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EDUCATION Elementary and Secondary School Education: Amend Chapter 2 of Title 20 of the Official Code of Georgia Annotated, Relating to Elementary and Secondary Education, so as to Enact the "Georgia Special Needs Scholarship Act;" Provide a Short Title; Define Certain Terms; Provide for Scholarships for Public School Students with Disabilities to Attend Other Public or Private Schools; Provide for Qualifications and Criteria for the Scholarship Program; Establish Certain Requirements for Schools that Participate in the Scholarship Program: Provide for the Amount of Scholarship and Method of Payments; Authorize

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EDUCATION

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CODE SECTIONS:	O.C.G.A. §§ 20-2-2110 to -2118 (new)
BILL NUMBER:	SB 10
ACT NUMBER:	117
GEORGIA LAWS:	2007 Ga. Laws 197
SUMMARY:	<p>The Act creates a scholarship for students with disabilities who are dissatisfied with the services received in their resident public school. The amount of each scholarship depends on the special needs matrix, which currently dictates funding for public schools. Scholarships are transferable and may be used at another public school within the resident system, a public school outside the resident system, a state school for the deaf or blind, or a private sectarian or non-sectarian school.</p>

To qualify for a scholarship, a student’s parents must currently reside in Georgia and have been Georgia

residents for at least one year. Furthermore, the student must have one or more of the listed disabilities. The student must also have attended a Georgia public school that implements the child's Individualized Education Plan (IEP), for one school year. Moreover, accepting a scholarship requires waiving rights available under the Individuals with Disabilities Education Act (IDEA).

EFFECTIVE DATE: July 1, 2007

History

School choice programs, once known as voucher programs, are government initiatives that allow "individual students and their parents to determine which school the student will attend and allocate[] a specific sum of money that can be used for part or full payment for the student to attend that school," instead of enrollment restricted by residency.¹

Early Ideas and Programs

In 1955, Milton Friedman, a free-market economist, theorized a voucher system for public education.² He proposed that education should not be the government's monopoly.³ However, a completely free market would be risky because education is a public commodity, to which wealthy and poor alike should have access.⁴ Thus, he posited that the government should provide parents with funds to offset the cost of education.⁵ This system would force schools to compete for student enrollment, causing schools to either excel by

1. 1 RONNA GREFF SCHNEIDER, EDUCATION LAW § 1:30 (2006).

2. Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123, 143-44 (Robert A. Solo ed., 1955).

3. *See id.*

4. *See id.*

5. *See id.*

catering to student's needs or to go out of business by losing enrollment and funding.⁶ In short, vouchers would use competition and choice to create more successful and innovative schools than those created by a bureaucratic government monopoly.⁷

Though Milton was the first academic to formalize this system, Maine and Vermont were actually the first states to adopt school choice programs out of necessity in the late 1800s.⁸ Beginning in 1869, Vermont allowed a school district to pay another school district or independent school to take its residents in lieu of opening and operating its own system.⁹ This was a financially attractive option because some school districts had a small number of sparsely dispersed students.¹⁰ In 1902, Vermont expanded the program to allow school districts to pay for students' out-of-state private tuition.¹¹ Today, 95 out of 246 towns still pay tuition for some or all of their students to attend another public school, a non-sectarian private school, or an out-of-state school.¹²

Similarly, in 1873, Maine passed the Free High School Act, a precursor to the present choice program.¹³ Since then, the Maine has allowed a school district to pay another school district or independent school to take its resident students in lieu of opening and operating its own school system.¹⁴ Students may choose public schools in other districts, private non-sectarian schools, or out-of-state schools, if their local district does not operate its own school, operates a school that has fewer than ten students, operates a school that offers insufficient courses (e.g., not enough foreign languages), or if the students live too far from the school.¹⁵

6. *See id.*

7. *See id.*

8. CHRISTOPHER HAMMONS, FRIEDMAN FOUND., SCHOOL CHOICE ISSUES IN DEPTH: THE EFFECTS OF TOWN TUITIONING IN VERMONT AND MAINE 5 (2002), available at <http://www.friedmanfoundation.org/friedman/downloadFile.do?id=61>.

9. *Id.* at 7.

10. *Id.*

11. *Id.* at 8.

12. *Id.* at 9.

13. HAMMONS, *supra* note 8, at 8.

14. *Id.* at 9.

15. ME. REV. STAT. ANN. tit. 20-A, § 5203 (1993) (giving elementary students the right to attend school in another administrative unit); ME. REV. STAT. ANN. tit. 20-A, § 5204 (1993) (giving secondary students the right to attend school in another administrative unit).

The Maine school choice system included sectarian schools until 1980 when Richard S. Cohen, Attorney General of Maine, issued an opinion advising the legislature that including sectarian schools within the school choice program violated the Establishment Clause of the United States Constitution.¹⁶ Consequently, in 1981 the legislature amended the school choice laws to comply with the Establishment Clause by excluding sectarian schools.¹⁷ In 2003, parents desiring to use vouchers at private sectarian schools challenged the law on grounds of Free Exercise and Equal Protection.¹⁸ The Supreme Court of the State of Maine upheld the exclusion of sectarian schools from the school choice program.¹⁹ In regard to Free Exercise, the court held that “[s]tates have some leeway to choose not to fund religious education even if a choice to fund religious education indirectly might not violate the Establishment Clause.”²⁰ Regarding Equal Protection, the court held that the “concern to avoid excessive entanglements provides a rational basis to maintain the funding limitation.”²¹

Ultimately, “small towns in Vermont and Maine often found it less expensive to ship students to existing private academies rather than build public schools.”²² Thus, school choice has been in practice for more than 100 years.

The Milwaukee Experience

Milwaukee was the first city to implement Friedman’s theory in an effort to fix educational woes.²³ In 1989, Wisconsin created the Milwaukee Parental Choice Program (MPCP) in an attempt to

16. See Me. Op. Att’y Gen. No. 80-2 (1980), available at 1980 WL 119258. This opinion was based on *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1972), which invalidated a New York statute authorizing a tuition tax-break for parents and funds for maintenance and repairs at schools. See *id.*

17. ME. REV. STAT. ANN. tit. 20-A, §§ 5203-5204 (1993); see also *Bagley v. Raymond Sch. Dep’t*, 728 A.2d 127, 130-31 (Me. 1999).

18. *Anderson v. Town of Durham*, 895 A.2d 944, 944 (Me. 2006), *cert. denied*, 127 S.Ct. 661 (2006).

19. See *id.*

20. *Id.* at 959.

