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SCHOOL CHOICE
UNDER THE PENNSYLVANIA CONSTITUTION

TESTIMONY BEFORE THE HOUSE EDUCATION COMMITTEE

I am Philip Murren, a partner in the law firm of Ball, Murren & Connell. Our firm has been continually involved since 1968 in cases involving religious freedoms and the rights of parents to choose the means of education best suited to the needs of their children.

We have examined the constitutionality of school choice legislation under the three provisions of the Constitution of the Commonwealth cited as posing possible obstacles to its implementation. No court has ever held such legislation invalid under these provisions, and we find no likelihood that a court would strike down school choice legislation under any available precedent.

I. Article III, Section 29

The prohibitory language of Article III, Section 29 of the Pennsylvania Constitution states as follows:

“No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association . . .”

If interpreted in an extreme literal fashion, the language of this provision would prohibit such “benevolent” and “charitable” programs as state unemployment compensation programs, general public assistance, medical assistance, foster care payments, and virtually every other human services or educational program currently in effect in the Commonwealth of Pennsylvania.

Fortunately, the controlling decisions of the Pennsylvania Supreme Court have not interpreted this provision so broadly. After decades of case law development, it could be said by Pennsylvania’s Attorney General Gerald Gornish, in summarizing the prohibition of Article III, Section 29 (and its predecessor, Article III, Section 18), that only those

appropriations for programs which do not result in any concomitant “public benefit” are barred by this constitutional provision. Pennsylvania Attorney General Official Opinion No. 78-24 (November 30, 1978); 1978 Opinions of the Attorney General, page 94.

It is not surprising that Article III, Section 29 has been interpreted to invalidate only those programs that do not benefit the public. In upholding legislation appropriating funds for the clearly “benevolent” purpose of making payments to unemployed individuals against an attack under the predecessor to Article III, Section 29, the Supreme Court of Pennsylvania set forth with unmistakable clarity the legal presumption which is to be indulged by the Pennsylvania judiciary in favor of the constitutionality of legislative enactments:

“In determining whether an act of assembly is unconstitutional, ... it should not be so held unless it is clearly, strongly and imperatively prohibited. ‘If the act is within the scope of legislative power, it must stand, and we are bound to make it stand if it will upon any intendment Nothing but a clear violation of the Constitution, - a clear usurpation of power prohibited, - will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void’. [Citation omitted.] Every presumption should be indulged in its favor and one who claims an act is unconstitutional must prove his case beyond doubt. [Citations omitted.] ‘It is the duty of every judge ... to search for a construction which will support the legislative interpretation of the Constitution, and an act can never properly be declared void unless this is found to be impossible.’ [Citation omitted.] A statute will be declared unconstitutional only ‘when it violates the Constitution *clearly, palpably, plainly*; and in such a manner as to leave *no doubt* or hesitation’ in the mind of the court. [Citation omitted.] ‘An act of the legislature is not to be declared void, unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt.’ [Citation omitted.]” (Emphasis by the court.)

Commonwealth ex rel. Schnader v. Liveright, 308 Pa. 35, 55-56 (1932).

Those who would challenge the constitutionality of educational choice legislation under Article III, Section 29, must therefore show beyond a “reasonable doubt” that providing school choice for elementary and secondary school students, and providing the economic means with which to attain it, can in no way be said to confer a “public benefit,” or in no way be in furtherance of a governmental function. Merely to so state the proposition (as the Pennsylvania Supreme Court’s decisions require) is to make obvious the conclusion: school choice is not a mere “gratuity,” forbidden by Article III, Section 29 of the Constitution of Pennsylvania. *Loomis v. Philadelphia School District*, 376 Pa. 428, 435 (1954).

The General Assembly of the Commonwealth has placed an obligation of compulsory school attendance on the parents of all children of elementary and secondary school age. The General Assembly also has enacted numerous and varied statutes and

programs which afford these parents and children the means to carry out their compulsory attendance obligations at either public or nonpublic schools.

In 1967, the Supreme Court of Pennsylvania was asked to void a 1965 statute affording public transportation to nonpublic elementary and secondary school children on the ground of the bar of Article III, Section 29. The Supreme Court, in the case of *Rhoades v. Abington Township School District*, 424 Pa. 202 (1967), *appeal dismissed*, 389 U.S. 11 (1967), turned aside that challenge. In *Rhoades*, the Court looked to its own previous decision in the case of *Schade v. Allegheny County Institution District*, 386 Pa. 507 (1956) for guidance in interpreting and applying the predecessor to Article III, Section 29. In *Schade*, the Court had turned aside a contention that the maintenance of neglected children by the state or the county was a “charity” or a “benevolence.” Even though the maintenance of neglected children in public or private institutions is a “charitable” undertaking in the broad sense of the word, because it also represents a “governmental duty,” the Court determined that payments so dedicated do not violate Article III, Section 29.

