NEW JERSEY AND SCHOOL VOUCHERS: PERFECT TOGETHER
Tuition Vouchers May Provide Interim Relief to New Jersey's Urban School Children

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On May 14, 1997, the New Jersey Supreme Court issued its latest report card on the State's effort to fulfill its constitutional mandate to provide New Jersey's school children with a "thorough and efficient education."[1] The Justices invalidated the State's newest legislative effort to tie increased school funding to academic standards.[2] A majority of the court ruled that the Comprehensive Educational Improvement and Financing Act[3] ("CEIFA") failed to guarantee children of the special needs districts[4] with a "thorough and efficient

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[1]*See* Abbott v. Burke, 149 N.J. 145, 693 A.2d 417 (1997) [hereinafter *Abbott IV*]. The New Jersey Constitution Article VIII, section 4, paragraph 1 states that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years." N.J. CONST. art. VIII, § 4, ¶ 1 (1947).

[2]*See Abbott IV*, 149 N.J. at 168-69, 693 A.2d at 429. The court held that the Comprehensive Educational Improvement and Financing Act ("CEIFA") did not tie academic standards to the amount of funding needed to reach those standards in any concrete way. *See id.* at 169, 693 A.2d at 429. CEIFA was enacted on December 20, 1996, pursuant to 1996 N.J. Laws c. 138 and codified as N.J. STAT. ANN. § 18A:7F1 to 34 (West 1997). The Legislature enacted CEIFA in response to the decision in Abbott v. Burke, 136 N.J. 444, 643 A.2d 575 (1994) [hereinafter *Abbott III*] which invalidated the predecessor statute, the "Quality Education Act," because it also failed to fund the most needy school districts at a level equal to the more affluent school districts. *See Abbott IV*, 149 N.J. at 159, 693 A.2d at 424-25.

[3]N.J. STAT. ANN. § 18A:7F1 to 34 (West 1997).

[4]The term "special needs districts" refers to the most impoverished school districts according to the stratification of school districts based on socioeconomic factors. *See Abbott IV*, 149 N.J. at 155 n.3, 693 at 422 n.3. School districts are segregated into ten groups designated A through J with A representing the lowest socioeconomic level and J signifying the highest socioeconomic level. *See id.* In addition, the lower socioeconomic groups are

education" because it did not provide sufficient funds to enable those students to meet the academic standards required by the Act.[5] As a remedial measure, the court ordered the state to spend an additional $250 million dollars on the special needs districts in an attempt to achieve parity with the wealthiest districts of the state.[6] Despite this new infusion of economic support, it is doubtful that the state will be able to instantly provide children in the special needs districts with a "thorough and efficient education."[7]

Support for this assertion can be seen from the stark reality evident in the state's three largest school districts: Jersey City, Paterson and Newark, where the state already exercises direct control over the districts.[8] In Jersey City, for

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further divided into "urban districts" if they have high levels of poverty and need. *See id.* As of 1990, 28 of 56 school districts were labeled special needs districts. *See id.*; *see also* Abbott v. Burke, 119 N.J. 287, 394-97, 575 A.2d 359, 412-14 (1990) [hereinafter *Abbott II*] (providing a complete list of school districts that are classified as groups A and B and those districts classified as urban districts.).

[5]*See Abbott IV*, 149 N.J. at 152-53, 693 A.2d at 420-21.

[6]*See id.* at 203 n.1, 693 A.2d at 446 n.1 (Garibaldi, J., dissenting). The court ordered the State to increase funding to those districts designated as special needs districts and "to study, identify, fund, and implement the supplemental programs required to redress the disadvantages of public school children in the special needs districts." *Abbott IV*, 149 N.J. at 153, 693 A.2d at 421.

[7]*See id.* at 191-92, 693 A.2d at 440-41. Justice Handler, writing for the majority, acknowledged that money alone cannot solve every problem in the special needs districts. The Justice opined that increased funding to the urban districts must be allocated to programs realistically intended to improve education. *See id.* at 193, 693 A.2d at 441. Similarly, Justice Garibaldi's dissent pointed out that New Jersey already spends more money per pupil than any other state. *See id.* at 204, 493 A.2d at 446 (Garibaldi, J., dissenting). In the dissent's view, it is the method of distributing limited resources that is the problem, not just the amount of funds spent. *See id.*; *see also* James Ahearn, *School Standards in N.J., Money Isn't Only Answer*, THE RECORD (N.J.), December 11, 1996, at L11 (observing that some New Jersey urban school districts do better with less funding than others do with more funding).

[8]*See* Dean Chang, *N.J. Takes Control of Jersey City Schools*, THE RECORD (N.J.), Oct. 5, 1989 at A3; Dunstan McNichol, *Paterson Parents Laud School Takeover Tell Lawmakers to Ignore Statistics*, THE RECORD (N.J.), Feb. 21, 1997 at L1; *State Seeks to Take Over Newark Schools; N.J. Report Says Students Are Poorly Educated in Shabby Buildings*, WASH. POST, July 25, 1994, at A9. The state has the authority to assume direct control of a local school district when that district fails to provide a constitutionally adequate education. *See* N.J. STAT. § 18A:7A-14 to 15 (West 1997). Pursuant to N.J. STAT. § 18A:7A-14(a)(1), the Commissioner of Education shall review each school district's performance against certain established criteria. *See* N.J. STAT. § 18A:7A-14(a)(1) (West 1997). If the Commissioner finds a school district has met the established standards, the Commissioner shall certify that that district is providing a "thorough and efficient education." *See id.* This

example, although the state has been operating the school system for nine years, the district has only shown a slight increase in student performance.[9] Similarly, in Paterson, six years of state control has yet to produce significant increases in student performance.[10] And in Newark, the state-operated school system is only just beginning to tackle years of mismanagement, rampant nepotism, poor test scores, and deplorable physical conditions.[11]

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certification shall last for seven years. *See id.* If, however, the Commissioner finds a school district is not in compliance, the Commissioner must initially place that district in level II monitoring. *See id.* When this situation occurs, the Commissioner will appoint a special review team to identify areas of improvement and prepare a remedial action plan. *See* N.J. STAT. ANN. § 18A:7A-14(b)(1) (West 1997). Failure of the school district to correct the identified deficiencies will subject the school district to further scrutiny under level III monitoring. *See* N.J. STAT. ANN § 18A:7A-14(b)(2) (West 1997). Should the district fail to effectively respond to the continuing deficiencies, the Commissioner may advise the State Board of Education that the local school district is unable to provide a "thorough and efficient education." *See* N.J. STAT. ANN § 18A:7A-15 (West 1997). In that instance, the Commissioner must recommend that the State Board of Education dissolve the local school board and create a state-run school board in its place. *See id.*; *see also* Joan Verdon, *School Takeover Outlined,* THE RECORD (N.J.), June 18, 1986 at A1. Governor Thomas Kean, who first proposed the state takeover law, warned that "the state has a legal and moral obligation to seize control of school districts that are failing to educate children." *Id.*

[9]*See* Nick Chiles, *State-run High Schools Fall Short Standardized Test Scores Decline for 11th Graders in Three City Districts*, THE STAR-LEDGER (N.J.), Aug. 7, 1997, at 1. Recent test scores show that Jersey City fourth graders have improved in reading, writing and math; eighth graders have improved in math, but declined in reading and writing; while in the eleventh grade all scores decreased from the previous year. *See id.*; *see generally* JERSEY JOURNAL, Sept. 9, 1997, at A3. For the 1996-1997 school year, the average score of Jersey City fourth graders on the Metropolitan Achievement Test were slightly above normal for math and language arts, but below the state minimum in reading. *See id.* Meanwhile, eighth graders failed to meet the state minimum in math, but achieved the minimum level of proficiency in reading and writing. *See id.* At the high school level, average test scores showed that eleventh graders were only able to meet the minimum proficiency in writing. *See id.*

[10]*See* Jean Rimbach, *State Extends Paterson School Control Mixed Test Scores Prompt 7th Year*, THE RECORD (N.J.), Aug. 7, 1997, at 1. Reporting that Jersey City fourth graders have shown marked improvement on the statewide achievement test from previous year, but the eighth and eleventh graders did not fair as well. *See id.*; *see also* McNichol, *supra* note 8, at L1. In the 1995-96 school year, Paterson experienced a rise in dropout rates, a decrease in eleventh grade test scores, and achieved only one third of its educational performance goals. *See id.*

[11]*See* Tom Topousis, *No Quick Fixes for Decades of Neglect, Failure*, THE RECORD (N.J.), July 23, 1994, at A1. The experiences of both Jersey City and Paterson school takeovers demonstrate that improving student performance will take many years. *See id.*; Ted Sherman and Bill Gannon, *Political Pals Lose Cushy Essex Jobs*, THE STAR-LEDGER (N.J.), Dec. 31, 1995, *available in* 1995 WL 11810455 (exposing widespread nepotism and patron-

These efforts to improve New Jersey's urban public schools, while laudable, are proceeding much too slowly for today's school children. Because the state has yet to devise a constitutionally acceptable funding plan[12] and expects to continue operating the three largest school districts for some time, [13] it is imperative that the state does not continue to penalize urban school children

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age within the Newark Board of Education); Robert Woodruff, *Board's Tired Excuses, Promises to Do Better Not Enough for Newark*, THE STAR-LEDGER (N.J.), July 16, 1995, *available in* 1995 WL 8862705 (reporting that every member of the Newark school board and many high ranking administrators have at least one family member on the school board payroll); *School Chief Hall Viewed as Right for the Job*, THE STAR-LEDGER (N.J.), Oct. 3, 1996, at 4 (noting that over the past thirty years the Newark school system squandered millions of dollars on inferior and non-existent goods and services); Caryl R. Lucas, *"I Was Appalled" Newark Schools Worst Chief's Ever Seen*, THE STAR-LEDGER (N.J.), July 18, 1995, *available in* 1995 WL 8864000. After completing an initial inspection of the Newark schools, the newly appointed Newark school superintendent stated that some of the schools were "disgusting." *See id.*

[12]The New Jersey Supreme Court has addressed the issue of school funding in a series of cases. Beginning in 1973, Kenneth Robinson, a twelve year old Jersey City resident, and various municipalities challenged the existing school financing program which the New Jersey Supreme Court declared unconstitutional. *See* Robinson v. Cahill, 62 N.J. 473, 520, 303 A.2d 273, 298 (1973) [hereinafter *Robinson I*]; *see also* Robinson v. Cahill, 63 N.J. 196, 306 A.2d 65 (1973) [hereinafter *Robinson II*], *cert. denied*, 414 U.S. 976 (1973); Robinson v. Cahill, 67 N.J. 35, 335 A.2d 6 (1975) [hereinafter *Robinson III*]; Robinson v. Cahill, 69 N.J. 133, 351 A.2d 713 (1975) [hereinafter *Robinson IV*], *cert. denied*, 423 U.S. 913 (1975); Robinson v. Cahill, 70 N.J. 155, 355 A.2d 129 (1976) [hereinafter *Robinson V*]; Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976) [hereinafter *Robinson VI*]; Robinson v. Cahill, 70 N.J. 464, 360 A.2d 400 (1976) [hereinafter *Robinson VII*].

Following *Robinson VII*, the school funding crusade was taken up by a new set of plaintiffs in *Abbott v. Burke*, 100 N.J. 269, 495 A.2d 376 (1985) [hereinafter *Abbott I*]. The lead plaintiff in *Abbott I*, Raymond Arthur Abbott, an eleven year old Camden student, was chosen as the lead plaintiff from among twenty other children living in the poorest urban school districts to represent urban students against the State Commissioner of Education, Fred G. Burke. *See* MaryJo Patterson and Ted Sherman, *Class of* Abbott vs. Burke *Takes Stock 20 Pupils from 1981: Where are They Now? They Didn't Know It, But They Made History*, THE STAR-LEDGER (N.J.), June 8, 1997, at 1; *see also A Genteel Cult from the '60's Sticks By Its Mantra of "Parity,"* THE STAR-LEDGER (N.J.), Mar. 5, 1997, at 1. Veterans of the school funding parity fight anticipate that the latest *Abbott v. Burke* decision will finally rectify 30 years of inequality between urban and suburban school districts. *See id.*

[13]*See* Topousis, *supra* note 11, at A1; *see also* Nick Chiles, *Jersey City Students' Performance Improving Return to Local Control in Two Years is Foreseen*, THE STAR-LEDGER (N.J.), Nov. 6, 1997 at 30. The state expects to return the Jersey City school system back to local control in 1999, provided that test scores reach state certification standards. *See id.*; Michael Casey, *State Will Run Schools in Paterson Till 2001: New Superintendent Hopes to Raise Scores*, THE RECORD (N.J.), July 9, 1997, at A1.

with a substandard education. Until it can be shown that urban public schools provide an education equal to that in the more affluent school districts, the state should provide alternatives to urban students.[14] Urban school children cannot afford to wait another generation before their schools are deemed "thorough and efficient."[15]

As a state, the goal should be to ensure that urban students living in the special needs districts are provided with the type of education mandated by the New Jersey Constitution. This Comment proposes that the state provide alternative options to every special needs district child as an interim measure. This aid should consist of either true public school choice or tuition vouchers for use at private schools.[16] Public school choice and tuition vouchers would al-

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[14]*See Abbott IV*, 149 N.J. at 177, 693 A.2d at 433. The court noted that poor urban school children generally do not achieve the same level of academic success as children from other areas. *See id.* at 178, 693 A.2d at 433. In 1995, the average pass rate for non-urban high school students, as measured by the High School Proficiency Test, was 75% while less than 52% of the urban high school students passed the test. *See id.* at 177 n.21, 693 A.2d at 433 n.21. In addition, the 1995-96 drop out rate for some Jersey City high schools ranged from 20.2% to 31.2% versus a zero percent to 2.9% drop out rate for non-urban high schools. *See id.* at 178 n.22, 693 A.2d at 433 n.21.

[15]*See supra* note 13 and accompanying text.

[16]*See* PETER W. COOKSON, JR., SCHOOL CHOICE 14-15 (1994). Public school choice plans may be designed in various ways including (1) an intradistrict-choice plan that permits students to attend any school in their district; (2) an interdistrict-choice plan allowing students to attend public schools outside their districts; (3) a magnet school plan that allows schools to offer specialized programs to attract district-wide students; (4) charter schools which operate with public funding, but without government control; (5) tuition vouchers provided to students to attend any school whether public or private; and (6) tuition tax credits that allow parents to deduct educational expenses against their income tax. *See id.* at 14-16.

In New Jersey, CEIFA contains a provision allowing the State Commissioner of Education to design an interdistrict plan. *See* N.J. STAT. ANN. § 18A:7F-3 (West 1997). Under CEIFA, the state has the authority to enact a plan to permit students to attend a school in another school district free of charge as long as the receiving school agrees to accept the student. *See id.* (incorporating inter-district school choice option in the definition of "resident enrollment"). The state will begin a three-year experimental choice plan in the 1998-99 school year. *See* Dunstan McNichol, *School-Transfer Plan Greeted with Disbelief*, THE STAR-LEDGER (N.J.), Feb. 5, 1998 at 1. Initially the program will be limited to twenty-one school districts and allow districts to restrict participation in the program in the event ten percent or more of any class transferred to another school. *See id.* Furthermore, receiving school districts may choose not to participate in the program provided that their school board enacts a resolution to that effect. *See id.* at 17. Those districts that do choose to participate, however, will not be fully reimbursed by the state. *See id.* Each transferring student will be counted as a resident entitling the receiving school to only that amount of state aid available for town residents. *See id.* In the wealthier school districts, state aid may only account for

low the children of special needs districts to leave substandard schools until those schools are brought up to par.

