

**KIDS AND THE KEYSTONE CONSTITUTIONAL CONUNDRUM:  
CAN PENNSYLVANIA INSTITUTE A SCHOOL VOUCHER  
PROGRAM TO RESCUE CHILDREN FROM  
UNDERPERFORMING SCHOOLS?**

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INTRODUCTION

In Pennsylvania, the state constitution stipulates that the General Assembly must provide a quality education to all Pennsylvanians by supporting a “thorough and efficient” public education system.<sup>2</sup> Yet, the current education options available to disadvantaged children in Pennsylvania fail to meet the demand for adequate educational opportunities in the state. For instance, a 2011 Philadelphia Inquirer article series focused on the problem of rampant school violence and crime in many of Philadelphia’s public schools that are considered dropout factories, persistently dangerous, or both.<sup>3</sup> Moreover, the Philadelphia School District’s average SAT scores were nearly 350 points below the national and state averages in 2012,<sup>4</sup> and its on-time high school graduation rate for the 2011-12 school year was 64%.<sup>5</sup> Many schools in Philadelphia not only fail to provide students with constitutionally-required “thorough and efficient” educational opportunities, but also sow the hopelessness that leads to cyclical and segregated poverty.

Past education reform efforts that have sought to remedy the poor performance of Pennsylvania’s public education system have fallen short of their promises. Lawsuits demanding increased funding on the basis of adequacy and equality for underfunded school districts in Pennsylvania have

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2. PA. CONST. art. III, § 14 (mandating that the General Assembly provide for a thorough and efficient system of public education).

3. See John Sullivan et al., *Assault on Learning*, PHILA. INQUIRER, Mar. 27-Apr. 3, 2011, available at [http://www.philly.com/philly/news/special\\_packages/inquirer/school-violence/](http://www.philly.com/philly/news/special_packages/inquirer/school-violence/).

4. 2012 SAT Average Scores, PA. DEP’T OF EDUC., [http://www.portal.state.pa.us/portal/http://www.portal.state.pa.us;80/portal/server.pt/gateway/PTARGS\\_0\\_123063\\_12979\\_99\\_0\\_0\\_18/2012%20SAT%20School%20average%20revised%20final%20version.xlsx](http://www.portal.state.pa.us/portal/http://www.portal.state.pa.us;80/portal/server.pt/gateway/PTARGS_0_123063_12979_99_0_0_18/2012%20SAT%20School%20average%20revised%20final%20version.xlsx) (last visited Mar. 6, 2014) (providing the 2012 SAT scores for every public school within the Philadelphia public school district); Tamar Lewin, *Slight Dip in SAT Scores for the Class of 2012*, N.Y. TIMES, Sept. 25, 2012, at A.14 (providing the national average SAT scores for verbal, math, and writing sections).

5. Paul Socolar, *On-time graduation rate has climbed 20 points in a decade*, THE NOTEBOOK (Mar. 22, 2013), <http://thenotebook.org/blog/135772/time-graduation-rate-has-climbed-20-points-decade>.

been rebuffed by the Supreme Court of Pennsylvania.<sup>6</sup> Additionally, charter schools and the Educational Improvement Tax Credit Program cannot adequately satisfy the high demand for alternatives to traditional public schools from parents who are trying to provide their children with better educational opportunities.<sup>7</sup>

In order to provide disadvantaged young Pennsylvanians with “thorough and efficient” educational options, many members of the General Assembly have advocated for the creation of a school voucher program.<sup>8</sup> Such a program will allow parents to use vouchers to pay tuition costs for the private schools of their choice in Pennsylvania.<sup>9</sup> Providing vouchers will give low-income and disadvantaged children the presently unavailable opportunity to attend schools that foster positive intellectual and social growth and that provide a safe environment for learning.<sup>10</sup> School voucher programs can also

6. See, e.g., *Danson v. Casey*, 399 A.2d 360, 362-63 (Pa. 1979); *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 111-12 (Pa. 1999); *Pennsylvania Ass’n of Rural and Small Sch. v. Ridge*, No. 11 M.D. 1991, at 2, 129-30 (Pa. Commw. Ct. 1998), *aff’d*, 737 A.2d 246 (Pa. 1999) (dismissing education clause challenges to school funding laws in Pennsylvania).

7. *Charter School Performance in Pennsylvania*, CENTER FOR RES. ON EDUC. OUTCOMES 20-21, (Apr. 2011), [http://credo.stanford.edu/reports/PA%20State%20Report\\_20110404\\_FINAL.pdf](http://credo.stanford.edu/reports/PA%20State%20Report_20110404_FINAL.pdf) (noting that charter schools in Pennsylvania, based on achievement test scores, were outperformed by their public school peers); Andrew Lefevre, *A Decade of Success: Pennsylvania’s Educational Improvement Tax Credit*, COMMONWEALTH FOUND. 1 (Aug. 2011), [http://www.commonwealthfoundation.org/doclib/20110817\\_PB2308EITC.pdf](http://www.commonwealthfoundation.org/doclib/20110817_PB2308EITC.pdf).

8. S.B. 1, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

9. *Id.*

10. This comment is limited to assessing the constitutionality of school vouchers under the Pennsylvania Constitution and does not analyze the policy reasons which support the implementation of school vouchers in Pennsylvania. However, determining whether vouchers are an empirically reliable solution for children in failing school districts is an important policy decision which has stimulated much policy debate. Compare JAY P. GREENE & RYAN H. MARSH, *THE EFFECT OF MILWAUKEE’S PARENTAL CHOICE PROGRAM ON STUDENT ACHIEVEMENT IN MILWAUKEE PUBLIC SCHOOLS 1* (Univ. of Ark. Dep’t of Educ. Reform, 11th ed. 2009) (finding positive effects of school vouchers in Milwaukee); Matthew Carr, *The Impact of Ohio’s EdChoice on Traditional Public School Performance*, 31 CATO J. 257, 259-60 (2011) (noting that school choice competition could lead to positive outcomes in public schools), and Caroline M. Hoxby, *School choice and school competition: Evidence from the United States*, 10 SWED. ECON. POL’Y REV. 11, 19-22 (2003) (noting substantial increased productivity gains when using school choice program), with DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 113-47 (2010) (providing a critical analysis of the progression of the school choice movement); Susan L. DeJarnatt, *School Choice and the (Irr)rational Parent*, 15 GEO J. ON POVERTY L. & POL’Y 1, 5 (2008) (noting that “[p]arents appear to use race as a heuristic when they are making school choices, in contrast to their stated values of academic standards and teacher quality[ ]”), and Henry M. Levin, *Educational Vouchers: Effectiveness, Choice, and Costs*, 17 J. POL’Y ANALYSIS & MGMT. 373, 373, 375 (1998) (finding that there is no difference or a slight advantage for private schools over public schools).

Additionally, it is important to note that the determination of whether or not school vouchers are an effective policy tool is strictly within the purview of the Pennsylvania General Assembly and would not be at issue during a constitutional challenge of a school voucher program in the state. See *Malone v. Hayden*, 197 A. 344, 352 (Pa. 1938) (noting that the Supreme Court of Pennsylvania will not review the policy reasons regarding the effectuation of the state’s affirmative duty to provide a “thorough and efficient” system of public education).

have the effect of increasing performance in public schools and creating competition dynamics that may stimulate reform in public school districts.<sup>11</sup>

Although there is increasing political support for a school voucher program in Pennsylvania, there are still several obstacles that may impede its creation. One such obstacle is the lack of voucher-specific precedent in Pennsylvania constitutional jurisprudence. Opponents of the program will likely challenge its legality by arguing that the Pennsylvania Constitution's religious provisions preclude the use of vouchers for payment of tuition at sectarian schools.<sup>12</sup> The constitutional challenges to school vouchers are formidable. The language of the Pennsylvania Constitution, at a cursory glance, does seem to prohibit direct appropriations to sectarian organizations.<sup>13</sup> Moreover, the constitution precludes using funds raised to support public schools in support of sectarian schools.<sup>14</sup>

This comment seeks to demonstrate that school vouchers should be deemed constitutional under the Pennsylvania Constitution. This conclusion is based on the text of the constitution, previous cases concerning the application of the Pennsylvania Constitution's religious provisions, and the Pennsylvania Supreme Court's deference to the General Assembly in school funding cases. Moreover, the United States Supreme Court's determination that school vouchers are constitutional under the First Amendment also supports the contention that school vouchers are legal in Pennsylvania.

Part I of this comment will describe the Pennsylvania General Assembly's duty to provide for a system of public education and the current status of the public education options available for the state's children. Part II will discuss the religious provisions of the Pennsylvania Constitution that seem to pose a legal threat to the constitutionality of school vouchers in Pennsylvania. Part III will analyze the legality of school vouchers in Pennsylvania and explain why the Supreme Court of Pennsylvania should deem school vouchers constitutional.

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11. Hoxby, *supra* note 10, at 14, 17.

