary of the training program to attend a sectarian school. Interestingly, the Court in *Mueller* did not consider empirical evidence in upholding Minnesota's educational tax deduction statute, where over 90 percent of the benefits ultimately flowed to religious institutions.

In *Zobrest v. Catalina Foothills School District*,[17] the Court ruled that the establishment clause did not bar a school district from providing a sign language interpreter under the Individuals with Disabilities Education Act (IDEA) to a deaf student attending classes at a Catholic high school. The Court observed that "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is no way skewed towards religion,' . . . it follows that under our previous decisions the provision of that service does not offend the Establishment Clause." The Court found that the handicapped student, not the sectarian school, was the primary beneficiary of the sign language interpreter because the service did not relieve the school of education costs it would otherwise incur. The IDEA funds went directly to the student's parents, who used the funds to hire the interpreter themselves. *Zobrest* is the first U.S. Supreme Court case that permits a public employee to help deliver instruction in a sectarian school.

The preceding decisions suggest that the Court might uphold an educational voucher plan that would allow parents to decide which public or private schools their children would attend.

The plan would require a sufficiently broad class of beneficiary schools and aid would need to be channelled through parents and children rather than directly to schools.

Excessive Entanglement

If a government program satisfies the first two parts of the Lemon test, courts will examine whether the program creates excessive church-state entanglement in the form of administrative entanglement, which refers to state involvement in the administration of a program, or political divisiveness, which refers to government action that promotes political fragmentation along religious lines. Administrative entanglement, which may occur under a voucher plan, arises when government inspectors must follow government aid to ensure that the aid is expended only for secular purposes.[18] There are several factors to consider in determining the extent of the government's entanglement, including whether: the aid is a one-time grant or continuing aid;[19] the recipient organizations are partly or pervasively sectarian;[20] aid is in the form of salary subsidies for parochial school teachers or public school teachers who teach secular subjects to parochial school students[21] or mechanical aids such as textbooks or public health services;[22] and student tests are prepared by parochial school teachers or the state.[23] Several Supreme Court justices have criticized the administrative entanglement test because state aid must be both supervised to avoid religious effects and unsupervised to avoid excessive entanglement.[24] How a voucher plan is structured determines the extent of state involvement in administering the plan and whether that involvement amounts to excessive entanglement.

Conclusion

Arguably, if government creates a competitive market for schools then educational voucher programs that include private sectarian schools are more likely to be effective because the large numbers of such schools offer families additional choices and might improve public education by increasing competition with private schools. However, including private sectarian schools in voucher programs may violate states' constitutions or the religion clauses of the U.S. Constitution. If government supplies or lends equipment or material, it must be to the religious school students and their parents and not the school. If government supplies teaching or administrative services, the personnel who supply the services must not be subject to the control of the religious school. If government supplies health, diagnostic, remedial, testing or counseling services to students in a religious school, it must provide all but the most impersonal and limited services off the school campus. If government provides state payments for students to attend a religious school, the aid must flow to the students and parents and not the school and the students and parents must be allowed to make individual choices about which school to attend. And finally, if government funds aid programs that benefit religious schools, the age of the students involved is important because young students are thought to be more likely to see state aid as a symbol of government endorsement of religion.

U.S. Supreme Court Decisions on Aid to Non-Public Schools

Approved Programs	Disapproved Programs
Permits states to **supply bus transportation** to children attending religious school. *Everson v. Board of Transportation* (1947)	Prohibits states from **paying salary supplements to religious school teachers or reimbursing religious schools for teacher salaries**, even if the money is used to provide secular education. *Lemon v. Kurtzman* (1971)
Permits states to **lend secular textbooks**, without charge to students in grades 7 to 12 attending religious school. *Board of Education v. Allen* (1968)	Prohibits states from **offering direct money grants to maintain and repair religious schools, unrestricted partial tuition grants to parents of low income students attending private religious schools, or income tax benefits to parents of students attending private school.** *Committee for Public Education v. Nyquist* (1973)
Permits the federal government to **provide one-time construction grants** to sectarian colleges and universities for constructing buildings for secular use. *Tilton v. Richardson* (1971)	Prohibits states from **providing remedial teaching and counseling services** on religious school grounds or **loaning instructional materials and equipment** to religious schools. *Meek v. Pittenger* (1975)
Permits states to **lend secular textbooks, supply standardized scoring and testing services, provide diagnostic services on nonpublic school grounds and offer therapeutic services off nonpublic school grounds** to students attending religious school. *Wolman v. Walter* (1977)	Prohibits states from **providing bus transportation for** religious school **field trips.** *Wolman v. Walter* (1977)
Permits states to **allow tax deductions** to parents **for tuition, textbook and transportation expenses** they incur in educating their children **at public and nonpublic** nonprofit **schools.** *Mueller v. Allen* (1983)	Prohibits states from **loaning instructional materials and equipment** for instructional use to students attending religious schools or to their parents. *Wolman v. Walter* (1977)
Permits states to **provide state vocational education vouchers** to visually handicapped students **to obtain vocational training at a religious college.** *Witters v. Washington Department of Services for the Blind* (1986)	Prohibits states from **using federal funds to pay** the salaries of **public school teachers who teach religious school students in low income areas.** *Aguilar v. Felton* (1985)
Requires school districts to **provide a sign language interpreter** under the Individuals with Disabilities Education Act **to a deaf student at a religious school.** *Zobrest v. Catalina Foothills School District* (1993)	Prohibits states from **providing publicly funded services on religious school premises.** *School District v. Ball* (1985)