This Comment will demonstrate the need for school choice and propose a tuition voucher program that will allow urban school children to acquire a quality education while their public schools are undergoing the substantial retooling so desperately required. Specifically, Part I will explore the urban public school crisis. Part II will discuss tuition vouchers as an interim solution and discuss their advantages and disadvantages toward helping school children and their parents. Additionally, Part III will address the constitutional problems of a tuition voucher program by examining two recent state cases ruling on the implementation of tuition voucher programs. Finally, Part IV will propose legislation that is likely to survive constitutional scrutiny; thereby giving disadvantaged school children the choice to avoid attending public schools that do not offer a thorough and efficient education.

I. *ABBOTT v. BURKE:* CRISIS IN THE URBAN PUBLIC SCHOOLS

The latest *Abbott v. Burke* decision represents the culmination of two decades of effort to obtain sufficient state funding for poor urban schools.[17] The *Abbott v. Burke* action originated in 1981 when public school children, living in various urban school districts, challenged the constitutionality of the Public

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less than ten percent of the total school budget, thus forcing town residents to pay the majority of costs to educate out-of-town students. *See id.* For example, the town of Madison only receives $516 per-pupil in state aid while Newark receives over $8,000 per-pupil. *See id.* Currently, it costs Madison over $10,000 to educate each child. Thus, if Madison were to accept a student from Newark, town residents would have to make up the difference with higher property taxes. *See id.* The prospect of increasing property taxes will likely keep wealthier school districts from participating in the program. *See id.* If the program is successful, however, then state officials may require the wealthier schools to participate. *See id*; *see also* Nick Chiles, *High Court Will Again Set Course for Schools: Better Facilities and Programs, as Before, Hinge on Funding*, THE STAR-LEDGER (N.J.), Dec. 26, 1997, at 23. *See generally* Philip T. K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems Be Overcome?*, 43 DEPAUL L. REV. 1, 13-16 (1993) (discussing that interdistrict choice plans in Minnesota and Ohio suffer from lack of funding and problems in transporting students to other districts).

[17]*See* Patterson and Sherman, *supra* note 12, at 1. The twenty children named as plaintiffs in the original *Abbott v. Burke* case "never knew they were making history, but they were at the heart of a school-funding debate that has plagued New Jersey governors, legislators and the courts for nearly two decades . . . ." *See id.*; *see also* Nicolas S. Warner, Comment, *Toward Parity in Education: Abbott v. Burke and the Future of New Jersey School Systems*, 5 TEMP. POL. & CIV. RTS. L. REV. 183 (1996) (providing an excellent overview of the school funding litigation in New Jersey).

School Education Act of 1975 ("the 1975 Act").[18]

A. *ABBOTT I:* STATE EDUCATIONAL FUNDING CHALLENGED

In *Abbott I* the plaintiffs' alleged, *inter alia*, that the 1975 Act violated the "thorough and efficient clause" of the 1947 New Jersey Constitution because the state provided local school districts with only 40% of their operating costs.[19] The remaining 60% was raised through local property taxes.[20] The plaintiffs alleged that the gross differences in state support resulted in substantial per-pupil spending disparities between property-rich and property-poor school districts.[21] Rather than decide the constitutional issues in question, the New Jersey Supreme Court merely decided to remand the case to an administrative law judge to develop a full and comprehensive record.[22]

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[18]100 N.J. 269, 277, 495 A.2d 376, 380 (1985) [hereinafter *Abbott I*]; *see also* The Public School Education Act of 1975, L. 1975, c.212 codified as N.J. STAT. ANN. § 18A:7A-33 (repealed).

[19]*See* 100 N.J. at 280, 495 A.2d at 381.

[20]*See id.*

[21]*See id.* In 1983, following an extensive discovery period, the chancery division granted the defendant's motion to dismiss for failure to exhaust administrative remedies. *See id.* at 278, 495 A.2d at 380. Thereafter, the appellate division reversed and remanded the case to the chancery division for a full hearing on the merits. *See id*; Abbott v. Burke, 195 N.J. Super. 59, 477 A.2d 1278 (App. Div. 1984). Subsequently, the New Jersey Supreme Court granted the defendant's petition for certification. *See* Abbott v. Burke, 97 N.J. 669, 483 A.2d 187 (1984).

[22]*See Abbott I*, 100 N.J. at 301, 495 A.2d at 393. Following an eight month evidentiary hearing, the administrative law judge determined:

> that evidence of substantial disparities in educational input (such as course offerings, teacher staffing, and per pupil expenditures) were related to disparities in school district wealth; that the plaintiffs' districts, and others, were not providing the constitutionally mandated thorough and efficient education; that the inequality of educational opportunity statewide itself constituted a denial of a thorough and efficient education; that the failure was systemic; and the statute and its funding were unconstitutional.

Abbott v. Burke, 119 N.J. 287, 297, 575 A.2d 359, 364 (1990) (paraphrasing the findings of *Abbott v. Burke*, No. EDU 5581-88 (OAL 1988)). The Commissioner of Education refused to accept the Administrative Law Judge's findings or recommendations. *See id.* at 298, 575 A.2d at 364. Consequently, the New Jersey Supreme Court certified the appeal to the appellate division which ultimately resulted in the *Abbott II* decision. *See id.* at 300, 575 A.2d

B. *ABBOTT II:* STATE EDUCATIONAL FUNDING FORMULA UNCONSTITUTIONAL

In 1990, the New Jersey Supreme Court declared the 1975 Act unconstitutional as applied to poor urban school districts.[23] The majority in *Abbott II* found that the evidence overwhelmingly demonstrated a correlation between the amount of money spent and the quality of education.[24] As a result, the court ordered New Jersey to amend the Act of 1975, thereby attempting to mandate equality of per-pupil spending between the poorest school districts and the wealthiest school districts.[25] The court ordered this increase in education funding even in light of the fact that New Jersey at the time spent more on education than almost every other state in the country.[26]

A unanimous court found that despite some educational successes, the poor remained in poverty and endured "severe educational deprivation" which the state had a duty to rectify.[27] The justices stressed that without proper education, the urban children would likely continue to endure dismal conditions.[28]

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at 365.

[23]*See Abbott II*, 119 N.J. at 295-96, 575 A.2d at 363.

[24]*See id.* In fact, Chief Justice Wilentz, writing for the majority, recognized the unique situation that inner-city students face on a daily basis. *See id.* at 391-92, 575 A.2d at 411. Chief Justice Wilentz specifically noted that poor urban children live in deteriorated cities and "in a culture where schools, studying, and homework are secondary. Their test scores, their dropout rate, their attendance at college, all indicate a severe failure of education." *Id.* at 391, 575 A.2d at 411. Furthermore, the court stated that although urban students have many needs, the need for education is overwhelming. *See id.* at 392, 575 A.2d at 411. Without a quality education, urban poor are unlikely to rise above their deplorable environment. *See id.*

[25]*See id.* The court determined that the under-funded school districts have hindered their student's ability to become full productive citizens on any level as compared with their peers in wealthy districts. *See id.* at 385, 575 A.2d at 408.

[26]*See id.* at 393, 575 A.2d at 412. Considering this fact, the court did not declare that all school districts provide an unconstitutional education, otherwise the thorough and efficient clause would have to be construed as mandating a significantly higher standard than found in any other school district in the country. *See id.*

[27]*See id.* at 392, 575 A.2d at 411.

[28]*See id.* at 392, 575 A.2d at 411. *See generally* Paul L. Tractenberg, *Tribute to Chief Justice Robert N. Wilentz: A Clear and Powerful Voice for Poor Urban Students: Chief Justice Robert Wilentz's Role in Abbott v. Burke*, 49 RUTGERS L. REV. 719, 720-22 (1997) (discussing Chief Justice Wilentz's commitment to the urban poor and his desire to see the state provide poor students with a "thorough and efficient education").

Chief Justice Wilentz opined that the state had to address the dire conditions, not only for the children's sake, but also for society's interest in preparing future citizens to contribute their part to the social, cultural, and economic growth of the state.[29] Chief Justice Wilentz concluded that if poor children were attending school in an affluent school district, "educationally they would be much better off."[30]

C. *ABBOTT III:* NEW JERSEY FAILS TO ENSURE EDUCATIONAL FUNDING PARITY

In an attempt to comply with the *Abbott II* decision, Governor Florio and the Legislature enacted the Quality Education Act of 1990[31] which raised the funding parity level from 70-75% to approximately 84%.[32] Nevertheless, the

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[29]*See* 119 N.J. at 392, 575 A.2d at 411. The court stressed that economists and state business leaders believe that New Jersey's economic success depends upon a well-educated and technically-proficient work-force. *See id.* As an indispensable part of the state's future, the urban poor must have the necessary skills to participate and contribute to the state's economic success. *See id.* Therefore, these leaders urge the state to improve the educational opportunities for the urban poor so that they will have the necessary skills to contribute to the state's economy. *See id.*

[30]*Id.* at 394, 575 A.2d at 412. Chief Justice Wilentz also remarked that the record only confirmed what was common knowledge that poor school children need the advantages of the wealthy school districts more than other students, but because they live in poor school districts, they are unable to obtain that type of education. *See id.*

[31]*See* Quality Education Act of 1990, ch. 52, 1990 N.J. Laws 587, *as amended by* the Quality Education Act II, Act of March 14, 1991, ch. 62 sec. 41, 1991 N.J. Laws 200, 231 (codified as N.J. STAT. ANN. §§ 18A:7D-1 to 37 (Repealed 1996)). *See generally* Craig A. Ollenschleger, Comment, *Another Failing Grade: New Jersey Repeats School Funding Reform*, 25 SETON HALL L. REV. 1074, 1096-97 (1995). On May 24, 1990, Governor James Florio introduced a package of tax hikes to raise $2.8 billion, approximately $1.3 billion of which was earmarked for urban education. *See id.* In addition to the tax hike, the legislature transferred state funds from wealthy suburban school districts to the special needs districts and shifted teacher pension obligations onto local school districts. *See id.* at 1097. These new obligations increased state income tax levels and raised property taxes to such an extent that the voters forced the legislature to provide income and property tax relief. *See id.* at 1097-98. As a result, the Legislature enacted the QEA II in 1991 which significantly reduced the amount of state aid to the poor urban districts. *See id.* The modified legislation also delayed transfer of the pension obligations and limited the amount of money the suburban schools could devote to education. *See id.* at 1098. Consequently, the amended legislation failed to provide enough state resources to satisfy its obligation to fund the special needs districts at a level equal to the wealthy school districts. *See id*

[32]*See* Ollenschleger *supra* note 31, at 1096-97.

Abbott plaintiffs challenged the new legislation for its failure to achieve 100% parity.[33] In response, the New Jersey Supreme Court directed Judge Paul Levy, of the Superior Court Chancery Division, to develop a complete factual record.[34] After completing the factual inquiry, Judge Levy invalidated the Quality Education Act because it failed to achieve funding parity between the rich and poor school districts.[35] In a unanimous decision, the New Jersey Supreme Court affirmed the lower court's holding that the Quality Education Act was unconstitutional.[36] Specifically, the justices found that substantial funding parity could only be achieved through the intervention of the Governor and Legislature and thus there was no guarantee the state would in fact equalize the funding mandated by *Abbott II*.[37] The New Jersey Supreme Court retained jurisdiction, but declined to issue any remedial orders in light of the state's recent supplement of $700 million to the special needs districts.[38] The justices, however, reserved the right to intervene in the event the state did not make a reasonable effort to close the then current 16% funding gap by the 1995-96 and 1996-97 school years.[39] The court warned that unless new legislation was adopted by September 1996 requiring 100% funding equality, the court would accept further applications for relief.[40]

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[33]*See id.* at 1099.

[34]*See id.*

[35]*See* Abbott v. Burke, No. 91-C-00150, 1993 WL 379818 at *3 (NJ. Super. Ct. Ch. Div. Aug. 31, 1993), *aff'd*, 643 A.2d 575 (1994) (*per curiam*). The chancery court required the state to prove that the Quality Education Act complied with prior *Abbott* decisions by showing that enough funds were provided to the special needs districts that would not overburden municipalities nor rely upon local budget decisions. *See id.* The court concluded that although the Quality Education Act provided a method to achieve funding parity, it did not assure parity within five years. *See* 1993 WL 379818 at *14. The chancery court also determined that the Act's "at-risk" remedial education aid was insufficient to improve the plight of the special needs districts students and that progress toward the goals set by *Abbott II* was proceeding at an unacceptably slow pace. *See id.* Consequently, the court held that the Quality of Education Act did not comply with the *Abbott II* decision. *See id.*

[36]*See* Abbott v. Burke, 136 N.J. 444, 447-48, 643 A.2d 575, 576 (1994).

[37]*See id.* at 450-51, 643 A.2d at 578.

[38]*See id.* at 447, 643 A.2d at 576.

[39]*See id.* at 447-48, 643 A.2d at 576.

[40]*See id.* at 447-48, 643 A.2d at 577.

D. *ABBOTT IV*: COURT ORDERED EDUCATIONAL FUNDING PARITY

In 1996, Governor Whitman responded to the New Jersey Supreme Court's challenge and introduced the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA).[41] Under CEIFA, the state defined the meaning of a "thorough and efficient education" through a set of core curriculum standards.[42] In *Abbott IV*, the New Jersey Supreme Court applauded CEIFA's substantive standards,[43] but criticized the per-pupil spending amounts as unrealistic because those amounts were based upon a hypothetical model school

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[41]*See* N.J. STAT. ANN. § 18A:7F1 to 34 (West 1997). CEIFA is designed to achieve a thorough and efficient education by tying specific substantive standards with performance measurements. *See also Abbott IV*, 149 N.J. 145, 161, 693 A.2d 417, 425 (1997). The substantive standards comprise seven core academic areas:

> visual and performing arts, comprehensive health and physical education, language-arts literacy, mathematics, science, social studies, and world languages. Infused throughout the seven core academic areas are five 'cross-content workplace readiness standards,' which are designed to incorporate career-planning skills, technology skills, critical thinking skills, decision-making and problem-solving skills, self-management, and safety principles.

Id. The standards do not require any particular curriculum, but merely propose goals for each core academic area. *See id.* at 161-62, 693 A.2d at 425. The development of a specific curriculum designed to meet the standards is delegated to local school districts. *See id.* at 162, 693 A.2d at 425. The state will track each district's progress through the use of standardized tests at the fourth, eighth, and eleventh grade levels. *See id.* Unfortunately, it will take several years to implement the testing program, and even longer to collect and analyze the data on student progress. *See id.* n.8.

[42]*See id.* at 168, 693 A.2d at 428. CEIFA's substantive standards set out in detail what every child should know in order to become a productive citizen. *See id.* at 161, 693 A.2d at 425. Moreover, it ties the cost of providing a constitutionally-adequate education to those standards. *See id.* at 163, 693 A.2d at 426. The legislature concluded that it would cost approximately $6,720 per-pupil to provide children with a quality education. *See id.* at 164, 693 A.2d at 426 (citing N.J. STAT. ANN. § 18A:7F-12). This per-pupil cost is also known as the "T & E amount." CEIFA defines the "T & E amount" as "the cost per elementary pupil of delivering the core curriculum content standards and extracurricular and cocurricular activities necessary for a thorough regular education under the assumptions of reasonableness and efficiency contained in the Report on the Cost of Providing a Thorough and Efficient Education." N.J. STAT. ANN. § 18A:7F-3.