12. Gregory M. Lipper, *The Future of School Voucher Programs in Pennsylvania: Legal Challenges to School Vouchers*, in *THE FUTURE OF SCHOOL VOUCHERS IN PA* 23, 23-34 (Pa. Bar Inst. ed., 2011) (arguing that school vouchers are unconstitutional under the Pennsylvania Constitution).

13. PA. CONST. art. I, § 3, art. III, §§ 15, 29, 30 (regulating the relationship between the state and religious organizations).

14. *Id.* at art. III, § 15.

## PART I: BACKGROUND

*I.A. The Pennsylvania General Assembly's Duty to Provide a Thorough and Efficient System of Public Education*

In Pennsylvania, ensuring the provision of public education in the Commonwealth is a constitutional duty placed upon the Pennsylvania General Assembly.<sup>15</sup> The Pennsylvania Constitution stipulates in Article 3, Section 14 that: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth."<sup>16</sup> The purpose of the original version of this Education Clause, which was adopted in 1874, was to formally recognize the Commonwealth's budding nineteenth-century public school system and the necessity of the General Assembly's support for the system.<sup>17</sup>

The Supreme Court of Pennsylvania examined the scope of Article 3, Section 14 in *Malone v. Hayden*, which stipulated that the General Assembly had a positive duty to ensure educational opportunities for all Pennsylvanians.<sup>18</sup> The court noted that the Education Clause "not only recognizes that the cause of education is one of the distinct obligations of the state, but makes of it an indispensable governmental function."<sup>19</sup> The court further stated that:

When the people directed through the Constitution that the General Assembly should "provide for the maintenance and support of a thorough and efficient system of public schools," it was a positive mandate that no Legislature could ignore. The power over education is an attribute of government that cannot be legislatively extinguished. It cannot be bargained away or fettered. Its benefits through a free government cannot be placed on the auction block or impeded by laws which will ultimately weaken, if not destroy, the underlying constitutional purpose. To permit such legislative incursion would relate our state back to the days when education was scarce and was secured only through private sources, as a privilege of the rich.<sup>20</sup>

The Pennsylvania Supreme Court found that the Education Clause conferred upon the legislature a duty that could not be disregarded.<sup>21</sup> However, the court stipulated that the state's judicial branch had to be deferential to the

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15. PA. CONST. art. III, § 14. The original version adopted in 1874 stated, "[t]he General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose." PA. CONST. of 1874, art. X, § 1.

16. PA. CONST. art. III, § 14.

17. *Pennsylvania Ass'n of Rural and Small Sch. v. Ridge*, No. 11 M.D. 1991, at 86-105 (Pa. Commw. Ct. 1998), *aff'd*, 737 A.2d 246 (Pa. 1999) (noting the history of the state's education clause).

18. *Malone v. Hayden*, 197 A. 344, 352 (Pa. 1938).

19. *Id.*

20. *Id.*

21. *Id.*

legislature when assessing challenges to constitutionality based on Article 3, Section 14.<sup>22</sup> The court found that the judiciary should not “inquire into the reason, wisdom, or expediency of the legislative policy with regard to education[ ]” in order to determine whether or not the legislature violated its duty under the Education Clause.<sup>23</sup> The *Malone* court specified that the examination of laws related to the public school system should be limited to determining “whether the legislation has a reasonable relation to the purpose expressed in [Article 3, Section 14],” and whether the legislation inhibits the General Assembly’s ability to adopt reforms based on educational advances.<sup>24</sup>

The Supreme Court of Pennsylvania has consistently reasserted this judicial deference to the legislature regarding education.<sup>25</sup> This persistent affirmation is especially evident in Article 3, Section 14 challenges to education funding allocations by the Pennsylvania legislature.<sup>26</sup> For instance, in *Danson v. Casey*, the Supreme Court of Pennsylvania found that the School District of Philadelphia’s Article 3, Section 14 challenge to the state’s funding scheme was non-justiciable.<sup>27</sup> The school district claimed that Article 3, Section 14 required uniformity in “educational offerings” and that the state’s funding scheme did not provide for this uniformity.<sup>28</sup> The *Danson* court found that Article 3, Section 14 did not require uniformity by applying the judicial deference standard of *Malone*:

The Constitution “makes it impossible for a legislature to set up an educational policy which future legislatures cannot change” because “the very essence of this section is to enable successive legislatures to adopt a changing program to keep abreast of educational advances.” It would be no less contrary to the “essence” of the Constitutional provision for this Court to bind future Legislatures and school boards to a present judicial view of a constitutionally required “normal” program of educational services. It is only through free experimentation that the best possible educational services can be achieved.<sup>29</sup>

In its application of *Malone*, the *Danson* court asserted that the funding scheme set by the legislature was reasonably related to its duty to provide support for educational funding.<sup>30</sup> This reasonableness standard reaffirmed the *Malone* court’s holding that the legislature should be afforded with wide latitude in determining how to support Pennsylvania’s education system, and allowed for differing levels in education funding throughout the state.

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22. *Malone*, 197 A. at 352.

23. *Id.*

24. *Id.*

25. *See, e.g.*, *Danson v. Casey*, 399 A.2d 360, 366-67 (Pa. 1979); *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 111-12 (Pa. 1999); *Pennsylvania Ass’n of Rural and Small Sch. v. Ridge*, No. 11 M.D. 1991, at 2, 129-30 (Pa. Commw. Ct. 1998), *aff’d*, 737 A.2d 246 (Pa. 1999) (dismissing education clause challenges to school funding laws in Pennsylvania).

26. *Danson*, 399 A.2d at 366-67.

27. *Id.*

28. *Id.*

29. *Id.* at 366.

30. *Id.* at 367.

In 1999, *Danson* and *Malone* were reaffirmed in *Marrero ex rel. Tabalas v. Pennsylvania*.<sup>31</sup> In *Marrero*, the Supreme Court of Pennsylvania dismissed an Article 3, Section 14 challenge based on the assertion that the Education Clause required an “adequate” level of education.<sup>32</sup> The *Marrero* court dismissed the claim by referencing the precedent set in *Danson*:

In short, as the Supreme Court was unable to judicially define what constitutes a “normal program of educational services” in *Danson*, this court is likewise unable to judicially define what constitutes an “adequate” education or what funds are “adequate” to support such a program. These are matters which are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government.<sup>33</sup>

By following *Danson*, the *Marrero* court established an even greater level of deference to the education funding decisions of the Pennsylvania legislature. This new level of judicial deference extended the reasonableness standard to the determination of whether or not the state fulfilled its duty to provide a “thorough and efficient” system of education. Prior to *Marrero*, the Pennsylvania Supreme Court had ensured only that the legislature could provide a funding scheme with differing levels of support.<sup>34</sup>

The Supreme Court of Pennsylvania further extended the reasonable relation standard in 1999 by affirming the Commonwealth Court's decision in *Pennsylvania Association of Rural and Small Schools v. Ridge*.<sup>35</sup> The opinion from the Commonwealth Court dismissed an Article 3, Section 14 challenge which asserted that the education funding system in Pennsylvania was unconstitutional because the “same resources do not support all students[.]”<sup>36</sup> In making this decision the Commonwealth referred to the reasonable relation standard found in *Danson*.<sup>37</sup> Thus, it seems that application of the standard has been extended to apply to “equality” claims as well as claims regarding “adequacy”<sup>38</sup> and “uniformity.”<sup>39</sup>

### *I.B. The Current Structure of Primary and Secondary Education in Pennsylvania*

In accordance with its duty under Article 3, Section 14 of the Pennsylvania Constitution,<sup>40</sup> the legislature has devised a number of educational options for children in the Commonwealth. Among these options is the traditional public

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31. *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 113-14 (Pa. 1999).

32. *Id.*

33. *Id.*

34. *Danson v. Casey*, 399 A.2d 360, 366-67 (Pa. 1979).

35. The Supreme Court's affirmation was provided without opinion. *Pennsylvania Ass'n of Rural and Small Sch. v. Ridge*, 737 A.2d 246 (Pa. 1999).

36. *Pennsylvania Ass'n of Rural and Small Sch. v. Ridge*, No. 11 M.D. 1991, at 129 (Pa. Commw. Ct. 1998), *aff'd*, 737 A.2d 246 (Pa. 1999).

37. *Id.* at 128-29.

38. *Danson*, 399 A.2d at 366-67.

39. *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 113-14 (Pa. 1999).