Justice Rehnquist, in *Wallace v. Jaffree*[25] (1985), summarized the apparent arbitrariness of parochial school case law as follows:

> [A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing 'services' conducted by the State inside sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects.

ENDNOTES

1. 179 N.W.2d 146 (1970).

2. 330 U.S. 1 (1947).

3. The Delaware Supreme Court in *State ex rel. Traub v. Brown*, 36 Del. 181, 172 A. 835 (1934), held that a similar bussing statute violated Delaware's constitutional prohibition against using educational funds to aid any sectarian, church or denominational school. The Delaware court concluded that free transportation "helps build up, strengthen and make successful the schools as organizations."

   The New York Court of Appeals followed with *Judd v. Board of Education*, 278 N.Y. 200, 15 N.E.2d 576 (1938), which became a leading case on public bussing of parochial school students. The New York state constitution prohibited using public money to aid any school in which any denominational tenet or doctrine was taught. The majority of judges rejected the argument that by transporting parochial school students, the state aided the students and not the school. They believed that free transportation encouraged attendance. The dissenting judges argued that the bussing statute merely implemented the state's compulsory attendance laws. The state constitution was later amended to permit the state to bus parochial school students and *Judd* was expressly overruled.

   The supreme courts of Washington in *Visser v. Nooksack Valley School District No. 506*, 33 Wash. 2d 699, 207 P.2d 198 (1949), Alaska in *Matthews v. Quinton*, 362 P.2d 932 (1961), Wisconsin in *State ex rel. Reynolds v.Nusbaum*, 17 Wis.2d 148, 115 N.W.2d 761 (1962), and Hawaii in *Spears v. Honda*, 51 Hawaii 1, 449 P.2d 130 (1968), also held unconstitutional similar bussing statutes.

4. The Minnesota court cited appellate court decisions in Maryland, California, Kentucky, Connecticut, New York, Pennsylvania, Michigan, West Virginia and New Jersey authorizing the use of public funds for bussing parochial school students.

5. *Opinion of the Justices to the House of Representatives*, 357 Mass. 846, 259 N.E.2d 564 (Mass. 1970).

6. 463 U.S. 388 (1983).

7. 82 Wash.2d 199, 509 P.2d 973 (1973).

8. 166 Wis.2d 501, 480 N.W.2d 460 (1992).

9. Case No. 95CV1982, which plaintiffs filed in the circuit court in Dane County, Wisconsin, asked the court for a preliminary injunction to maintain the status quo of the Milwaukee Parental Choice Program pending resolution of plaintiffs' constitutional claims. Plaintiffs wanted to stop the superintendent of public instruction and the department of public instruction from implementing the expanded choice program that no longer prohibits religious elementary and secondary schools from participating in the program. The Wisconsin Supreme Court issued an injunction.

10. 403 U.S. 602 (1971).

11. In *Lee v. Weisman*, 112 S.Ct. 2649 (1992), the U.S. Supreme Court held that a nonsectarian prayer at public school graduation ceremony violated the establishment clause by coercing students to participate in the prayer. The majority opinion defined coercion to include social and psychological pressure. The dissent defined coercion as that which is supported by the force of law. The case did not overrule the Lemon test.

12. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), Justice O'Connor suggested modifying the Lemon test to say that the establishment clause is violated when government endorses or disapproves of a religion.

13. 463 U.S. 388 (1983).

14. 413 U.S. 756 (1973).

15. 473 U.S. 373 (1985).

16. 474 U.S. 481 (1986).

17. 113 S.Ct. 2462 (1993).

18. See *Aguilar v. Felton*, 473 U.S. 402 (1985).

19. See *Tilton v. Richardson*, 403 U.S. 672 (1971).

20. See *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976).

21. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

22. See *Wolman v. Walter*, 433 U.S. 229 (1977).

23. See *Committee for Public Education v. Regan*, 444 U.S. 646 (1980).

24. *Aguilar v. Felton*, 473 U.S. 402 (1985) (Rehnquist, J., dissenting).

25. 472 U.S. 38 (1985).