[43]*See Abbott IV*, 149 N.J. at 168, 693 A.2d at 428. The court held the substantive portions of CEIFA to be "facially adequate as a reasonable legislative definition of a constitutional thorough and efficient education." *Id.*

district.[44]

As an interim measure, the court tied the special needs districts' funding to that of the wealthier districts until the state could develop more realistic fiscal standards.[45] Realizing the incompleteness of the judicial remedy and recognizing the grievous conditions existing in the special needs districts, the justices felt compelled to act.[46] The majority opined that the New Jersey Consti-

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[44]*See id.* at 173, 693 A.2d at 431. The court found the model school district represented only an aspirational standard and that the Act did not specifically provide enough money to the special needs districts to conform to the model district's characteristics. *See id.* The majority was incredulous at the Act's treatment of all schools as homogenous and divorced from their environments. *See id.* As an example, the court noted that under CEIFA's model high school, the state would only be required to pay for one security guard per 900 students. *See id.* For example, only 3.3 security guards would be provided to Trenton High School whose student population numbers 3000. *See id.* In actuality, Trenton High School has approximately 20 security guards. *See id.* The court questioned whether the state could claim that the other seventeen security guards were redundant and wasteful. *See id.* The justices faulted the state for applying the same funding criteria for wealthy and inner-city districts. *See id.*

The justices noted that under CEIFA the wealthiest school districts would continue o spend more than the T & E amount, thereby providing a superior education. *See id.* at 173-74, 693 A.2d at 431. The state contended that calculating funding based upon what the wealthiest districts spend was inappropriate because of inherent inefficiencies in those districts. *See id.* at 165, 693 A.2d at 427. Justice Handler questioned the state's rationale for attributing inefficiencies to the wealthiest districts' excess spending in light of the fact that they produce superior results on statewide tests. *See id.* at 172 n.17, 693 A.2d at 430 n.17. In sum, the court observed that, under CEIFA, the wealthiest districts would continue to spend more money per-pupil on affluent children than special needs districts would spend on poor children. *See id.* at 174, 693 A.2d at 431. In the absence of an effective means to quantify the cost of providing a "thorough and efficient education," the court relied upon the per-pupil spending levels of the affluent districts to determine what the special needs districts should spend per-pupil. *See id.* at 176, 693 A.2d at 432.

[45]*See id.* at 176-77, 693 A.2d at 432-33.

[46]*See id.* at 189, 693 A.2d at 439. The majority noted that its judicial remedy "at best serves only as a practical and incremental measure that can ameliorate but not solve such an enormous problem. It cannot substitute for the comprehensive remedy that can be effectuated only through legislative and executive efforts." *See id.* Justice Handler also found that special needs district children must confront overwhelming obstacles such as poverty, drug infested neighborhoods, single parent households, hunger, and racial segregation. *See id.* at 178, 693 A.2d at 433. The justice cited statistics that show "[i]n 1995-96, dropout rates in urban high schools were as a high as 31.2% (Henry Snyder High in Jersey City). The dropout rate was 24.7% at Lincoln High in Jersey City, and 20.2% at Eastside High in Paterson. In 1995-96, dropout rates in non-SNDs ranged from zero percent to a high of 2.9% (Cherry Hill West High)." *Id.* at n.22

tution requires that public school students be given the chance to attain their place in society.[47] Because CEIFA in its present form did not provide sufficient funding to allow special needs districts children to attain that promise or to induce sufficient changes within those districts, the court ordered immediate monetary relief in the sum of $248,152,068.[48]

II. THE NEED FOR TUITION VOUCHERS

Over the last decade, tuition vouchers have been proposed as a popular alternative to induce educational reform in public schools.[49] In its simplest form, vouchers would enable parents to select an alternative school for their children at state expense. Under such a program, the state would provide each

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[47]*See id.* at 201, 693 A.2d at 445.

[48]*See id.*

[49]Currently, proponents have either proposed or introduced voucher legislation in the following states. In Arizona, the state legislature is considering voucher legislation. *See* H.B. 2362, 43rd Leg., 1st Reg. Sess. (Az. 1997); *see also* Vicki Cabot, *School Advocates Lay Out Education Choices and Costs*, GREATER PHOENIX JEWISH NEWS, Aug. 8, 1997, at S20 (discussing school choice issues in Arizona). In Colorado, voucher proponents seek to place a voucher proposal on the state ballot in 1998. *See* John Sanko, *Tuition Voucher Proposal Resurfaces: Supporters File Papers Seeking Ballot Issue on Choice of Schools*, ROCKY MOUNTAIN NEWS, Nov. 25, 1997, at 5A. Draft legislation was also introduced in the Colorado legislature to reimburse parents for the cost of sending their children to private school. *See* H.B. 1228, 61st Leg., 1st Reg. Sess. (Colo. 1997). In Georgia, there is a resolution pending that would create a committee to study the feasibility of school choice vouchers. *See* S. Res. 21, 144th Reg. Sess. (Ga. 1997). In Hawaii, the state legislature is studying a voucher proposal that would become effective in the 2000-01 school year. *See* H.B. 2046 19th Leg. Sess. (Haw. 1997). In Illinois, the state established the Educational Choice Act which will create a pilot voucher program in selected Chicago schools for the 1998-99 school year. *See* H.B. 991, 90th Reg. Sess. (Ill. 1997). Nevada has a proposal pending to create a temporary tuition voucher program. *See* A.B. 571, 69th Reg. Sess. (Nev. 1997). A Vermont bill was introduced to require school districts to provide tuition vouchers to students attending approved schools including private sectarian schools. *See* H.B. 364, 64th B. Sess. (Vt. 1997). In Washington D.C., the House of Representatives passed a tuition voucher bill which would allow pupils in the District of Columbia to attend private or public schools in the surrounding areas. *See* Sam Fulwood III, *House Backs School Voucher Tryout in D.C.: Bill Clears by One Vote, Threatened With Veto*, THE STAR-LEDGER (N.J.), Oct. 10, 1997, at 13.; *see also* Jo Ann Bodemer, Note, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid From The Lemon Test*, 70 ST. JOHN'S L. REV. 273, 286 (1996) (noting that tuition vouchers have been gaining in popularity even though the Milwaukee Parental Choice Program is the only voucher program to actually become operational); Daniel, *supra* note 16, at 76-96 (providing a list of states that have considered school choice programs as of 1993).

child with a check to pay the tuition costs associated with attending an alternative school.[50] Depending on how the voucher program is crafted, the voucher could either pay all or a portion of the alternative school's tuition.[51] Under a comprehensive voucher program, a child could redeem the voucher at any school whether public or private—including private sectarian—schools.[52]

Tuition vouchers gained notoriety in the 1950's, with the theory that the free market system could reform public education.[53] Two early proponents, Milton and Rose Friedman, believed that the public schools have failed to adequately educate children, especially in the inner-cities, primarily because the public school systems had become unresponsive to the needs of student-consumers.[54] If the parents as consumers had the power to choose their child's school, then schools would endeavor to provide better service or risk losing business.[55] To stay competitive, market driven public schools would be forced

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[50]*See* Henry M. Levin, *Educational Choice and the Pains of Democracy*, *in* PUBLIC DOLLARS FOR PRIVATE SCHOOLS 17, 34 (Thomas James & Henry M. Levin eds., 1983). Vouchers have been described as a GI bill for children. *See* MILTON AND ROSE FRIEDMAN, FREE TO CHOOSE 160-61 (1980). Under the actual GI Bill, the government provides educational benefits to veterans for use at any educational facility. *See id.* Similarly, a voucher plan would allow a parent, at state expense, the freedom to choose any school for their child. *See id.*; *see also* COOKSON, *supra* note 16, at 16.

[51]*See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 89, 99 (1962); FRIEDMAN & FRIEDMAN *supra* note 50, at 161 (estimating the actual sum given to each parent to be approximately equivalent to the national average cost to educate each child at a public school); JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE 192 (1978) (asserting that for a voucher plan to be fair and equitable, the subsidy should be large enough to ensure that most families can use the subsidy).

[52]*See* FRIEDMAN & FRIEDMAN, *supra* note 50, at 161 (asserting that parents should be allowed to use vouchers at any school willing to accept their child); Peter W. Cookson, Jr., *Redesigning the Financing of American Education to Raise Productivity: The Case for a Just Voucher*, *in* PRIVATIZING EDUCATION AND EDUCATIONAL CHOICE 105 (Simon Hakim et al. eds., 1994) ("[A] voucher can be defined as an 'arrangement whereby individuals are in effect handed the funds (typically in the form of a chit) to purchase the schooling of their choice outside the public sector."); *see also* WIS. STAT. § 119.23(2)(a) (1995-1996) (allowing any child living in Milwaukee to attend any nonsectarian private school within Milwaukee free of charge); OHIO REV. CODE ANN. §§ 3313.975(A), 3313.976(A) (West 1997) (establishing a pilot voucher program to allow Cleveland students to attend any private school within a certain geographic area around the Cleveland school district).

[53]*See* Daniel, *supra* note 16, at 3 (explaining the development of the school choice theories).

[54]*See* FRIEDMAN & FRIEDMAN, *supra* note 50, at 151-52.

[55]*See id.* at 156-57.

to specialize in different areas, thus creating even more opportunities for students.[56] Presently, however, power rests in the hands of the educators whose interests are better served by reducing the influence of parents.[57] This imbalance of power reduces the ability of parents to effect needed change in their educational systems, and adversely affects the poor who cannot afford private tuition or move to areas with better public schools.[58] Hence, the poor are forced to endure failing public schools with no opportunity to obtain a quality education for their children.[59]

Providing parents with a state supported voucher would transfer control over education from bureaucrats to parents, thus giving disadvantaged parents the same opportunities as wealthy parents to choose the appropriate education for their children.[60] Consequently, all students, including the poor, enjoy better access to quality education.[61]

Opponents argue that voucher plans would be detrimental to urban students.[62] To be successful, opponents assert that vouchers need to be progressively tied to parental income, include free transportation and prohibit private schools from raising tuition above the voucher amount.[63] Otherwise the bene-

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[56]*See* JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS 216-17 (1990).

[57]*See* FRIEDMAN & FRIEDMAN, *supra* note 50, at 157.

[58]*See id.* at 157-58; *see also* Judith Areen and Christopher Jencks, *Education Vouchers: A Proposal for Diversity and Choice, in* EDUCATIONAL VOUCHERS: CONCEPTS AND CONTROVERSIES 48, 50 (George R. La Noue, ed. 1972). Presently, only relatively wealthy parents can move to new locations or afford private school tuition. *See id.* at 50; *see also* COONS and SUGARMAN, *supra* note 51, at 26.

[59]*See* FRIEDMAN & FRIEDMAN, *supra* note 50, at 158.

[60]*See id.* at 160-61; FRIEDMAN, *supra* note 51, at 99; CHUBB and MOE, *supra* note 56, at 215-16. A truly competitive education market can only occur if all schools are approved to participate in a voucher plan, including private sectarian schools. *See id.*; *see also* Justin J. Sayfie, Comment, *Education Emancipation for Inner City Students: A New Legal Paradigm for Achieving Equality of Educational Opportunity*, 48 U. MIAMI L. REV. 913, 939 (1994) (arguing that vouchers give poor families more control over decisions that impact their lives).

[61]*See* FRIEDMAN, *supra* note 51, at 99.

[62]*See* JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 70 (1994).

[63]*See id.*

fits would go primarily to the middle and upper income families.[64] Critics assert that vouchers would impose additional administrative burdens on local school districts in monitoring participating private schools.[65] Furthermore, detractors believe that vouchers would drain the public schools of the brightest students as well as needed tax dollars which would substantially threaten the existence of public schools.[66] Some critics contend that school choice initiatives subsidize the Catholic Church because the majority of private schools are Catholic parochial schools.[67] Still other opponents argue that the free market theory is ill suited to the public education system as there is scant evidence that the free market will actually achieve its intended results.[68] Despite these arguments, a carefully crafted voucher plan can provide a meaningful benefit to those students that are trapped in failing schools.

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[64]*See id.*

[65]*See id.*

[66]*See id.* at 70-71. *But see* Areen and Jencks, *supra* note 58, at 55 (claiming that voucher systems would in fact expand the public school sector because they would be forced to accept students from outside their districts).

[67]*See* Philip F. Lawler, *Breaking the Logjam?*, THE CATHOLIC WORLD REPORT, July 1994, at 44.

[68]*See* School Choice, A Special Report, The Carnegie Foundation for the Advancement of Teaching 6 (1992) (citing Albert Shanker, president of the American Federation of Teachers, on voucher idea). Mr. Shanker stated that "'Choice [proponents] view education as a consumer good from some vendor . . . . That goes against the tradition and values that have made our democracy the envy of the world. Education is a public good that communities have provided for all children because they are our future citizens.'" *Id.* (quoting Albert Shanker). After one year in operation, the Milwaukee Parental Choice Program showed that while most participating parents were content with their school choices, test scores demonstrated little or no improvement. *See id.* at 17. The report, however, noted that the true impact of the program could not be determined until it operated for a longer period of time. *See id.* at 18; *see also* WIS. STAT. § 119.23(b) (West 1994) (limiting voucher program to 1.5 percent of the current enrollment of the Milwaukee school district); *see also* Albert Shanker and Bella Rosenberg, *Private School Choice: An Ineffective Path to Educational Reform*, *in* PRIVATIZING EDUCATION AND EDUCATIONAL CHOICE 59, 69 (Simon Hakim et al. eds., 1994) (noting that the first year results of the Milwaukee voucher program did not prove "that private schools do a better job of educating low-income students than public schools."). *But see* John F. Witte et. al., Fourth-Year Report Milwaukee Parental Choice Program, University of Wisconsin-Madison (Dec. 1994). Witte's fourth year study of the Milwaukee program showed improved but mixed results. *See id.*; *see also* MYRON LIEBERMAN, PUBLIC EDUCATION: AN AUTOPSY 13 (1993). Mr. Lieberman criticized the Milwaukee plan because it was not structured as a true market system of education and could not promote serious competition. *See id.* Consequently, the Milwaukee program would be unlikely to produce good results. *See id.*

In New Jersey, the urban poor of the special needs districts have no alternative but to wait for the court-ordered remedy to work. Whether the increase in funding along with CEIFA will actually prompt the state to provide the special needs districts with a constitutional education remains to be seen.[69] If the past twenty years provides a preview of the state's ability to deliver a constitutionally adequate education, then there is a very good chance that today's urban students may not receive a quality education as defined and guaranteed by the New Jersey Constitution.[70] As stressed in *Abbott IV*, enduring educational change can only occur through comprehensive and systemic relief.[71] Even if CEIFA cures the problems in the special needs districts, the changes will take a considerable amount of time.[72] For example, the state has struggled for nearly eight years to raise the test scores of Jersey City public school children above the state minimum standards.[73] Consequently, it appears that special needs district children may expect to wait a long time to receive their constitutional right to a "thorough and efficient education." Such a delay will only perpetuate the already abnormal status quo.

Accepting a wait and see approach, however, continues to penalize children attending school today.[74] Moreover, allowing children to languish in substan-

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[69]*See Abbott v. Burke*, 149 N.J. 145, 204, 693 A.2d 417, 446 (1997) (Garibaldi, J., dissenting) (noting that although the state has given the special needs districts $850 million since 1990, there is barely any evidence that it has reached the students).

[70]*See* Patterson and Sherman, *supra* note 12, at 1 (stating that the quest for educational reform began in 1973 with *Robinson I*); *see also Abbott IV*, 149 N.J. at 153-54, 693 A.2d at 421 (noting that the urban poor have been seeking their constitutional right to a thorough and efficient education since 1973).

[71]*See Abbott IV*, 149 N.J. at 202, 693 A.2d at 445.

[72]*See id.* at 162 n.8, 693 A.2d at 425 n.8. In fact, the state does not even expect to have all the testing mechanisms in place prior to the year 2001. *See id.*

[73]*See* Chiles, *supra* note 9, at 1 (noting mixed results among recent tests for fourth, eighth and eleventh grades). Richard DiPatri, the state-appointed Jersey City Schools Superintendent anticipates that Jersey City may reach state certification requirements in the tenth year of state control. *See* Chiles, *supra* note 13, at 1. The experiences of the Jersey City and Paterson takeovers demonstrate that there are no quick fixes for improving student performance. *See* Topousis, *supra* note 11, at A1.