40. *See supra* pp. 142-43.

school system, which is still the largest provider of publicly-funded primary and secondary educational services in Pennsylvania.<sup>41</sup> The traditional public school system was formally recognized under the Pennsylvania Constitution of 1874.<sup>42</sup> This recognition occurred after many decades of transition to state and local government support of free public education.<sup>43</sup> The system is administered by local school districts, which are run by school boards of directors endowed with authority under the Public School Code of 1949.<sup>44</sup> Under the code, schools receive financing through two primary sources: state subsidies and local taxation.<sup>45</sup> Even with the advent of educational alternatives in recent years, Pennsylvania's traditional public schools still provide over 90% of the taxpayer-supported educational programming in the state.<sup>46</sup>

Taxpayer dollars also support public education through scholarships provided by the Pennsylvania Department of Community and Economic Development's Educational Improvement Tax Credit Program, and through charter and cyber charter schools.<sup>47</sup> These reforms were established during the late 1990s with the authority provided by the *Malone* court to make reforms that take advantage of educational advances.<sup>48</sup> First, charter schools and cyber charter schools were established by the legislature in 1997.<sup>49</sup> They are self-managed public schools "created and controlled by parents, teachers, community leaders, and colleges or universities."<sup>50</sup> Local school districts approve the charter schools, while the Pennsylvania Department of Education approves cyber charter schools.<sup>51</sup> The charter school student population is

41. *Enrollment Public School 2010-11*, PA. DEP'T OF EDUC., [http://www.portal.state.pa.us/portal/server.pt/document/1264764/enrollment\\_public\\_school\\_2010-11\\_xls](http://www.portal.state.pa.us/portal/server.pt/document/1264764/enrollment_public_school_2010-11_xls) (last visited Mar. 5, 2013) (noting that the public school system enrolled 1,781,206 students during the 2010-11 school year).

42. *Pennsylvania Ass'n of Rural and Small Sch.*, No. 11 M.D 1991, at 88.

43. *See id.*

44. *See* 24 PA. CONS. STAT. §§ 1-101 to 27-2702 (2004) (providing the act commonly known as the Public School Code of 1949).

45. *Danson v. Casey*, 399 A.2d 360, 363 (Pa. 1979).

46. *Enrollment Public School 2010-11*, *supra* note 41 (noting that during the 2009-10 school year, Pennsylvania's public schools enrolled 1,781,206 students in grades K-12). The total number of students in traditional public school districts in 2009-2010 was 1,675,173, while the total number of student in "public schools," including nearly 80,000 students in charter schools, was 1,781,206. *Id.*

47. *See What is a Charter School?*, PA. DEP'T OF EDUC., [http://www.portal.state.pa.us/portal/server.pt/community/charter\\_schools/7356](http://www.portal.state.pa.us/portal/server.pt/community/charter_schools/7356) (last visited Mar. 6, 2014) (providing the structure of charter schools in Pennsylvania); Lefevre, *supra* note 7, at 1 (noting the creation of the Educational Improvement Tax Credit Program in Pennsylvania).

48. *Malone v. Hayden*, 197 A. 344, 352 (Pa. 1938).

49. 24 PA. CONS. STAT. ANN. §§ 17-1701-A to 17-1751-A (2004); *see also Charter Schools*, PA. DEP'T OF EDUC., [http://www.portal.state.pa.us/portal/server.pt/community/purdon%27s\\_statutes/7503/charter\\_schools/507318](http://www.portal.state.pa.us/portal/server.pt/community/purdon%27s_statutes/7503/charter_schools/507318) (last visited Mar. 6, 2014) (providing an overview of Pennsylvania Charter School Law); *Cyber Charter Schools*, PA. DEP'T OF EDUC., [http://www.portal.state.pa.us/portal/server.pt/community/purdon%27s\\_statutes/7503/cyber\\_charter\\_schools/507354](http://www.portal.state.pa.us/portal/server.pt/community/purdon%27s_statutes/7503/cyber_charter_schools/507354) (last visited Mar. 6, 2014) (providing an overview of cyber schools and cyber school law in Pennsylvania).

50. *What is a Charter School?*, *supra* note 47.

51. *Id.*

significantly smaller than the population of schools administered by local school boards; total student enrollment in all charter schools for the 2010-11 academic year was 90,616.<sup>52</sup>

The General Assembly established the Education Improvement Tax Credit Program in 2001.<sup>53</sup> Beginning in the 2001-02 school year, low to middle-income families were eligible to apply for partial scholarships that would pay for tuition at private and parochial schools throughout the state.<sup>54</sup> The scholarship program was facilitated by a tax credit program in which businesses could receive substantial tax credits for donations to qualified “scholarship organizations” that provide scholarships to parents or that provide donations to “educational improvement organizations.”<sup>55</sup> These organizations then provide support services to public schools throughout the state, such as mentoring programs for at-risk students.<sup>56</sup> The scholarship program provided 38,646 scholarships for K-12 schools during the 2009-10 fiscal year, with an average amount of \$1,044.<sup>57</sup>

*I.C. The Limited Availability of Current Publicly Funded Alternatives to the Traditional Public School System Model in Pennsylvania and the School Voucher Solution*

Violence, dropping out, and underperformance are prevalent in many Pennsylvania public school districts.<sup>58</sup> While the state’s on-time graduation rate was 78.73% in the 2009-10 school year, many districts failed to graduate even 70% of their high school students on time.<sup>59</sup> Among these districts are the Washington School District (located in Southwestern Pennsylvania) and the Chester-Upland School District (located in Southeastern Pennsylvania), which had on-time graduation rates below 50%.<sup>60</sup>

As noted earlier, such underwhelming results have spurred reform in recent years through the provision of alternative educational opportunities in Pennsylvania.<sup>61</sup> However, these opportunities have failed to provide a supply of quality educational options in Pennsylvania that meets the demand. For instance, charter schools across the state are at capacity. According to the Pennsylvania Coalition of Public Charter Schools, there are an estimated

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52. *Enrollment Public School 2010-11*, *supra* note 46.

53. Lefevre, *supra* note 7, at 2.

54. *Id.* at 1.

55. *Id.* at 3.

56. *Id.* at 2.

57. *Id.* at 1.

58. See Colin McEvoy, *Statewide study explores violence in low-performing schools, including Allentown*, THE EXPRESS-TIMES: LEHIGH VALLEY LIVE (July 16, 2012, 4:55 AM), [http://www.lehighvalleylive.com/allentown/index.ssf/2012/07/state\\_study\\_on\\_violence\\_in\\_low.html](http://www.lehighvalleylive.com/allentown/index.ssf/2012/07/state_study_on_violence_in_low.html).

59. *2009-10 Four-Year Cohort Graduation Rate*, OPERATION RESTART, [http://www.operationrestart.org/pdfs/data/Graduation\\_Rate.pdf](http://www.operationrestart.org/pdfs/data/Graduation_Rate.pdf) (last visited Mar. 6, 2014).

60. *Id.*

61. See *supra* Section I.B.



44,000 students on charter school waiting lists.<sup>62</sup> Likewise, the state's Education Improvement Tax Credit program also fails to meet the demand for alternative educational options because it only provides partial scholarships to a limited number of the students eligible for the program.<sup>63</sup> For example, the Children's Scholarship Fund Philadelphia, a scholarship organization, has provided roughly 12,000 scholarships to recipients chosen from a pool of 125,000 applicants for K-8th grade students.<sup>64</sup> Additionally, these scholarships require a minimum family contribution of \$500.<sup>65</sup> These limitations on the number of available scholarships and the amount of aid received through the tax credit program exclude many eligible low and middle-income children from the program.<sup>66</sup>

Collectively, the limitations of Pennsylvania's charter school and Educational Improvement Tax Credit programs have failed to meet the demand for effective educational options for disadvantaged students. This failure demonstrates that Pennsylvania is not currently providing the "thorough and efficient" system of public education called for by the state constitution.<sup>67</sup> To meet this standard, the state must utilize modern advances in the education field.<sup>68</sup>

One of the more recent developments in education policy has been the push to provide low- and middle-income families with an alternative to their local public schools in the form of publically funded vouchers for private school tuition.<sup>69</sup> More specifically, a student would receive a voucher to be carried by him/her to the school of his/her choice.<sup>70</sup> When the student enrolls in the school, the school receives a payment equal to the amount of the student's voucher, which is funded by taxpayer dollars.<sup>71</sup> Thus, school

62. *What's a Charter School?*, PA. COAL. OF PUB. CHARTER SCH., <http://pacharters.org/why-charters/> (last visited Mar. 6, 2014).

63. See *Educational Improvement Tax Credit Program*, PA. DEP'T OF CMTY. & ECON. DEV. 1, 2 (Mar. 2011), [http://www.newpa.com/webfm\\_send/1625](http://www.newpa.com/webfm_send/1625) ("An eligible student is a school age student, including an eligible student with a disability, who is a resident of Pennsylvania, who is enrolled in a school located in this Commonwealth and who is a member of a household with an annual household income of not more than \$50,000 (\$60,000 on or after July 1, 2011), except that an additional income allowance of \$10,000 (\$12,000 on or after July 1, 2011) is permitted for the student and for each other dependent (as defined by the IRS) living within the same household.").

64. *About CSF Philadelphia*, CHILDREN'S SCHOLARSHIP FUND PHILA., <http://www.csfphiladelphia.org/about-csf-philadelphia> (last visited Mar. 6, 2014).

