

**THE UNIVERSAL SCHOOL VOUCHERS ROADBLOCK:
CONSTITUTIONAL & PUBLIC POLICY BARRIERS TO SCHOOL
CHOICE IN GEORGIA**

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I. INTRODUCTION

In a continuing effort to improve education, many states have considered or implemented programs that allow parents to choose the schools that their children attend. One such school choice program, school vouchers, provides state-funded scholarships to assist parents in financing a better education for their children. During the Georgia General Assembly's 2009 and 2010 legislative sessions, it considered legislation proposing to create just such a universal school vouchers program, Senate Bill 90.¹

With public schools suffering under budgetary constraints, many parents consider private school education to be of higher quality than public school education. Private schools enjoy private funding, often giving them many more resources to provide greater educational opportunities than public schools, whose funding is inextricably intertwined with ever-limited state funds.² In fact, the State of Georgia recently has taken to furloughing public school teachers to gain education funds³. However, because the vast majority of private schools are religiously affiliated institutions,⁴ school vouchers that allow

1. S.B. 90, Gen. Assem., 1st Reg. Sess. (Ga. 2009).

2. As of the 2006-2007 school year, Georgia public schools ranked twenty-sixth in the nation for per pupil expenditures. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., TOTAL AND CURRENT EXPENDITURES PER PUPIL IN FALL ENROLLMENT IN PUBLIC ELEMENTARY AND SECONDARY EDUCATION, BY FUNCTION AND STATE OR JURISDICTION: 2006-2007, in DIGEST OF EDUCATION STATISTICS, tbl.2 (May 2009), http://www.nces.ed.gov/programs/digest/d09/tables/dt09_183.asp.

3. Alyse Knorr, *Teachers Groups Angry Over Furloughs*, ATLANTA J.-CONST., Jul. 23, 2009, available at <http://www.ajc.com/news/teachers-groups-angry-over-97828.html>.

4. See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2007-2008 PRIVATE SCHOOL UNIVERSE SURVEY (Mar. 2009),

parents to distribute state-funded scholarships to private schools may encroach upon the separation of church and state.

Section II of this comment will explain the history of school vouchers legislation in Georgia. Section III will discuss the federal laws implicated by school vouchers programs and how those laws affect the implementation of such programs in Georgia. Section IV will analyze the state constitutional and public policy challenges to universal school vouchers programs using the language of Senate Bill 90 as an example. The author concludes that implementing a vouchers program, such as the one proposed by Senate Bill 90, would violate the Georgia Constitution, would violate public policy, and would not provide Georgia parents with the means to choose a better education for their children. If greater school choice opportunities are to be a realistic goal for Georgia students, the General Assembly should consider only legislation which makes significant changes to and improvements upon Senate Bill 90.

II. THE HISTORY OF SCHOOL VOUCHERS

The origin of school vouchers systems can be traced to a proposal by free-market economist Milton Friedman in 1955.⁵ Friedman believed that education should not be controlled by the government, but rather, the government should provide parents with funds to subsidize the cost of private education.⁶ He argued that leaving education to private organizations would force schools to compete for students (and the funding their enrollment would bring) or face going out of business.⁷ In his view, this competition would result in more successful schools than a government monopoly can create.⁸

http://nces.ed.gov/surveys/pss/tables/table_whs_03.asp [hereinafter PRIVATE SCHOOL UNIVERSE SURVEY].

5. Milton Friedman, *The Role of Government in Education, in ECONOMICS AND THE PUBLIC INTEREST* (Robert A. Solo ed., 1955), available at <http://www.schoolchoices.org/roo/fried1.htm> (last visited Mar. 18, 2010).

6. *Id.*

7. *Id.*

8. *Id.*

Wisconsin was the first state to test Friedman's theory⁹ when, in 1989, it created the Milwaukee Parental Choice Program to allow students who met the residency and income requirements to attend private school for free.¹⁰ With Wisconsin paving the way, several states and the District of Columbia have since enacted school vouchers programs, including Arizona, Colorado, Florida, Ohio, Maine, Utah, Vermont, and Georgia.¹¹

A. *The School Vouchers Debate in Georgia Courts*

The school vouchers debate gained publicity in Georgia in October 1993, when Glenn Delk, attorney and Georgia Parents for Better Schools President, organized and presented pro-school choice testimony at public hearings called by Lieutenant Governor Pierre Howard and held at the Legislative Office Building across the street from the state capitol.¹² Mr. Delk argued that O.C.G.A. §§ 20-2-640 to -650 could be used to give parents the choice of sending their children to a public or

9. School Choice Wisconsin, *Accurate Information About School Choice, Milwaukee Parental Choice Program*, <http://schoolchoicewi.org/k12/detail.cfm?id=4> (last visited Mar. 22, 2010).

10. WIS. STAT. § 119.23 (2009). To be eligible for the MPCP, a student must reside in the city of Milwaukee in a household with an income equal to or less than 175% the federal poverty line. *Id.*

11. *See* the Colorado Opportunity Contract Pilot Program, COLO. REV. STAT. §§ 22-56-101 to -110 (repealed 2006) (creating vouchers for students who lived in a participating district for one year, qualified for free or reduced lunch, and performed unsatisfactorily on state standardized tests); the Opportunity Scholarship Program, FLA. STAT. § 1002.38 (2005) (deemed unconstitutional by the First District Court of Appeals of Florida in *Bush v. Holmes*, 886 So.2d 340 (Fla. 1st Dist. Ct. App. 2004), *declined to address issue in* 919 So.2d 392 (Fla. 2006)) (creating vouchers for any student attending a failing school for two years in a four-year period). *See also* ARIZ. REV. STAT. §§ 15-891 to -891.06 (2009) (deemed unconstitutional by the Supreme Court of Arizona in *Cain v. Horne*, 202 P.3d 1178 (Ariz. March, 25, 2009)); D.C. CODE §§ 38-1851.01-.11 (2010); ME. REV. STAT. ANN. tit. 20-A, §§ 5203-5204 (2009); OHIO REV. CODE ANN. §§ 3313.974-.979 (2010); UTAH CODE ANN. § 53A-1a-701-09 (2009); VT. STAT. ANN. tit. 16, § 821-27 (2009).

12. Susan Stevenon Sullivan, *School Choice Advocates Press for Voucher Funds*, GA. BULL. (Archdiocese of Atlanta, Ga.), Oct. 21, 1993, *available at* <http://www.georgiabulletin.org/local/1993/10/21/a/>.

private school.¹³ These statutes, known as the Tuition Grant Act, stated:

Every child between the ages of six and nineteen years residing in this state . . . who is otherwise eligible and qualified to attend the elementary and secondary public schools of the local school system wherein such child resides shall, in lieu of attending the public schools of such local school system be eligible to receive an education grant to be expended for the purpose of paying or otherwise defraying the cost of tuition at a nonsectarian private school. . . .¹⁴

Delk argued that while this law may have been passed for the wrong reasons—namely, to help white students avoid integrated schools—it now could be used for the right reasons to benefit low-income families that lack choices when it comes to their children’s educations.¹⁵

Strong public interest in Delk’s argument led three parents of students in kindergarten through twelfth grades to file suit against the state in 1997.¹⁶ The parents’ complaint alleged that the state had denied their children equal protection of the law by treating their children differently than children receiving pre-kindergarten and post-twelfth grade education, as the latter groups of children can receive state funds to finance private school education.¹⁷ To support this equal protection claim, the parents had the burden to prove that their kindergarten through twelfth grade children were similarly situated to the pre-kindergarten and post-twelfth grade students.¹⁸ However, the Supreme Court of Georgia found that the parents could not make such a showing because the state does not require school enrollment for pre-kindergarten and post-twelfth grade students; therefore, these groups are not constitutionally entitled to education.¹⁹ On the other hand, the state does require the

13. *Id.*

14. O.C.G.A. §§ 20-2-640 to -650 (repealed 2005).

15. Sullivan, *supra* note 12.

16. *Lowe v. Georgia*, 482 S.E.2d 344 (Ga. 1997).

