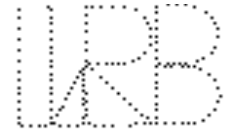


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STATE AID TO PRIVATE SCHOOLS

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The United States Supreme Court's recent decision in *Zelman v. Simmons-Harris*, upholding the constitutionality of state-funded vouchers used by parents to send their children to religiously affiliated elementary and secondary schools, may raise interest in state aid to private schools. This note provides an overview of the issue of state aid to private schools.

Q1: *What is the Establishment Clause of the First Amendment to the United States Constitution?*

A1: The Establishment Clause refers to the language in the First Amendment to the United States Constitution that forbids Congress to make any "law respecting an establishment of religion." This inhibition on Congress was made applicable to the states by the Fourteenth Amendment. The Establishment Clause is also referred to as the doctrine of separation of church and state. The Establishment Clause generally prohibits any governmental action that assists, endorses or prefers one religion over another or that assists, endorses or prefers any religion over nonreligion. Therefore, any governmental sponsorship, financial support, active involvement, or any act that confers state approval on any particular religion or any religion at all is prohibited. The state must be neutral in its relations with religious groups, neither advancing nor inhibiting them.

Q2: *Does the Establishment Clause limit state aid to private schools?*

A2: Any governmental program to provide assistance to educational institutions that includes private religious or sectarian schools will implicate the Establishment Clause. Similarly, any attempt to exclude religious or sectarian schools from broad educational aid programs assisting nonreligious private schools undoubtedly would be subject to challenge under the Establishment and Equal Protection Clauses. In evaluating

whether a government school aid program violates the Establishment Clause, the courts must inquire: whether the governmental action has a neutral or secular purpose; and whether it has the principal or primary effect of advancing or inhibiting religion

Q3: If the Establishment Clause prohibits government aid to sectarian schools, why do courts say that some types of state aid to sectarian schools are OK?

A3: The United States Supreme Court has consistently rejected the proposition that the Establishment Clause prohibits any program that in some manner aids a religiously affiliated institution. The Court's reaction to specific factual situations, as well as shifting political philosophies, has led to a dizzying array of school aid cases that defy simple categorization. For example, in early cases the United States Supreme Court approved laws authorizing the reimbursement of school bus transportation expenses for and the lending of textbooks to children attending private schools, including sectarian schools. However, a series of United States Supreme Court cases in the 1970s struck down various programs providing aid to sectarian schools, including reimbursement for: expenses for textbooks, instructional materials, teachers' salaries for secular courses; testing and recordkeeping expenses; and auxiliary educational services such as remedial instruction, counseling, testing, and therapy for exceptional, remedial, or educationally disadvantaged students. During this same time period, however, the Court approved federal construction grants, issuance of revenue bonds, and annual noncategorical grants to religiously affiliated colleges and universities, provided the aid was restricted to secular activities and the institutions were not pervasively sectarian. In these cases, the Court also distinguished the nature of higher education institutions from primary and secondary schools, noting that college students are less impressionable and thus less susceptible to religious indoctrination and that the nature of college courses and the high degree of academic freedom inherently limits opportunities for sectarian influence.

Over the last two decades, a doctrinal shift in Establishment Clause case law has resulted in the authorization of more forms of public aid for private sectarian schools. The Court has rejected the presumptions and reasoning underlying its 1970s decisions that all government aid that directly assists the educational function of religious schools is invalid. The Court reaffirmed that courts must inquire: whether the governmental action has a neutral or secular purpose; and whether it has the principal or primary effect of advancing or inhibiting religion. With respect to this second inquiry, the Supreme Court adopted the following criteria:

1. Does the aid program result in governmental indoctrination;
2. Does it define its recipients by reference to religion; or
3. Does it create an excessive entanglement.