65. *Id.*

66. Lefevre, *supra* note 7, at 4.

67. PA. CONST. art. III, § 14.

68. *Malone v. Hayden*, 197 A. 344, 352 (Pa. 1938) (discussing then-equivalent of PA. CONST. art. III, § 14) ("The very essence of this section is to enable successive Legislatures to adopt a changing program to keep abreast of educational advances.").

69. See Malcom Glenn & Michelle Gininger, *School Choice Now: The Year of School Choice*, ALLIANCE FOR SCH. CHOICE 6, 26 (2011-2012), [http://s3.amazonaws.com/assets.alliancefor schoolchoice.com/admin\\_assets/uploads/67/scy2012.pdf](http://s3.amazonaws.com/assets.alliancefor schoolchoice.com/admin_assets/uploads/67/scy2012.pdf) (noting the expansion of school choice programs throughout the United States in recent years).

70. Hoxby, *supra* note 10, at 14.

71. *Id.*

voucher programs would provide students with a publicly funded alternative to their underperforming public schools. Moreover, school voucher programs have the potential to allow parents to place their child in a school that is better suited to the child's educational and social needs.

School voucher programs have garnered support in recent years because of the United States Supreme Court's rejection of the argument that voucher programs violate the Establishment Clause by indirectly funding religious schools.<sup>72</sup> In *Zelman v. Simmons-Harris*, decided in 2002, the Court held that the Cleveland school voucher program did not violate the Establishment Clause because the program was "entirely neutral with respect to religion."<sup>73</sup> The Court held that the school voucher program was neutral toward religion, even though 96% of the scholarship recipients attended religious schools, because: "[i]t provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious."<sup>74</sup>

With the issue of federal legality settled, members of the Pennsylvania General Assembly<sup>75</sup> and Governor Tom Corbett<sup>76</sup> have developed proposals for the creation of a school voucher program in Pennsylvania. However, a significant legal concern remains. While school vouchers are constitutional under the federal Free Exercise and Establishment Clause provisions, the Supreme Court of Pennsylvania has never determined whether school vouchers are constitutional under the Pennsylvania Constitution.<sup>77</sup> This is a particularly prescient issue given state constitutional restrictions on funding to sectarian institutions.<sup>78</sup> Thus, a school voucher law in Pennsylvania is likely to be challenged based on the State Constitution's Free Exercise and Establishment Clauses, and its various restrictions on public funding to sectarian institutions.<sup>79</sup>

## PART II: RELIGION AND THE PENNSYLVANIA CONSTITUTION

In order to gauge the applicability of the religious liberty protections placed in the Pennsylvania Constitution to a school voucher program, an understanding of the text of the religious provisions of the State's Constitution and the prior case law interpreting those provisions is necessary. Below is an

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72. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002).

73. *Id.* at 662.

74. *Id.*

75. S.B. 1, 195th Gen. Assemb., Reg Sess. (Pa. 2011).

76. Jan Murphy, *Corbett unveils voucher plan*, THE PATRIOT-NEWS, Oct. 12, 2011, at A.3, available at [http://www.pennlive.com/midstate/index.ssf/2011/10/corbett\\_unveils\\_pennsylvanias.html](http://www.pennlive.com/midstate/index.ssf/2011/10/corbett_unveils_pennsylvanias.html).

77. Lipper, *supra* note 12, at 24 (noting that the Supreme Court of Pennsylvania has never directly considered a challenge to a voucher program).

78. PA. CONST. art. I, § 3, art. III, §§ 15, 29, 30.

79. Lipper, *supra* note 12, at 23 (noting that a school voucher program will inevitably attract constitutional challenges in Pennsylvania).

examination of the text and jurisprudence surrounding the four religious provisions, Article I, Section 3, Article I, Section 15, Article III, Section 29, and Article III, Section 30, which will likely be used to challenge the constitutionality of school vouchers in Pennsylvania.

#### *II.A. Pennsylvania Constitution Article I, § 3—Religious Freedom*

Like the Federal Constitution, the Pennsylvania Constitution has a provision that seeks to protect religious freedom.<sup>80</sup> Article 1, Section 3 of the Pennsylvania Constitution states that:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given law to any religious establishments or modes of worship.<sup>81</sup>

The Religious Freedom provision can be split into three clauses. The first clause provides for citizens of Pennsylvania to freely worship “Almighty God” in a manner of their choosing.<sup>82</sup> The Pennsylvania clause is textually different from the Federal Constitution’s Free Exercise Clause, which simply states that “Congress shall make no law . . . prohibiting the free exercise [of religion].”<sup>83</sup>

In addition to the first clause, two clauses in Article 1, Section 3 concern the coerced establishment of religion in Pennsylvania. The first Establishment Clause provides against the forced support of a religious institution or ministry.<sup>84</sup> The second Establishment Clause precludes the passage of any law which gives a preference to a religious establishment or “mode of worship.”<sup>85</sup> Like its Free Exercise Clause, Pennsylvania’s Establishment Clauses are textually different from the Federal Constitution’s Establishment Clause. The federal government simply provides that the “Congress shall make no law respecting an establishment of religion[.]”<sup>86</sup>

Although textually and structurally different, the scope and effect of Pennsylvania’s Religious Freedom provision and the Federal Constitution’s

80. *See* U.S. CONST. amend. I; PA. CONST. art. I, § 3 (noting religious freedom through clauses which guarantee the free exercise of religion and preclude the establishment of religion by the government).

81. PA. CONST. art. I, § 3.

82. *Id.*

83. *Compare* U.S. CONST. amend. I, *with* PA. CONST. art. I, § 3 (offering substantially more detail within the state’s Religious Freedom provision than the Federal Constitution’s Free Exercise and Establishment Clauses).

84. PA. CONST. art. I, § 3 (“[N]o man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience[ ] . . .”).

85. *Id.* (“[N]o preference shall ever be given by law to any religious establishments or modes of worship.”).

86. U.S. CONST. amend. I.

Free Exercise and Establishment Clauses have been interpreted identically. This synchronization of the Pennsylvania Constitution with the religious freedom protections and limitations provided by the Federal Constitution was established in *Wiest v. Mt. Lebanon School District*.<sup>87</sup> In *Wiest*, the Supreme Court of Pennsylvania determined that the “protection of rights and freedoms secured by this section of our Constitution, however, does not transcend the protection of the First Amendment of the United States Constitution.”<sup>88</sup>

The Supreme Court of Pennsylvania affirmed this fusion of meaning and purpose in *Springfield School District v. Department of Education*.<sup>89</sup> In *Springfield*, the court examined an act which mandated that school districts providing free transportation to public school students within the district must also provide free transportation to residents who are students at private and parochial schools within a ten-mile radius of the district.<sup>90</sup> The *Springfield* court determined that this law was constitutional under the Free Exercise and Establishment Clause of the Federal Constitution based on a test promulgated by the United States Supreme Court in *Lemon v. Kurtzman*.<sup>91</sup> Moreover, the court found that it did not need to complete a separate analysis of Pennsylvania’s Religious Freedom provision because of the fact that its protections did not exceed the limitations of the Federal Constitution’s First Amendment.<sup>92</sup> In making this determination, the *Springfield* court expressly noted the holding in *Wiest*.<sup>93</sup>

*II.B. Pennsylvania Constitution Article III, § 15—Public School Money Not Available to Sectarian Schools*

In addition to its Religious Freedom provision, the Pennsylvania Constitution contains additional provisions that regulate the interaction of the state government with sectarian institutions.<sup>94</sup> One of these provisions is Article 3, Section 15, which states that: “No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.”<sup>95</sup>

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87. 320 A.2d 362 (Pa. 1974).

88. *Id.* at 366-67.

89. 397 A.2d 1154, 1170 (Pa. 1979) (“First, we have earlier held that the provisions of Article I, Section 3 of our constitution do not exceed the limitations in the first amendment's establishment clause.”).

90. *Id.* at 1168.

91. *Id.* at 1167. *See also* *Lemon v. Kurtzman* 403 U.S. 602, 612-13 (1971) (holding that a statute must have the following three elements in order to be found constitutional under the First Amendment’s Establishment Clause: (1) a secular purpose, (2) an effect that neither inhibits nor advances religion, and (3) no excessive entanglement between government and religion).

92. *Springfield*, 397 A.2d at 1170-71.

93. *Id.* at 1170.

94. *See* PA. CONST. art. III, §§ 15, 29, 30 (containing provisions meant to regulate government interaction with sectarian institutions).

95. *Id.* at art. III, § 15.