21. *Id.* at 961.

22. HAMMONS, *supra* note 8, at 7.

23. SchoolChoiceWI, Milwaukee Parental Choice Program, <http://schoolchoicewi.org/k12/detail.cfm?id=4> (last visited Dec. 21, 2007) (stating MPCP is “oldest” school choice program).

provide a “quality” education for every child.²⁴ The MPCP allows students, under certain circumstances, to attend private schools within Milwaukee “at no charge.”²⁵ Participation is based on two factors: residency and income.²⁶ First, the student must live in the city of Milwaukee.²⁷ Second, the student must live in a household with an income equal to or less than 175% of the federal poverty level.²⁸ Students may remain in the program so long as their household income is equal to or less than 220% of the federal poverty level.²⁹

Under this framework, 14,217 students attended 121 private schools through MPCP in January 2006.³⁰ MPCP presently costs the state approximately \$93,683,601 per year.³¹ To pay for such a widely-used and costly program, MPCP tried numerous funding structures before arriving at the configuration used today.³² Currently, the program receives 45% of its funding from a reduction in the Milwaukee Public School (MPS) budget and 55% from the state general-purpose revenue fund.³³ MPCP seeks to benefit low-income students by offering them options. A consequence of having options is that parents have become more involved. MPCP has also forced schools to compete, which should theoretically create better schools.³⁴ However, there is little concrete data on the quality of education that choice students receive, and the present data is inconsistent. Current data alternately shows that choice students are

24. WIS. STAT. § 119.23 (2004).

25. Wis. Dep’t of Pub. Instruction, Milwaukee Parental Choice Program Homepage, <http://dpi.wi.gov/sms/choice.html> (last visited Aug. 3, 2007).

26. *See id.*

27. WIS. STAT. § 119.23(2)(a) (2004).

28. WIS. LEGISLATIVE FISCAL BUREAU, INFORMATIONAL PAPER 29: MILWAUKEE PARENTAL CHOICE PROGRAM 1 (2007), available at <http://www.legis.state.wi.us/lfb/Informationalpapers/29.pdf> [hereinafter MILWAUKEE PARENTAL CHOICE].

29. *Id.*

30. WIS. DEP’T OF PUBLIC INSTRUCTION, MILWAUKEE PARENTAL CHOICE PROGRAM: FACTS AND FIGURES FOR 2005-2006 (2006) (on file with the Georgia State University Law Review).

31. *Id.*

32. One previous funding arrangement included a requirement that the state pay for two-thirds and MPS for one-third of the MPCP program. *See MILWAUKEE PARENTAL CHOICE*, *supra* note 28, at 7. This arrangement was essentially a program completely funded by the state because the state paid MPS directly for each student enrolled in its system, and all children participating in MPCP were considered to be enrolled in MPS. *See id.* Another arrangement required that each school district pay a prorated share for MPCP, which necessitated raising property taxes in under-funded districts to offset money paid to the program. *See id.*

33. *See id.*

34. *See id.*

surpassing, doing the same as, or doing worse than their MPS counterparts.³⁵ Wisconsin has issued a five-year comprehensive comparison of MPCP and MPS students, which should give more conclusive results in 2011.³⁶

One problem with MPCP was the numerous unregulated “voucher-schools” which formed in the initial years of the program. For example, one school that was eventually shut down was opened by a convicted rapist.³⁷ Other schools were closed for reporting fictitious students, failing to get financial audits, unsafe conditions, and failure to provide instruction.³⁸ In addition, taxes in Milwaukee have increased to compensate funding both MPCP and MPS.³⁹ Thus, while the program has given benefits to many students, including unique instruction, extended hours, Saturday schooling, new curriculum, and individual attention, the program still has large problems to address, including ineffective schools, inconsistent results, and the increasing cost of education.⁴⁰

35. See Amanda Paulson, *Milwaukee's Lessons on School Vouchers*, CHRISTIAN SCI. MONITOR, May 23, 2006, available at <http://www.csmonitor.com/2006/0523/p01s03-usgn.html>. Paulson notes:

Nationally, studies on vouchers have been mixed. A few showed signs of improved student achievement and evidence that competition improves public schools. Others showed negligible difference. “The evidence to date is very mixed,” says Jack Jennings, director of the nonpartisan Center on Education Policy. “For [the] sake of kids . . . it would be good to have an objective analysis.”

Id. But cf. JOHN F. WITTE, TROY D. STERR & CHRISTOPHER A. THORN, FIFTH-YEAR REPORT MILWAUKEE PARENTAL CHOICE PROGRAM (1995), available at <http://dpls.dacc.wisc.edu/choice/choice%5Frep95.html> (showing students using the scholarships and students staying public school had similar test results, but scholarship students reported greater parent involvement; thus, there was negligible positive effects and no detrimental effects) and SCHOOL CHOICE WIS., MILWAUKEE'S PUBLIC SCHOOLS: IN AN ERA OF CHOICE (2005), available at http://www.schoolchoicewi.org/data/cutdev_links/mps_05sm.pdf (stating that the introduction of the choice system has resulted in numerous improvements to the public school system, including increased spending per student, increased graduation rates, and an increased number of schools making Adequate Yearly Progress under No Child Left Behind).

36. SCHOOL CHOICE WIS., SCHOOL CHOICE ACCOUNTABILITY: RESULTS FROM MILWAUKEE 3 (2006), <http://www.schoolchoicewi.org/data/research/accountability%202006.pdf> [hereinafter SCHOOL CHOICE WISCONSIN].

37. Paulson, *supra* note 35.

38. SCHOOL CHOICE WISCONSIN, *supra* note 36, at 4.

39. Wisconsin Dep't of Pub. Instruction, Milwaukee Parental Choice Program (MPCP) Facts and Figures for 2004-2005, <http://www.dpi.wisconsin.gov/sms/doc/mpc04fnf.doc> (last visited Dec. 21, 2007) (stating MPS can replace the reduction in state general equalization aid with an increase in its property tax levy).

40. See Paulson, *supra* note 35.

Voucher Programs Policy Review

To date, school choice has been implemented in Arizona, Colorado, Florida, Illinois, Iowa, Maine, Minnesota, Ohio, Pennsylvania, Vermont, Wisconsin, and Washington, D.C.⁴¹ The programs in these states differ in many ways.⁴² Regardless of the program's final specifications, all recent school choice programs spark similar policy debates, many of which were discussed in Georgia when SB 10 was introduced in 2007.