Under this test, the Court, in recent years, has approved the provision of federally funded supplemental, remedial instruction to disadvantaged children by government employees on the premises of sectarian schools¹ and the provision of Chapter 2 federal school aid for educational materials, computers and equipment.²

Moreover, in determining whether state aid has the effect of advancing or inhibiting religion, the United States Supreme Court has distinguished between government programs that provide direct aid to religious schools and programs of true private choice, in which the government aid reaches religious schools only as a result of genuine and independent choices of private individuals. With respect to the latter, the Court consistently has rejected Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals who, in turn, direct the aid to religious schools or institutions of their own choosing.³

Q4: *If the U.S. Constitution does not prohibit all state aid to private schools, why does Hawaii's government seem to operate differently?*

A4: The language in Hawaii's State Constitution differs from the United States Constitution in an important respect. Article I, section 4, of the Hawaii Constitution is similar to the federal Constitution, providing in pertinent part: "No law shall be enacted respecting an establishment of religion." However, article X, section 1, of the State Constitution specifically prohibits the use of public funds for the support or benefit of *any sectarian or private educational institution*, except under specific exceptions. The Hawaii Supreme Court interpreted this provision, in the seminal case *Honda v. Spears*,⁴ which struck down bus transportation subsidies for private and sectarian school students. Examining the legislative history of the Constitutional Convention of 1950, the Hawaii court noted the framers had a clear vision of "the importance and unique function of public education in a democratic state, as compared with nonpublic education." Moreover, the framers had a clear-cut intent to ensure support of the public schools and protection from any public assistance that would "build-up, strengthen, and make

¹ *Agostini v. Felton*, 251 U.S. 203 (1997) (overruling *Aquilar v. Felton*, 473 U.S. 402 (1985) and partially overruling *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985)).

² *Mitchell v. Helms*, 120 S. Ct. 2530 (2000) (plurality decision) (overruling *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolamn v. Walter*, 433 U.S. 229 (1977)).

³ See *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deductions for educational expenses including private school tuition costs); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (vocation rehabilitation grant for blind student to attend religious college); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (provision of sign language interpreter for deaf student attending sectarian school); *Zelman v. Simmons-Harris*, No. 00-1751 decided June 27, 2002) (tuition waivers granted to students attending sectarian schools).

⁴ 51 Hawaii 1 (1968).

successful the nonpublic schools" at the expense of the public schools. Accordingly, the Hawaii court concluded that the language of the state constitutional prohibition on public aid to nonpublic educational institutions was "unequivocal." In so ruling, the court flatly rejected the argument, known as the child benefit theory, that the bus subsidy did not constitute "support or benefit" for the nonpublic educational institutions themselves, but rather benefited the children attending those institutions.

Q5: *Are any forms of state aid to private schools allowed in Hawaii? If so, what are they?*

A5: Yes, article 10, section 1, of the State Constitution provides a specific exception to the ban on public aid to private and sectarian schools, by authorizing proceeds of special purpose revenue bonds to be appropriated to finance or assist not-for-profit corporations that provide early childhood education and care facilities serving the general public.

Also, during the Regular Session of 2002, the Legislature enacted Act 257, (SLH 2002), authorizing the State to issue special purpose revenue bonds for the benefit of not-for-profit private nonsectarian and sectarian elementary schools, secondary schools, colleges and universities that serve the general public. This Act was contingent upon ratification during the November 2002 general election of a state constitutional amendment to authorize the State to issue special purpose revenue bonds to assist not-for-profit private nonsectarian and sectarian elementary schools, secondary schools, colleges and universities, and to allow "pooling" or combination of separate issues of these bonds.⁵ Such pooling would allow smaller educational entities to combine their financial resources to obtain funding for their respective construction needs, thereby reducing the costs of issuing the bonds. In approving the language for the proposed amendment, the Conference Committee found that "the mission of the State is to ensure that all students in Hawaii receive an effective education," regardless of whether a student attends a public or private school.⁶ On November 5, 2002, Hawaii voters approved constitutional amendments to: (1) authorize the State to issue special purpose revenue bonds to assist not-for-profit private nonsectarian and sectarian elementary schools, secondary schools, colleges and universities; and (2) authorize the State to combine two or more proposed issues of these bonds into a single issue in an amount not to exceed the combined total amount of the proposed issues.

⁵ See House Bill No. 2848, C.D. 1 (SLH 2002).

⁶ Conference Committee Report No. 1-02 on House Bill No. 2848, C.D. 1, Regular Session of 2002.