The application of Article 3, Section 15 in cases concerning transportation funding for students in sectarian and private schools suggests the potential scope of the provision.<sup>96</sup> In *Rhoades v. School District of Abington Township*, the Supreme Court of Pennsylvania upheld a state statute that required local school boards to provide transportation to local nonpublic school students if such services were provided to public school students.<sup>97</sup> In response to the constitutional challenge based on Article 3, Section 15, the court noted that the transportation provided to the children was unrelated to the support of sectarian schools because that transportation provided for the “health, welfare and safety” of the children of the Commonwealth.<sup>98</sup> Further, the court noted that preserving the health, welfare, and safety of children was “one of the most fundamental responsibilities of the State[.]”<sup>99</sup>

Thirteen years later, in *Springfield*, the court similarly determined that Article 3, Section 15 did not preclude the funding of transportation for parochial and non-public school students to schools outside of the public school districts in which they resided.<sup>100</sup> The court stated that an analysis of a potential Article 3, Section 15 violation was not necessary because no state funds “reach[ed] the coffers” of sectarian schools.<sup>101</sup> Additionally, the court stated that Article 3, Section 15 was not at issue in the case because the transportation provided did not support any sectarian school, but “it merely confer[red] upon all *children* the right to be transported safely to their schools.”<sup>102</sup> These statements, in conjunction with the *Rhoades* court’s decision, seem to suggest that there is no Article 3, Section 15 bar to laws which provide services to students who attend sectarian schools if such services are both funded without providing payment directly to sectarian schools and are intended to fulfill some fundamental government duty.<sup>103</sup> However, the *Rhoades* and *Springfield* decisions do not resolve the question of whether sectarian schools can be paid to provide fundamental government services without violating Article 3, Section 15.

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96. See *Rhoades v. Sch. Dist. of Abington Twp.*, 226 A.2d 53, 67 (Pa. 1967); *Springfield*, 397 A.2d at 1170-71 (finding that the restrictions in the state constitution did not apply to the provision of transportation of parochial and non-public school students).

97. *Rhoades*, 226 A.2d at 67.

98. *Id.* at 66.

99. *Id.*

100. *Springfield*, 397 A.2d at 1171.

101. *Id.*

102. *Id.*

103. See also Official Op. No. 257, Op. Pa. Att’y Gen. 99, 101 (1961-62) (noting that the then-equivalent of Article 3, Section 15 “does not prohibit the rendering of health services to parochial school children as the rendering of such services does not constitute an appropriation or use of tax moneys for the support of a sectarian school. Such services are intended to preserve the health of children, not to promote the sectarian school they might attend.”).

*II.C. Pennsylvania Constitution Article III, § 29—Appropriations for Public Assistance, Military Services, Scholarships*

Article 3, Section 29 is another provision in the Pennsylvania Constitution that regulates government support of sectarian institutions. The provision states that:

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: Provided, That appropriations may be made for pensions or gratuities for military service and to blind persons twenty-one years of age and upwards and for assistance to mothers having dependent children and to aged persons without adequate means of support and 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.<sup>104</sup>

The provision precludes appropriations to any person, community, corporation, or sectarian institution for any charitable, educational, or benevolent purpose.<sup>105</sup> The language and terms of the provision have been modified over time to include exceptions to the general preclusions listed in Article 3, Section 29.<sup>106</sup> The first amendment to Article 3, Section 29 occurred in 1933 when an exception was added to allow aid for blind persons.<sup>107</sup> In 1937, the language of Article 3, Section 29 was changed to add exceptions for assistance to mothers with dependent children and to elderly persons without adequate means of support.<sup>108</sup> In 1963, an exception was added to provide grants and loans to residents of the Commonwealth for higher education purposes.<sup>109</sup> Also, in 1967, language relating to the bribery of members of the legislature was removed from Article 3, Section 29.<sup>110</sup>

The scope and effect of Article 3, Section 29's restriction on appropriations for charitable, educational, or benevolent purposes has been shaped by cases interpreting the provision's constraints and by the amendments noted

104. PA. CONST. art. III, § 29.

105. *Id.*

106. *Collins v. Kephart*, 117 A. 440, 441 (Pa. 1921) (noting the original language of Article 3, Section 29, which was originally Article 3, Section 18, stated, "[n]o appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association[ ]").

107. 1933 Pa. Laws 1557.

108. 1937 Pa. Laws 2875, 2875-76.

109. 1963 Pa. Laws 1401 ("[A]ppropriations 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.").

110. 1967 Pa. Laws 1037, 1043.

above.<sup>111</sup> The cases interpreting Article 3, Section 29 have held that there is a governmental duty exception to the general preclusion stated in the provision.<sup>112</sup> This exception asserts that “appropriations to perform obligatory public duties or functions are not charities or benevolences[ ] . . . .”<sup>113</sup> Thus, while performing a governmental duty, the state is not restricted by Article 3, Section 29. The state can “either directly . . . assume this obligation, . . . permit and aid one of its subsidiaries of government to perform it, or . . . have it performed by an institution not forbidden by the Constitution.”<sup>114</sup> Given the governmental duty exception, sectarian institutions can receive appropriations to assist the state government in performing such duties, as long as their performance of such duties is not disallowed by the state constitution.<sup>115</sup>

A relevant example of the application of the governmental duty exception can be found in *Schade v. Allegheny County Institution District*.<sup>116</sup> In *Schade*, the Supreme Court of Pennsylvania determined that Article 3, Section 29 did not apply to funds provided to denominational or sectarian institutions for the support of abandoned and neglected children.<sup>117</sup> Such funds were not considered appropriations for charitable, educational, or benevolent purposes under Article 3, Section 29.<sup>118</sup> The court reasoned that the funds provided to the denominational or sectarian institutions were not considered appropriations under Article 3, Section 29 because the “cost of the maintenance of neglected children either by the State or the County is neither a charity nor a benevolence, but a governmental duty.”<sup>119</sup> Additionally, the court noted that the transaction did not violate other constitutional limitations by stating that:

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111. *See, e.g.*, *Springfield Sch. Dist. v. Dep’t of Educ.*, 397 A.2d 1154, 1171 (Pa. 1979); *Schade v. Allegheny Cnty. Inst. Dist.*, 126 A.2d 911, 914 (Pa. 1956); *Commonwealth v. Perkins*, 21 A.2d 45, 48-49 (Pa. 1941), *aff’d per curiam*, 314 U.S. 586 (1942); *Commonwealth ex rel. Schnader v. Liveright*, 161 A. 697, 711 (Pa. 1932); *Constitutional Def. League v. Waters*, 162 A. 216, 217 (Pa. 1932); *Collins v. Martin*, 139 A. 122, 123-24 (Pa. 1927); *Busser v. Snyder*, 128 A. 80, 84 (Pa. 1925); *Common Cause of Pennsylvania v. Commonwealth*, 668 A.2d 190, 201 (Pa. Commw. Ct. 1995), *aff’d*, 677 A.2d 1206 (Pa. 1996) (cases containing constitutional challenges based on Article 3, Section 29).

112. *Springfield*, 397 A.2d at 1171 (finding that sections 12 and 29 apply only when state funds “flow to the sectarian school or institution[ ]”); *Busser*, 128 A. at 83; *Liveright*, 161 A. at 711.

113. *Liveright*, 161 A. at 711 (“Having twice decided that appropriations to perform obligatory public duties or functions are not charities or benevolences, we again hold that the state, in performance of its governmental duty to take care of the poor, is not forbidden by article 3, § 18, either directly to assume this obligation, or to permit and aid one of its subsidiaries of government to perform it, or to have it performed by an institution not forbidden by the Constitution. As long as these channels are kept clear, constitutional inhibitions will not disturb such acts.”).

114. *Id.*

115. *Id.*

116. 126 A.2d at 914.

117. *Id.*

118. *Id.*

119. *Id.*

The Constitution does not prohibit the State or any of its agencies from doing business with denominational or sectarian institutions, nor from paying just debts to them when incurred at its direction or with its approval. Numerous cases can be readily visualized where such situations have occurred: i. e. payment of the bill of an injured employee to a sectarian hospital.<sup>120</sup>

Given the result in *Schade* and other cases, it is fair to conclude that the governmental duty exception to Article 3, Section 29 requires the application of a two part test.<sup>121</sup> The first part of the test requires determining whether the appropriation in question is being provided by the state for a “charitable, educational, or benevolent” purpose or if the appropriation is made to fulfill a governmental duty.<sup>122</sup> The case law does not provide any mechanism or instruction for determining whether or not an appropriation’s purpose is to fulfill a governmental duty.<sup>123</sup> However, courts have looked to federal case law<sup>124</sup> and other Pennsylvania authorities<sup>125</sup> to determine a given appropriation’s purpose. The second part of the test is to determine whether or not the institution providing the service is precluded from doing so by some other constitutional provision.<sup>126</sup> This portion of the analysis is completed by assessing the applicability of any other federal or state constitutional provisions which may deem the appropriation to be illegal.<sup>127</sup> For instance, the *Schade* court conducted this analysis by referring to Federal Establishment Clause jurisprudence.<sup>128</sup>

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120. *Schade*, 126 A.2d at 914.