First, opponents of publicly-funded school choice programs argue that they drain students and resources away from public schools.⁴³ Public schools would lose funding, making it even harder for every student to receive an education.⁴⁴ Furthermore, the brightest students would be lured to the private sector, leaving under-funded public schools with the most challenging students.⁴⁵

Proponents of school choice disagree, arguing that the threat of losing students and funds would actually motivate schools to excel.⁴⁶ Furthermore, proponents point out that any lost funding corresponds proportionally to the number of students leaving the public school system through vouchers; thus, although funding may decrease, so does the number of students the school is expected to educate.⁴⁷ Finally, most public schools currently sort students through ability-tracking, which has the same "draining" effect on classrooms within the school.⁴⁸ Thus, the effect of choice on public schools, at least according to advocates, would actually make a leaner, more focused public school system.⁴⁹

41. KRISTA KAHER, HERITAGE FOUND., BACKGROUNDER: PROGRESS ON SCHOOL CHOICE IN THE STATES (2003), available at http://www.heritage.org/Research/Education/upload/48429_1.pdf.

42. See generally *id.* (reviewing existing school choice programs).

43. TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC 27-30 (2001); Letter from Bill Nigut, Southeast Region Director of the Anti-Defamation League, to House Education Committee (Feb. 9, 2007) (on file with the Georgia State University Law Review) [hereinafter ADL Letter].

44. MOE, *supra* note 43, at 27-30.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

Second, opponents argue that school choice would create social inequality.⁵⁰ The socially advantaged, as a result of better behavior and better test scores, would be accepted at better private schools while the underprivileged would toil in inadequate public schools.⁵¹ Proponents counter that the current system causes such inequality, as only the upper-class can afford private schools.⁵² Publicly-funded school choice would provide everyone with the options now available only to the wealthy.⁵³

Third, opponents worry that choice and the free-market would lead to the “race academies” of the 1950s and 1960s, providing an avenue for segregation.⁵⁴ However, the current system, drawn by housing lines influenced by Jim Crow laws, is not very integrated.⁵⁵ Proponents hope everyone, regardless of race, would seek the best education, and thereby voluntarily desegregate.⁵⁶ Should issues arise, specific legislation, such as admission lotteries, Title VII, and Title IX could combat problems.⁵⁷

Fourth, opponents theorize that school choice undermines democratic control.⁵⁸ This is because many students would be attending schools that are not directly operated by the government, and thus educational decisions in those schools would not be for the people, by the people.⁵⁹ Proponents concede this could occur if government control were completely eliminated from education.⁶⁰ However, with school choice programs, the government retains influence over education through control measures, such as graduation requirements, which would ensure schools represent the population.⁶¹

50. MOE *supra* note 43, at 27-30; ADL Letter, *supra* note 43.

51. MOE, *supra* note 43, at 27-30.

52. *Id.*

53. *Id.*

54. *Id.*; see also *Allen v. Wright*, 468 U.S. 737 (1984).

55. MOE, *supra* note 43, at 27-30.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. MOE, *supra* note 43, at 27-30.

Fifth, opponents believe that publicly-funded school choice is a front for advancing religion.⁶² Proponents, in short, argue freedom of religion is a fundamental right of every citizen.⁶³ Thus, parents should be able to choose a religious education as their private choice.⁶⁴

Sixth, opponents worry that parents may make educational decisions for the wrong reasons, such as athletics, social motivations, or geographical preferences.⁶⁵ However, proponents argue that parents should know a child's educational needs better than the government.⁶⁶

With this backdrop, SB 10, the Georgia Special Needs Scholarship Act, landed in the Georgia Senate on January 10, 2007.⁶⁷ The bill's sponsors, Senator Eric Johnson (R-1st) and Representative David Casas (R-103rd) based the Georgia Special Needs Scholarship Act on the McKay Scholarship Program in Florida.⁶⁸

The McKay Scholarship Program

The McKay Scholarship Program allows the parents of students with disabilities who are dissatisfied with the student's progress to choose another public school or a private school.⁶⁹ Participating students must have a disability documented by an individual education plan.⁷⁰ Students with disabilities include kindergarten through twelfth grade students who are mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally handicapped, specific language disabled, hospitalized or homebound,

62. *Id.*; ADL Letter, *supra* note 43.

63. MOE, *supra* note 43, at 27–30.

64. *Id.*

65. *Id.*

66. *Id.*

67. State of Georgia Final Composite Status Sheet, SB 10, June 5, 2007.

68. Telephone Interview with Rep. David Casas (R-103rd) (May 16, 2007) [hereinafter Casas Interview]; Video Recording of Senate Floor Debate, Jan. 31, 2007 at 1 hr., 9 min., 10 sec. (remarks by Sen. Eric Johnson (R-1st)), http://www.georgia.gov/00/article/0,2086,4802_6107103_72682316,00.html [hereinafter Senate Video].

69. FLA. STAT. § 1002.39(2) (2004).

70. FLA. STAT. § 1002.39(1) (2004).

or autistic.⁷¹ To be eligible, the student also must have spent the prior year in attendance at a Florida public school without making satisfactory progress.⁷² The parent must then notify the Department of Education at least sixty days prior to the first scholarship payment disbursement.⁷³

A student has the option of choosing the public school recommended by the present school, in which case the district will provide transportation.⁷⁴ The student may also choose an adjacent school district, private non-sectarian school, or private sectarian school, in which case the district does not have to provide transportation.⁷⁵ With either option, the student may request to take statewide assessment tests, in which case the original district must provide locations and times for testing.⁷⁶

Participating private schools must demonstrate fiscal soundness by being in operation for the previous three years or by “obtaining a surety bond or letter of credit for the amount equal to the scholarship funds for any quarter”⁷⁷ After notifying the department of its intent to participate, the private school must comply with the antidiscrimination provisions of 42 U.S.C. § 2000, state and local health and safety laws, and the general laws regulating private schools.⁷⁸ Teachers must have a baccalaureate degree or higher or have three years teaching experience, “or have special skills, knowledge, or expertise that qualifies them to provide instruction in subjects taught.”⁷⁹

Ultimately, the school is academically accountable to the parent for meeting the educational needs of the student.⁸⁰

The student may receive as tuition the lesser of the calculated amount for educational costs or the private school’s tuition and

71. *Id.*

72. FLA. STAT. § 1002.39(2) (2004) (additionally providing that youth in the Department of Juvenile Justice commitment programs are not eligible).