[74]*See A Study of Supplemental Programs and Recommendations for the* Abbott *Districts*, N.J. Dept. of Educ. (Dec. 23, 1997) <http://www.state.nj.us/njded/genfo/abbottstudy.htm>. As of the 1996-97 school year:

> [s]chools in *Abbott* districts have been failing to meet state standards in reading,

dard schools does not comport with the New Jersey Supreme Court's vision of providing the special needs district children with the opportunity to receive a thorough education.[75] These students can have that opportunity today if the state were to provide tuition vouchers to each student redeemable at both public and private schools.[76] Under CEIFA, the Commissioner of Education currently has the authority to implement a public school choice plan that would allow students to attend inter-district public schools.[77] Utilizing such a program alone, however, may not provide enough opportunities to the special needs district children because of overcrowding in the public schools.[78] A tuition voucher plan, on the other hand, could eliminate or reduce the overcrowding problem by enlarging the number of schools open to students wishing to leave their current school. In light of *Abbott IV* and the state's commitment to reforming the public schools, a tuition voucher program should be made available for a limited number of years until CEIFA and the court ordered remedy has had a chance to fully reform the special needs districts and

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> writing, and math, as measured by the eighth grade Early Warning Test and by the Highs School Proficiency Test administered in grade 11. A total of 148 schools in 20 *Abbott* districts [special needs districts] have failed to meet state standards in one or more subject areas for three consecutive years. In addition, 83 schools have failed one or more subject areas for one year, and 29 have failed for two consecutive years. Currently, there are three Abbott districts under state operation and five that have to develop corrective action plans to improve student achievement or face further state intervention.

Id. at 2.

[75]*See Abbott IV*, 149 N.J. at 201-202, 693 A.2d at 445. The court refused to adopt a "wait and see" approach to whether CEIFA would improve educational opportunities for the special needs districts' students because for too long generations of children have endured an unconstitutional education. *See id.*

[76]*See* Sayfie, *supra* note 60, at 939. Tuition vouchers can provide students with immediate relief from unconstitutional schools. *See id.* In contrast, traditional educational remedies usually take years to work while students continue to endure substandard education. *See id.* Allowing students to remain in unconstitutional schools may irreversibly harm their future ability to fully participate in the labor market. *See id.*

[77]*See* Chiles, *supra* note 16, at 1.

[78]*See* Chiles, *supra* note 16, at 1. Robert Boose, executive director of the New Jersey School Boards Association, commented that many suburban schools are overcrowded due to a population explosion. *See id.*; *see also* Sue Epstein, *Building Blocks of Education: Districts Enlarge Facilities to Handle Influx of Students*, THE STAR-LEDGER (N.J.), Sept. 7, 1997, at 35. Rising student enrollments have forced approximately eight Middlesex County school districts to expand their school facilities. *See id.*

raise test scores to acceptable levels.[79]

Both Wisconsin and Ohio have endeavored to provide low income families with an opportunity to leave their failing public school system. A review of each program and their subsequent constitutional challenges provide insight to the constitutional issues at stake and the elements necessary for an effective voucher program in New Jersey.

III. THE CONSTITUTIONAL QUESTION: A LOOK AT TWO RECENT VOUCHER PROGRAMS

A. THE MILWAUKEE PARENTAL CHOICE PROGRAM

In 1990, Wisconsin enacted the first voucher legislation at the insistence of Milwaukee's minority leaders.[80] They sought to alleviate the problems which plagued the Milwaukee public schools, such as high dropout rates, dismal test scores, overcrowded classrooms and forced busing.[81] The voucher program, the Milwaukee Parental Choice Program, provides that any Milwaukee student in grades kindergarten through 12 may enroll free of charge in any private nonsectarian school located within the city.[82] The program is limited to students whose "total family income does not exceed an amount equal to 1.75 times the poverty level" established by federal law.[83] This requirement limited the amount of eligible pupils to only one percent of the 97,000 students in the

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[79]*See* Sayfie, *supra* note 60, at 939 (arguing that once the public schools begin to provide a constitutionally adequate education, a voucher remedy will no longer be necessary); *see generally* Greg D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795 (1995) (asserting that tuition vouchers provide a timely remedy to students whose state educational rights have been violated).

[80]*See* Richard L. Colvin, *Voucher Test is Praised in Milwaukee*, THE STAR-LEDGER (N.J.), Nov. 3, 1996, at 13.

[81]*See id.*

[82]*See* WIS. STAT. ANN. § 119.23(2)(a) (West 1994). Section 119.23(2)(a) states in part "[s]ubject to par. (b) beginning in the 1990-1991 school year, any pupil in grades kindergarten to 12 who resides within the city may attend, at no charge, any nonsectarian private school located in the city . . . ." *Id.*

[83]*See* WIS. STAT. ANN. § 119.23(2)(a)(1) (West 1994). Specifically, this section explains that: "[t]he pupil is a member of a family that has a total family income that does not exceed an amount equal to 1.75 times the poverty level determined in accordance with criteria established by the director of the federal office of management and budget." *Id.*

Milwaukee school system.[84] Additionally the program limited each nonsectarian private school from enrolling more than 65 percent of their student body with voucher students.[85] Upon acceptance into a private school, the state superintendent would pay the students' tuition with state funds.[86]

In 1992, the Wisconsin Supreme Court upheld the constitutionality of the Milwaukee voucher plan.[87] After four years of operation, researchers have concluded that the Choice Program student generally performs the same as their public school counterparts with slightly higher class attendance.[88] Their report also indicated that the voucher program provides choices to families that

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[84]*See* WIS. STAT. ANN. § 119.23(b)(1) (West 1994). This section dictates that "[n]o more than 1% of the school district's membership may attend private schools under this section in the 1993-94 school year. Beginning in the 1994-95 school year, no more than 1.5% of the school district's membership may attend private schools under this section in any school year." *Id.*; *see also* Carnegie Report, *supra* note 68, at 18.

[85]*See* WIS. STAT. ANN. § 119.23(b)(2) (West 1994) ("No more than 65% of a private school's enrollment may consist of pupils attending the private school under this section.").

[86]*See* WIS. STAT. ANN. § 119.23(b)(3)-(4) (West 1994). Section (b)(3) states in part: "[t]he state superintendent will ensure that the private school determines which pupils to accept on a random basis." *Id.* Section (b)(4) reads in pertinent part "[u]pon receipt from the pupil's parent or guardian of proof of the pupil's enrollment in the private school, the state superintendent shall pay to the private school . . . an amount equal to the total amount to which the school district is entitled . . . divided by the school district membership." *Id.* In 1990, the Milwaukee Public School system paid each private school $2,500 per-pupil. *See also* Shanker and Rosenberg, *supra* note 68, at 69.

[87]*See* Davis v. Grover, 480 N.W.2d 460 (Wis. 1992). The Wisconsin Supreme Court noted that the program "was an experiment intended to address a perceived problem of inadequate educational opportunities." *Id.* at 470; *see also* James B. Egle, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459 (1992) (surveying the constitutionality of school choice plans with emphasis on state constitutional issues with regard to *Davis v. Grover*). Additionally, in *Miller v. Benson*, 878 F. Supp. 1209 (E.D. Wis. 1995), *vacated as moot*, 68 F.3d 163 (7th Cir. 1995), five low income parents and their school children asserted that the failure to include religious schools in Milwaukee Parental Choice Program violated their First Amendment right to the free exercise clause and equal protection under the Fourteenth Amendment. *See id.* at 1212. On summary judgment, the district court held that "to expand the current Choice Program to make tuition reimbursements directly payable to religious private schools who admit eligible Choice Program schoolchildren would violate the Establishment Clause." *Id.* at 1216. On appeal, the Seventh Circuit vacated the lower court's decision as moot because the Wisconsin Legislature included religious schools in the revised Milwaukee Parental Choice Program which took effect during the appeal. *See Miller v. Benson*, 68 F.3d 163, 164 (7th Cir. 1995).

[88]*See* Witte, *supra* note 68, at vi.

could never afford to send their children to private school.[89] Moreover, Parental Choice parents were more satisfied with their private school and the program.[90] According to the parents and students surveyed, the majority indicated they were better off because of the Choice Program.[91] In 1995, the Wisconsin Legislature voted to expand the program to include religious schools and a significant increase in the number of eligible pupils.[92]

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[89]*See id.*

[90]*See id.*; *see also* David Ruenzel, *A Choice in the Matter*, EDUCATION WEEK, Sept. 27, 1995, at 24 (reporting on the success of the Milwaukee Parental Choice Program through interviews with participating students, parents and educators).

[91]*See* Witte, *supra* note 68, at vii. The researchers recommended several areas of improvement to the Wisconsin Legislature. *See id.* Specifically, the researchers endorsed greater state oversight through statewide tests, improved reporting requirements, and a revision of the transportation reimbursement program. *See id.* The study also cautioned readers that due to the limited scope of the Choice Program, its findings could neither anticipate nor evaluate other more inclusive voucher programs. *See id.*

[92]*See* WIS. STAT. ANN. § 119.23(2)(a) (West 1995-96) (deleting "nonsectarian" from the earlier version of the statute). Other changes include eliminating the 65 percent cap on choice student enrollment in the private schools. *See* WIS. STAT. ANN. § 119.23(2)(b)(2) (West 1995-96) (deleted). In addition, tuition payments to the private school were restricted to the lesser amount of state aid that the public school expected to receive divided by the district's membership or "an amount equal to the private school's operating and debt service cost per pupil that is related to educational programming." WIS. STAT. ANN. § 119.23(4) (West 1995-96). Parents also have the option of excusing their children from all religious activity provided that they give written notification to the school's principal. *See* WIS. STAT. ANN. § 119.23(7)(c) (West 1995-96). Furthermore, the number of schools allowed to participate dramatically increased from 1.5% of the school district's membership to 15% by the 1996-97 school year. *See* WIS. STAT. ANN. § 119.23(2)(b). Originally, only twelve nonsectarian private schools participated in the program, but under the amended plan approximately eighty-nine religious schools volunteered to participate. *See* Jackson v. Benson, 570 N.W.2d 407, 413 (Wis. Ct. App. 1997). The amended program also changed the method of payment by requiring parents to restrictively endorse the tuition checks before the school could redeem them for cash. *See* WIS. STAT. ANN. § 119.23(4) (West 1995-96) ("The department shall send the check to the private school. The parent or guardian shall restrictively endorse the check for the use of the private school."). Although the state limited the amount of tuition payments to each school, they were free to use the money for any purpose including religious purposes. *See Jackson*, 570 N.W.2d at 414. Furthermore, the amended program deleted the requirement for the state superintendent to submit annual reports to the legislature on the progress of the program, but did not eliminate the annual audits conducted by the legislature. *See* WIS. STAT. ANN. § 199.23(5)(d) (West 1995-96) (deleted); *see also* WIS. STAT. ANN. § 119.23(9) (West 1995-96). Finally, the amended program continued the requirement for random selection of participating pupils except where the school previously admitted one of the applicant's siblings. *See* WIS. STAT. ANN. § 199.23(3)(a) (West 1995-96).

B. THE MILWAUKEE PARENTAL CHOICE PROGRAM CHALLENGED: *JACKSON v. BENSON*

Before the 1995-96 school term began, the updated Choice Program was challenged on the grounds of violating both the Wisconsin and United States Constitutions.[93] The Dane County Circuit Court held that the amended Milwaukee Parental Choice Program violated Article I, Section 18[94] of the Wisconsin Constitution and thus did not need to reach the First Amendment claim.[95] The Court of Appeals affirmed the circuit court's decision for essentially the same reasons.[96] The appellate court also focused its analysis on the

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[93]The circuit court ordered the state to terminate the amended program at the end of the 1996-97 school year. *See Jackson*, 570 N.W.2d at 415.

[94]This clause states:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

WIS. CONST. art. I, § 18.

[95]*See Jackson*, 570 N.W.2d at 415. The circuit court found that the voucher program specifically violated Article I, Section 18 because the primary effect of the amended program was to benefit private schools and their religious missions, and that it compelled state taxpayers to support religious establishments without their consent. *See id.* The circuit court also held that private sectarian school participation in the Choice Program violated the state's public purpose doctrine which requires the state to expend tax revenues only for public purposes as defined by the legislature. *See id.* The court further held that the amended program violated Article IV, Section 18 of the state constitution which prohibits a "private or local bill" from containing more than one subject. *See id.*; WIS. CONST. art. IV, § 18. Finally, the circuit court dismissed the claim that the legislature violated its constitutional duty to establish and maintain public schools by allowing religion to be taught at state supported schools. *See id.*; *see also* Article X, Section 3 of the Wisconsin Constitution which states in relevant part that "[t]he legislature shall provide by law for the establishment of district schools, which shall be nearly uniform as practicable; . . . and no sectarian instruction shall be allowed . . . ." WIS. CONST. art. X, § 3.

[96]*See Jackson*, 570 N.W.2d at 423. The appellate court also declined to reach any of the other issues raised by the parties because its decision concerning Article I, Section 18 rendered those claims unnecessary. *See id.* The court recognized that the remaining claims: Article IV, Section 18, the prohibition against enacting legislation for private or local issues; the public purpose doctrine and Article X, Section 3, the duty to maintain public schools free

Wisconsin Constitution rather than the First Amendment.[97] The court opined that because Article I, Section 18, places more restrictions on state support of religion than does the Establishment Clause of the United States Constitution a separate First Amendment analysis was not required.[98] The Wisconsin Supreme Court has generally found that private sectarian schools qualify as "religious seminaries" under Article I, Section 18, because of their religious missions and tendency to infuse their curricula with religion.[99] As a result, the court was obligated to invalidate the amended program unless the plaintiffs could distinguish the court's prior holdings that the participating sectarian schools did not quality as religious seminaries or that the tuition payments made directly to the parents compelled a different result.[100]

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of religious instruction, were all advanced and rejected in *Grover v. Davis*, 480 N.W.2d 460 (Wis. 1992) (challenging the original MPCP). *See Jackson*, 570 N.W.2d. at 423. Hence, the appellate court felt it was unnecessary to address these issues. *See id.* The court also rejected arguments under the Establishment Clause of the First Amendment and the Equal Protection Clause under the Wisconsin and United States Constitutions. *See id.*

[97]The court explained that it limited its analysis to Article I, Section 18 because the trial court and the parties expended a major portion of their analysis on that section and a determination that Article I, Section 18 was violated would render further analysis on any other issues unnecessary. *See id.* at 416.

[98]*See id.* For example, in *State ex rel. Weiss v. District Board of School District No. Eight of Edgerton*, 44 N.W. 967 (Wis. 1890), the court held that reading the bible in a public school classroom constituted a "religious benefit" in violation of Article I, Section 18. *See id.* at 980. The *Weiss* court determined that for state constitutional purposes, the combination of bible reading and state support of the public school converted the school into a seminary. *See id.* Consequently, the public school was engaged in religious instruction with state support in violation of the Wisconsin Constitution. *See id.* In reaching this decision, the *Weiss* court commented that "Wisconsin, as one of the later states admitted into the Union . . . has, in her organic law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization or society than any other state in the Union." *Id.* at 977.

[99]*See Jackson* 570 N.W.2d at 418 (citing State *ex rel.* Reynolds v. Nusbaum, 115 N.W.2d 761, 765 (Wis. 1962)) (holding that elementary and secondary schools that provide some religious instruction are "religious seminaries").