17. *Id.* at 345. In some situations, pre-kindergarten and post-twelfth grade students are entitled to scholarships created through tax and lottery revenues whereas kindergarten through twelfth grade students are not entitled to such state-funded scholarships. *Id.*

18. *Id.*

19. *Id.* at 346.

kindergarten through twelfth grade students to attend school, and these students are entitled to an adequate education by mandate of the Georgia Constitution.²⁰ Therefore, the court determined that these two groups of students were not similarly situated, and the parents could not satisfy their burden on the equal protection claim.

The parents' complaint also sought a writ of mandamus to compel the State of Georgia to implement and enforce the Tuition Grant Act and to award students funds under the Act.²¹ The court reasoned that compelling the state to enforce the Act would mandate that the state perform discretionary acts, such as determining whether a particular school or student has a need for scholarship funds.²² Because discretionary acts are outside the scope of a writ of mandamus, the Georgia Supreme Court determined that this remedy was not available to the parents.²³ Because the parents could not support the equal protection claim, and because the mandamus remedy was not available to them, the court affirmed the trial court's denial of the parents' motion for summary judgment, dismissing the parents' claim with prejudice.²⁴

Despite the strong support Delk garnered for the Tuition Grant Act in 1993, the surge of school choice advocacy among Georgia parents, which led to the mandamus action, later quieted for several years. The Tuition Grant Act ultimately met its demise when, in December 2004, Representative Tyrone Brooks, of the 63rd district, introduced House Bill 27 proposing to repeal the Tuition Grant Act in its entirety.²⁵ By unanimous votes in both the House and Senate, the General Assembly passed House Bill 27 and effectively repealed the Tuition Grant Act as of July 2005.²⁶

20. *Id.* (referencing GA. CONST. art. VIII, § 1, para. 1, which guarantees all elementary and secondary students in Georgia a free, adequate public education).

21. *Id.*

22. *Lowe v. Georgia*, 482 S.E.2d 344, 346 (Ga. 1997).

23. *Id.*

24. *Id.*

25. H.B. 27, 147th Gen. Assem., 2d Reg. Sess. (Ga. 2004).

26. Ga. Gen. Assem., H.B. 27 (Oct. 11, 2006), http://www.legis.state.ga.us/legis/2005_06/sum/hb27.htm; O.C.G.A. § 20-2-640-50 (repealed 2005).

The school vouchers debate did not reach the Georgia courts again until March 2006 when the Court of Appeals of Georgia dismissed a claim brought by three Atlanta students, as filed through their parents.²⁷ These parents alleged that the State of Georgia had denied them the fundamental right to choose the best education for their children and that the Georgia school funding statutes are unconstitutional.²⁸ In their complaint, the parents proposed that Georgia should provide “economic means, including scholarships, tuition tax credits and charter schools to enable [students] to attend the charter, government-run, or private school of their choice.”²⁹ The court dismissed the claim because it failed to assert a valid equal protection claim, as the Georgia Constitution guarantees only adequate education, not a right to the best education.³⁰

B. The School Vouchers Debate in the Georgia General Assembly

While the school vouchers movement has resulted in little litigation in Georgia, it has remained at the forefront of the legislative calendar for several years. In 1999, Senator Clay Land introduced Senate Bill 329, known as the Early HOPE Scholarship Bill.³¹ The Bill proposed awarding state-funded scholarships worth the cost of tuition at a private school or ninety percent of the funds public schools receive for each student, whichever was less, to low-income families with children attending below-average public schools.³² However, the General Assembly gave the Early HOPE Scholarship Bill no attention after its first reading on January 14, 2000.³³ In 2001, two other bills, Senate Bills 200 and 201, proposed essentially the same vouchers program.³⁴ The primary difference between

27. *Williams v. Georgia*, 627 S.E.2d 891 (Ga. 2006).

28. *Id.* at 892.

29. *Id.*

30. *Id.* at 893.

31. S.B. 329, 145th Gen. Assem., 2d Reg. Sess. (Ga. 1999).

32. *Id.*

33. Ga. Gen. Assem., S.B. 329 (May 15, 2000), http://www.legis.ga.gov/legis/1999_00/leg/sum/sb329.htm.

34. S.B. 200, 146th Gen. Assem., 1st Reg. Sess. (Ga. 2001), *available at* http://www.broc.state.ga.us/legis/2001_02/fulltext/sb200.htm (last visited

these two 2001 bills and the failed Early HOPE Scholarship Bill is that the 2001 bills required the Georgia State Board of Education to implement a pilot vouchers program for low-income children in three failing public schools throughout the state.³⁵ After these two bills failed to pass during the 2001 session, the Senate recommitted the bills in the 2002 session, during which the bills also failed to pass and died in committee.³⁶

In 2007, Georgia enacted its first school vouchers legislation, Senate Bill 10, also known as the Georgia Special Needs Scholarship Act.³⁷ Modeled after Florida's McKay vouchers program,³⁸ the vouchers available under this Act are worth the amount of state funds the public school would have received for the student's education or the tuition of the chosen private school, whichever is less.³⁹ A child participating in the Special Needs Scholarship program must have lived in Georgia for one year, spent the prior school year in a public school, and have a disability as defined by the Act.⁴⁰ In addition, the public school the disabled child attends must have created an Individualized Education Program ("IEP") for the child.⁴¹ Finally, the disabled child must apply and gain admission to a participating private

Mar. 22, 2010); S.B. 201, 146th Gen. Assem., 1st Reg. Sess. (Ga. 2001) available at http://www.broc.state.ga.us/legis/2001_02/fulltext/sb201.htm (last visited Mar. 22, 2010).

35. Compare Ga. S.B. 200 and Ga. S.B. 201, with Ga. S.B. 329.

36. Ga. Gen. Assem., S.B. 200 (July 21, 2002), http://www.legis.state.ga.us/legis/2001_02/sum/sb200.htm; Ga. Gen. Assem., S.B. 201 (July 21, 2002), http://www.legis.state.ga.us/legis/2001_02/sum/sb201.htm.

37. O.C.G.A. § 20-2-2110 to -2118 (2009).

38. FLA. STAT. § 1002.39 (2009); Bridget Gutierrez, *Georgia May Copy Florida Vouchers*, ATLANTA J.-CONST., Mar. 12, 2007, available at http://www.schoolchoiceinfo.org/news/index.cfm?action=detail&news_id=797 (last visited Mar. 8, 2009).

39. O.C.G.A. § 20-2-2110 to -2118 (2009).

40. O.C.G.A. § 20-2-2114 (2009) (listing the following disabilities as a program eligibility requirement: Autism, Deaf/blind, Deaf/hard of hearing, Emotional and behavioral disorder, Intellectual disability, Orthopedic impairment, Other health impairment, Specific learning disability, Speech-language impairment, Traumatic brain injury, or Visual impairment).

41. *Id.*

school before applying for the vouchers program.⁴² This Act gives the Georgia Department of Education the sole discretion to determine which students will be accepted into the vouchers program and provides no guidance to the Department as to the basis for granting or denying admission to the program.⁴³ The state expended almost \$5,500,000 under this vouchers program during the first year of its operation and almost \$10,000,000 during the second year.⁴⁴

During the 2009 and 2010 legislative sessions, the Georgia General Assembly considered Senate Bill 90, which was proposed by Senator Eric Johnson, the same Senator who proposed the Special Needs Scholarship Act.⁴⁵ This Bill sought to allow all children, regardless of disability or income-level, to receive state funds to attend the school of their choice, whether public or private, sectarian or secular.⁴⁶ Under Senate Bill 90, children must meet the same requirements as provided in the Special Needs Scholarship Act, except that a disability is not a requisite for this program.⁴⁷ Like the Special Needs Scholarship Act, the amount of funds available to students under Senate Bill 90 equal the amount of state funds a public school would have received for the student's education, or the tuition of the chosen private school, whichever is less.⁴⁸

42. *Id.* See also GA. DEPT. OF EDUC., 2008-2009 GEORGIA SPECIAL NEEDS SCHOLARSHIP PROGRAM END OF SCHOOL YEAR REPORT 12-15 (Nov. 23, 2009), available at <http://public.doe.k12.ga.us/sb10.aspx> [hereinafter 2008-2009 EOY REPORT] (under GSNS Reporting, on the bottom right corner of the page, click "08-09 GSNS End of Year Rpt") (listing all private schools participating in the Special Needs Scholarship Program in the 2008-2009 school year).