73. *Id.*

74. FLA. STAT. § 1002.39(5)(a) (2004).

75. FLA. STAT. §§ 1002.39(5)(e), (8) (2004).

76. FLA. STAT. § 1002.39(5)(f) (2004).

77. FLA. STAT. § 1002.39(8)(a) (2004) (referencing FLA. STAT. § 1002.421 (2004)).

78. FLA. STAT. § 1002.421(2)(a) (2004).

79. FLA. STAT. § 1002.421(2)(h) (2004).

80. FLA. STAT. § 1002.39(8)(c) (2004).

fees.⁸¹ The Department of Education will transfer the entitled funds quarterly from the General Revenue funds to the private school.⁸² As the checks can only be endorsed to the school, checks are made payable to the parent but sent to the private school.⁸³

Adopting much of the same language and policy of Florida's McKay Scholarship, SB 10 began its progression through the Georgia legislature.

Bill Tracking

Consideration by the Senate

SB 10 was first read in the Senate on January 10, 2007.⁸⁴ It then went to the Senate Education and Youth Committee, which made a number of changes.⁸⁵ First, the committee expanded the category of schools eligible to receive funds.⁸⁶ The committee's amendment replaced "eligible private schools," as the only entity to receive scholarship students, with "participating school," which includes non-resident public school systems, private schools, and schools for the deaf and blind.⁸⁷ Throughout the bill, "private school" was replaced with "participating school."⁸⁸

In defining the term "participating schools," the committee tightened requirements so that the participating school must have a physical location in Georgia, in order to prevent out-of-state schools or online educational programs from receiving voucher money.⁸⁹

The committee also reduced the scholarship amount to exclude federal funding.⁹⁰ Thus, under the committee substitute, the resident school system retains all federal funding, and only the state-based

81. FLA. STAT. § 1002.39(10)(b) (2004).

82. FLA. STAT. § 1002.39 (2004) (providing that if a school requires partial payment prior to the school year, the McKay Scholarship may pay up to \$1,000 up front).

83. FLA. STAT. § 1002.39(10)(e) (2004).

84. State of Georgia Final Composite Status Sheet, SB 10, June 5, 2007.

85. *See id.*

86. *See* SB 10 § 1 (SCS), 2007 Ga. Gen. Assem.

87. *Id.*

88. *Compare* SB 10 § 1, as introduced, 2007 Ga. Gen. Assem., *with* SB 10 § 1 (SCS), 2007 Ga. Gen. Assem.

89. SB 10 (SCS), 2007 Ga. Gen. Assem.

90. *Id.*

special education funding follows the student.⁹¹ This structure was intended to allow local schools to have more resources but less responsibility, as a school would receive federal funds for all of the scholarship students even though those students would actually attend other schools.⁹²

The Committee reported favorably on the bill and it was sent to the Senate floor to be read for the third time and a Senate vote.⁹³ During the floor debate, Senator Eric Johnson (R-1st) offered an amendment, which was adopted, to require participating private schools to comply with all “state law[s] applicable to private school.”⁹⁴

A number of other proposed amendments were rejected. The second Senate floor amendment sought to establish a maximum scholarship amount of \$17,000, equivalent to twice the cost of the educational program as calculated under Code section 20-2-161.⁹⁵ The third Senate floor amendment sought to require the resident school system to be responsible for transportation to and from the participating school.⁹⁶ The fourth Senate floor amendment would have required the state to pay the resident school district as if the student remained enrolled and to also pay the scholarship to the private school, thereby doubling the budget for special education.⁹⁷ The fifth floor amendment, which also failed, would have explicitly limited school choice to “the area of special needs children.”⁹⁸ Thus, the Act leaves open the possibility for school choice expansion.⁹⁹

After the debate, the Senate passed the bill by a 31 to 23 vote.¹⁰⁰

91. *See id.*

92. Senate Video, *supra* note 68, at 1 hr., 16 min., 20 sec. (remarks by Sen. Eric Johnson (R-1st)).

93. *See* State of Georgia Final Composite Status Sheet, SB 10, June 5, 2007.

94. SB 10 (SFA), 2007 Ga. Gen. Assem.

95. *See* Failed Senate Floor Amendment Two to SB 10, introduced by Sen. Horacena Tate (D-38th) & Sen. Vincent Fort (D-39th), Jan. 31, 2007.

96. *See* Failed Senate Floor Amendment Three to SB 10, introduced by Sen. Robert Brown (D-26th), Sen. Regina Thomas (D-2nd), Sen. Emanuel Jones (D-10th), & Sen. Vincent Fort (D-39th), Jan. 31, 2007.

97. *See* Failed Senate Floor Amendment Four to SB 10, introduced by Sen. Robert Brown (D-26th), Sen. Emanuel Jones (D-10th), & Sen. Vincent Fort (D-39th), Jan. 31, 2007.

98. Failed Senate Floor Amendment Five to SB 10, introduced by Sen. Steve Thompson (D-33), Jan. 31, 2007.

99. Sen. Eric Johnson (R-1st), Remarks at the Oglethorpe Legal Society's 2007 Legislative Forum (April 4, 2007).

100. *Id.*; Georgia Senate Voting Record, SB 10 (Jan. 31, 2007).

Consideration by the House

The Act was first read in the House on February 1, 2007.¹⁰¹ The second reading was the following day, February 2, 2007.¹⁰² The bill was then referred to the House Committee on Education.¹⁰³

At the Committee meeting, Senator Eric Johnson (R-1st) and Representative David Casas (R-103rd) introduced Patricia Levesque, who as an education policy advisor helped draft the McKay Scholarship for Governor Bush in Florida.¹⁰⁴ She explained the current statistics behind scholarship recipients in Florida: 20% are diagnosed as the most disabled, 40% qualify for free or reduced lunch, 50% are minority and 50% use the scholarship at a sectarian school.¹⁰⁵ However, less than 5% of eligible students use the scholarship.¹⁰⁶

The Committee made several changes to the bill. The first change was to add Code section 20-2-2118, requiring the Office of Student Achievement to report to the General Assembly on the scholarship program.¹⁰⁷ The second change redefined “participating school” to include only private schools; however, it also added Code section 20-2-2113, which allows special needs students to attend other public schools.¹⁰⁸ Thus, the basic schema remained unchanged, allowing special needs students to use scholarships to attend another public school or a private, sectarian, or nonsectarian school.