[100]*See id.* at 418. The court pointed out that since the Wisconsin Supreme Court began interpreting Article I, Section 18 narrowly, it has upheld this interpretation in two similar cases. *See id.* at 418-19. In *State ex rel. Reynolds v. Nusbaum,* 115 N.W.2d 761 (Wis. 1962), the Wisconsin high court held that the use of public funds for the transportation of pupils to private sectarian schools violated the state constitution. *See id.* at 762. The majority found the indirect aid conferred a benefit to all religious schools because the free transportation served to increase student enrollment at the religious schools. *See id.* at 765. In *State ex rel. Warren v. Nusbaum*, 198 N.W.2d 650 (Wis. 1972), the court held that a state statute subsidizing the tuition of a catholic university's dental school students must be re-

The state contended, however, that even though religious schools received state benefits under the amended program, the program must be upheld unless the program's primary effect is to benefit religion.[101] The state argued that the court should apply the United States Supreme Court's Establishment Clause analysis beginning with the three prong test set out in *Lemon v. Kurtzman*.[102] Under the *Lemon* test a statute does not offend the Establishment Clause if it has a secular purpose, its principal or primary effect neither promotes nor hinders religion and it does not "foster an 'excessive government entanglement with religion.'"[103] The court conceded that while it should apply the *Lemon* test, its application would not affect the court's holding. The court reasoned that the United States Supreme Court invalidated a program similar to the Choice Program in *Committee for Public Education & Religious Liberty v. Nyquist*.[104]

The *Jackson* court compared the New York statute in *Nyquist* with the

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stricted to secular purposes to avoid offending the state constitution. *See id.* at 655. Applying this narrow interpretation, the *Jackson* majority found that the Choice Program's expansion to 15,000 pupils and the inclusion of eighty-four sectarian schools would surely increase enrollments at the participating private sectarian schools. *See Jackson*, 570 N.W.2d at 419. In addition, the Choice Program did not restrict the use of the tuition payments to secular purposes. *See id.* Consequently, the court found that the Choice Program provided state benefits to religious seminaries in violation of the Wisconsin Constitution. *See id.*

[101]*See id.* at 419.

[102]403 U.S. 602 (1971). In *Lemon*, the Supreme Court invalidated programs in Pennsylvania and Rhode Island which provided aid to nonpublic schools for costs incurred by those schools in teaching secular subjects. *See id.* at 606-07. The majority held both programs created an excessive entanglement with religion because of the continuing need to ensure that participating religious schools did not infuse their secular classes with religion. *See id.* at 615-19.

[103]*Id.* at 612-13 (citation omitted).

[104]*See Jackson*, 570 N.W.2d at 420 (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)). In *Nyquist*, the Supreme Court struck down three New York statutes that provided assistance in several forms to parents of elementary and secondary schoolchildren. *See Nyquist* 413 U.S. at 798. The New York statutes granted money to private elementary and secondary schools for the maintenance and repair of physical facilities; granted partial tuition reimbursements to low-income parents for sending their children to private school; and gave tax deductions or credits to middle and upper income parents whose children attended private school. *See id.* at 762-67. The Supreme Court held all three programs had the primary effect of advancing religion in violation of the Establishment Clause. *See id.* at 798. The majority left open the question of whether scholarships granted directly to parents without regard to "the sectarian-nonsectarian, or public-nonpublic nature of the institution" would produce a different result. *Id.* at 782.

amended Choice Program.[105] Judge Deininger noted that the Supreme Court in *Nyquist* invalidated the tuition subsidies because it failed the primary effect test, despite the fact the tuition reimbursement payments were made directly to parents.[106] The *Jackson* court found Justice Powell's comment in *Nyquist* persuasive, that although New York intended to relieve parents of some of the financial burden in sending their children to private sectarian schools, "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."[107] In *Jackson,* the court stated that because Article I, Section 18 is more restrictive than the Establishment Clause of the First Amendment, the *Nyquist* holding lends further support to their conclusion that the Parental Choice program violates the Wisconsin Constitution.[108]

The dissent argued that the majority erred in conducting an Article I, Section 18 analysis prior to conducting an Establishment Clause analysis.[109] The

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[105]*See Jackson*, 570 N.W.2d at 420.

[106]*See Nyquist*, 413 U.S. at 768.

[107]*See Jackson,* 570 N.W.2d at 420 (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973)).

[108]*See id.* As to the "compelled support" clause of Article 1, Section 18, the majority found that it also had been violated, but did not form a separate and distinct basis for the court's holding. *See id.* at 421. The court also rejected the state's argument that subsequent Supreme Court cases have narrowed *Nyquist's* broad reading of the primary effect test. *See id.* at 421. The appellate court declined to adopt this view for three reasons. *See id.* First, the court recognized that the current state of Establishment Clause jurisprudence is in "hopeless disarray." *See id.* (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 860 (1995) (Thomas, J., concurring)). Second, all of the cases cited by the state were distinguishable on the facts. *See id.* Third, using federal precedent as a guide in interpreting the Wisconsin Constitution, the court must focus on cases factually similar to *Nyquist. See id.* (citing e.g., *Rosenberger*, 515 U.S. at 819 (1995) (holding that a university could not withhold student activity funds from a student group for the printing costs of a newsletter with a Christian message); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (holding that sign language interpreter provided to deaf student under the Individual Disabilities Education Act for assistance at the deaf student's private sectarian high school did not have primary effect of advancing religion); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (finding vocational aid given to blind student to attend a religious seminary did not violate the First Amendment); and Mueller v. Allen, 463 U.S. 388 (1983) (holding that state tax deduction provided to parents who sent their children to private and public schools did not violate Establishment Clause). *See Jackson*, 570 N.W.2d at 420. In addition, the court opined that it was not free to speculate on whether the United States Supreme Court would modify *Nyquist's* interpretation of the primary effect test. *See id.* Therefore, *Nyquist* continues to hold precedential value until the Court overrules it. *See id.* (citing Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997).

[109]*See id.* at 427 (Roggensack, J., dissenting). Judge Roggensack admonished the

dissent asserted that if the majority had first conducted a thorough Establishment Clause analysis, it would have found that the case law provided a "well articulated guide" for each of the issues presented.[110] The dissent concluded that the statute should have been upheld because the respondents failed to prove the Choice Program unconstitutional beyond a reasonable doubt.[111]

The dissent noted that although the "Lemon test" enunciates well settled principles, the different factual scenarios the Supreme Court has faced over the years have not produced a "bright line test for Establishment Clause claims."[112] One reason for the failure to produce a bright line test, the dissent explained, was that throughout our country's history there has always been some interaction between church and state.[113] Indeed, in *Nyquist* Justice Powell acknowledged that "it has never been thought either possible or desirable to enforce a regime of total separation [of church and state]."[114] Thus, the dissent argued that a court must conduct a comprehensive analysis of the challenged statute to determine whether it violates any one of the three prongs of the *Lemon* test.[115] Since *Lemon* was decided, the dissent noted, the Supreme Court has had many opportunities to address challenges to state laws affecting education and through successive cases the Justices have continued to refine

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majority for determining that the mere payment of money by the state provided a constitutionally impermissible "benefit" under Article I, Section 18. *See id.* at 439 (Roggensack, J., dissenting). The dissent contended that the majority incorrectly focused on the payment of money instead of analyzing the type of benefit accorded to the school children which led to the incorrect assumption that a person accepting state benefits may not use those funds to buy services from a sectarian institution without violating the constitution. *See id.* Moreover, the dissent questioned the majority's conclusion that when a sectarian school is provided with state money it is for "the benefit of a religious seminary." *See id.* Judge Roggensack asserted that this finding was not warranted because the Choice Program provided adequate safeguards to prevent religious schools from using state money for religious purposes. *See id.* at 439-41 (Roggensack, J., dissenting). Consequently, Judge Roggensack maintained that the majority erred in concluding that the state supports religious indoctrination. *See id.* at 441 (Roggensack, J., dissenting).

[110]*See id.*

[111]*See id.*

[112]*See id.* at 428 (Roggensack, J., dissenting).

[113]*See id.*

[114]*See id.* (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973)).

[115]*See id.*

the reach of the prongs promulgated in *Lemon*.[116] Judge Roggensack summarized the Supreme Court's view that the Establishment Clause is not violated when a recipient obtains a benefit accorded on a neutral basis and then spends that benefit in any manner, even on religion-related expenditures.[117]

In view of the Supreme Court's precedents since *Nyquist*, Judge Rog-

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[116]*See id.*

[117]*See id.* at 431 (Roggensack, J., dissenting). The dissent supported this view with the following cases: *Agostini v. Felton*, 117 S. Ct. 1997 (1997); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *Witters v. Washington Department Services for the Blind*, 474 U.S. 481 (1986); and *Mueller v. Allen*, 463 U.S. 388, 398 (1983). In *Witters*, for example, the Court found that using neutrally provided government vocational aid at a religious school did not have the primary effect of advancing religion. *See* 474 U.S. at 483. Writing for the majority, Justice Marshall stated that "it is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution." *Id.* at 486. As an example, a state may pay an employee who it knows will donate all or a part of his salary to a sectarian institution without violating the Constitution. *See id.* The majority determined that the sectarian schools could only benefit from state aid as a result of the independent and personal choice of the aid recipient and that the state aid program did not discriminate on the basis of the religious or non-religious affiliation of the school. *See id.* at 488. Moreover, the Court found that the aid provided to Witters did not create an incentive to attend a religious bible school. *See id.* In a concurring opinion, Justice Powell opined that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of the individual beneficiaries." *Id.* at 490-91 (Powell, J., concurring).

The dissent noted further that *Agostini v. Felton* provides the most recent example of the Supreme Court's view that indirect aid to sectarian institutions which is based upon neutral criteria does not violate the Establishment Clause. *See Jackson*, 570 N.W.2d at 431 (Roggensack, J., dissenting). In *Agostini*, Justice O'Connor, writing for the majority, overturned the Court's decision in *Aguilar v. Felton*, 473 U.S. 402 (1985) and a portion of its decision in *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985) when it decided that state and federal programs which paid public school teachers to provide remedial education and other services to qualified school children in their private sectarian schools could proceed without violating the Establishment Clause. *See Agostini*, 117 S. Ct. at 2016 (1997).

The Supreme Court opined that since *Aguilar* and *Ball* were decided, the criteria used to evaluate whether state aid to sectarian institutions impermissibly advances religion had changed. *See id.* Justice O'Connor concluded that in Establishment cases, the focus should be on the criteria used to distribute aid to a class of beneficiaries because they are important in determining whether the aid advances religion and promotes a financial incentive to attend a sectarian school. *See id.* at 2014. The Justice reasoned that "[t]his incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.*

gensack found that the Choice Program satisfied the first prong of the *Lemon* test because the program's stated aim is to improve the academic performance of children from economically disadvantaged families.[118] The dissent also concluded that the Choice Program did not offend the "excessive entanglement" test because the statute provides for only minimal governmental oversight.[119] On the more difficult second prong, the dissent argued that the United States Supreme Court decisions since *Nyquist* demonstrate that the Choice Program does not violate the primary effect test.[120] The dissent argued that a social welfare program is not unconstitutional simply because the program aids a religious organization.[121] Next, the dissent opined that the program must qualify the beneficiaries on a neutral basis.[122] Lastly, the dissent noted that the type of benefit granted must neither express hostility toward religion nor create a religious incentive.[123] The dissent was also guided by Justice Powell's directive that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries."[124]

Applying these principles, the dissent concluded that the amended Choice Program defined the class of beneficiaries by income level and geographic location.[125] Thus, in the dissent's view, the statute made no reference to religion in establishing eligibility for the state benefits.[126] In addition, the dissent noted

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[118]*See Jackson*, 570 N.W.2d at 432 (Roggensack, J., dissenting).

[119]*See id.* at 434 (Roggensack, J., dissenting).

[120]*See id.* at 433 (Roggensack, J., dissenting).

[121]*See id.*; *see also Zobrest*, 509 U.S. 1, 12 (1993); Bowen v. Kendrick, 487 U.S. 589, 609 (1988).

[122]*See Jackson*, 570 N.W.2d at 433 (Roggensack, J., dissenting); *see also* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83, n.38 (1973); *Witters*, 474 U.S. at 487-88.

[123]*See Jackson*, 570 N.W.2d at 433; *see also Witters*, 474 U.S. at 490-91 (Powell, J., concurring).

[124]*See Jackson*, 570 N.W.2d at 433 (quoting Witters v. Washington Dep't Servs. for the Blind, 474 U.S.481, 490-91(1986) (Powell, J., concurring)).

[125]*See id.*

[126]*See id.*

that the benefit provided by the program opened up additional educational opportunities for low-income families.[127] This benefit was neither favorable nor hostile to religion, the dissent reasoned, but provided educational alternatives to low academic achievers.[128] The dissent also found that through this program, the parents are given the choice of where to send their children to school.[129] Judge Roggensack emphasized that under current Establishment Clause jurisprudence, it is not unconstitutional for parents to enroll their children in religious schools, even if the state provides the financial assistance to make that decision possible.[130] Furthermore, the dissenting judge stressed that the constitutionality of the choice program did not necessarily depend upon the number of sectarian schools that will participate in the program.[131] The dissent also concluded that because the amended Choice Program limited the tuition payments to the cost of providing a secular education, the state did not reimburse the participating religious schools for costs they would have incurred without the program.[132]

Finally, Judge Roggensack concluded that the amended Choice Program did not offend the Establishment Clause because it provided educational benefits to a defined class of individuals without regard to their sectarian affiliation, conferred the benefit of educational choice which was religion neutral and did not relieve the sectarian schools of expenses they would have incurred absent their participation in the amended program.[133] Furthermore, the dissent noted that any aid given to sectarian institutions was the result of a private individual

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[127]*See id.*

[128]*See id.*

[129]*See id.*

[130]*See id.* (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 (1993)).

[131]*See id.*

[132]*See id.* at 434 (Roggensack, J., dissenting). The dissent criticized the majority's reliance on *Nyquist* because that case was factually distinguishable from the Choice Program, and *Nyquist* should have been interpreted in conjunction with subsequent United States Supreme Court precedent. *See id.* The judge pointed out that unlike the situation in *Nyquist,* the amended Choice Program makes a significant attempt to separate the religious and secular functions of the participating schools by including an "opt-out" provision from religious activity and requiring random selection of pupils. *See id.* at 435 (Roggensack, J., dissenting); *see also* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 785-86 (1973); *see also* WIS. STAT. ANN. § 119.23 (7)(C) (West 1995-96).

[133]*See Jackson*, at 434 (Roggensack, J., dissenting).

choice on the part of individual parents.[134]

Although the dissent was unable to persuade the majority to uphold the Parental Choice Program, the final outcome rests with the Wisconsin Supreme Court, which is expected to rule on the case this spring.[135] Observers expect the case will eventually go to the United States Supreme Court unless the Wisconsin Supreme Court decides the issue under the Wisconsin Constitution.[136] In that event, no appeal will be possible.[137] Legal commentators are divided on whether the Wisconsin Supreme Court will uphold the constitutionality of the program on either state constitutional grounds or under the Establishment Clause of the First Amendment.[138] In any event, the proponents and opponents remain convinced that their position will prevail.[139] The result in this case may

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[134]*See id.*

[135]Three Milwaukee public school board members filed an *amicus curiae* brief requesting the Wisconsin Supreme Court to uphold the constitutionality of the Milwaukee Parental Choice Program which should be decided in the Spring of 1998. *See* Joe Williams, *3 on MPS Board Ask Court to Uphold School Choice*, THE MILWAUKEE J. SENTINEL, Dec. 18, 1997, *available in* 1997 WL 12765802. Choice Program proponents promised to appeal the case to the Wisconsin Supreme Court and both parties predict the case will go to the United States Supreme Court; *see* Andrew Blasko, *Appeals Court Rules Against School Choice, Both Sides Predict Dispute Over Governor's Plan Will Reach U.S. Supreme Court*, WIS. ST. J., Aug. 23, 1997, at 1A.