43. O.C.G.A § 20-2-2114 (2009).

44. GA. DEPT. OF EDUC., 2007-2008 GEORGIA SPECIAL NEEDS SCHOLARSHIP PROGRAM END OF SCHOOL YEAR REPORT 4 (Nov. 18, 2008), available at <http://public.doe.k12.ga.us/sb10.aspx> [hereinafter 2007-2008 EOY REPORT] (under GSNS Reporting, on the bottom right corner of the page, click "07-08 GSNS End of Year Rpt"); 2008-2009 EOY REPORT, *supra* note 42, at 4.

45. S.B. 90, 150th Gen. Assem., 1st Reg. Sess. (Ga. 2009).

46. *Id.*

47. Compare Ga. S.B. 90, with O.C.G.A § 20-2-2114 (2000).

48. Ga. S.B. 90.

On February 3, 2009, the Senate read Senate Bill 90 and referred it to the Education and Youth Committee.⁴⁹ On February 26, 2009, the Committee favorably reported on Senate Bill 90, and the Senate read the Bill for the second time on March 3, 2009.⁵⁰ While Senate Bill 90 failed to pass the Senate during the 2009 legislative session, the Senate recommitted the Bill in the second regular session of the 150th General Assembly on January 11, 2010.⁵¹ However, the Senate gave the Bill little attention during the 2010 legislative session, and it failed to pass prior to the end of crossover day on March 26, 2010.⁵²

The language of Senate Bill 90, as is analyzed in more detail below,⁵³ is very broad and provides few limitations on the spending of public funds under the program. This lack of tailoring likely was a cause of the limited attention the General Assembly gave the Bill. However, as the school choice movement continues to gain popularity in Georgia, the potential for future similar legislation, seeking to create a universal school vouchers program, warrants pause as such programs implicate both federal and state laws as well as the state's fundamental interest in educating children.

III. FEDERAL LAW AFFECTING SCHOOL VOUCHERS PROGRAMS

There is currently no federal school vouchers program; however, federal laws that affect the ways in which the states can create and implement such programs do exist.⁵⁴ While these

49. Ga. Gen. Assem., S.B. 90 (Mar. 20, 2010), http://www.legis.ga.gov/legis/2009_10/sum/sb90.htm.

50. *Id.*

51. *Id.*

52. *Id.*

53. *See infra* Part IV.

54. While a thorough analysis is outside the scope of this comment, it is arguable that the language of Senate Bill 90 may implicate the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2010) and the No Child Left Behind Act, 20 U.S.C. § 6301 (2010). Both Acts require that programs refrain from violating otherwise existing state law, including state constitutional provisions. *See* 20 U.S.C. § 1400 (2010); 20 U.S.C. § 6301 (2010). As is analyzed *infra* Part IV, the vouchers program created by Senate Bill 90 likely violates the Georgia Constitution. By violating the Georgia Constitution, which constitutes existing state law, Senate Bill 90

federal laws generate important requirements for Georgia lawmakers to consider when evaluating the merits of a universal school vouchers program, there are likely no viable federal constitutional challenges to such programs.

A. Establishment Clause Challenges to School Vouchers

School vouchers programs, which allow students to devote public funds to private, religiously affiliated schools, implicate the First Amendment to the United States Constitution, which states that “Congress shall make no law respecting an establishment of religion”⁵⁵ Some have argued that state school vouchers programs violate the Establishment Clause of the First Amendment.⁵⁶ However, the United States Supreme Court in *Zelman v. Simmons-Harris* held that such programs do not violate the Establishment Clause.⁵⁷ In that case, Ohio state taxpayers challenged the Ohio Pilot Scholarship Program (“PSP”), a school vouchers program similar to the program proposed by Senate Bill 90.⁵⁸ Participants of the program intervened as defendants.⁵⁹

The PSP provides financial assistance to families in any Ohio school district that has been under the supervision and operational management of the state superintendent by order of a federal court.⁶⁰ At the time the Supreme Court reviewed *Zelman*, the Cleveland school district is the only district to fall within this category; therefore, any public or private school within that district can accept state funds from students participating in the program.⁶¹ The PSP awards families with incomes below two hundred percent of the poverty line a scholarship worth ninety percent of the private school tuition up

would also violate both the IDEA and NCLB. Such violations could require Georgia to reimburse the federal government for the funds it has been granted under these Acts. See 20 U.S.C. § 1400 (2010); 20 U.S.C. § 6301 (2010).

55. U.S. CONST. amend. I.

56. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

57. *Id.* at 653.

58. *Id.*

59. *Id.*

60. *Id.* at 644-45.

61. *Id.* at 645.

to \$2250.⁶² These low-income families receive first priority in the distribution of funds.⁶³ Assuming that scholarship funds are still available after the participating low-income families have received their award, the PSP awards all other participating families a scholarship worth seventy-five percent of the private school tuition up to \$1875.⁶⁴

In analyzing the constitutionality of the PSP under the Establishment Clause, the Supreme Court considered whether the government aid program is neutral with respect to religion and provides aid to a broad class of citizens.⁶⁵ The Court noted that where a program meets this test, the program is not subject to challenge under the Establishment Clause, even if the citizen receiving the government aid, based on her own genuinely independent choice, directs the aid to a religious institution.⁶⁶ The Supreme Court found that the Ohio program was neutral with respect to religion as it was a part of Ohio's general effort to improve the educational opportunities available to children in failing school districts.⁶⁷ The Court also found that the PSP benefits a broad class of citizens, as any parent with a school-

62. *Zelman v. Simmons-Harris*, 536 U.S. 639, 646 (2002).

63. *See id.*

64. *Id.*

65. *Id.* at 652. As was noted by the United States Supreme Court in *Edwards v. Aguillard*, in analyzing whether public school legislation comports with the Establishment Clause, the proper test is the *Lemon* test. 482 U.S. 578, 583 n.4 (1987). To pass the three-prong *Lemon* test, the legislation (1) must have been adopted with a secular purpose; (2) must not have a principal effect that either advances or inhibits religion; and (3) must not result in an excessive entanglement of government with religion. *Id.* at 583.

While the Supreme Court did apply the *Lemon* test in *Zelman*, the Court's analysis of the "effects" prong dominates the opinion. *Zelman*, 536 U.S. at 648-49, 668-69 (O'Connor, J., concurring). The Court makes quick work of the "secular purpose" prong as there was no dispute that providing educational assistance to poor children is a valid secular purpose. *Id.* at 649. Further, because the Court has essentially combined the "entanglement" prong with the "effects" prong, the Court did not provide a separate "entanglement" prong analysis in *Zelman*. *See id.* at 650-63; *Agostini v. Felton*, 521 U.S. 203, 232 (1997) ("[T]he factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'").

66. *Zelman*, 536 U.S. at 652.

67. *Id.* at 653.

aged child in a failing school district is eligible to participate in the program.⁶⁸ The Court reasoned that although some of the parents participating in the PSP chose to use the government aid in religiously affiliated private schools, the program created no incentives that encouraged the parents to choose religious schools.⁶⁹ The only way a religious private school could receive funds under the PSP was if a parent endorsed the tuition check over to such a school.⁷⁰ Because the program did not incentivize students to attend private schools in any way and religious organizations only gained benefit from the program based upon the “true private choice” of the participating parents, the Court held that the Ohio program did not violate the Establishment Clause.⁷¹

B. Applying the Establishment Clause to Senate Bill 90

The Supreme Court’s holding in *Zelman* seemingly opens the door for state legislatures to create constitutionally valid school vouchers programs modeled after the Ohio PSP. However, because the Supreme Court’s analysis in *Zelman* focused closely on the “true private choice” of program participants, there may be other federal constitutional challenges that the Court did not address which could impede state school vouchers programs such as the program proposed by Senate Bill 90.⁷² For example, despite the fact that Ohio’s PSP failed to prohibit participating private schools from discriminating based on any grounds other than race, color, or national origin, the United States Supreme Court in *Zelman* did not address the possibility that this failure, in and of itself, is a violation of the Establishment Clause.