There was also debate over how disabilities that are “treatable” would be handled. If a student progressed to a point where she could no longer be classified as disabled, should the child be allowed to

101. State of Georgia Final Composite Status Sheet, SB 10, June 5, 2007.

102. *Id.*

103. *Id.*

104. See Video Recording of House Subcommittee on Education Debate, Mar. 29, 2007 at 16 min, 8 sec. (remarks by Sen. Eric Johnson (R-1st) and Patricia Levesque, Executive Director, Foundation for Florida's Future), available at http://www.legis.state.ga.us/legis/2007_08/house/Committees/education/eduArchives.htm [hereinafter House Subcommittee Video].

105. *Id.* at 19 min. 45 sec. (remarks by Patricia Levesque, Executive Director, Foundation for Florida's Future).

106. *Id.*

107. Compare SB 10 (SCS), 2007 Ga. Gen. Assem., with SB 10 (HCS), 2007 Ga. Gen. Assem.

108. *Id.*

continue in the program?¹⁰⁹ In response to the issue, the House Committee on Education changed the language stating a student “shall have” a disability to a student “has” a disability, in order to qualify for a scholarship.¹¹⁰ Theoretically, the present tense verb “has” would require the child to be presently disabled, so if a child progressed past the disability then the child would no longer qualify.¹¹¹ Though seemingly simple, psychologists are uncertain if a person can no longer be disabled.¹¹² According to the committee’s language, students must be diagnosed as special needs and remain special needs to retain the scholarship, but whether the state can stop funding a particular scholarship because the student is no longer “special needs” will likely be debated in the future.¹¹³

Next, the committee decided to retain the requirement that participating schools have a physical location in Georgia because legislators wanted to keep Georgia money in Georgia.¹¹⁴

In its fourth change, intended to ensure private school accountability, the House Subcommittee on Education added that participating schools must employ teachers who hold a bachelor’s degree or higher or have at least three years experience in education or health.¹¹⁵ The committee further required the school to provide parents with the teacher’s credentials annually, and authorized the Department of Education to require participating schools to fill out a compliance form, which requests pertinent information in regards to implementing the Act.¹¹⁶

Though not expressed in a change to the Act, a primary concern of the Act’s opponents was how much money the scholarship would

109. See House Subcommittee Video, *supra* note 104, at 28 min., 38 sec. (remarks of Rep. Howard Maxwell (R-17th)) (asking about treatable disabilities, like speech pathology).

110. *Id.*

111. *Id.* at 29 min., 18 sec. (remarks of Patricia Levesque, Executive Director, Foundation for Florida’s Future) (stating that Florida’s approach allows a treated disability to remain in a private school because the parent is best equipped to decide what school the child should attend).

112. See Wendy Hensel, Editorial, *Equal Time: Voucher Bill Ignores System Abuse, Costs*, ATLANTA J.-CONST., Jan. 31, 2007, at A19, available at 2007 WLNR 1829220.

113. SB 10 (HCS), 2007 Ga. Gen. Assem.

114. See House Subcommittee Video, *supra* note 104, at 1 hr., 11 min., 17 sec. (remarks by Rep. Fran Millar (R-79th)). Compare SB 10 (SCS), 2007 Ga. Gen. Assem., with SB 10 (HCS) 2007 Ga. Gen. Assem.

115. SB 10 (HCS), 2007 Ga. Gen. Assem.

116. *Id.*

cost the state.¹¹⁷ Senator Johnson compared the Georgia scholarship to Florida's McKay scholarship and noted that in Florida the average scholarship is \$6117.¹¹⁸ Georgia should average about \$9000 per scholarship.¹¹⁹ More importantly, the public school system will keep all federal funds for the child, even though the child has left the public school, and only the state funds allocated under the FTE funding matrix will follow the student.¹²⁰

After the subcommittee made the changes, the bill was read in the House for the third time on April 20, 2007, and passed that day.¹²¹ The Senate adopted the House Subcommittee on Education's substitute version the same day.¹²²

The Act

As passed, the Act creates the Georgia Special Needs Scholarship Act.¹²³ A student qualifies for a scholarship if the student has one or more of the listed disabilities which prompted the creation of an Individualized Education Program (IEP) at the public school.¹²⁴ The scholarship student must also have resided in Georgia for the previous year and attended a Georgia public school for the previous year.¹²⁵ "The only way" a student can get a special needs scholarship is by being enrolled in a public school for at least one year and having an IEP for that year.¹²⁶

After accepting a scholarship, the parent assumes full financial responsibility for educating the child, including transportation, and waives all rights under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400.¹²⁷ Having parents responsible for

117. See Notes of Sen. Eric Johnson (R-1st), Talking Points for Subcommittee Meeting (Feb. 21, 2007) (on file with the Georgia State University Law Review).

118. *Id.*

119. *Id.*

120. Letter from Sen. Eric Johnson (R-1st) to Supporters (April 25, 2007) (on file with the Georgia State University Law Review); SB 10 (HCS), 2007 Ga. Gen. Assem. (allotting schools different amounts of money based on each student's needs and enrollment).

121. See State of Georgia Final Composite Status Sheet, SB 10, June 5, 2007.

122. *Id.*

123. O.C.G.A. § 20-2-2110 (Supp. 2007).

124. O.C.G.A. § 20-2-2114 (Supp. 2007).

125. *Id.*

126. Senate Video, *supra* note 68, at 1 hr., 9 min., 10 sec. (remarks by Sen. Eric Johnson (R-1st)).

127. O.C.G.A. §§ 20-2-2114(b), (f) (Supp. 2007).

transportation is one of the “biggest negatives” of the Act, but parents are still able to choose between public schools with free transportation or private schools without it.¹²⁸ The scholarship may be used until the student returns to his or her assigned school, graduates from high school, or reaches the age of twenty-one, whichever occurs first.¹²⁹

Schools wishing to enroll scholarship students must meet a number of requirements, including: a physical location in Georgia; fiscal soundness as demonstrated by one year of operation or a financial audit; compliance with federal anti-discrimination law; compliance with state laws regarding private schools as well as health and safety; parental reports of student achievement; and credentialed teachers with a bachelor's degree or three years experience in education or health.¹³⁰ Home schools and residential treatment facilities are not eligible to enroll scholarship students.¹³¹

Scholarship students enrolled in a participating school will receive either the cost of the educational program that would have been provided under the state funding matrix, minus the federal funds which stay with the resident school, or the amount of the participating school's tuition and fees, whichever is less.¹³² Scholarships will be distributed quarterly to the participating school but made out to the parents, who would restrictively endorse the check to the school.¹³³

Also, scholarship students may request to take state-wide assessment tests, which the resident public school system must make available. The scores of scholarship students, however, will not affect the average of the resident school system's test scores.¹³⁴

