



**Summary of Constitutional Barriers to an Illinois School Voucher Program**  
**Alicia Haller and Erika Hunt – February 2017**

The new administration has brought renewed interest to the issue of school choice and particularly to the topic of school vouchers. Secretary of Education Betsy DeVos has a long history as serving as a champion of school choice. President Trump, in his first joint address to Congress, called for “a bipartisan school choice bill to help disadvantaged children trapped in failing schools”. It is unclear whether such a school choice bill would supersede state law as the President has remained a steadfast supporter of bringing control back to states and local government.

This white paper outlines the constitutional barriers currently in place in Illinois to allowing public funding to go toward religious based private education. Given the current constitutional requirements against this, federal policymakers from Illinois (and states like it) should understand that **requiring the enactment of school voucher programs as a contingency to the receipt of any federal education funding could cost the state millions of dollars in federal education funding at least for the years it will take to implement an amendment to the state constitution.**

### CONTEXT

According to Private School Review, 284,245 students in Illinois attend private schools and there are 1,732 private schools in the state, with 59% of them religiously affiliated. Nationally, 12 states in the U.S. have some form of voucher program that provides public funds for students whose parents choose to send them to private schools. Currently, there are no laws or regulations barring the Illinois General Assembly, Illinois State Board of Education, or any county, city, town, or district from establishing a voucher program that would fund tuition to non-religious institutions. However, there are substantial state constitutional barriers for providing vouchers to religiously affiliated schools in Illinois.

In the 1980s, the U.S. Supreme Court ruled that a state program to reimburse low-income parents for parochial school tuition violated the Establishment Clause of the First Amendment that prohibits government from advancing any religion. The Illinois Supreme Court previously struck down a tuition voucher program for parents for similar reasons. In both cases, despite the fact that government funds went to the parents/students rather than to the religious school, made no

difference. It was deemed unconstitutional because the funds ultimately provided an overly-broad level of financial support for religious instruction.

In a different case in 2002, the U.S. Supreme Court upheld a lower court ruling on Ohio's Cleveland Scholarship Program (*Zelman v. Simmons-Harris*, 536 U.S. 639). The court found that the program was narrow enough in scope to be allowable under the U.S. Constitution. *Zelman* sets the standards that all school choice programs must comply with the First Amendment's Establishment Clause and included a provision that banned religious schools that accepted vouchers from providing religious education. Even though the U.S. Supreme Court allows for a more nuanced interpretation of the Establishment Clause, with regard to funding for religiously affiliated schools, school voucher proposals in Illinois would still run afoul of clear language in the Illinois Constitution (see Articles I § 3 and X § 3 of IL Constitution below).

**ARTICLE I – Section 3 - The Compelled Support Clause, states “No person shall be required to attend or support any ministry or place of worship against his consent...”**

**ARTICLE X – Section 3- the Blaine Amendment states, “Public funds for sectarian purpose forbidden. Neither the General Assembly nor any county, city, town, township, school district, or other public corporation shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.**

Under Article I, Section 3, an argument can be made that no taxpayer can be compelled to have their tax dollars allocated to a religious institution. That, along with Article X, Section 3, formed the basis for the Illinois court's decision to bar unrestricted public funds from going to religious schools in Illinois. Restricted vs. unrestricted funding was an important distinction made by Illinois courts, because there is some precedent for funds being allocated to religious schools in Illinois. For example, the Illinois Supreme Court has only found that unrestricted payments of public funds to religious schools in the form of tuition vouchers/scholarships are unconstitutional. But the court did uphold the statute that provided the transportation of private school students at public expense and the use of public funds to pay for textbooks and nursing services. More recently, two Illinois teachers' unions separately challenged the constitutionality of an Illinois tax credit program for tuition to private schools and/or out-of-district public schools. Two trial courts and Illinois courts of appeal upheld the tax credit program, citing it constitutional under both the federal Establishment Clause and the Illinois Constitution's religion clause. Further, the Illinois Supreme Court denied appeals on those rulings (*Toney v. Bower*, 2001; and *Griffith v. Bower*, 2001)<sup>1</sup>.

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<sup>1</sup> Other relevant Illinois case law, include: 1) *Board of Education v. Bakalis* (Ill. 1973) involving a statute requiring public school buses to transport private school students. The court ruled that the statute did not violate Article X § 3 of the Illinois constitution because the statute was intended and implemented as a health-and-safety measure that benefited all students. 2) *People ex rel. Klinger v. Howlett*, (Ill. 1973) involving tuition vouchers/grants to religious schools. The court ruled that unrestricted public funds provided to religious organizations could ultimately subsidize religious services and violate Article X § 3 of the Illinois Constitution. However, the court opened the door for restricted, targeted funding that did not support the religious organization.

The Cleveland, Milwaukee, and Washington D.C. voucher programs all relied on the federal *Zelman v. Simmons-Harris* ruling to establish their programs. In that case, the U.S. Supreme Court set a consistent federal standard for school choice programs. The court determined that public funding for religious schools does not violate the Establishment Clause, so long as such education program is religiously neutral and based on true private choice.

But the US Supreme Court ruling is not the only consideration for a voucher program in Illinois. Regardless of whether or not the schools removed the religious education component from their programs, tuition vouchers/scholarships have been determined by an Illinois court to ultimately support religious organizations. Due to the unrestricted nature of the funding, they act to subsidize costs to the religious organization (e.g. they are used to support facilities maintenance, administrative costs, etc. that are not exclusive to the use of the secular school component). In other words, even if a religious school eliminates the religious education component, public funding would still be viewed as supporting a religious organization. Therefore, the State has provided only restricted funds, targeted toward very specific allowable goods and services, that are secular in nature and do not support the religious organization overall (e.g. secular text books, transportation, SPED support, tax credit for tuition, etc.).

While Governor Rauner has publicly supported and advocated for school choice, there is no reference to a state supported voucher program (neither for religious nor secular private schools) found in the framework developed by the Illinois School Funding Reform Commission. The bipartisan Commission was charged with developing an equitable school funding system for the state. The only significant reference to school choice in the Commission's final report in 2017 requires no state revenue and merely provides tax incentives for donations toward scholarships to private schools. That reference in the report states, "Approximately 12% of Illinois children attend non-public schools. Governor Rauner and some members of the Commission support the availability of school choice tax credits for individuals or corporations donating money to fund scholarships for low-income students, as long as those schools are nonprofit and the accepting school publishes accountability data equivalent to what is required for public schools."

## **MECHANISMS TO CHANGE THE ILLINOIS CONSTITUTION**

There are currently only three ways in which the Illinois Constitution can be amended/modified:

- (1) by a constitutional convention with changes submitted to the voters,
- (2) by amendments approved by the General Assembly and submitted to the voters, or
- (3) by petition initiated by the people limited to the structure and procedures of the Legislature and submitted to the voters.

Regardless of how an amendment is proposed, the issue must be placed on the ballot of a statewide election and passage requires that a supermajority of voters must agree to the change. Additionally, a limit of no more than three amendments can be put to the voters per general election. The Illinois Constitution has been successfully amended 14 times since 1970.

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## **CONCLUSION**

Staff in the Center for the Study of Education policy absolutely believe that all students deserve high quality educational opportunities. We also support the high quality development of educators in all of our schools, including public and private schools. One of our current projects – the Illinois Partnership to Advance Rigorous Training (IL-PART) – funded through the USDE School Leader Recruitment and Support Office prepares principals for both public and Catholic schools. However, we caution federal policymakers from going too far with federal regulations governing or incentivizing school voucher programs. This could in effect provide a disadvantage to educators in states that have constitutional barriers to complying with the federal programs.