Much like the Ohio PSP, the language of Senate Bill 90 places minimal eligibility requirements on private schools. Most importantly, Senate Bill 90 requires participating private schools to comply only with the anti-discrimination provisions of 42 U.S.C. § 2000(d), which prohibits discrimination based on

68. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

69. *Id.*

70. *Id.* at 646.

71. *Id.* at 653, 663.

72. Thirty-six amicus curiae briefs were filed in the *Zelman* case, no doubt raising several legal issues left unaddressed by the Supreme Court’s opinion.

race, color, or national origin; the Bill does not prohibit discrimination based on any other classes.⁷³ As the Bill places no further limits on discrimination by private schools, a participating private school can deny a student admission based on gender, religion, disability, economic status, sexual orientation or any other characteristic not protected by 42 U.S.C. § 2000(d), and that school would still be eligible to receive state taxpayer dollars under Senate Bill 90.

This scenario creates a slightly different Establishment Clause issue as Senate Bill 90 would provide state funds to religious private schools while permitting those schools to engage in discrimination. However, public schools are prohibited from engaging in discrimination based on any classification.⁷⁴ In effect, Senate Bill 90 would allow religious private schools to benefit from public funds without subjecting them to the same limitations as public schools. By permitting a religious school to receive public funds while engaging in discrimination which is prohibited for a public school, Senate Bill 90 can be said to “advance” religion. The advantage to religious private schools is evident as these schools can opt to admit only gifted or affluent students in hopes of producing higher test scores and bringing in greater private resources, while public schools must admit all students regardless of talents or wealth. By advancing a religion, Senate Bill 90 would fail the “effects” prong of the *Lemon* test, thereby violating the Establishment Clause of the First Amendment.

Because *Zelman* did not specifically address this issue, there is no precedent law that would prohibit a court from finding an Establishment Clause violation on these grounds. However, what is clear from the Court’s decision in *Zelman* is that the Court’s conclusion turned on the fact that any benefit to a religious school created by Ohio’s PSP would be based on the “true private choice” of the parent, a choice also afforded to parents under the Senate Bill 90 program.⁷⁵ Because the program proposed by Senate Bill 90 does not encourage or incentivize participating parents to direct public funds to

73. Ga. S.B. 90; 42 U.S.C. § 2000(d) (2010).

74. See U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

75. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002); Ga. S.B. 90.

private, sectarian schools,⁷⁶ the Bill is neutral with respect to religion and likely cannot be challenged under the Establishment Clause of the First Amendment of the United States Constitution, even under this alternative theory.

IV. STATE CONSTITUTIONAL AND PUBLIC POLICY CHALLENGES TO UNIVERSAL SCHOOL VOUCHERS

While no federal law challenges to universal school vouchers may exist, the language of Senate Bill 90 creates both state constitutional and public policy challenges to the school vouchers program it proposes. These potential challenges should be instructive when drafting and evaluating future legislation seeking to create a universal school vouchers program in Georgia.

A. State Constitutional Challenges to Universal School Vouchers

While the United States Supreme Court's decision in *Zelman* could impede a finding that a universal school vouchers program violates the Establishment Clause of the United States Constitution, such a program may violate the Blaine Amendment of the Georgia Constitution as well as the state's constitutional guarantee to a free, adequate public education. Using the language of Senate Bill 90 as an example, the following discussion elucidates the susceptibility of universal school vouchers to constitutional challenge.

1. Universal School Vouchers May Violate the Blaine Amendment

a. The History of Georgia's Blaine Amendment

Article I, section 2, paragraph 7 of the Georgia Constitution states that “[n]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or

76. Ga. S.B. 90 (“Any scholarship directed to a participating school is so directed wholly as a result of the genuine and independent private choice of the parent.”).

religious denomination or of any sectarian institution.”⁷⁷ This constitutional provision, known as the Blaine Amendment, was based upon the 1875 proposal of Speaker of the House James Blaine to amend the United States Constitution.⁷⁸ 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.”⁷⁹

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.⁸⁰ If enacted, the Amendment would have prevented Catholic schools from receiving public funds and forced Catholic students into Protestant public schools.⁸¹ 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.⁸² Today, thirty-seven state constitutions contain some version of the Blaine Amendment,⁸³ including the Georgia Constitution.⁸⁴

77. GA. CONST. art. I, § 2, para. 7.

78. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J. L. & PUB. POL’Y 551, 556 (2003).

79. *Id.* at 557; President Ulysses S. Grant, Speech to the Army of the Tennessee (Sept. 29, 1875).

80. DeForrest, *supra* note 78, at 557, 564.

81. *Id.* at 560-64.

82. *See id.* at 573.

83. Shannon S. Taylor, *Special Education, Private Schools, and Vouchers: Do All Students Get a Choice?*, 34 J.L. & EDUC. 1, 16 (2005).

84. In 2003, after a proposal by Governor Sonny Perdue, Senator Daniel Lee introduced Senate Resolution 560 which proposed to amend the Blaine Amendment of Georgia’s Constitution. Press Release, Office of the Governor, State of Ga., Governor Perdue Proposes Faith-Based Constitutional Amendment (Oct. 7, 2003), *available at* http://gov.georgia.gov/00/press/detail/0,2668,78006749_91290006_91682677,00.html [hereinafter Governor Perdue Press Release]; S.B. 560, 147th Gen. Assem., 1st Reg. Sess. (Ga. 2003) (as introduced), *available at* http://www.legis.state.ga.us/legis/2003_04/versions/sr560_As_introduced__LC_28_2.htm (last visited Mar. 22, 2010). The amendment sought to add

b. Analyzing Senate Bill 90 Under the Blaine Amendment

The universal school vouchers program proposed by Senate Bill 90 permits students participating in the vouchers program to use tuition awards to fund private school education.⁸⁵ With 80.6% of all private school students enrolled in religiously affiliated schools, chances are that parents who would participate in the Senate Bill 90 program who choose to send their children to private schools would distribute school vouchers funds taken from the public treasury to religiously affiliated organizations.⁸⁶ Also, the Bill requires that payments of private school tuition made be mailed directly from the Department of Education to the private school, whereupon the parent endorses the check over to the private school.⁸⁷ Such a vouchers program in Georgia may violate the plain language of

the following language to Georgia's Blaine Amendment: "except as permitted or required by the United States Constitution, as amended." Ga. S.B. 560. The drafters intended this clause to prevent discrimination against faith-based institutions by creating an interpretation of Georgia's Blaine Amendment that would allow individuals to use public funds at faith-based institutions. Governor Perdue Press Release, *supra*. However, if passed, Senate Resolution 560 would have prevented Georgia courts from striking down voucher programs as violative of the Blaine Amendment. *Id.*; see Ga. S.B. 560 (as introduced). Although the Georgia Senate passed this Resolution in January 2004, the House did not consider the Resolution, and it died in committee. Ga. Gen. Assem., S.R. 560 (July 23, 2004), http://www.legis.state.ga.us/legis/2003_04/sum/sr560.htm.

The next year the General Assembly considered an identical resolution, Senate Resolution 49. S.R. 49, 148th Gen. Assem., 1st Reg. Sess. (Ga. 2005) (as introduced), *available at* http://www.legis.state.ga.us/legis/2005_06/versions/sr49_As_introduced_LC_28_1995_EC_2.htm (last visited Mar. 22, 2010). The Resolution's supporters argued that the amendment was intended to redress the mistake that Georgia made when it adopted the discriminatory Blaine Amendment and to allow the state to provide public funds to religious organizations performing social services. Governor Perdue Press Release, *supra*. However, several opponents countered that the true intention behind the Resolution was to pave the way for school vouchers. *See id.* In any event, Senate Resolution 49 failed to pass the Senate, and Georgia's Blaine Amendment, as adopted, remains intact. Ga. Gen. Assem., S.R. 42 (Oct. 11, 2006), http://www.legis.state.ga.us/legis/2005_06/sum/sr42.htm.