Finally, the Act mandates the Office of Student Achievement to provide the General Assembly with a report including the numbers and demographics of scholarship students, as well as the numbers of participating schools.¹³⁵

128. Senate Video, *supra* note 68, at 1 hr., 28 min., 15 sec. (remarks by Sen. Johnson (R-1st)).

129. O.C.G.A. § 20-2-2114(e) (Supp. 2007).

130. O.C.G.A. § 20-2-2115(a) (Supp. 2007).

131. O.C.G.A. §§ 20-2-2115(b)-(c) (Supp. 2007).

132. O.C.G.A. § 20-2-2116 (Supp. 2007).

133. *Id.*

134. O.C.G.A. § 20-2-2114(c) (Supp. 2007).

135. O.C.G.A. § 20-2-2118 (Supp. 2007).

*Analysis**Policy*

One of the main arguments against the Special Needs Scholarship Act was that it would hurt local public schools by draining students and funds away from them.¹³⁶ However, Senator Eric Johnson (R-1st) noted that “local school systems will end up with more dollars for fewer students” because the federal funds would stay in the local district, while the special needs students would leave.¹³⁷ As further proof that the Act does not hurt local school districts, Senator Johnson reiterated that this Act does not take local property tax dollars from the schools, relying instead on state funds.¹³⁸

Senator Johnson also addressed the argument that the Act will cause greater racial and economic stratification in schools by pointing out that the wealthy already have options, such as attending private schools, moving to a different district, or hiring attorneys to challenge an IEP.¹³⁹ If Georgia’s numbers mirror the McKay Scholarship, 40% of scholarship students will be on free or reduced lunch and 50% will be minority students.¹⁴⁰ Thus, this program is “not for rich white kids.”¹⁴¹

Transportation was another policy issue. Because the Act explicitly denies transportation funding for scholarship students to and from the participating school, some worry that the urban poor, primarily minorities, will not be able to utilize the scholarship.¹⁴² In response, Senator Chip Rogers (R-21st) stated that even without transportation funding, the state should still improve education when possible: “Why would we say, ‘if everybody can’t get this particular school then nobody gets it?’”¹⁴³ Senator Rogers then related the statistic that 75% of parents using the McKay scholarship in Florida spent “\$1000

136. MOE, *supra* note 43, at 27-30.

137. Senate Video, *supra* note 68, at 1 hr., 16 min., 20 sec. (remarks by Sen. Eric Johnson (R-1st)).

138. *Id.* at 1 hr., 27 min., 20 sec. (remarks by Sen. Johnson (R-1st)).

139. *Id.* at 1 hr., 16 min., 40 sec. (remarks by Sen. Johnson (R-1st)).

140. *Id.*

141. *Id.*

142. Senate Video, *supra* note 68, at 2 hr., 23 min., 50 sec. (remarks by Sen. Emanuel Jones (D-10th)).

143. *Id.* at 2 hr., 24 min., 05 sec. (remarks by Sen. Chip Rogers (R-21st)).

or less to have their child educated,” thereby implying that the poor, who have the most transportation issues, could find a way to utilize this program.¹⁴⁴

Another contentious issue surrounding school choice was the amount of time a student must spend in the public school system.¹⁴⁵ Public schools were concerned that students, presently in private schools, would flood back into public school just to get funds to return to private school in compliance with the Act.¹⁴⁶ Therefore, public school associations want the time requirement for enrollment in public school to be as short as possible.¹⁴⁷ Parents too wanted their child in public school for as short a time as possible because they were unhappy with the education the school provided to begin with.¹⁴⁸ Ultimately, the Act said that to be eligible for a scholarship a student has to remain in public school for one full year.¹⁴⁹ Representative David Casas (R-103rd) explained that the children need to be in public school for enrollment counts so the state can “appropriate money for every child in the public school.”¹⁵⁰

Furthermore, because passage of the Act would have been difficult, if not impossible, if it required new funding, it was restricted to redistributing existing funds. In order for this redistribution to occur, students must be counted towards enrollment.¹⁵¹

Opponents also are concerned about requiring parents to forfeit their IDEA rights.¹⁵² Under the Individuals with Disabilities Education Act (IDEA), public schools must make education available to disabled children in the “least restrictive environment appropriate to their individual needs.”¹⁵³ Furthermore, the IDEA guarantees that

144. *Id.*

145. House Subcommittee Video, *supra* note 104, at 26 min., 42 sec. (remarks by Rep. Howard Maxwell (R-17th)) (asking for an explanation of how much time scholarship recipients must spend in public education before becoming eligible).

146. *See id.*

147. *See id.*

148. *See id.*

149. O.C.G.A. § 20-2-2114(a)(3) (Supp. 2007).

150. Casas Interview, *supra* note 68.

151. *Id.*

152. Senate Video, *supra* note 68, at 2 hr., 15 min., 21 sec. (remarks by Sen. Joseph Carter (R-13th)).

153. U.S. Dep’t of Justice, A Guide to Disability Rights Laws: Individuals with Disabilities Education Act, <http://www.usdoj.gov/crt/ada/cguide.htm#anchor65310> (last visited Dec. 13, 2007).

the public school develops an Individualized Education Plan (IEP) for children with disabilities, which details the “specific special education and related services” the child needs.¹⁵⁴ Most importantly, the IDEA creates a cause of action for parents to sue under if their child is mistreated.¹⁵⁵ Senator Joseph Carter (R-13th) responded that parents could always return to the public school system to sue for IDEA rights if they were unhappy with private school.¹⁵⁶

Opponents are also concerned about “Vouchers-R-Us” schools, fraudulent schools springing into existence to take money without providing education.¹⁵⁷ However, Patricia Levesque explained that Florida experienced more hesitation from private schools than manipulation because established private schools, which were the main participants, were unaccustomed to taking public funds.¹⁵⁸ Nonetheless, Florida has experienced manipulations of the McKay Scholarship.¹⁵⁹ Without strict oversight, it is possible that Georgia’s scholarship may similarly fund fraudulent programs.

Constitutional Issues

The Special Needs Scholarship Act faces three potential constitutional challenges: Equal Protection, the Establishment Clause, and Article VIII, Section 1, of Georgia’s Constitution, which guarantees quality education.