On the authority of the *Schade* case, the Pennsylvania Supreme Court in *Rhoades* stated flatly and unequivocally that:

“Educating the children of the state is a **governmental duty**, and if excessive distance builds a wall around the place of education, government must level that wall.”

424 Pa. at 221. (Emphasis added).

While the Supreme Court’s decisions in *Schade* and *Rhoades* definitively conclude that programs providing assistance for the care and education of children constitute action in the nature of a “governmental duty” (and *for that reason alone* are not barred by Article III, Section 29), other determinations of the Pennsylvania Attorney General and decisions of the courts of Pennsylvania consistently confirm the breadth of allowable government activity under Article III, Section 29 and its predecessor.

In 1941, the Pennsylvania Supreme Court upheld Pennsylvania’s unemployment compensation law against a contention that providing unemployment benefits to individuals amounted to an appropriation for a charitable or benevolent purpose. Instead, the court found that the legislature was acting pursuant to a governmental function, rather than one of pure charity or benevolence in relieving the burdens of unemployment. *Commonwealth v. Perkins*, 342 Pa. 529 (1941).

Formal Opinion No. 686, issued by the Pennsylvania Attorney General in 1957, upheld a program of state payments made to sectarian institutions for nursing home care, and stated: “Payments made by a governmental body in pursuance of a governmental function . . . are payments to the individual” rather than to the institution, for constitutional purposes.

In Attorney General Opinion 132, issued on July 9, 1958, Attorney General McBride found that payments to sectarian institutions for *tuition* for the blind and visually handicapped did not violate the predecessor of Article III, Section 29.

On January 9, 1963, Attorney General Stahl and Deputy Attorney General Killian issued an opinion upholding the use of local governmental funds to provide health services to children in parochial schools. That opinion stated:

“The *Schade* case is authority for the proposition that tax funds may be expended in the furtherance of an admittedly *governmental function*, the care of needy children, and that such expenditure does not constitute support or establishment of religion.”

* * *

“The protection and preservation of the health of school children is clearly a proper *governmental function* in the nature of public welfare legislation, whether the children attend public, private or parochial schools, and the use of tax funds for this purpose cannot successfully be attached on constitutional grounds.” (Emphasis added.)

Subsequently, in *Basehore v. Hampden Industrial Development Authority*, 433 Pa. 40, 50 (1968), the Pennsylvania Supreme Court held:

“If the legislative program is reasonably designed to combat a problem within the competence of the legislature and if the public will benefit from the project, then the project is sufficiently public in nature to withstand constitutional challenge.”

Official Opinion 154 of the Pennsylvania Attorney General, issued by Attorney General Creamer on October 27, 1972, cited the above-quoted statement from *Basehore* in support of the constitutionality of a program of disaster relief that was being questioned under Article III, Section 29 of the Pennsylvania Constitution. Referring also to the previously cited case of *Loomis v. Philadelphia School District Board of Education*, 376 Pa. 428 (1954), the Attorney General, in that same Opinion, summarized the standard of interpretation for Article III, Section 29:

“The Court there set down the rule that the section of the Constitution applies only to charitable gratuities made without any corresponding benefit derived by the public from the class to be benefited.”

The “public benefit” standard for interpretation of Article III, Section 29 was also subsequently applied by Attorney General Gornish to uphold a program for continuation of medical benefits to dependents of state police officers killed in the line of duty in Official Opinion No. 78-24, issued on November 30, 1978.

Finally, in *Springfield School District v. Department of Education*, 483 Pa. 539 (1979), *appeal dismissed*, 443 U.S. 901 (1979), the Pennsylvania Supreme Court turned

aside a challenge on state and federal constitutional grounds to the Commonwealth's 1972 nonpublic school transportation law. With respect to funds appropriated to furnish assistance to nonpublic school children, including children attending religiously-affiliated schools, the Court held that Article III, Section 29 and Article III, Section 15 of the Pennsylvania Constitution could not be interpreted any more stringently than the Establishment Clause of the United States Constitution:

“We need not reach the state constitutional challenges unless our Constitution provides more stringent limitations upon the church-state relationship than does the Federal Constitution. In answering this threshold question we believe 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.**” 483 Pa. at 571. (Emphasis added).

On June 27, 2002, the Supreme Court of the United States definitively ruled that “voucher” type school choice programs do not violate the Establishment Clause of the First Amendment. *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002). In *Zelman*, the Court held that “programs of true private choice, in which government aid reaches private schools only as a result of the genuine and independent choices of private individuals” constitute aid to the individual student beneficiaries, not to the institutions those students attend. 122 S.Ct. at 2465-2466.