85. Ga. S.B. 90.

86. PRIVATE SCHOOL UNIVERSE SURVEY, *supra* note 4.

87. *Id.*

the Blaine Amendment because by permitting a state agency, the Department of Education, to directly disburse state tax funds from the public treasury to a religious institution, a sectarian private school.⁸⁸

The Georgia Attorney General has interpreted the Blaine Amendment to provide broader protection to Georgia citizens than the Establishment Clause.⁸⁹ 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

88. Georgia taxpayers may be suitable plaintiffs to challenge the school vouchers program, claiming a violation of Georgia's Blaine Amendment. To have standing, a plaintiff must establish an injury in fact, causation and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). While taxpayer injuries, in some cases, may be too abstract to give rise to standing, the injury to Georgia taxpayers caused by Senate Bill 90 would invade the taxpayers' constitutionally protected interest in preventing the distribution of state funds to religious institutions. *Id.* at 573-74; GA. CONST. art. I, § 2, para. 7. As Georgia taxpayers would be challenging a violation of the Blaine Amendment of the Georgia Constitution, they would have an injury in fact sufficient to give rise to taxpayer standing. Such an injury is more than fairly traceable to the actions of the state, as the vouchers program will not exist without the state enacting Senate Bill 90. Also, state funds would not be awarded to religious private schools without the state approving such schools to participate in the voucher program and mailing award checks to the religious private schools. Thus, there is sufficient causation to give the Georgia taxpayers standing.

Finally, the injury to Georgia taxpayers is redressable as their interest in preventing state funds from going to religious institutions would be protected and restored if a court were to deem the school vouchers program created by Senate Bill 90 unconstitutional and prohibit the state from disbursing taxpayer dollars to religious private schools. As Georgia taxpayers will suffer an actual injury, if the state is permitted to distribute tax funds to religious private schools and that injury could be redressed by a ruling that the Senate Bill 90 vouchers program is unconstitutional, Georgia taxpayers would have standing to sue for a violation of the Blaine Amendment. This conclusion is supported by the fact that it was Ohio taxpayers who were found to have standing to sue in *Zelman*, suggesting that Georgia taxpayers would also have standing to challenge the voucher program created by Senate Bill 90. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 639 (2002) (finding that Ohio taxpayers had standing to sue as is evidenced by the fact that the Court heard, analyzed, and ruled on the merits of the claim, despite the lack of explicit standing analysis).

89. 1960 Op. Ga. Att'y Gen. 349.

finding that school vouchers violate the broader, more encompassing Blaine Amendment.

The Georgia Supreme Court has not yet had occasion to review the constitutionality of a school vouchers program under the Blaine Amendment. However, the Georgia Supreme Court evidenced a strict interpretation of the Blaine Amendment, in accord with the Attorney General's opinion, in *Bennett v. City of La Grange*.⁹⁰ In that case, the court held that the City's use of public funds to pay the Salvation Army for caring for the City's poor constituted the taking of money from the public treasury, directly and indirectly, in aid of a religious organization in violation of the Blaine Amendment.⁹¹ If the use of public funds to pay a religious organization for its service to the poor violates the Blaine Amendment, so too should the use of public funds to pay a religious organization to education children violate the Blaine Amendment.

Moreover, other state courts have used their state's version of the Blaine Amendment to strike down vouchers programs, which may encourage a similar finding if a universal school vouchers program is contested in a Georgia court.⁹² For

90. *Bennett v. City of La Grange*, 112 S.E. 482 (Ga. 1922).

91. *Id.* at 484.

92. *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (holding that two school voucher programs which allow foster and disabled children to use public funds to attend private schools violate the Arizona Constitution); *Bush v. Holmes*, 886 So.2d 340 (Fla. 1st Dist. Ct. App. 2004) (holding that Florida's Opportunity School Voucher system violates Florida's Blaine Amendment), *declined to address issue in* 919 So.2d 392 (Fla. 2006). *But see* *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied* 525 U.S. 997 (1998) (holding that the Milwaukee school vouchers program does not violate the Blaine Amendment of Wisconsin's Constitution because the primary effect of the program was not to benefit religious organizations).

While the Wisconsin Supreme Court declined to strike down the Milwaukee Parental Choice Program under the state's Blaine Amendment, the Court's analysis focused on whether the primary effect of the program was to benefit religious organizations - analysis that is essentially the same as the "effects" prong of the *Lemon* test applied to Establishment Clause challenges. *See* *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998), *cert. denied* 525 U.S. 997 (1998). The Court's application of analysis substantially identical to Establishment Clause analysis suggests that the Wisconsin Supreme Court does not interpret its Blaine Amendment to require a stricter reading than the Establishment Clause, as does Georgia. Therefore, the Wisconsin Blaine Amendment can be characterized as more

example, in 2006, the First District Court of Appeals of Florida declared the state's Opportunity Scholarship Program unconstitutional in violation of the state's Blaine Amendment.⁹³ The language of Florida's Blaine Amendment is almost identical to Georgia's Blaine Amendment: "[n]o revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."⁹⁴ Interpreting this language as "far stricter" than the Establishment Clause, the First District Court of Appeals of Florida held that this provision is violated when religious organizations benefit from increased student enrollment or financing, even when this benefit is granted based on the independent choice of a parent.⁹⁵ Because the Opportunity Scholarship Program granted students public funds to finance private education at religiously affiliated schools, the court found the program to be unconstitutional in violation of Florida's Blaine Amendment.⁹⁶

Georgia's Blaine Amendment, with strikingly similar language to the Florida Blaine Amendment, has also been interpreted by the Georgia Attorney General and Georgia Supreme Court to require a stricter reading than the Establishment Clause.⁹⁷ With Senate Bill 90 allowing the same transfer of public funds from the treasury to religiously affiliated private schools through the choice of participating

permissive than the more strictly interpreted Georgia Blaine Amendment, and *Jackson v. Benson* should be instructive to Georgia courts reviewing Senate Bill 90.

93. *Bush*, 886 So.2d at 366. This decision was a case of first impression for the First District Court of Appeals of Florida. *Id.* at 367. Because its decision invalidated the Florida statute authorizing the Opportunity Scholarship Program, the First District Court of Appeals of Florida certified the question of whether the program violated the Blaine Amendment to the Supreme Court of Florida. *Id.* However, the Supreme Court of Florida expressly declined to address that issue. *Bush v. Holmes*, 919 So.2d 392, 413 (Fla. 2006).

94. FLA. CONST. art. I, § 3.

95. *Bush*, 886 So.2d at 352-53, 359-60 (quoting *Witters v. Washington Dep't. of Servs. for the Blind*, 474 U.S. 481, 489 (1981)).

96. *Id.* at 413.

97. *See, e.g.*, 1960 Op. Ga. Att'y Gen. 349; *Bennett*, 112 S.E. at 484.

students⁹⁸ as was allowed by Florida's Opportunity Scholarship Program, it is a reasonable conclusion that Georgia courts may follow the lead of the First District Court of Appeals of Florida and find that such a vouchers program violates the Blaine Amendment.

Proponents of a universal school vouchers program argue that state funds are being distributed to religious private schools based solely upon the independent choice of parents. However, this argument does not support the constitutionality of the program, as the Blaine Amendment prohibits both direct *and indirect* distribution of state funds to secular institutions.⁹⁹ A parent's endorsement of a state funds check over to a secular private school can be considered an indirect distribution of state funds to a religious institution in violation of the Blaine Amendment.

Given the Georgia Attorney General's opinion and the Georgia Supreme Court's strict interpretation of the Blaine Amendment, a universal school vouchers program likely would violate the Blaine Amendment. The state court decisions striking down similar vouchers programs support this conclusion.¹⁰⁰ Therefore, by enacting a universal school vouchers program, such as the one proposed by Senate Bill 90, the Georgia General Assembly would be permitting the use of state funds for religious institutions in violation of the Georgia Constitution.