Equal Protection Challenges

Senator Nan Orrock (D-36th) summarized one of the main legal concerns during the Senate floor debate: whether “private schools”

154. *Id.*

155. *Id.*

156. Senate Video, *supra* note 68, at 2 hr., 15 min., 21 sec. (remarks by Sen. Joseph Carter (R-13th)).

157. House Subcommittee Video, *supra* note 104, at 26 min., 42 sec. (remarks by Rep. Tommy Benton (R-31st)) (asking about start-up schools trying to take advantage of the program when the Act was passed).

158. *Id.* at 34 min., 31 sec. (remarks by Patricia Levesque, Executive Director, Foundation for Florida’s Future).

159. See Dana Treen, *Success Academy Supervisor Faces Charges of Grand Theft; She’s Accused of Taking Money Meant for Disabled Students*, FLA. TIMES-UNION, Aug. 25, 2006, at A1 (describing how an administrator at a private school stole \$421,477 from the McKay Scholarship by reporting extra students enrolled at the school).

can deny students admission “based on nationality, based on their religion, [or] based on their skin color?”¹⁶⁰ Senator Vincent Fort (D-39th) reiterated those concerns by saying that it was his understanding that laws regarding racial discrimination would apply to private schools, while laws concerning gender, religion, and even disability would not be protected under the Act. For that reason, he could not support it.¹⁶¹

Senator Orrock and Senator Fort fear that the scholarship could be used to recreate the race academies of the 1950s. That is not its intent—as Senator Johnson pointed out, this program is “not for rich white kids.”¹⁶² If challenged, a court would likely apply rational basis review, which is a low level of scrutiny, because the scholarship is not facially discriminatory.¹⁶³ Under a rational basis analysis, the court must ask whether the government act is a rational means through which the government is pursuing a legitimate objective.¹⁶⁴ Deference is generally given to the government action when this test is used.¹⁶⁵ In this case, the government’s purpose of educating special needs children provides the legitimate objective required under rational basis scrutiny.¹⁶⁶ Additionally, this program is likely a rational means to pursuing that objective because scholarships are available for any student, regardless of race, with special needs. Therefore, while individual schools could be sued for discrimination, it is unlikely that the entire Act will be invalidated as a violation of the Equal Protection Clause.

Establishment Clause Challenges

In *Zelman v. Simmons-Harris*, the United States Supreme Court held that a publicly-funded school choice program can include

160. Senate Video, *supra* note 68, at 1 hr., 33 min., 50 sec. (remarks by Sen. Nan Orrock (D-36th)).

161. *Id.* at 2 hr., 9 min., 20 sec. (remarks by Sen. Vincent Fort (D-39th)).

162. *Id.* at 1 hr., 16 min., 40 sec. (remarks by Sen. Eric Johnson (R-1st)).

163. *McDaniel v. Thomas*, 248 Ga. 632, 638 (Ga. 1981) (applying rational basis to the school funding system, even though it had a negative impact on wealth-poor counties, because it was not facially racially based).

164. *Id.*

165. *See generally id.*

166. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (holding that persons with disabilities are not a suspect class).

religious schools, providing the program is of “true private choice.”¹⁶⁷ The Ohio school choice program in *Zelman* entailed scholarships paid directly to the private schools while requiring the parent’s restrictive endorsement; the Georgia Scholarship follows the same “straw man” arrangement, where the parents serve as a “straw man” to accept the funds, so the private religious schools do not receive them directly.¹⁶⁸ Therefore, the Act seemingly complies with federal jurisprudence regarding school choice payments and the Establishment Clause.

However, the Georgia Blaine Amendment, which is the state constitutional provision mirroring the Establishment Clause, is much more restrictive.¹⁶⁹ Georgia’s Blaine Amendment states, “[n]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.”¹⁷⁰

Governor Sonny Perdue, in his Faith and Family Services movement, recognized that Georgia’s Blaine amendment prevents the inclusion of sectarian institutes in school choice: “vouchers would still be constitutional in Georgia as long as they are not used in Parochial Schools.”¹⁷¹ In addition, the Georgia Attorney General has long recognized that the Blaine Amendment is intended to have a stronger application than the First Amendment to the United States Constitution.¹⁷² Furthermore, the Georgia Attorney General advised the Legislature that the Georgia Supreme Court would likely consider a contract for services between a public elementary or secondary school and a nonpublic sectarian school unconstitutional.¹⁷³

167. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

168. Compare OHIO REV. CODE ANN. § 3313.979 (2005), with O.C.G.A. § 20-2-2116(f) (Supp. 2007).

169. GA. CONST. art. I, § 2, para. 7.

170. *Id.*

171. SONNY PERDUE, FAITH AND FAMILY SERVICES CONSTITUTIONAL AMENDMENT BRIEFING (2004), available at http://gov.georgia.gov/vgn/images/portal/cit_79369762/92324782faith_services_amend.pdf [hereinafter CONSTITUTIONAL AMENDMENT BRIEFING].

172. See 1960-61 Ga. Op. Att’y Gen. 349.

173. 1969 Ga. Op. Att’y Gen. 69-125.

Despite the warnings, Senator Johnson advanced the Act in reliance on the existence of Florida's McKay Scholarship Program.¹⁷⁴ Furthermore, the Act could be supported by the United States Supreme Court's analysis in *Zelman*.¹⁷⁵

Other authority shows that the Florida McKay Scholarship has never been challenged, but other Florida school choice programs have.¹⁷⁶ The Florida Supreme Court struck down another school choice program for violating a provision of the state constitution guaranteeing education, and in so doing, the Florida Supreme Court explicitly refrained from analyzing school choice under the Blaine Amendment.¹⁷⁷

However before *Bush v. Holmes* reached the Florida Supreme Court, the Florida Court of Appeals did analyze how the Blaine Amendment would constrain school choice in Florida.¹⁷⁸ Like Georgia's Blaine Amendment, Florida's Blaine Amendment states, "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury *directly or indirectly* in aid of any church, sect, or religious denomination or in aid of any sectarian institution;" thus, as in Georgia, state funds in Florida cannot "directly or indirectly" benefit a sectarian institute.¹⁷⁹ Therefore, how a Florida court addressed the issue of vouchers and separation of church and state may be insightful as to how a Georgia court may decide the issue.

In *Bush v. Holmes*, Florida's Governor first advanced a straw man argument similar to the one made in *Zelman*—that because the voucher checks were made payable to parents, the parents, and not the state, bestow the funds.¹⁸⁰ However, the Florida Court of Appeals rejected this argument because the parents must restrictively endorse the voucher to the school, which causes the state to pay voucher

174. Sen. Eric Johnson (R-1st), Remarks at the Oglethorpe Legal Society's 2007 Legislative Forum (April 4, 2007); see also Fla. Dep't of Educ., School Choice, <http://www.floridaschoolchoice.org> (last visited Dec. 13, 2007).