[136]*See* Richard P. Jones & Joe Williams, *Religious School Vouchers Rejected Appeals Court's Ruling to be Appealed, Choice Program Supporters Say; 6 Years of School Choice*, THE MILWAUKEE J. SENTINEL, Aug. 23, 1997, *available in* 1997 WL 12730283 (Edward Marion, the attorney hired by Governor Thompson to represent Wisconsin, commented about the case: "This is something that's just a temporary decision. It does not necessarily have any real immediate impact."). Jeffrey Kassel of the American Civil Liberties Union noted that if the Wisconsin Supreme Court decides the case solely on the Wisconsin Constitution, "proponents will have few if any avenues for further appeals." *Id.*

[137]*See id.*

[138]*See* Harlan A. Loeb & Debbie N. Kaminer, *God, Money, and Schools: Voucher Programs Impugn the Separation of Church and State*, 30 J. MARSHALL L. REV. 1, 16-18 (1996) (concluding that the Wisconsin Supreme Court would conclude that the amended choice program would violate both the Wisconsin Constitution and the First Amendment); Kristen K. Waggoner, *The Milwaukee Parental Choice Program: The First Voucher System to Include Religious Schools*, 7 REGENT U. L. REV. 165 (1996) (concluding that the Wisconsin Supreme Court would find that the Milwaukee Parental Choice Program does not violate the Establishment Clause).

[139]*See* Jones and Williams, *supra* note 136. Clint Bolick, the litigation director for the Institute of Justice and lawyer for school choice families stated "[w]e are confident that in the Wisconsin Supreme Court, the parents and children will prevail."; *see* Andrew

also have implications beyond Wisconsin, as other states consider similar voucher proposals.[140] Voucher proponents also expect to find further support for their cause in Ohio, where the Ohio Supreme Court is expected to rule on the pilot voucher plan enacted for Cleveland school children.[141]

C. THE CLEVELAND PILOT SCHOLARSHIP PROGRAM

The Ohio Pilot Scholarship Program[142] was enacted as the result of an on-going educational crisis in the Cleveland City School District.[143] The Cleveland public schools experienced low graduation rates, high dropout rates, and a general dissatisfaction with the school system leading many parents to send their children to private school.[144] Realizing that low-income families did not have the resources to afford private schools, the state legislature enacted a pilot scholarship program to allow those families to remove their children from the Cleveland public schools.[145] The Pilot Program consistes of two parts: a

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Blasko, *supra* note 135, at 1A. The American Civil Liberties Union of Wisconsin believes the Appellate Court decision was a "victory for religious liberty and not a defeat for better education." *Id.*

[140]*See supra* note 49 (providing sample of states considering school choice legislation).

[141]*See* Joe Hallett, *State Appeals Voucher Ruling*, THE PLAIN DEALER (Cleveland Ohio), June 7, 1997, at 5B. The Ohio Attorney General has asked the Ohio Supreme Court to review, as soon as possible, the appellate court's decision to invalidate the Cleveland pilot voucher program. *See id.*; *see also Pilot Program to Run During Court Challenge Tuition Vouchers*, THE COLUMBUS DISPATCH, July 26, 1997, at 2C. The Ohio Supreme Court agreed to review the state appellate court's decision to invalidate the Cleveland pilot voucher program. *See id.*

[142]OHIO REV. CODE ANN. §§ 3313.974 to.979 (West 1997).

[143]*See* Simmons-Harris v. Goff, No. 96APEO8-982, No. 96APEO8-991, 1997 Ohio App. LEXIS 1766, at *1 (Ohio Ct. App. May 1, 1997), *appeals granted*, 684 N.E.2d 705 (Ohio 1997). This matter began as two separate actions which the trial court consolidated before trial. *See id.* The educational crisis in Cleveland was precipitated by the decision of the United States District Court for the Northern District of Ohio, which ordered the State of Ohio to take control of the failing Cleveland City School District. *See id.* at *3 (citing Reed v. Rhodes, No. 1:73 CV 1300 (N.D. Ohio 1995) (unreported)).

[144]*See* Gatton v. Goff, No. 96CVH-01-193, 96CVH-01-721, 1996 WL 466499, at *1 (Ohio Ct. C.P., Franklin County), *rev'd*, Simmons-Harris v. Goff, 1997 Ohio App. LEXIS 1766, at *1, *appeal granted* 684 N.E.2d 705 (Ohio 1997).

[145]*See id.*

scholarship tuition grant designed to allow Cleveland school children to attend "alternative schools"[146] and tutorial assistance grants provided to children who remained in the public schools.[147] The Pilot Program allows both private and public schools to participate provided they complied with certain restrictions.[148]

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[146]*See* OHIO REV. CODE ANN. § 3313.974(G) (West 1997). The statute defines an alternative school as "a registered private school located in a school district or a public school located in an adjacent school district" that is adjacent to the Cleveland City School District. *Id.*

[147]*See* OHIO REV. CODE ANN. § 3313.975(A) (West 1997). This section states in relevant part: "[t]he program shall provide for a number of students residing in such district to receive scholarships to attend alternative schools, and for an equal number of students to receive tutorial assistance grants while attending public school in such district." *Id.* The plaintiffs only challenged the scholarship program. *See id.*; *see also Simmons-Harris,* 1997 Ohio App. LEXIS 1766, at *4. The scholarship was worth ninety percent of a private school's tuition up to a maximum of $2,500 for students whose family income did not exceed more than two hundred percent of the poverty level, and a scholarship worth seventy-five percent of an alternative school's tuition was available to students whose family income was above this amount. *See* OHIO REV. CODE ANN. §3313.978 (West 1997). Initially the scholarships were awarded by lottery and restricted to grades kindergarten through third. *See* OHIO REV. CODE ANN. § 3313.977 (West 1997). Those students that remained in the public schools, and otherwise met the same criteria for a scholarship, were entitled to tutorial grant up to a maximum of five hundred dollars. *See* OHIO REV. CODE ANN. § 3313.978 (West 1997).

[148]*See* OHIO REV. CODE ANN. § 3313.976(A) (West 1997). The first requirement is that each school must register with the state superintendent requesting permission to participate in the scholarship program. *See* OHIO REV. CODE ANN. § 3313.976(A) (West 1997). The superintendent must allow the school to participate provided that it met the established criteria. *See* OHIO REV. CODE ANN. § 3313.976(A) (West 1997). Each school is required to meet the following criteria:

> (1) The school is located within the boundaries of the pilot project school district [Cleveland]; (2) [t]he school indicates in writing its commitment to follow all requirements for a state-sponsored scholarship program . . .; (3) [t]he school meets all state minimum standards for chartered nonpublic schools . . .; (4) [t]he school does not discriminate on the basis of race, religion, or ethnic background; (5) [t]he school enrolls a minimum of ten students per class or a sum of at least twenty-five students in all the classes offered; (6) [t]he school does not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion; (7) [t]he school does not provided false or misleading information about the school to parents, students, or the general public; (8) [t]he school agrees not to charge any tuition to low-income families participating in the scholarship program in excess of ten per cent of the scholarship amount . . . .

Six months after the Pilot Program was enacted, it was challenged as violating both the United States and Ohio Constitutions. The trial court granted summary judgment to defendants and upheld the constitutionality of the Pilot Program under the Establishment Clause of the First Amendment and selected portions of the Ohio Constitution.[149] On appeal, Judge Young reversed the lower court decision by holding that the Pilot Program violated both the First Amendment and the Ohio Constitution.[150]

In reviewing the Pilot Program's constitutionality under the First Amendment, the appellate court focused its attention on the second prong of the *Lemon* test.[151] The court noted that the Supreme Court has concentrated on two factors when deciding whether a statute has the primary effect of promoting religion.[152] The two factors are whether the governmental aid is religion neutral and whether that aid is "direct and substantial" or "indirect and incidental."[153] On the first question, the appellate court initially looked to whether the Pilot Program provided scholarships to recipients on a neutral basis. The

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OHIO REV. CODE ANN. § 3313.976(A) (West 1997). Public schools that desired to participate and were located next to the Cleveland school district only had to notify the state superintendent six months in advance. *See* OHIO REV. CODE ANN. §3313.976(C) (West 1997).

[149]*See Gatton*, 1996 WL 466499, at *1. The trial court found that the Pilot Program, on its face, provided aid on a neutral basis without regard to the sectarian or nonsectarian nature of the schools. *See id.* at *14. The court also held that the participating sectarian schools could only benefit from the state aid through the independent choices of the parents. *See id.* Thus, the private schools received only indirect state aid. *See id.* The lower court further determined that sending payments directly to the school did not advance or aid religion because the school did not obtain the funds until the parent signed the check over to the school. *See id.* The trial court also concluded that the program did not provide an incentive to parents to send their child to a sectarian school nor subsidize the private schools' secular functions, thus relieving the school from costs it would have incurred without the program. *See id.* at *15. Consequently, the court held the Pilot Program did not violate the Establishment Clause. *See id.*

[150]*See* Simmons-Harris v. Goff, No. 96APEO8-982, No. 96APEO8-991, 1997 Ohio App. LEXIS 1766, at *1 (Ohio Ct. App. May 1, 1997), *appeals granted*, 684 N.E.2d 705 (Ohio 1997). The court's decision was unanimous. *See id.*

[151]*See id.* at *11-12. Judge Young observed that all parties agreed that the program had a valid secular purpose, that is, to provide low-income families with the means to remove their children from the Cleveland Public school system. *See id.* at *12. Hence, the Pilot Program easily satisfied the first prong of the *Lemon* test. *See id.*

[152]*See id.* at *12-13.

[153]*See id.* at *13 (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 394 (1985)).

court pointed out that although the statute appears facially neutral, the program primarily benefits parents who intend to send their children to religious schools.[154] The court reasoned that without the participation of the better public schools, a parent's only real choice was between the failing Cleveland public schools and religious schools.[155] These choices, in effect, created a powerful incentive to select a religious school.[156] Thus, the court concluded that the program favored religion.[157]

The unanimous court further determined that the state could have assured the statute's neutrality had it compelled the adjacent public schools to participate in the scholarship program.[158] The state argued, however, that requiring those districts to participate would interfere with the autonomy of the local school districts.[159] Nevertheless, the court opined that local autonomy over education cannot prevent the state from taking action to prevent constitutional conflicts.[160]

The appellate court also rejected the state's assertion that if the court con-

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[154]*See id.* at *19 (citing Witters v. Washington Dep't. Serv. for the Blind, 474 U.S. 481, 488 (1986)). In the 1996-97 school term, the state awarded approximately two thousand scholarships for use at approximately 53 private schools of which eighty percent were sectarian. *See id.* at *5-6. In addition, none of the surrounding public school districts chose to register for the pilot program, thus prompting the appellate court to observe that "[p]arents of scholarship recipients do not have a 'full opportunity to apply scholarship aid on [a] wholly secular education.'" *Id.* at *19 (quoting Witters v. Washington Dep't. Serv. for the Blind, 474 U.S. 481, 488 (1986)).

[155]*See id.* at *19-20.

[156]*See id.*

[157]*See id.* at *20. The three judges rejected the state's assertion that in deciding the scholarship program's constitutionality, *Mueller v. Allen* prohibits a court from considering the effect of the non-participation of the adjacent public school districts in the Pilot Program. *See id.* The court distinguished *Mueller* by pointing out that the Supreme Court declined to evaluate the disparate impact of the tax deductions "because that impact resulted not from the manner in which the state drafted the deduction, but from the 'extent to which . . . private citizens claimed benefits under the law.'" *Id.* (quoting Mueller v. Allen, 463 U.S. 388, 401 (1983)). In this case, the judges emphasized that the state has the power to require the adjacent public schools to participate in the program and thus are responsible for the program's disparate impact. *See id.* at *20-21.

[158]*See id.* at *20-21.

[159]*See id.* at *21.

[160]*See id.*

sidered the scholarship and tutorial programs together, it must conclude that the entire statute is neutral toward religion.[161] The court reasoned that no authority exists for anchoring the constitutionality of a statute upon two individual and distinct governmental benefits, where one program primarily benefits religious institutions and the other primarily benefits secular institutions.[162] In addition, the court opined that the benefits accorded to parents who send their children to private schools far outweighed the benefits given to parents who elected to keep their children in the Cleveland Public Schools.[163] Judge Young concluded that because of the great differences in benefits provided to scholarship and tutorial recipients, the Pilot Program did not offer benefits on a facially neutral basis.[164]

As to whether the program provided direct or indirect aid to sectarian institutions, the court first noted that aid cannot be "made 'indirect' simply by passing the aid through the hands of private individuals enroute to the sectarian institution."[165] Instead, the appellate court stressed, government aid will be deemed indirect if it reaches a religious institution only through the independent and private choice of individuals.[166] Applying these principles, the court of

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[161]*See id.* at *21-22

[162]*See id.* Judge Young noted that a governmental benefit may not be made neutral simply by coupling a neutral secular benefit with one that primarily advances religion. *See id.* at *22. Otherwise, it would be permissible to allow the state to "reimburse all parents for sectarian school tuition on the theory that such aid is neutral when considered in conjunction with the existing system of government-funded public education." *See id.* (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973)).

[163]*See id.* The court of appeals posited that *Mueller* does not prevent it from balancing the relative values of the program's two components. *See id.* at *22-23. The court reasoned that in *Mueller*, the Supreme Court found the tax deductions facially neutral, and thus, the Court simply refused to look at evidence concerning the actual impact of the tax deductions. *See id.* at *23.

[164]*See id.* at *25.

[165]*See id.* (citations omitted). Scholarship recipients were entitled to the tuition payments upon notifying the state that they had been accepted to one of the participating schools. *See* OHIO REV. CODE ANN. §3313.979 (West 1997). The state then sent the tuition check directly to the school with the restriction that the recipient's parent had to sign the check before it would be honored. *See id.*

[166]*See* Simmons-Harris v. Goff, No. 96APEO8-982, No. 96APEO8-991, 1997 Ohio App. LEXIS 1766, at *25-26 (Ohio Ct. App. May 1, 1997), *appeals granted*, 684 N.E.2d 705 (Ohio 1997) (citing Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986)).

appeals acknowledged that although the Pilot Program funds sectarian institutions only after a parent chooses a sectarian school, the parent's choices are largely limited to sectarian institutions.[167] The court held that without a real opportunity to exercise a genuine and independent choice between sectarian or nonsectarian institutions, the Pilot Program effectively provided a direct government subsidy to religious institutions.[168] Additionally, the appellate court concluded that the scholarship program provided a substantial amount of aid to sectarian institutions because the program expended several million dollars to educate students at religiously affiliated schools.[169] Consequently, the court of appeals decided the scholarship program had the primary effect of advancing religion because it delivered a "direct and substantial, non-neutral government aid to sectarian schools."[170]

In addition to finding a violation of the First Amendment, the appellate court held the scholarship program violated three sections of the Ohio Constitution: (1) Ohio's establishment clause;[171] (2) its prohibition against directing state funds to religious schools;[172] and (3) the uniformity clause,[173] which pro-

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[167]*See id.*

[168]*See id.*

[169]*See id.* at *26-27. The judges distinguished this scholarship program from the situations in *Mueller*, *Zobrest*, and *Witters*, where the Supreme Court found in each of those cases that the government aid only incidentally benefited sectarian institutions. *See id.* at *27.

[170]*Id.* The court noted that the Pilot Program did not offend the entanglement test because it did not require any sort of continuing government surveillance of religion. *See id.* at n.4 (citations omitted); *see also* OHIO REV. CODE ANN. § 3313.976(B) (West 1997) (stating that the state must cancel the registration of any participating private school that violates any of the program's requirements).

[171]Ohio's establishment clause, Article I, Section 7, states in relevant part: "[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent . . . ." OHIO CONST. art. I, § 7.

[172]Article VI, Section 2, provides: "[t]he general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but 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." OHIO CONST. art. VI, § 2.