2. *Universal School Vouchers May Violate the Guarantee of Free, Adequate Public Education*

Additionally, a universal school vouchers program's effect on the education of students not participating in the program may also create a constitutional issue. Article VIII, section 1, paragraph 1 of the Georgia Constitution states: "The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation."¹⁰¹ By its own terms,

98. Ga. S.B. 90.

99. GA. CONST. art. I, § 2, para. 7 (emphasis added).

100. *See supra* note 92.

101. GA. CONST. art. VIII, § 1, para. 1.

this constitutional provision does more than merely give the state authority to administer public education; it *obligates* the state to make adequate elementary and secondary education available to the public for free.¹⁰²

Yet, the language of Senate Bill 90 allows the public education resources provided by taxation to fund public schools to be distributed to private schools, which traditionally have much greater resources than public schools.¹⁰³ By reducing the funds available to public schools, Senate Bill 90 further limits the resources available to all students and hinders the ability of public schools to provide an adequate education. Moreover, by disbursing these funds to finance private education, rather than public education, the state of Georgia is arguably neglecting its “primary obligation” to provide public education.¹⁰⁴ Therefore, a universal school vouchers program, such as Senate Bill 90, may violate Georgia’s mandate that all children receive a free, adequate public education.¹⁰⁵

102. *Id.* (emphasis added).

103. Ga. S.B. 90.

104. GA. CONST. art. VIII, § 1, para. 1.

105. Georgia public school students not participating in the vouchers program, through their parents, may be suitable plaintiffs to challenge school vouchers, claiming the state’s failure to provide an adequate education. *See supra* note 88 for a discussion of the standing test. As evidence of an injury in fact, such students could assert a deprivation of their constitutionally protected right to a free, adequate public education. However, such a claim may be difficult to support. Empirical studies which show the fiscal and educational impact on students remaining in public schools after implementation of a vouchers program may be necessary to support such a claim. As the program has not yet been implemented, such evidence has not been produced. Therefore, an inadequate education claim may be most viable only after a school voucher program has been in place in Georgia for several years.

Further, the students could establish causation between the state and this injury as the vouchers program will not exist without the state enacting Senate Bill 90, and the state funds would not be distributed to private schools to the detriment of public schools without the state mailing award checks to the private schools. The students’ injury would be redressed if a court were to declare the Senate Bill 90 program unconstitutional; as public schools would not be deprived of the funds used for the vouchers program and would have more resources available to provide students an adequate education. Therefore, students not participating in the vouchers program would have standing to challenge Senate Bill 90 as a violation of their fundamental right

As with the Blaine Amendment, most state constitutions guarantee a right to education,¹⁰⁶ and, some states have struck down school vouchers programs as violative of these provisions.¹⁰⁷ Again, the state of Florida presents a prime example as the Supreme Court of Florida, in reviewing the certified question of the First District Court of Appeals in *Bush v. Holmes*,¹⁰⁸ declared the Opportunity Scholarship Program unconstitutional in violation the state's constitutional guarantee to "free public schools that allow students to obtain a high

to an adequate education. This conclusion is supported by the fact that it was Georgia students, through their parents, that were found to have standing to sue in *Williams* on exactly the same claim. See *Williams v. Georgia*, 627 S.E.2d 891, 892 (Ga. 2006) (finding that Georgia public schools students had standing to sue as is evidenced by the fact that the Court heard, analyzed, and ruled on the merits of the claim, despite the lack of explicit standing analysis).

106. See, e.g., WIS. CONST. art. X, § 3; COLO. CONST. art. IX, § 15; FLA. CONST. art. IX, § 1(a).

107. See *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 944 (Colo. 2004) (declaring the Colorado Opportunity Contract Pilot Program unconstitutional as it violated Article IX, Section 15 of the Colorado Constitution); *Bush v. Holmes*, 919 So.2d 392, 407 (Fla. 2006) (declaring the Florida Opportunity Scholarship Program unconstitutional as it violated Article IX, Section 1(a) of the Florida Constitution). But see *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998), cert. denied 525 U.S. 997 (1998) (finding the Milwaukee Parental Choice Program did not violate Article X, Section 3 of the Wisconsin Constitution).

While the Wisconsin Supreme Court found that the Milwaukee school vouchers program did not violate the state's constitutional right to education, it did so based on constitutional language that is quite different from that of Georgia's Constitution. Compare WIS. CONST. art. X, § 3 ("The 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; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours."), with GA. CONST. art. VIII, § 1, para. 1 ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation."). Because the Wisconsin Constitution grants its citizens on the right to education, not *adequate* education, the *Jackson* opinion should not be instructive to a Georgia court reviewing Senate Bill 90.

108. *Bush*, 919 So.2d at 413.

quality education.”¹⁰⁹ The court reasoned that because the Opportunity Scholarship Program allowed public funds to go to private schools, the program was using the state’s resources to educate children through means other than a system of free public schools in violation of the plain language of the Florida Constitution.¹¹⁰ The court went on to note that the program undermined the system of “high quality” education by reducing the funds available to public schools.¹¹¹

The Georgia Constitution, like the Florida Constitution, requires the state to provide its citizens education through free, public schools. Therefore, if a universal school vouchers program which allows public funds to finance private education violates this provision in the Florida Constitution, a program which allows the same distribution of public funds to finance private education, such as Senate Bill 90, should also violate the similar provision in Georgia’s Constitution. It is true that the Georgia Constitution does not guarantee citizens a high quality education, as does Florida’s Constitution.¹¹² However, it is a reasonable inference that if public schools providing high quality education are undermined when their funding is reduced, as the Florida Supreme Court suggests, then further limiting the funds available to Georgia public schools, which currently are struggling to provide only adequate education, could have an even more devastating effect.

Some may argue that the decision of the Court of Appeals of Georgia in *Williams v. Georgia*¹¹³ may make success on an inadequate education claim more difficult. However, the downfall of the plaintiffs’ claim in *Williams* was that they claimed a denial of the right to choose the *best* education for their children.¹¹⁴ Future challenges to school vouchers programs could circumvent this holding by claiming that the state has failed to provide an *adequate* education, as is granted by the Georgia Constitution.¹¹⁵ Because universal school

109. FLA. CONST. art. IX, § 1(a).

110. *Bush*, 919 So.2d at 407.

111. *Id.* at 409.

112. Compare FLA. CONST. art. IX, § 1(a), with GA. CONST. art. VIII, § 1, para. 1.

113. See *supra* Part II.A. for a discussion of the *Williams* case.

114. *Williams v. Georgia*, 627 S.E.2d 891, 893 (Ga. 2006).

115. GA. CONST. art. VIII, § 1, para. 1.

vouchers reduce the funding available to public schools and subvert Georgia's primary obligation to those public schools, such programs likely violate Georgia citizens' constitutionally protected right to a free, adequate public education.

As is exemplified through an analysis of Senate Bill 90, a universal school vouchers program could be challenged under both Georgia's Blaine Amendment and the guarantee of a free, adequate public education provided in Georgia's Constitution. The Georgia Attorney General's and the Georgia Supreme Court's opinions strictly interpreting the Blaine Amendment, in conjunction with the decisions from other states striking down vouchers programs under similar Blaine Amendments, support the success of a Blaine Amendment challenge to school vouchers in Georgia. An inadequate education claim may be an uphill battle best fought after the school vouchers program has been in place for several years, allowing time to generate empirical data evidencing the affect of the program on public schools. Yet, the Florida Supreme Court's decision in *Bush* should be instructive to Georgia courts given the similarity of the two states' constitutional provisions.

B. Public Policy Challenges to Universal School Vouchers

Few would argue that the general goal to improve the educational opportunities of Georgia students creates bad public policy. However, reasonable minds differs on the appropriate means to achieve that end. While a universal school vouchers program may create the desired opportunitites for some, public policy demands that state educational initiatives promote the interests of all students rather than a select few. A look at the provisions of Senate Bill 90 illuminates several policy concerns relating to universal school vouchers of which Georgia citizens should be aware.