As a result, under the Pennsylvania Supreme Court's holding in *Springfield* (stating that Pennsylvania's constitutional prohibitions on public funding of religious schools must be read as being co-extensive with the Federal Establishment Clause), the United States Supreme Court's ruling in *Zelman* is dispositive of the issue of the validity of school choice programs under the Pennsylvania Constitution.

Other state supreme courts have also ruled that similar limitations on the funding of religious entities contained in their state constitutions do not prohibit voucher-type programs. See, *Jackson v. Benson*, 578 N.W.2d 602 (Wisconsin, 1998), *cert. denied*, 525 U.S. 997 (1998); and *Simmons-Harris v. Goff*, 711 N.E. 2d 203 (Ohio, 1999).

However, some have contended that other portions of Article III, Section 29 cast doubt on whether scholarships intended for use at the elementary or secondary school level are constitutionally permitted. Article III, Section 29 states as an express exception to its general prohibition on the payment of “gratuities”:

“That appropriations may be made . . . in the form of 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.”

This language was adopted on November 5, 1963 as a prelude to implementation of the PHEAA grant and loan program, apparently out of a fear that such grants and loans might somehow be viewed as providing insufficient *public* benefit. However, given the state of

the development of the case law up to that point (as set forth hereinabove), it is highly doubtful that such an amendment to Article III, Section 29 was actually necessary in order to assure the constitutionality of such higher educational assistance to individuals.

Nevertheless, there is a clear distinction (in terms of public benefit) between providing funds for individuals to attend colleges and universities, and providing assistance to enable residents of the Commonwealth to discharge their statutory obligation to comply with the compulsory attendance law at the elementary and secondary school level. Assistance to elementary and secondary school students has already been conclusively determined – due to its benefits to the public as a whole - to be constitutionally permissible under Article III, Section 29 in the *Rhoades* and *Springfield* cases mentioned previously.

If the 1963 amendment which permits scholarship grants and loans for higher educational purposes is interpreted to impliedly prohibit scholarship grants or loans for other educational purposes, then all of the other appropriations which are expressly permitted by Article III, Section 29 must be similarly read to impliedly prohibit appropriations for analogous purposes not specifically permitted. For example, the authorization for pensions for military service should impliedly prohibit pensions for other types of service, such as for teaching or for police service. The authorization for payments to blind persons 21 years of age and upwards must be held to impliedly prohibit assistance to blind persons under the age of 21. The authorization for assistance to mothers having dependent children must be held to impliedly prohibit general or medical assistance to all men and to all women who do not have dependent children. These absurd results demonstrate the impropriety of the reasoning process which would parlay Article III, Section 29's permission of higher education assistance into a prohibition on educational assistance for any other purpose.

Indeed, to read the 1963 amendment to Article III, Section 29 so broadly as to forbid any form of educational assistance other than to individuals attending higher educational institutions would render unconstitutional existing special education payments for pupils attending approved private special education schools, as well as endanger the continuation of payments for educational services for dependent and neglected children provided under contract with private residential rehabilitative institutions under Section 914.1-A of the Public School Code (24 P.S. §9-964.1). Also placed in jeopardy would be per-capita grants made under the Pre-K Counts Program.

In addition, the legislative history on the 1963 amendment to Article III, Section 29 is exceedingly sparse, with no substantive remarks being recorded in the House or Senate Journals other than comments over the partisan makeup of the sponsorship of the various bills which contained the amendment. There is thus no basis whatsoever on which to conclude that the 1963 amendment was intended to have any effect on any programs other than those specifically addressed therein, *i.e.*, grants or loans to individuals to help them pay for their educations beyond high school. See, William Bentley Ball, *The Religion Clauses of the Pennsylvania Constitution*, 3 *Widener Journal of Public Law* 709 (1994). See also, Fiorentino and Sheehan, *The Constitutionality of School Choice in Pennsylvania: Educational Opportunity Grants and the Original Intent of Article III, Section 29 of the Pennsylvania Constitution*, 8 *Widener Journal of Public Law* 25 (1998).

Based on the presumption of constitutionality generally accorded Pennsylvania statutes, on the definitive interpretations of Article III, Section 29 by Pennsylvania's Supreme Court and its Attorneys General that educational assistance to children is in furtherance of a "governmental function," and on the recognition that applying an overbroad interpretation to the prohibition stated in Article III, Section 29 would recklessly imperil the validity of many other beneficial statutory programs, we conclude with confidence that a Pennsylvania school choice program which includes appropriations to enable all segments of the school-age population to participate fully therein does not violate Article III, Section 29 of the Constitution of the Commonwealth of Pennsylvania.