[173]The uniformity clause of the Ohio Constitution states "all laws, of a general nature, shall have a uniform operation throughout the State." OHIO CONST. art. II, § 26.

hibits state laws from applying only to certain geographic locations.[174]

Whether the Ohio Supreme Court will sustain the court of appeals decision remains to be seen. Approximately three thousand scholarship recipients will be anxiously awaiting the Ohio court's decision which is expected sometime this spring.[175] Legal commentators that have studied Ohio's scholarship plan agree with the court of appeals.[176] In contrast, the Attorney General of Ohio believes neither the federal nor state constitution forbid "this well-meaning social-welfare legislation."[177] Whatever the outcome, the effect is sure to have

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[174]*See* Simmons-Harris v. Goff, No. 96APEO8-982, No. 96APEO8-991, 1997 Ohio App. LEXIS 1766, at *28 (Ohio Ct. App. May 1, 1997), *appeals granted*, 684 N.E.2d 705 (Ohio 1997). The court of appeals held the scholarship program violated both article I, Section 7 and article VI, Section 2 of the Ohio Constitution because they provide essentially the same protections as the Establishment Clause of the United States Constitution. *See id.* at *31. Judge Young further concluded that the Pilot Program violated Ohio's uniformity clause because the challenged statute effectively, although not explicitly, limited the Pilot Program to the Cleveland City School District which clearly violated the uniformity clause's prohibition against limiting a statute's effect to a geographical area. *See id.* at *38.

[175]*See Court Ban of School Vouchers Angers Parents*, DAYTON DAILY NEWS, May 5, 1997, at 2B. In reaction to the appellate court's decision, David Brennan, an Ohio industrialist and founder of two private non-religious schools, commented that "[w]e have 3,000 children waiting to go to school in September. If this decision is left to stand, they'll all have to go back to the public schools, which were destroying them." *Id.* In the 1996-97 school year, approximately 2,000 children participated in the scholarship program with each receiving $2,500 to attend private schools. *See id.*; *see also Pilot Program to Run During Court Challenge Tuition Vouchers*, THE COLUMBUS DISPATCH, July 26, 1997, at 2C. The Ohio Supreme Court has decided to allow the Pilot Program to continue operating while the case remains in litigation. *See id.* It is anticipated that the Ohio Supreme Court will rule on the case in the spring of 1998. *See* Scott Stephens, *Congressmen Do Homework On Vouchers*, THE PLAIN DEALER (Cleveland Ohio), Sept. 13, 1997, at 4B.

[176]One author concludes that the Ohio scholarship program would violate the primary effect test because sectarian institutions have first priority over state funds and the program does not limit tuition payments to secular functions. *See* Daniel, *supra* note 16, at 62-64. The author also finds that the program violates the entanglement test because Ohio would provide large amounts of aid to religious schools and monitor student performance. *See id.* at 63. Note, however, that the Ohio court of appeals did not find any entanglement problems or show concern over how the participating private schools would spend the scholarship payments.; *see also* Loeb and Kaminer, *supra* note at 138, at 11 (concluding that the Pilot Program violates the First Amendment because the scholarship payments provide a substantial indirect flow of government aid to religion).

[177]*See* Joe Hallett, *State Appeals Voucher Ruling*, THE PLAIN DEALER, (Cleveland Ohio) June 7, 1997, at 5B. The Attorney General criticized the court of appeals ruling because it punishes poor people. *See id.*

implications for other voucher proposals.[178]

D. ALTERNATIVE ESTABLISHMENT CLAUSE TESTS: DO THEY PRESENT OBSTACLES FOR TUITION VOUCHER PLANS

Neither appellate court decision considered whether two alternative Supreme Court Establishment Clause tests would pose an obstacle to their respective voucher plans.

In *Lynch v. Donnelly*,[179] Justice O'Connor proposed an alternative method of analyzing whether a municipality's display of a nativity scene in a public park violated the Establishment Clause.[180] The Justice explained that the government can violate the Establishment Clause in two ways.[181] The first occurs when the government becomes excessively entangled with sectarian institutions.[182] Excessive entanglement threatens a religious institution's autonomy, promotes political division, and grants political power to the favored institutions.[183] The second transpires when the government endorses or disapproves of a particular religion.[184] According to Justice O'Connor, the constitutional inquiry should center on the actual government action that may cause political divisiveness.[185]

The endorsement test, articulated by Justice O'Connor, seeks to modify the primary effect prong of the *Lemon* test in order to ask whether the governmental activity communicates an approval or disapproval of a particular religion.[186] This inquiry prevents the invalidation of governmental activity simply

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[178] *See supra* note 49 (listing states that are considering or have proposed some form of voucher program).

[179] 465 U.S. 668 (1984).

[180] *See id.* at 687-88 (O'Connor, J., concurring).

[181] *See id.*

[182] *See id.* at 688 (O'Connor, J., concurring).

[183] *See id.*

[184] *See id.* Justice O'Connor explained that endorsement conveys a message to nonbelievers of a particular religion that they fall outside the accepted political community while assuring adherents that they remain inside that community. *See id.* In contrast, disapproval of religion operates in reverse. *See id.*

[185] *See id.*

[186] *See id.* at 691 (O'Connor, J., concurring).

because it has the primary effect of promoting or inhibiting religion.[187] In applying this new test, the Justice found that the nativity scene did not endorse Christianity, but merely celebrated a public holiday.[188] Consequently, Justice O'Connor found the crèche display satisfied her endorsement test because it acknowledged religion without actually endorsing it.[189]

In *School District of the City of Grand Rapids v. Ball*,[190] Justice O'Connor again applied the endorsement test in another concurring opinion. In *Ball*, the Court considered whether two education programs that paid public school teachers to provide remedial education to nonpublic school pupils at private, mostly religious, affiliated schools violated the Establishment Clause.[191] Writing for the majority, Justice Brennan noted that if a government is perceived as endorsing or disapproving religion, "a core purpose of the Establishment Clause is violated."[192] Concluding that both programs conveyed a message of government approval of religion, the Court invalidated them.[193]

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[187]*See id.* at 691-92 (O'Connor, J., concurring); *see* Walz v. Tax Comm., 397 U.S. 664 (1970) (holding tax exemption for religious, educational and charitable groups was constitutional); McGowan v. Maryland, 366 U.S. 420 (1961) (concluding that mandatory Sunday closing law did not violate Establishment Clause); Zorach v. Clauson, 343 U.S. 306 (1952) (concluding that a program that gave students time off from school to attend off-campus religion instruction did not violate the Establishment Clause).

[188]*See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). Accompanying the nativity scene were traditional Christmas holiday figures including reindeer, Santa Claus, a candy-striped pole, Christmas tree, etc. *See id.* at 671. Justice O'Connor opined that government celebration of the Christmas holiday is generally not recognized as an endorsement, but more akin to the celebration of Thanksgiving. *See id.* at 692 (O'Connor, J., concurring).

[189]*See id.* at 692-93 (O'Connor, J., concurring).

[190]473 U.S. 373 (1985).

[191]*See id.* at 375-78. One program, the Shared Time Program, paid public school teachers to provide remedial and enrichment classes to private school pupils at their private schools. *See id.* at 375. This program was limited only to non-public schools. *See id.* at 375-76. The other program, known as the Community Education Program, offered classes to children and adults primarily at sectarian schools. *See id.* at 376. In addition, almost all of the classes offered at the non-public schools were taught by private school teachers. *See id.* at 376-77.

[192]*Id.* at 389.

[193]*See id.* at 397. Justice Brennan articulated three reasons for his decision: (1) teachers may inculcate religious doctrine at public expense; (2) the program may produce a symbolic connection between the state and religion; (3) the programs relieve sectarian institutions of costs they would have incurred thereby freeing up more money for religious in-

Whether the Supreme Court would analyze a tuition voucher plan under the endorsement test is unclear. The Court has adopted Justice O'Connor's test only to analyze the display of religious symbols.[194] This test may, however, play an important role in analyzing aid to school children because of *Ball*'s concern that a symbolic union between religion and state may influence young children.[195] Some commentators argue that the endorsement test would invalidate tuition plans because the state directly funds sectarian school teachers.[196] Others argue that the endorsement test would not pose a problem for tuition vouchers because the nature of the government's message is not readily apparent.[197] Any message conveyed by the government aid to private sectarian

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struction. *See id.* In her concurrence, Justice O'Connor agreed that the Community Education program which paid parochial school teachers to teach secular subjects to pupils in private schools violated the Constitution. She reasoned that permitting this to continue "has the perceived and actual effect of advancing the religious aims of the church-related schools." *Id.* at 400 (O'Connor, J., concurring in part, dissenting in part). The Justice however, would have upheld the Shared Time Program because nothing in the record showed that the public school teachers would attempt to indoctrinate school children. *See id.* at 399 (O'Connor, J., concurring in part, dissenting in part); *But see* Agostini v. Felton, 117 S. Ct. 1997, 2010 (1997) (explaining that more recent Establishment Clause cases have undermined Justice Brennan's three presumptions which formed the basis of the Court's decision in *Ball*).

[194]*See* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) (holding that a nativity scene displayed on the county court house steps had the impermissible effect of endorsing religion). Writing for the majority, Justice Blackmun noted that the endorsement test was more suited to analyzing religious symbols than that used by the *Lynch* majority. *See id.* at 595; *see also* Daniel, *supra* note 16, at 65 n.426.

[195]*See Ball*, 473 U.S. at 390; Peter J. Weishaar, Comment, *School Choice Vouchers and The Establishment Clause*, 58 ALB. L. REV. 543, 558 (1994) (asserting that the endorsement test would be applicable to voucher plans that includes young children).

[196]*See* Daniel, *supra* note 16, at 66; Weishaar, *supra* note 196 at 570-71 (asserting that vouchers are similar to the Community Education Program struck down in *Ball* and thus the indirect payments to sectarian school teachers would violate the First Amendment).

[197]*See* Eric Nasstrom, Note, *School Vouchers in Minnesota: Confronting the Walls of Separating Church and State*, 22 WM. MITCHELL L. REV. 1065, 1100 n. 255; Bodemer, *supra* note 49 at 300 (asserting that the endorsement test poses no obstacle to a comprehensive voucher plan because government entanglement with religion would not increase more than what currently exists and it is the parents who endorse or disapprove of religion when they select sectarian over nonsectarian schools); Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J.L. & SOC. PROBS. 423, 456-58 (1995) (concluding that endorsement test is better suited for analyzing government sponsored religious symbols because the government is attempting to communicate values); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 286-91 (1987).

schools is incidental to the purpose and effect of that aid.[198] As Justice O'Connor reiterated in *Agostini*, the fact that a beneficiary uses government funds at a sectarian institution does not send a message of endorsement when that aid is provided on a neutral basis.[199] Moreover, a voucher program would further attenuate any governmental message of endorsement because the parents, not the state, choose whether sectarian or non-sectarian schools shall receive the aid.[200] Thus, the endorsement test is not likely to independently affect the outcome of a carefully structured voucher program.[201]

In *Lee v. Weisman*,[202] Justice Kennedy applied a different Establishment Clause analysis known as the coercion test.[203] In *Weisman*, Justice Kennedy held that a nonsectarian benediction, conducted at a public school graduation ceremony, violated the Establishment Clause because the graduating students were coerced to participate in the prayer.[204] The Justice explained that coercion may exist either overtly or covertly through public and peer pressure.[205]

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[198]*See* Stick, *supra* note 198, at 457 (noting that state aid to sectarian schools sends only an indirect message about religion); Andrew Rotstein, *Good Faith? Religious-Secular Parallelism and The Establishment Clause*, 93 COLUM. L. REV. 1763, 1771 n.54 (1993) (contrasting government acts that transmit values with state programs that do not communicate any message).

[199]*See* Agostini v. Felton, 117 S. Ct. 1997, 2016 (1997). Justice O'Connor stated that no endorsement of religion occurs when, as the program did in *Agostini*, the government aid program does not cause government indoctrination, provides benefits to recipients on a neutral basis, or require excessive entanglement with religion. *See id.*

[200]*See* Bodemer, *supra* note 49 at 300 (asserting that parents are the ones who endorse or disapprove of religion when choosing either a religious or non-religious school for their children).

[201]For example, neither of the courts in *Jackson v. Benson* nor *Simmons-Harris v. Goff* courts considered the endorsement test to decide whether the respective voucher programs had the effect of advancing or inhibiting religion.

[202]505 U.S. 577 (1992).

[203]Justice Kennedy first proposed the coercion test in a separate concurring opinion in *County of Allegheny*. *See* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part, dissenting in part).

[204]*See* 505 U.S. at 599.

[205]*See id.* at 593. Justice Kennedy opined that "the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction." *Id.*

The majority found that the subtle and indirect pressure to attend a graduation exercise coerces some students to participate in the ceremony even if they object to the religious activity.[206] Finding a clear Establishment Clause violation, Justice Kennedy limited the majority's holding to the facts and declined to revisit its decision in *Lemon v. Kurtzman*.[207]

In their concurring opinions, Justices Blackmun and Souter, also limited the reach of the coercion test. Justice Blackmun concluded that while "coercion is not necessary to prove an Establishment Clause violation, it is sufficient."[208] Justice Souter, on the other hand, articulated that the Court's prior precedents did not offer any support for the position that coercion is a necessary predicate to finding an Establishment Clause violation.[209] Justices Stevens and O'Connor joined both concurring opinions thereby limiting the coercion test further.[210] Finally, the dissent insisted that the legislative history of the Establishment Clause only prohibits coercion under threat of legal penalty.[211]

One commentator has argued that school choice programs would violate the coercion test because students would have no choice but to attend superior private sectarian schools to obtain a better education.[212] Students attending such schools will be forced to participate in religious activity by virtue of the fact that religion pervades the entire curricula.[213] This argument, however, fails to account for the fact that Justice Kennedy limited the holding in *Weisman* to its facts or that the other Justices do not believe coercion creates an independent basis for an Establishment Clause violation. Furthermore, a voucher plan that includes both inter-district public and private non-sectarian schools would eliminate any coercive pressure to attend sectarian schools.[214] Additionally,

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[206]*See id.* at 593.

[207]*See id.* at 586-87.

[208]*See id.* at 604 (Blackmun, J., concurring).

[209]*See id.* at 619 (Souter, J., concurring).

[210]*See id.* at 599 (Blackmun, J., concurring); *see also id.* at 609 (Souter, J., concurring).

[211]*See id.* at 640-41 (Scalia, J., dissenting).

[212]*See* Daniel, *supra* note 16, at 67-68.

[213]*See* Daniel, *supra* note 16, at 68.

[214]*See e.g.*, Wis. STAT. ANN § 119.23 (West 1995-96); *cf.* Simmon-Harris v. Goff, No. 96APEO8-982, No. 96APEO8-991, 1997 Ohio App. LEXIS 1766, at *19-20 (Ohio Ct. App. May 1, 1997), *appeals granted,* 684 N.E.2d 705 (Ohio 1997).

coercion to attend a better school is not the same as being coerced to attend state controlled religious ceremonies. Hence, the coercion test is unlikely to invalidate tuition voucher legislation.[215]

IV. TUITION VOUCHER PROPOSAL FOR NEW JERSEY'S SPECIAL NEEDS DISTRICTS

From the cases discussed above, it appears that a tuition voucher plan may survive First Amendment scrutiny if the plan can satisfy the three prong *Lemon* test.[216] Both *Jackson v. Benson* and *Simmons-Harris v. Goff* provide some guidance in crafting a valid voucher plan. The following proposed voucher plan[217] for New Jersey (hereinafter "New Jersey Plan") should: (1) declare that the purpose of the voucher plan is to provide a quality education to all *Abbott* district children until their school districts provide a constitutionally "thorough and efficient" education; (2) grant tuition vouchers to all elementary and high

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[215]*See also* Stick, *supra* note 198, at 453-54 (concluding that the coercion test would apply only where the government compels individuals to participate in religious services or endorses a particular religious view); Nasstrom, *supra* note 196, at 1102 (asserting that voucher programs provide students with real educational choices and thus do not coerce students to participate in religion).