1. Universal School Vouchers May Not Give Parents Unfettered School Choice

Despite the fact that Senate Bill 90 was championed as a means to give Georgia parents the power to govern the

education of their children,¹¹⁶ the program it proposes may not actually give parents the right to freely choose which school their children should attend. A student is eligible for the school vouchers program proposed by Senate Bill 90 only if the student's parent currently resides in and has been a resident of Georgia for at least one year.¹¹⁷ Also, the student must have attended a Georgia public school for at least one year, and the student's parent must submit an application to the Georgia Department of Education prior to a deadline specified by the Department.¹¹⁸ Before applying for the vouchers program, the student must receive admission to a participating school.¹¹⁹

To become eligible to accept students under the vouchers program proposed by Senate Bill 90, a school must have a physical location in Georgia.¹²⁰ Also, the school must demonstrate that it is fiscally sound by having been in operation at least one year or by submitting a financial report confirming that the school is insured and has sufficient capital according to the standards of the Department of Education.¹²¹ Participating

116. Currently, Georgia students are required to attend the public school within their residential district, unless they are eligible for the Special Needs Scholarship or they elect to use their own funds to attend private school.

117. Ga. S.B. 90 ("A student shall qualify for a scholarship under this article if: (1) [t]he student's parent currently resides within Georgia and has been a Georgia resident for at least one year.").

118. *Id.* ("A student shall qualify for a scholarship under this article if: . . . (2) [t]he student has spent the prior school year in attendance at a Georgia public school; . . . (4) [t]he parent submits an application for a scholarship to the department no later than the deadline established by the department.").

119. *Id.* ("A student shall qualify for a scholarship under this article if: . . . (3) [t]he parent obtains acceptance for admission of the student to a participating school.").

120. *Id.* ("To be eligible to enroll a scholarship student, a participating school shall: (1) [h]ave a physical location in Georgia where the scholarship students attend classes and have direct contact with the school's teachers.").

121. *Id.* ("To be eligible to enroll a scholarship student, a participating school shall: . . . (2) [d]emonstrate fiscal soundness by having been in operation for one school year or by submitting a financial information report for the school that complies with uniform financial accounting standards established by the department and conducted by a certified public accountant. The report must confirm that the school desiring to participate is insured and the owner or owners have sufficient capital or credit to operate the school for the upcoming school year serving the number of students anticipated with expected revenues from tuition and other sources that may

schools must employ teachers holding at least a bachelor's degree and three years of experience in education.¹²² The school is required to annually report to the parents the credentials of its teachers and regularly report to the parents the academic progress of the students.¹²³ Also, the school is required to comply with state health and safety codes and all other state laws applicable to private schools.¹²⁴

Based on these eligibility requirements for both the school and the student, a parent's choice is limited to the schools approved to participate in the program, and the choice is further limited by which of those approved schools agrees to admit the student. While a universal school vouchers program will admittedly provide parents with options other than the local public school in the student's residential district, the private schools approved to participate in the vouchers program are permitted to deny admission based on a student's age, gender, religion, disability, sexual orientation, or any trait other than race, color, or national origin.¹²⁵ Because a student is not eligible for the vouchers program until she has been admitted to a participating school, the program proposed in Senate Bill 90

be reasonably expected. The report shall be limited in scope to those records that are necessary for the department to make a determination on fiscal soundness and to make payments to schools for scholarships.”).

122. *Id.* (“To be eligible to enroll a scholarship student, a participating school shall: . . . (7) Employ or contract with teachers who hold a bachelor's degree or higher degree or have at least three years of experience in education and annually provide to the parents the relevant credentials of the teachers who will be teaching their students.”).

123. Ga. S.B. 90 (“To be eligible to enroll a scholarship student, a participating school shall: . . . (6) Regularly report to the parent and the department on the student's academic progress, including the results of pre-academic assessments and post-academic assessments given to the student, in accordance with department guidelines.”).

124. *Id.* (“To be eligible to enroll a scholarship student, a participating school shall: . . . (4) Comply with all health and safety laws or codes that apply to private schools; (5) Comply with all provisions of Code Section 20-2-690 and any other state law applicable to private schools.”).

125. *See id.* As discussed *supra* Part III.B., Senate Bill 90 requires that participating private schools comply with 42 U.S.C. § 2000(d) which prohibits discrimination based on race, color, and national origin, but the Bill does not prohibit private schools to discriminate based on any other classification. *Id.*

leaves a student's eligibility for the vouchers program in the discretion of the participating schools,¹²⁶ not Georgia parents.¹²⁷

Further, universal school vouchers may create social inequality because they permit private schools, receiving public funds, to engage in discrimination based on any class other than race, color, and national origin.¹²⁸ The failure of the Bill to prohibit such discrimination would allow private schools to accept only those students with the best test scores, only those students free from disability, or only those students of a particular religion, leaving all other students ineligible to participate in the vouchers program for lack of a school to accept them.

Some may view the current educational system in Georgia to embody such inequality because only wealthy families can afford to send their children to private school or because the housing lines upon which public school assignments are made were influenced by the Jim Crow laws of the 1950s and 1960s. However, any such existing inequality does not explain away the lack of measures to redress such inequality in the language of Senate Bill 90. Those concerned with the inequality of the current educational system will find no relief in the language of the Bill which merely extends public funds to private schools without preventing discriminatory admissions practices.¹²⁹

126. *Id.* ("It shall be in the sole discretion of the school, in accordance with an annual policy established by the school council, to accept students pursuant to this [school vouchers program].").

127. *Id.*

128. *Id.*

129. In fact, Senate Bill 90 explicitly declines to take any measures which would regulate a private school's ability to use discriminatory admissions practices. Ga. S.B. 90 ("The creation of the program shall not be construed to expand the regulatory authority of the state, its officers, or any local school system to impose any additional regulation of nonpublic schools beyond those reasonably necessary to enforce the requirements of this article."). While limited government involvement in private schools likely is an important feature that attracts some parents to private schools, it is at least arguable that the transfer of public funds to private schools through school vouchers programs, such as Senate Bill 90, warrants a slight increase in the government's regulatory authority over such schools.

2. *Universal School Vouchers May Not Benefit Low-Income Families*

Moreover, universal school vouchers may not actually benefit low-income families. Consider the funding mechanism of Senate Bill 90, which sets the amount of the scholarships available under its school vouchers program to be the cost of tuition and fees to attend the participating private school or the amount that the resident school pays per student to fund education, whichever is less.¹³⁰ Parents of eligible students remain responsible for all educational costs not covered by the voucher award, such as any tuition fees above the voucher amount awarded, and transportation costs.¹³¹

An analysis of the data relating to Georgia's existing school vouchers program, the Special Needs Scholarship Act, may illustrate this point.¹³² On average, Georgia schools spent \$6331

130. *Id.* (“The amount of the scholarship provided pursuant to this article shall be the lesser of: (1) The costs of the educational program that would have been provided for the student in the resident school system as calculated under Code Section 20-2-161, which shall not include any federal or local funds; or (2) The amount of the participating school’s tuition and fees, including any assessment fee required by the participating school.”).

131. *Id.* (“[T]he parent shall be responsible for transportation to and from such school.”).