Article III, Section 15

Nor would school choice legislation violate Article III, Section 15 of the Pennsylvania Constitution, which prohibits support of sectarian schools with money "raised for the support of the public schools."

To begin with, State general fund revenues are expended for diverse general State purposes, and are not earmarked solely "for the support of the public schools". By its literal terms, Article III, Section 15 is thus not applicable to an educational program funded by general fund revenues.

The most recent decision of the Pennsylvania Supreme Court regarding the applicability of Article III, Section 15 of the Pennsylvania Constitution to programs of aid which benefit both public and nonpublic school children was the case of *Springfield School District v. Department of Education*, 483 Pa. 539 (1979), *appeal dismissed*, 443 U.S. 901 (1979).

As previously noted, in that case, our Supreme Court addressed the question whether our school transportation law violated any of three provisions of the State Constitution. The Supreme Court ruled that none of those three provisions, including Article III, Section 15, provides more stringent limitations upon the church-state relationship than does the Federal Constitution. 483 Pa. at 571.

There is, however, in both Article III, Section 29 and in Article III, Section 15 of the Pennsylvania Constitution, a striking facial similarity to the infamously anti-Catholic "Blaine Amendment" that was proposed at much the same time as the adoption of our Constitution of 1874, and which found its way into the constitutions of 29 states by 1890. Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 Yale Law and Policy Review 113, 147 (1996).

As stated by one constitutional historian,

"The history of the original Blaine Amendment and its progeny in the States underscores one of the most incredible ironies in American constitutional law. Strict separationists often point to these local provisions as safeguards of religious freedom, using them to prevent objectionable interaction between governmental and religious institutions.

In fact, the Blaine Amendment is a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics.”

Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 *Harvard Journal of Law and Public Policy* 657, 659 (1998). And see also, William Bentley Ball, *Economic Freedom of Parental Choice in Education: the Pennsylvania Constitution*, 101 *Dickinson Law Review* 261, 264-265 (1997); and John C. Jefferies, Jr. and James E. Ryan, *A Political History of the Establishment Clause*, 100 *Michigan Law Review* 279, 282 (2001).

As stated in unusually blunt terms in the opinion of the plurality of the justices of the United State Supreme Court in the case of *Mitchell v. Helms*, 120 S.Ct. 2530 (2000):

“Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.... Opposition to aid to ‘sectarian’ schools acquired prominence in the 1870’s with Congress’ consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that ‘sectarian’ was code for ‘Catholic.’

“This doctrine [that children who attend ‘sectarian’ schools are barred from participation in programs of general educational benefit], born of bigotry, should be buried now.”

The United States Supreme Court has also recently held that legislative prohibitions that are specifically targeted at religious groups or entities will not easily survive challenge under the Free Exercise Clause of the First Amendment, thus casting further doubt on the validity of any “Blaine Amendment” provisions that are not co-extensive with the Establishment Clause. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S.Ct. 2217 (1993).

Fortunately, the Supreme Court of Pennsylvania has mooted the question of whether Article III, Section 29 and Article III, Section 15 of the State Constitution are impermissible limitations on the Free Exercise of religion by construing those provisions to be co-extensive with the Federal Establishment Clause.

III. Article III, Section 30

Article III, Section 30 of the State Constitution permits the General Assembly to make appropriations by two-thirds majority vote to an “educational institution not under the absolute control of the Commonwealth”. This is the provision under which non-preferred educational appropriations are made each year by the General Assembly, generally to post-secondary educational institutions and to professional schools.

Non-preferred appropriations are made directly to the institution. Appropriations under a school choice proposal would be made to the Department of Education and paid by the Department of Education as grants in the form of certificates which are to be used by parents for the purpose of paying tuition at the public or nonpublic schools at which their children are enrolled. Consequently, any vouchers granted to parents under a program to be administered by the Department of Education do not constitute non-preferred “appropriations” within the meaning of Article III, Section 30. See *Pennsylvania Association of State Mental Hospital Physicians v. Commonwealth of Pennsylvania*, 63 Pa. Cmwlth. 307 (1981).

* * * * *

There are many parents of modest means who send their children to nonpublic schools while paying their taxes for the support of the public schools. Those parents have a constitutional right to send their children to those nonpublic schools and are saving their school districts and the Commonwealth a great deal of money by doing so. In addition, those parents, those children and the schools that they attend are rendering an invaluable service to the Commonwealth for generations to come.

If the General Assembly should now recognize that it is only fair that these parents be accorded the benefit of a portion of their tax payments in the form of financial assistance for the education of their children, the legislature would be fulfilling a truly public purpose of the type which legislatures are constitutionally empowered to pursue.

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