121. See *Commonwealth ex rel. Schnader v. Liveright*, 161 A. 697, 711 (Pa. 1932) (outlining two part test for determining whether governmental duty exception applied); see also *Schade*, 126 A.2d at 914; *Commonwealth v. Perkins*, 21 A.2d 45, 48-49 (Pa. 1941), *aff’d per curiam*, 314 U.S. 586 (1942) (applying the two-part test from *Liveright*).

122. See *Liveright*, 161 A. at 711 (“[W]e again hold that the state, in performance of its governmental duty to take care of the poor, is not forbidden by [the then-equivalent of Article 3, Section 29][.]”).

123. See *id.* at 707 (holding that the General Assembly “may create preferential appropriations for any purpose which, in its judgment, it deems necessary in the interest of government[ ] . . .”).

124. See, e.g., *Schade*, 126 A.2d at 914 (citing *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370, 374-75 (1930)).

125. *Busser v. Snyder*, 128 A. 80, 84 (Pa. 1925) (“[T]here is no direct prohibition against the use of state money to pay for the care and maintenance of indigent, infirm, and mentally defective persons, without ability or means to sustain themselves, and other charges of a like nature. They become direct charges on the body politic for its own preservation and protection. As such, in the light of an expense, they stand exactly in the same position as the preservation of law and order.”).

126. See *Liveright*, 161 A. at 711 (noting that the state may have government duties fulfilled by an institution not forbidden by the Constitution).

127. *Id.*

128. *Schade*, 126 A.2d at 914 (noting the U.S Supreme Court’s decision in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)).



*II.D. Pennsylvania Constitution Article III, § 30—Charitable and Educational Appropriations*

The last relevant provision regulating the interaction between the state and sectarian institutions is Article 3, Section 30. The provision stipulates that:

No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each House.<sup>129</sup>

The provision provides a limitation on appropriations to prevent the exploitation of public donations to charitable and educational institutions by legislators who required kickbacks for appropriations.<sup>130</sup> The Attorney General asserted that the members of the 1873 Constitutional Convention required that appropriations for charitable and educational institutions not under state control be voted on in a bill separate from the state budget and be approved by two-thirds of both houses of the General Assembly.<sup>131</sup> Furthermore, the Attorney General suggested that the appropriations prohibited under the section are those appropriations made directly to specific institutions.<sup>132</sup>

The Commonwealth Court's decision in *Pennsylvania Association of State Mental Hospital Physicians v. Commonwealth* supports this interpretation.<sup>133</sup> In *Pennsylvania Association of State Mental Hospital Physicians*, a group of petitioners sought to prevent the Commonwealth of Pennsylvania from taking funds appropriated to the Department of Public Welfare and transferring them to a private medical college for the operation of an institute by that private college.<sup>134</sup> The petitioners argued that the appropriation violated Article 3, Section 30 because the transfer was made to a school not wholly in the control of the Commonwealth.<sup>135</sup> The Commonwealth Court of Pennsylvania dismissed the claim because it determined that the Department of Public Welfare's appropriation was made to fulfill a governmental duty.<sup>136</sup> In making the judgment, the court specifically referred to the Supreme Court's utilization of the governmental duty exception for Article 3, Section 29:

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129. PA. CONST. art. III, § 30.

130. Official Op. No. 78-18, Op. Pa. Att'y Gen. 69, 70 (1978).

131. *See id.*

132. *Id.*

133. *Pennsylvania Ass'n of State Mental Hosp. Physicians v. Commonwealth*, 437 A.2d 1297, 1299-300 (Pa. Commw. Ct. 1981) (citing *Schade v. Allegheny Cnty. Inst. Dist.*, 126 A.2d 911, 914 (Pa. 1956)) (finding that Article 3, Section 30 preclusions did not apply).

134. *Id.* at 1298.

135. *Id.* at 1299.

136. *Id.* at 1299-300.

We believe that our Supreme Court's reasoning in [*Schade*] is applicable to the instant petition. In *Schade* the Court held that it was constitutional for the Institution District to make payments for tax revenues to denominational and sectarian homes for the support and maintenance of neglected or dependent children on order of the Juvenile Court. The Court found that the support of these children was a governmental duty and that the payments did not constitute appropriations within the meaning of Article III, Section 29. The Court recognized that “[t]he Constitution does not prohibit the State or any of its agencies from doing business with denominational or sectarian institutions, nor from paying just debts to them when incurred at its direction or with its approval.” We consider this analysis equally applicable to Article III, Section 30.<sup>137</sup>

By applying Article 3, Section 29's governmental duty exception, the Commonwealth Court implicitly recognized the Attorney General's interpretation that Article 3, Section 30 is limited to appropriations given to specific institutions.<sup>138</sup> Additionally, the holding of *Schade* suggests that Article 3, Section 30 applies only if an appropriation fails to pass the governmental duty test.<sup>139</sup>

### PART III: THE CONSTITUTIONALITY OF SCHOOL VOUCHERS IN PENNSYLVANIA

Although school vouchers are constitutional under the Federal Constitution, a school voucher law may receive a state constitutional challenge in Pennsylvania.<sup>140</sup> The impetus for such a challenge would be the Supreme Court of Pennsylvania's policy that it is “free to reject the conclusions of the United States Supreme Court so long as we remain faithful to the minimum guarantees established by the United States Constitution.”<sup>141</sup> Moreover, it is the policy of the Supreme Court of Pennsylvania to undertake an independent analysis of the Pennsylvania Constitution each time one of its provisions is implicated.<sup>142</sup> Thus, the constitutional provisions that may preclude a school voucher program in Pennsylvania will be assessed using the four-factor *Edmunds* test.<sup>143</sup> The *Edmunds* test analyzes the following to determine the constitutionality of a statute which implicates a provision of the Pennsylvania Constitution: “(1) [the] text of the Pennsylvania constitutional provision; (2) [the] history of the provision, including Pennsylvania case law; (3) related cases from other states; and (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania

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137. *Pennsylvania Ass'n of State Mental Hosp. Physicians*, 437 A.2d at 1299-300 (citation omitted).

138. *Id.*

139. *Id.*

140. See Lipper, *supra* note 12, at 23 (noting that school voucher programs will inevitably attract constitutional challenges in Pennsylvania).

141. *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991).

142. *Id.* at 894-95.

143. *Id.* at 895.

jurisprudence.<sup>144</sup> In applying the four-factor test, the court should determine that school vouchers are constitutional under the Pennsylvania Constitution.

### *III.A. Text of the Pennsylvania Constitutional Provisions*

When measuring a school voucher law against the text of the religious constitutional provisions, the Supreme Court of Pennsylvania should not find any apparent constitutional violations. Under the Religious Freedom provision of Article 1, Section 3, the Free Exercise and Establishment Clauses do not have any apparent conflict with a school voucher law. This assertion holds because school vouchers must be entirely neutral toward religion and contain true private choice for participants in order to pass federal constitutional muster.<sup>145</sup> Thus, a school voucher program cannot trigger a violation of the Commonwealth's Religious Freedom provision because the program's federal constitutional requirements necessarily preclude any coercion of participants by the government on behalf of sectarian schools. Moreover, the neutrality requirement indicates that the institution of a school voucher program does not lead to a governmental endorsement of any religious organization.

An analysis of Article 3, Section 15's restriction on public school money not being available to sectarian schools suggests that school vouchers do not violate its text. The express language of the amendment suggests that money specifically designated for the support of public schools in Pennsylvania cannot be appropriated to or used for the support of sectarian schools.<sup>146</sup> It is upon this distinction that commentator William Bentley Ball noted that a school voucher program would be constitutional under Article 3, Section 15 because the funding for school vouchers would not consist of funding for the public schools.<sup>147</sup>

An analysis of Article 3, Section 29's restriction on appropriations for charitable, educational, or beneficial purposes to sectarian institutions does not seem to suggest that school vouchers violate the provision. This judgment holds because of the 1937 amendment to the provision, which adds exceptions for assistance to mothers with dependent children and for elderly persons without adequate means of support.<sup>148</sup> This amendment would seem to allow

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144. *Edmunds*, 586 A.2d at 895.

145. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002).

146. PA. CONST. art. III, § 15.

147. William Bentley Ball, *Economic Freedom Of Parental Choice In Education: The Pennsylvania Constitution*, 101 DICK. L. REV. 261, 273 (1997). This distinction between funds raised for the support of public schools and funds not raised for the support of public schools is clearly delineated in Senate Bill 1. S.B. 1, 195th Gen. Assemb., Reg. Sess. (Pa. 2011). The bill makes this distinction by stipulating that local funds raised to support public schools could only be used for scholarships to send students to non-resident public schools. *Id.* Moreover, bill calls for the school vouchers for private schools to be paid for through the state's general fund. *Id.*

148. 1937 Pa. Laws 2875, 2875-76.

for school vouchers because the vouchers are payments to parents for the purpose of providing tuition assistance.