175. See *supra* text accompanying notes 160-161.

176. See generally *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

177. *Id.* at 413 (holding that the Court "neither approve[s] nor disapprove[s] the First District's determination that the OSP violates the 'no aid' [Blaine Amendment] provision in article I, section 3 of the Florida Constitution, an issue we decline to reach.").

178. See *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004).

179. Compare GA. CONST. art. I, § 2, para. 7, with FLA. CONST. art. I, § 3.

180. *Holmes*, 886 So. 2d at 353.

funds indirectly to the school in violation of the Blaine Amendment's prohibition against "indirect" funding of religious schools.¹⁸¹ In Georgia, Representative David Casas, (R-103rd), who co-sponsored and wrote the Act, stated that the money "is being issued to the parent" so a sectarian private school cannot claim a benefit.¹⁸² Thus, to defend the Georgia Special Needs Scholarship, Georgia would have to make the same straw man funding argument that the Florida court rejected.

In Florida, the Governor additionally argued that the voucher payments were not a benefit to the school at all because they did not fully cover the cost of educating each student.¹⁸³ In essence, the private religious school was actually taking a loss for accepting a student for a price less than the tuition.¹⁸⁴ The court rejected the "shortfall" argument because the school still received financial support, which by nature advances the school and its religious educational components.¹⁸⁵ No such dialogue ensued in the SB 10 debates.

In all likelihood, the Act violates the Georgia Blaine Amendment because it provides an indirect benefit to sectarian schools: even though the sectarian schools receive funding through the parents, the schools still receive thousands of dollars in tuition from the state, which may be considered an indirect benefit.¹⁸⁶

Nonetheless, school choice supporters may benefit from any decision rendered by the courts about the Georgia Blaine Amendment. If the Act is challenged and withstands scrutiny, the power behind the Blaine Amendment will have been significantly weakened. On the other hand, if the Act violates the Blaine Amendment, Governor Perdue's Faith Based Initiative to repeal the Blaine Amendment will gain new momentum.¹⁸⁷ If the Act is found to violate the Blaine Amendment, it may be seen as a defeat to

181. *Id.*

182. Casas Interview, *supra* note 68.

183. *Holmes*, 886 So. 2d at 353.

184. *Id.*

185. *Id.*

186. See O.C.G.A. § 20-2-2116(f) (Supp. 2007); GA. CONST. art. I, § 2, para. vii; FLA. CONST. art. I, § 3; *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004).

187. See generally CONSTITUTIONAL AMENDMENT BRIEFING, *supra* note 171.

special needs children, and would serve as the impetus for repealing the Amendment.¹⁸⁸

Thus, the Act complies with Federal Establishment Clause jurisprudence, but state requirements are much more restrictive. The straw man scheme will likely be ruled as “indirect” aid because the tuition dollars, which will be a great benefit to the schools, go from the state to the sectarian school. Even though the Act provides that “the scholarship program established in this article is for the valid secular purpose of tailoring a student’s education to that student’s specific needs and enabling families to make genuine and independent private choices,” the scholarships are still indirect aid to sectarian schools.¹⁸⁹ If challenged, the decision will either weaken the Blaine amendment or strengthen the movement to repeal that amendment.

Georgia Constitution, Article VIII, Section 1, Paragraph 1

A final legal challenge may arise under another provision of the Georgia Constitution. Article VIII, section 1, paragraph 1 states:

The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation. The expense of other public education shall be provided for in such manner and in such amount as may be provided by law.¹⁹⁰

School choice opponents could claim that by financing private education the state shirks its “primary obligation” to provide adequate public education by relinquishing control to the private schools.¹⁹¹ However, school choice would not deny any student an adequate, free education provided by taxes because, although the

188. See generally *id.*

189. O.C.G.A. § 20-2-2111(4) (Supp. 2007).

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

191. See generally *id.*; *Owens v. Colo. Cong. of Parents*, 92 P.3d 933 (Colo. 2004) (holding a school choice program in violation of the State Constitutional guarantee to public education).

child would voluntarily leave a public school, the public school would still be ready, willing, and able to accept a returning student.

If the “waiting-in-the-wings” argument failed, the Act could be defended by arguing the Georgia Constitution provides a floor and not a ceiling for educational policy development. In 1981, the Georgia Supreme Court addressed the legislature’s authority to alter education under article VIII, in *McDaniel v. Thomas*.¹⁹² In *McDaniel*, a group of parents brought a claim alleging that the existing system of financing public education deprived their children of an “adequate education” in contradiction of article VIII, section 1, paragraph 1.¹⁹³ The financing system allowed local school districts to contribute additional funds to education through local property taxes, and, as some school districts received more taxes, a disparity arose.¹⁹⁴ The court rejected plaintiff’s claim that the state failed to provide an adequate education.¹⁹⁵ The court reasoned that the Constitution obligates imposing a tax for the maintenance of public education and that the education be adequate, but there is not an express obligation to provide equalized educational opportunities.¹⁹⁶ “The ‘adequate education’ provisions of the constitution do not restrict local school districts from doing what they can to improve educational opportunities within the district, nor do they require the state to equalize educational opportunities between districts.”¹⁹⁷

Under *McDaniel*’s reasoning, a publicly-funded school choice program would not have to be uniform because the constitution establishes a floor, not a ceiling. This leaves the legislature free to enact programs providing non-uniform, but better than adequate, education.¹⁹⁸

192. See *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981).

193. *Id.* at 157.

194. *Id.* at 160.

195. *Id.* at 165.

196. *Id.* at 166.

197. *Id.* at 164.

198. Compare *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981), with *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992) (reaching a similar conclusion that school choice did not violate the Wisconsin constitutional guarantee to education but on the different reasoning that private schools, even when accepting public funds, are a different entity than public schools, and thus not subject to that Constitutional requirement).

Conclusion

Senator Eric Johnson (R-1st) compares this Act to other state programs, which technically function like vouchers: HOPE scholarships, the G.I. Bill, Medicaid, food stamps, and public housing.¹⁹⁹ But whatever the future of the Act may be, parents of special needs children in Georgia now have an option for educating their children.

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199. Jim Wooten, *Our Opinion: Grand Day for Students with Special Needs*, ATLANTA J.-CONST., Jan. 28, 2007, at B6, available at 2007 WLNR 1659057.