132. Because the Georgia General Assembly has not yet enacted Senate Bill 90, no data on the vouchers program it creates is available. However, data is beginning to emerge on the Special Needs Scholarship Program, which was first available to students in the 2007-2008 school year. O.C.G.A. § 20-2-2110 to -2118 (2007). Because the funding mechanism proposed by Senate Bill 90 is identical to that of the Special Needs Scholarship Program, funding data from the Special Needs Scholarship Program is the most appropriate, available tool for analyzing Senate Bill 90. *Cf.* Ga. S.B. 90 (“The amount of the scholarship provided pursuant to this article shall be the lesser of: (1) [t]he costs of the educational program that would have been provided for the student in the resident school system as calculated under Code Section 20-2-161, which shall not include any federal or local funds; or (2) [t]he amount of the participating school’s tuition and fees, including any assessment fee required by the participating school.”), *with* O.C.G.A. § 20-2-2116 (2009) (“(a) The maximum scholarship granted a scholarship student pursuant to this article shall be an amount equivalent to the costs of the educational program that would have been provided for the student in the resident school system as calculated under Code Section 20-2-161. This shall not include any federal funds. (b) The amount of the scholarship shall be the lesser of the amount calculated in subsection (a) of

per student under the Special Needs Scholarship Act in the 2008-2009 school year.¹³³ Of the 135¹³⁴ private schools which enrolled participating students that year, 100 schools charged more than \$6331 in tuition.¹³⁵ The average tuition across all of the 135 participating private schools was \$11,231.¹³⁶

Applying these figures to the universal school vouchers program proposed in Senate Bill 90, some may argue that granting all low-income families, not just families of disabled students, \$6331 toward private school education is a step toward a better educational opportunity. However, for the average student, this amount will not cover all costs of attendance at any one of the 100 participating private schools with tuition greater than \$6331. Even where a student is granted an above average voucher award which will cover private school tuition in full, Senate Bill 90 leaves the parents responsible for transportation costs and other discretionary costs of attendance, such as book fees and uniform clothing requirements.¹³⁷ These additional costs may be impossible to bear for low-income families struggling to make ends. Therefore, a universal school vouchers program may not actually benefit low-income families who cannot cover the additional tuition, fees, and transportation costs above the amount awarded by the scholarship.

3. *Universal School Vouchers are Fiscally Questionable*

Finally, the program proposed in Senate Bill 90 is fiscally questionable because the Bill sets no maximum income level for program participants.¹³⁸ Therefore, even families with sufficient funds to finance a private school education can apply for this school vouchers program and receive public funds. Allowing

this Code section or the amount of the participating school's tuition and fees, if applicable.").

133. 2008-2009 EOY REPORT, *supra* note 42, at 4. The amount of vouchers granted ranged from \$2592 to \$13,586. *Id.*

134. While 145 private schools were eligible to participate in the Special Needs Scholarship Program, only 135 actually enrolled students in the 2008-2009 school year. *Id.*

135. *See id.* at 12-15.

136. *See id.* The cost of tuition of these 135 participating private schools ranged from \$3270 to \$37,950. *See id.*

137. *Id.*

138. Ga. S.B. 90.

such an over-inclusive class of students to qualify for the program is an unprecedented legislative feat¹³⁹- a feat which could result in unnecessary government spending and waste of taxpayer dollars. The taxpayers of Georgia undertook the state's first school vouchers legislation, the Special Needs Scholarship Act, only two years ago, leaving little time to determine whether such a vouchers program is ultimately successful in Georgia. With that program limited to only certain disabled students, the state spent almost \$10,000,000 the program during the 2008-2009 school year.¹⁴⁰ The amount of spending is likely to increase exponentially under a universal school vouchers program as it contains no such eligibility limitation – a spending increase accomplished without a determination of whether the existing, more limited vouchers program is even effective.

Given the budgetary crisis in Georgia, it is of great concern that a universal school vouchers program would further tighten an already limited public education budget. The funds provided to students through vouchers are funds that a public school would have received if the student had remained in public school.¹⁴¹ The Senate Bill 90 program takes education funds

139. No other state in the nation has enacted such a universal school vouchers program. Most state school voucher programs limit enrollment based on financial need or failing public school systems. *See, e.g.*, the Colorado Opportunity Contract Pilot Program, COLO. REV. STAT. §§ 22-56-101 to -110 (repealed 2006) (limiting eligibility to only students that qualify for free or reduced lunch and further limiting the program to only 1% of the school district's enrollment); the Opportunity Scholarship Program, FLA. STAT. § 1002.38 (2005) (limiting eligibility to only students attending a failing school for two years in a four-year period); the Ohio Pilot Scholarship Program, OHIO REV. CODE ANN. §§ 3313.974-.979 (2010) (limiting eligibility to only students living in households with an income below 200% of the poverty line priority); the Milwaukee Parental Choice Program, WIS. STAT. § 119.23 (2009) (limiting eligibility to only students living in households with an income equal to or less than 175% the federal poverty line).

140. 2008-2009 EOY REPORT, *supra* note 42, at 4.

141. Ga. S.B. 90. Under the identical funding mechanism of the Special Needs Scholarship Program, the average student was awarded \$6331. 2008-2009 EOY REPORT, *supra* note 42, at 4. Applied to Senate Bill 90, any Georgia student, meeting the residency requirements, could chose to transfer to a participating private school and take \$6331 of public funds along with her. Ga. S.B. 90.

from public schools and distributes them to private schools participating in the vouchers program.¹⁴² Last year, Georgia public schools were deprived of almost \$10,000,000 which transferred along with students participating in the Special Needs Scholarship Program.¹⁴³ Georgia's public schools are already struggling to provide adequate education with limited resources.¹⁴⁴ Implementing a universal school vouchers program will only further hinder the education of all Georgia students by depleting even greater resources necessary to provide the constitutionally required adequate public education.¹⁴⁵

While proponents of school vouchers may argue that the public school only loses the funds that would have been necessary to educate the student that is transferring pursuant to the vouchers program, this argument assumes an unrealistic flexibility in public school budgets. A public school's need to employ teachers, maintain facilities, and provide transportation does not change with the exit of one or even a few transferring students. An adjustment in a school budget based on individual student transfers would be impractical as it would mean the school must decrease the salary of the teachers which taught that student and decrease the spending on the computers, books, and all facilities which that student used by the percentage of the funds allocated to that individual student. However, in reality, that teacher's salary is likely already set, and the computers, books, and facilities have likely already been purchased, so even this across the board percentile decrease is impossible. It is unavoidable that the loss of funds caused by the transfer of even one student under a universal school vouchers program would affect the educational resources available to all public school students.

142. Ga. S.B. 90.

143. 2008-2009 EOY REPORT, *supra* note 42, at 4.

144. According to the U.S. Dept. of Education State Education Data Profiles, Georgia students scored below the national average in both fourth and eighth grade math and reading. See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., STATE EDUCATION DATA PROFILES, NATIONAL ASSESSMENT OF EDUCATION PROGRESS (2005), <http://nces.ed.gov/programs/stateprofiles/sresult.asp?mode=short&s1=13>.

145. GA. CONST. art. VIII, § 1, para. 1.

Universal school vouchers may not give parents the school choice they expect from a vouchers program as the participating private schools are free to deny students based on any classification other than race, color, and national origin. Vouchers may not actually benefit low income families because they leave those families to bear any costs of private school education left uncovered by the vouchers. Finally, universal school vouchers are fiscally questionable because they fail to adequately limit student eligibility for the program and further tighten an already limited public education budget. These public policy concerns create strong challenges to any proposed universal school vouchers program in Georgia.

V. CONCLUSION

While improving the education of Georgia's children should be an ever-present goal of the General Assembly, a universal school vouchers program, such as the program proposed in Senate Bill 90, does little to advance this goal while doing much to infringe upon the separation of church and state. The interest of Georgia citizens in preventing the use of tax dollars to support religious institutions is not a necessary casualty in the struggle to provide adequate public education.

Universal school vouchers go against public policy by advocating irresponsible fiscal spending to the disadvantage of public schools and taxpayers in Georgia while failing to guarantee low-income families a meaningful benefit. Further, such programs, especially the program proposed in Senate Bill 90, contain major flaws leaving them susceptible to litigation for violations of the Blaine Amendment to Georgia's Constitution and the fundamental right to a free, adequate public education guaranteed by Georgia's Constitution.

If a school vouchers program available to students other than those with a disability is to be a realistic goal for the State of Georgia, the General Assembly should strive to more narrowly tailor legislation so as to avoid these potential public policy and constitutional challenges. Language to limit program eligibility to only those students whose family income is below the poverty line by a specified percentage would be a significant step toward overcoming the policy concerns which led to the defeat of Senate Bill 90 in the state legislature. Limiting the program to only participating *public* schools or amending the

Georgia Constitution, admittedly more drastic steps, may be the only way to avoid the constitutional challenges to a universal school vouchers program.

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