Similarly, school vouchers do not seem to trigger the text of Article 3, Section 30. The provision provides a minimum vote requirement for appropriations made to any charitable or educational institution not within the absolute control of the Commonwealth.<sup>149</sup> This procedural requirement does not apply because of the payment instrument utilized in school voucher programs.<sup>150</sup> Vouchers are direct payments to parents, which parents use to pay for tuition and fees at schools of their choice.<sup>151</sup> Thus, vouchers would not be educational appropriations to institutions outside of the control of the Commonwealth.

### III.B. History of the Provision—Including Prior Pennsylvania Case Law

Although a voucher law would involve no apparent textual violations of the Pennsylvania Constitution, it is unlikely that the Supreme Court of Pennsylvania would rely on simple textual analysis given how prior case law has interpreted the provisions. These interpretations have provided a meaning to such provisions that is not readily apparent from a cursory reading of the text. These interpretations have often led to methods of applying each provision different from the approaches suggested by textual analysis. In the case of school vouchers, the methods of determining constitutionality under the religious provisions at issue are substantially different when prior case law is applied. However, the case law also supports the suggestion that the Supreme Court of Pennsylvania should deem school vouchers constitutionally valid.

#### III.B.1. Constitutionality under Article I, § 3's Religious Freedom Provision

School voucher programs should be deemed valid under Article 1, Section 3's Religious Freedom provision because of the United States Supreme Court's decision in *Zelman*.<sup>152</sup> The *Zelman* decision applies because prior Pennsylvania case law stipulates that the protections provided by Article 1, Section 3 do not extend beyond those provided by the First Amendment of the Federal Constitution.<sup>153</sup> The *Zelman* court found that school vouchers were constitutional under the First Amendment of the Federal Constitution.<sup>154</sup> This

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149. PA. CONST. art. III, § 30.

150. See Glenn & Gininger, *supra* note 69, at 8-9; *supra* notes 68-70 and accompanying text.

151. See Glenn & Gininger, *supra* note 69, at 8-9; *supra* notes 69-70 and accompanying text.

152. *Zelman v. Simmons-Harris*, 536 U.S. 639, 663 (2002).

153. *Springfield Sch. Dist. v. Dep't of Educ.*, 397 A.2d 1154, 1170 ("First, we have earlier held that the provisions of Article I, Section 3 of our constitution do not exceed the limitations in the first amendment's establishment clause.").

154. *Zelman*, 536 U.S. at 663.

determination of constitutionality would apply to Article 1, Section 3, notwithstanding the state's policy of independent analysis of the Pennsylvania Constitution.<sup>155</sup> This conclusion stands because the Supreme Court of Pennsylvania, not the United States Supreme Court, made the determination that the federal and state interpretations of the Free Exercise and Establishment Clauses were synchronized with one another in *Wiest* and *Springfield*.<sup>156</sup>

### III.B.2. Constitutionality Under the Religious Provisions in Article III, §§ 15, 29, and 30

A review of prior case law suggests that the provisions regulating government interaction with sectarian institutions in Article 3 should not invalidate a school voucher program in Pennsylvania. Constitutionality under the Article 3 provisions can be determined by applying the governmental duty test utilized in *Schade*.<sup>157</sup> The first prong of the test—determining whether an appropriation is for a governmental duty or for a “charitable, beneficial, or educational” purpose—can be settled in the affirmative for a school voucher law because of provisions in the Pennsylvania Constitution.<sup>158</sup> Article 3, Section 14 puts forth an affirmative governmental duty to provide a “thorough and efficient” system of public education.<sup>159</sup> This affirmative duty allows the General Assembly to use innovative methods in order to provide support for the public education system.<sup>160</sup> Given the broad discretion that the General Assembly has to fulfill this duty, the General Assembly can assert that funding a school voucher program is a component of fulfilling its obligation under

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155. See *Springfield*, 397 A.2d at 1170-71 (citing to the constitutional analysis presented in *Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 366 (Pa. 1974)). Some commentators have asserted that the incorporation of the *Edmunds* analysis to Pennsylvania jurisprudence may override the court's assertion that Pennsylvania's religious freedom provision and the federal Free Exercise and Establishment Clauses were calibrated with each other. See, e.g., Lipper, *supra* note 12, at 33 (noting that a separate *Edmunds* analysis could deem school vouchers unconstitutional under Article 1, Section 3). The basis of this argument is that the *Edmunds* decision was made after the court's decision in *Wiest* and *Springfield*. *Id.* This argument does not hold given the Supreme Court's opinion in *In re Redevelopment Auth. of Phila.*, 938 A.2d 341, 343 (Pa. 2007). The case determined that a condemnation action with subsequent transfer to a religious entity did not violate the Establishment Clause of the United States Constitution or Article 1, Section 3 of the Pennsylvania Constitution. *In re Redevelopment Auth. of Phila.*, 938 A.2d at 348-49. In making this decision, the court reaffirmed its position that the protections provide in Pennsylvania's Religious Freedom clause did not transcend the protections provided in the First Amendment of the United States Constitution. *Id.* at 350 n.2 (quoting *Wiest*, 320 A.2d at 366-67).

156. See *Springfield*, 397 A.2d at 1170-71 (citing to the constitutional analysis presented in *Wiest*, 320 A.2d at 366).

157. *Schade v. Allegheny Cnty. Inst. Dist.*, 126 A.2d 911, 914 (Pa. 1956).

158. See Commonwealth *ex rel. Schnader v. Liveright*, 161 A. 697, 711 (Pa. 1932).

159. PA. CONST. art. III, § 14.

160. *Malone v. Hayden*, 197 A. 344, 352 (Pa. 1938).

Article 3, Section 14, and not a “charitable, beneficial, or educational” appropriation under Article 3, Sections 29 and 30.<sup>161</sup>

The second prong of the test—ensuring that there are no other constitutional preclusions to the appropriation—is a more difficult test to satisfy in favor of a school voucher program.<sup>162</sup> This difficulty arises out of determining whether or not Article 3, Section 15’s restriction on public school money being available for sectarian schools applies.<sup>163</sup> One argument is that the vouchers are provided to parents and thus any restriction under Article 3, Section 15 is not applicable because there is no direct payment to a sectarian school. This argument may be deemed satisfactory, but it is admittedly questionable given prior case law. For instance, the *Springfield* court stated that an analysis of a potential Article 3, Section 15 violation was not necessary in that case because no state funds “reach[ed] the coffers” of sectarian schools.<sup>164</sup> Thus, the court could conceivably find that there was a direct benefit being conferred upon sectarian institutions through the provision of a voucher program and trigger an analysis under Article 3, Section 15. However, even if the court deemed that the assignment of vouchers to sectarian institutions was a benefit, the court would likely find that the payments were constitutional under Article 3, Section 15 because the source of revenue would be state tax dollars, as opposed to local property taxes that are primarily generated for the purpose of supporting public schools.<sup>165</sup> This, along with the determination that school vouchers fulfilled a governmental duty, would ensure constitutionality under Article 3’s regulations.<sup>166</sup>

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161. *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 114 (Pa. 1999); *Danson v. Casey*, 399 A.2d 360, 366 (Pa. 1979). The term “educational” does not draw its meaning from common usage. 1 PA. CONST. STAT. ANN. § 1903(b) (2004) (“General words shall be construed to take their meanings and be restricted by preceding particular words.”). Its meaning is drawn, in part from the preceding words “charitable” and “beneficial.” The use of these terms suggest that the use of the word “educational” is not used for the purpose of restricting all education related appropriations, but to restrict those educational appropriations made which are not made to fulfill a governmental duty. If the term “educational” were interpreted more broadly, then Article 3, Section 29 would be in conflict with article 3, Section 14’s provision of support for educational purposes. PA. CONST. art. III, § 14 (calling for the support of a public education system). Such a result would not be allowed under Pennsylvania law. 1 PA. CONST. STAT. ANN. § 1921(a) (2004) (“Every statute shall be construed, if possible, to give effect to all its provisions.”).

162. *See Liveright*, 161 A. at 711.

163. PA. CONST. art. III, § 15.

164. *Springfield Sch. Dist. v. Dep’t of Educ.*, 397 A.2d 1154, 1171 (Pa. 1979).

165. *See Ball*, *supra* note 147, at 273-74.

166. *See Lipper*, *supra* note 12, at 31 (“Vouchers would fit within [the governmental duty] exception—and would survive scrutiny under Article III, Section 29—only if the Court were to define the government duty as education generally, rather than public-education specifically.”).

### III.C. Related Cases from Other States

The Supreme Court of Pennsylvania will find support for deeming a Pennsylvania school voucher program constitutional when analyzing the voucher decisions from Ohio<sup>167</sup> and Wisconsin,<sup>168</sup> and the anti-voucher decisions in Florida,<sup>169</sup> Arizona<sup>170</sup> and Colorado.<sup>171</sup> These cases, although divergent in results, support the arguments for finding school vouchers constitutional under Pennsylvania's Constitution. For instance, the decisions to deem school vouchers unconstitutional in Florida,<sup>172</sup> Arizona,<sup>173</sup> and Colorado<sup>174</sup> resulted from the fact that each state's constitution expressly mandated that funds be used to support public schools or public school districts. These education clauses are more restrictive and prescriptive than Article 3, Section 14.<sup>175</sup> As noted above, *Malone* provides that Article 3, Section 14's affirmative duty to provide a system of public education is achieved by the legislature's exercising of broad discretionary authority "to

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167. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 207 (Ohio 1999).

168. *Jackson v. Benson*, 578 N.W.2d 602, 620 (Wis. 1998).

169. *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).

170. *Cain v. Horne*, 202 P.3d 1178, 1184 (Ariz. 2009).

171. *Owens v. Colorado Cong. of Parents, Teachers & Students*, 92 P.3d 933, 936 (Colo. 2004).

172. FLA. CONST. art. IX, § 1(a) ("The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a *uniform, efficient, safe, secure, and high quality system of free public schools* that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.") (emphasis added); *Bush*, 919 So. 2d at 398 ("[W]e find that the OSP violates this language. It diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida's children.").

173. ARIZ. CONST. art. IX, § 10 ("No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.") (emphasis added); *Cain*, 202 P.3d at 1184 ("For all intents and purposes, the voucher programs do precisely what the Aid Clause prohibits. These programs transfer state funds directly from the state treasury to private schools.").

174. COLO. CONST. art. IX, § 15 ("The general assembly shall, by law, *provide for organization of school districts of convenient size*, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. *Said directors shall have control of instruction in the public schools of their respective districts.*") (emphasis added). *Owens*, 92 P.3d at 936 ("Given the mandates of article IX, section 15, we hold that the Pilot Program violates the local control requirements of our state constitution because it directs the school districts to turn over a portion of their locally-raised funds to nonpublic schools over whose instruction the districts have no control. Irrespective of the fact that the goals of the program and the policy considerations underlying it are laudable, we see no way to reconcile the structure of the program with the requirements of the Colorado Constitution. To hold otherwise would render the local control provisions of article IX, section 15 meaningless.").

175. See PA. CONST. art. III, § 14 ("The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.").

adopt a changing program to keep abreast of educational advances.”<sup>176</sup> Given this discretionary authority, the Pennsylvania General Assembly, unlike its counterparts in Florida, Arizona, and Colorado, does not have to confine its education funding appropriations to the support of public schools and can constitutionally fund school vouchers.<sup>177</sup>

Additional support for the constitutionality of school vouchers in Pennsylvania comes from the pro-voucher decisions by the Supreme Court of Ohio in *Simmons-Harris v. Goff* and the Supreme Court of Wisconsin in *Jackson v. Benson*.<sup>178</sup> The courts in both cases asserted that their respective state Establishment Clauses were interpreted in the same manner the courts interpreted the Federal Establishment Clause.<sup>179</sup> In applying this standard, both courts upheld the voucher program at issue under their state’s Establishment Clause.<sup>180</sup> A similar result should be reached in a constitutionality review of a Pennsylvania school voucher program because of the Supreme Court of Pennsylvania’s stance that the protections of the State Establishment Clause do not transcend the protections of the Federal Establishment Clause.<sup>181</sup>

Additionally, *Simmons-Harris* supports the constitutionality of school vouchers in Pennsylvania through its interpretation of the Ohio Constitution’s education provision. The provision contains a Sectarian Support Clause which states that “no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.”<sup>182</sup> The *Simmons-Harris* court found that the clause did not preclude the provision of school vouchers by stating that: “the sole fact that some private schools receive an indirect benefit from general programs supported at public expense does not mean that such schools have an exclusive right to, or control of, any part of the school funds of this state.”<sup>183</sup> This interpretation bolsters the claim that vouchers are constitutional in Pennsylvania because of the similarity between the Sectarian Support Clause in Ohio’s education provision and Article 3, Section 15 of the Pennsylvania Constitution, which states that: “No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.”<sup>184</sup>

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176. *Malone v. Hayden*, 197 A. 344, 352 (Pa. 1938).

177. 1967 Pa. Laws 1037, 1038 (removing the term “public schools” from Pennsylvania’s education provision and replacing it with “public education”).

178. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 207 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 620 (Wis. 1998) (noting that state establishment clauses were interpreted using the framework of federal establishment clause analysis).

179. *Simmons-Harris*, 711 N.E.2d at 211; *Jackson*, 578 N.W.2d at 620.

180. *Simmons-Harris*, 711 N.E.2d at 211; *Jackson*, 578 N.W.2d at 632.

181. *Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 366-67 (Pa. 1974) (“The protection of rights and freedoms secured by this section of our Constitution, however, does not transcend the protection of the First Amendment of the United States Constitution.”).

182. OHIO CONST. art. VI, § 2.

183. *Simmons-Harris*, 711 N.E.2d at 212 (quoting *Protestants & Other Ams. United for Separation of Church & State v. Essex*, 275 N.E.2d 603, 608 (Ohio 1971)).

184. PA. CONST. art. III, § 15.



Given the interpretation of the Supreme Court of Ohio and the similarity of the Ohio and Pennsylvania clauses restricting sectarian funds, the Supreme Court of Pennsylvania should deem school vouchers constitutional under Article 3, Section 15.

*III.D. Policy Recommendations, Including Unique Issues of State and Local Concern, and Applicability Within Modern Pennsylvania Jurisprudence*

The Supreme Court of Pennsylvania's deference to the legislature on school funding matters further suggests that school vouchers should be deemed constitutional. Beginning with its decision in *Danson v. Casey* in 1979, the Supreme Court of Pennsylvania has determined that challenges to the General Assembly's education funding scheme based on equality<sup>185</sup> and adequacy<sup>186</sup> are invalid due to the court's interpretation of the General Assembly's constitutional duty to provide a "thorough and efficient" education system.<sup>187</sup> In these cases, the court has read the affirmative mandate to provide educational opportunities to Pennsylvania children as one that grants the General Assembly broad discretion in implementation.<sup>188</sup> Moreover, these cases assert that any legislation implemented for the purpose of effectuating the constitution's education provision is constitutional as long as the legislation is rationally related to creating a "thorough and efficient" system of public education.<sup>189</sup>

School vouchers should be deemed constitutional because they are rationally related to the purposes of Article 3, Section 14. This rational relationship arises out of the fact that the programs allow students in underperforming districts with the opportunity to attend nonresident public school or private schools with publically supported vouchers.<sup>190</sup> Moreover, there is a reasonable argument that school vouchers will stimulate competition between public and private schools and thus increase the performance of public schools.<sup>191</sup> Such competition will assist the legislature in performing its duty to support a "thorough and efficient" public education system in Pennsylvania.<sup>192</sup> Lastly, the current publicly funded options for students in underperforming districts simply do not effectively meet the demand for quality educational opportunities.<sup>193</sup> Thus, the court should apply the tradition of deference found in education funding cases and find that a school voucher

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185. *See Danson v. Casey*, 399 A.2d 360, 366-67 (Pa. 1979).

186. *See Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 114 (Pa. 1999).

187. *Malone v. Hayden*, 197 A. 344, 352 (Pa. 1938).

188. *Marrero*, 739 A.2d at 114; *Danson*, 399 A.2d at 367.

189. *Danson*, 399 A.2d at 367; *see Marrero*, 739 A.2d at 113.

190. *See, e.g.*, S.B. 1, 195th Gen. Assemb., Reg. Sess., § (b)(8) (Pa. 2011) (noting that vouchers would be available to students in Pennsylvania's lowest performing schools).

191. Hoxby, *supra* note 10, at 17-44.

192. PA. CONST. art. III, § 14.

193. *See supra* Part I.C.

program is constitutional under the power granted to the legislature via article 3, Section 14 and *Malone*.<sup>194</sup>

#### CONCLUSION

The current state of Pennsylvania's education system has relegated underprivileged and minority students to underperforming school districts with little or no hope of an educational alternative. To remedy this situation, members of the General Assembly have proposed the institution of a school voucher program. While such a program is legal under the Federal Constitution, the Supreme Court of Pennsylvania has yet to deem school vouchers constitutional under the state constitution. It should.

School vouchers would not violate the State Constitution's Religious Freedom section because the provision's interpretation mirrors the United States Supreme Court's interpretations of the First Amendment's Free Exercise and Establishment Clauses. Additionally, the regulations of appropriations to sectarian institutions under Article 3 of the Pennsylvania Constitution do not apply because school vouchers fulfill the obligations of a governmental duty. These arguments are further buttressed by school voucher cases decided by other state courts and the deferential *Malone* standard in Pennsylvania cases assessing the General Assembly's duty to provide a "thorough and efficient" system of public education. Collectively, these decisions, interpretations, and standards demand that the Supreme Court of Pennsylvania find school vouchers constitutional.

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194. *Malone v. Hayden*, 197 A. 344, 352 (Pa. 1938).