[216]One author asserts that the United States Supreme Court would uphold a voucher program if it provided scholarships to school children; allowed parents to choose both public and private schools; and did not favor religious schools. *See* Frank R. Kemerer, *The Constitutionality of School Vouchers*, 101 ED. LAW REP. 17, 23 (1995).

[217]This proposal is the author's creation. In the fall of 1996, New Jersey State Assemblyman Garrett introduced a bill in the state assembly establishing a pilot voucher program for one school district per county. *See* A.B. 2443, 207th Leg., 1st Sess. (N.J. 1996); *see also* John Mooney, *N.J. Panel Proposes Pilot School Voucher Program*, THE RECORD (N.J.), Dec. 16, 1995 at A17 (explaining the details of the pilot voucher program). The program was designed to promote education reform by offering parents the opportunity to send their children to quality schools. *See* A.B. 2443, 207th Leg., 1st Sess. (N.J. 1996). Under the plan, parents would be provided with a tuition check that could be applied to either a participating nonpublic or public school located within the same county. *See id.* Tuition amounts were set at $2,500 for elementary school children and $3,500 for high school students. *See id.* Since the program was submitted as an experiment, the bill allocated only $5.5 million dollars for the first year. *See id.* Despite the pilot's limited size and the support of both Governor Whitman and State Education Commissioner, Leo Kagholz, the bill failed to attract sufficient legislative support. *See* David Glovin, *Voucher Vote Invites Legal Storm if Upheld, Strategy Could Sweep State*, THE RECORD (N.J.), Feb. 13, 1997 at A1; *see also* David Glovin & John Chadwick, *State Bar School Voucher Program Lincoln Park Warned Not to Use Public Funds*, THE RECORD (N.J.), Apr. 8, 1997 at A1. While the Governor remains supportive of the bill, it appears that greater efforts will be needed to convince legislators to support a voucher program. *See id.*

school students who meet an established low income level and reside in one of the twenty-eight Abbott districts;[218] (3) allow parents to choose any school for their child including private sectarian, non-sectarian and non-*Abbott* public schools;[219] (4) provide payments to the parents upon notice of the child's acceptance in an alternative school; (5) send the tuition check made payable to the parent directly to the parent's choice of school and require the parent to endorse the check over to the school before the school may receive the funds;[220] (6) limit tuition payments to the actual cost of providing a secular education to voucher students up to a maximum of $3,500;[221] (7) where the parent chooses a non-*Abbott* public school, the full cost of the tuition shall be paid to that school;[222] (8) require participating schools to honor a parent's decision to exclude their child from all religious activity, otherwise known as an "opt-out" provision;[223] (9) limit government oversight to ensuring compliance with all existing state and federal regulations, and require voucher students to take the same periodic performance tests given to public school students;[224] and (10) require each non-*Abbott* public school district to accept a certain percentage of voucher students.[225]

Analyzing the New Jersey Plan under the United States Supreme Court's *Lemon v. Kurtzman* test, the proposed voucher plan must satisfy all three criteria: the statute must have a valid secular purpose, its primary effect must not advance nor inhibit religion or encourage "an excessive governmental entanglement with religion."[226] Here, the stated purpose of the New Jersey Plan is

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[218]Both the Milwaukee Parental Choice Program and the Cleveland Scholarship Program targeted low income families. *See supra* text accompanying notes 83 & 147.

[219]*See supra* text accompanying notes 92 & 148.

[220]*See supra* text accompanying notes 86 & 165.

[221]*See supra* text accompanying notes 86 & 147.

[222]*See* OHIO REV. CODE ANN. § 3313.979 (West 1997) (stating that "[e]ach scholarship to be used for payments to a public school in adjacent school district is payable to the school district of attendance.").

[223]*See supra* note 93.

[224]*See supra* note 93; *see also* OHIO REV. CODE ANN. § 3313.976(B) (West 1997).

[225]*Cf.* Simmon-Harris v. Goff, No. 96APEO8-982, No. 96APEO8-991, 1997 Ohio App. LEXIS 1766, at *20-21 (Ohio Ct. App. May 1, 1997), *appeals granted*, 684 N.E.2d 705 (Ohio 1997).

[226]*See Lemon*, 403 U.S. at 612-13.

to provide educational opportunity to low-income children living in the special needs districts. As was shown in both *Jackson v. Benson* and *Simmons-Harris v. Goff*, a statute that increases educational opportunity for underprivileged children easily satisfies the entanglement prong of the *Lemon* test.[227] The New Jersey Plan should easily satisfy this test because the state is not required to do anything other than ensure compliance with existing laws; determine pupil eligibility; and subject voucher students to the same performance tests that public school students must take. In comparison, Judge Roggensack concluded that the Milwaukee Parental Choice Program did not violate the entanglement prong, in part, because of the new standards established by *Agostini v. Felton*.[228] The requirements imposed upon the state such as ensuring that participating private schools comply with the pertinent laws and codes, monitoring student performance, and conducting financial audits, did not embroil the state in religious instruction at any sectarian institution.[229] Similarly, Judge Young concluded that the administrative burdens imposed upon the state in the Cleveland Pilot Program did not violate the entanglement prong because the state was not required to conduct extensive and ongoing state surveillance of the participating private sectarian schools.[230] From these examples, it appears

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[227]*See Jackson*, 570 N.W.2d at 420. In *Jackson*, the majority acknowledged that the Milwaukee Parental Choice Program had a valid secular purpose and thus easily met the first prong of the *Lemon* test. *See id.* The majority noted that "[h]ere, as in many Establishment Clause and religious benefit clause cases, the secular purpose . . . is virtually conceded." *See id.*; *see also Simmons-Harris*, 1997 Ohio App. LEXIS 1766 at *12 (concluding that the Cleveland Pilot Program easily satisfied the secular purpose prong of the *Lemon* test); *see generally* Mueller v. Allen, 463 U.S. 388, 391 (1983) (noting that Minnesota's stated purpose of providing education tax deductions clearly satisfied *Lemon's* first prong).

[228]*See Jackson*, 570 N.W.2d at 434 (Roggensack, J., dissenting); *see also Agostini*, 117 S. Ct. at 2010. In *Agostini*, the majority rejected the Court's previous assumptions that "excessive" entanglement occurs whenever there is administrative cooperation between a religious institution and the government; that pervasive monitoring must be used to ensure that public employees teaching in sectarian classrooms do not inculcate religion to their pupils; and that allowing public employees into religious classrooms causes "political divisiveness." *See id.* at 2015-16. In addition, Justice O'Connor pointed out that the "excessive" entanglement standard is a fairly high hurdle to meet. *See id.*; *see also, e.g.*, Bowen v. Kenkrick, 487 U.S. 589, 615-17 (1988) (finding no excessive entanglement existed where the government periodically reviewed a sectarian run counseling program funded with public money); Roemer v. Board of Public Works of Md., 426 U.S. 736, 764-65 (1976) (concluding that excessive entanglement was not present where the government conducted yearly audits of sectarian colleges to ensure that public grants were not utilized to teach religion).

[229]*See Jackson*, 570 N.W.2d at 434 (Roggensack, J., dissenting).

[230]*See Simmons-Harris*, 1997 Ohio App. LEXIS 1766, at *27, n.4; *see* OHIO REV. CODE ANN. § 3313.976 (West 1997) (listing many of the requirements imposed upon participating schools).

that the government oversight outlined in the proposed New Jersey Plan would not embroil the state in religious instruction or extensive and pervasive monitoring of sectarian schools.[231] Hence, the New Jersey Plan would not violate the entanglement prong.

The critical inquiry here is whether the New Jersey Plan has the primary effect of advancing or inhibiting religion. To satisfy the "primary effect" test the aid to religion must be provided to the beneficiaries on a neutral basis that neither expresses hostility to religion nor creates a religious incentive. [232] The proposed New Jersey Plan identifies beneficiaries according to their income level and geographic location. The voucher program is crafted to offer low-income pupils who attend New Jersey's most troubled schools an opportunity to obtain a quality education while the state enacts court-ordered reforms to improve their public schools.[233] Identifying the beneficiaries in this way accords benefits to recipients without reference to religion.[234] The proposed plan also provides parents with the choice of sending their children to private or public schools. Unlike the Cleveland Scholarship Program, the proposed New Jersey Plan would require each non-*Abbott* school district to accept a certain percentage of special needs district voucher students.[235] In effect, parents will have a real choice to send their children to quality public or private schools.[236] This requirement eliminates the incentive for parents to select a religious

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[231]*Cf.* N.J. STAT. ANN. § 18A:6-4 (West 1997) (requiring private schools that receive state aid to annually report to the Commission of Higher Education such statistics as the Commission considers relevant).

[232]*See* Witters v. Washington Dep't Servs. for the Blind, 474 U.S. 481, 487-88 (1986).

[233]*Cf.* Sayfie, *supra* note 60, at 939 (arguing that a voucher program would rescue school children from their failing schools during the long process of implementing needed changes in their schools).

[234]*See Witters*, 474 U.S. at 490-91 (Powell, J., concurring) (stating that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries."); *see also Mueller*, 463 U.S. at 398-99; Agostini v. Felton, 117 S. Ct. at 2016.

[235]*See, e.g., Simmons-Harris*, 1997 Ohio App. LEXIS 1766, at *19. The Ohio Court of Appeals found the lack of public school participation in the Cleveland scholarship program did not give parents a real choice between choosing a secular or religious school for their children. *See id.*

[236]*See id.*

school over a non-religious school.[237] Additionally, the aid given to parents only reaches sectarian schools after the parents have made an independent and private choice.[238] Furthermore, the proposed plan provides an opportunity for parents to excuse their children from all religious activity.[239] As Judge Roggensack found, this option makes a significant attempt to separate the religious and secular functions of the participating private sectarian schools.[240]

The New Jersey Plan also limits the amount of aid that reaches sectarian institutions to the actual cost of providing voucher students with a secular education. Thus, religious institutions are not relieved of costs that they would have otherwise incurred but for the program.[241] Concluding that any aid that may reach sectarian institutions will occur only as the result of a parent exercising a true independent choice between quality public and private schools ensures that the aid is funneled indirectly to sectarian institutions. Finally, whether more aid reaches sectarian schools than public schools under the voucher plan does not affect the constitutionality of the program.[242] As long as the criteria used to offer the aid to beneficiaries is provided on a neutral basis that neither favors nor disfavors religion, the actual number of beneficiaries using that aid at sectarian institutions is irrelevant.[243] Because the New Jersey Plan provides benefits without reference to religion; gives parents meaningful choices between quality public and private schools; provides that payments under the program do not relieve sectarian schools of costs they would have otherwise incurred; and the aid that reaches sectarian institutions results from the independent choices of parents, establishes the necessary safeguards against pro-

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[237]*See id.* at *19-20.

[238]*See, e.g.*, Jackson v. Benson, 570 N.W.2d 407, 433 (Wis. App. Ct. 1997) (Roggensack, J., dissenting).

[239]*See supra* text accompanying note 92 (citing WIS. STAT. ANN. § 119.23(7)(c) (West 1995-96)).

[240]*See Jackson*, 570 N.W.2d at 435 (Roggensack, J., dissenting).

[241]*See id.* at 433-34 (Roggensack, J., dissenting); *see also Agostini*, 117 S. Ct. at 2011-12 (explaining that the Court rejected the presumption that state aid that reaches a student enrolled at a private sectarian school relieves the sectarian school of costs it would have borne but for the program).

[242]*See id.* at 431 (Roggensack, J., dissenting); *see also Agostini*, 117 S. Ct. at 2013. Justice O'Connor emphasized that the constitutionality of an aid program does not depend on the number of beneficiaries who choose to use that aid at sectarian institutions. *See id.*

[243]*See Witters*, 474 U.S. at 487; *Zobrest*, 509 U.S. at 10.

moting or inhibiting religion. Accordingly, the New Jersey Plan should survive a challenge under the Establishment Clause of the First Amendment.[244]

CONCLUSION

Over the last twenty years, the New Jersey Supreme Court has attempted to

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[244]The proposed voucher plan should also survive a state constitutional challenge under New Jersey's religion clauses. The New Jersey Supreme Court has interpreted the State religion clauses to afford substantially the same protections provided by the First Amendment. *See* Schaad v. Ocean Grove Camp Meeting Assoc., 72 N.J. 237, 266, 370 A.2d 449, 464 (1977), *overruled by* State v. Celmer, 80 N.J. 405, 404 A.2d 1 (1979) ("[T]he letter and spirit of these New Jersey constitutional provisions [Article I, paragraphs 3 & 4], taken together, are substantially of the same purpose, intent and effect as the religious guaranties of the First Amendment . . . ."). Article I, paragraph 3 of the New Jersey Constitution prohibits the use of state taxes "for building or repairing . . . churches, places . . . of worship, or for the maintenance of any minister or ministry . . . ." N.J. CONST. Art. I, paragraph 3. This prohibition, however, does not apply to general welfare services, such as fire and police protection. *See also* Resnick v. East Brunswick Township Bd. of Educ., 77 N.J. 88, 102, 389 A.2d 944, 951 (1978) (holding that Article I, paragraph 3 does not prohibit a lease agreement between religious groups and school boards as long as the school board does not incur expenses beyond the lease payments).

In *Resnick,* the majority also held that leasing of school facilities to religious organizations during non-school hours did not violate Article I, paragraph 4, which prohibits the state from establishing one religious sect in preference to another. *See id.* at 104, 389 A.2d at 952. The court reasoned that because the program did not discriminate among religious groups the school board did not show a preference for one any religion. *See id.* In so holding, the court recognized that Article I, paragraph 4, "'is less pervasive, literally, than the federal [Establishment Clause] provision'" and thus, applied the Supreme Court's three prong *Lemon* test to the lease agreements. *See id.* at 103, 389 A.2d at 951 (quoting Clayton v. Kervick, 56 N.J. 523, 528, 267 A.2d 503, 506 (1970)); *see also* South Jersey Catholic Teachers Org. v. St. Teresa, 150 N.J. 575, 696 A.2d 709 (1997) (recognizing that challenges under Article I, paragraph 4 of the state constitution requires an analysis under the Establishment Clause of the First Amendment).

Following these precedents, it appears that the New Jersey Plan should survive a challenge under both state religion clauses. First, the purpose of the voucher program is to provide educational opportunity to urban children irrespective of their religious beliefs. Therefore, Article I, paragraph 4 is not violated. Second, although some religious schools will benefit, any benefits that flow to religious schools will be the result of private choices of individual beneficiaries. This program is analogous to the public welfare program of *Everson v. Board of Education,* 330 U.S. 1 (1947), where the United States Supreme Court upheld state funding to parents for transportation costs incurred in sending their children to parochial schools. The proposed plan simply provides public welfare benefits to individuals without supporting religious institutions. Hence, the New Jersey Plan is unlikely to violate Article I, paragraph 3.

provide educational reform to urban school children. The latest *Abbott v. Burke*, calls the state to act immediately to ensure that the Special Needs Districts provide a constitutionally adequate education.[245] Commendable as this decision is, the state's effort to effect changes in the urban school systems will take to time to work. In the interim, urban school children will continue to be deprived of their right to a "thorough and efficient education." Consequently, the state can meet its constitutional obligation to those children by adopting the proposed tuition voucher plan. As was demonstrated in Parts III and IV, a properly crafted voucher plan should survive a constitutional challenge. Moreover, an interim voucher plan would give parents the same opportunities that wealthy parents have in choosing the right school for their children. The evidence from the Milwaukee Parental Choice Program indicates that vouchers increase student satisfaction and academic performance. Enacting a voucher program in New Jersey should also provide disadvantaged urban students with similar results. A school choice program may also force Abbott district schools to respond more effectively to parent's concerns and improve their performance in order to eliminate the need for a voucher program in their district.

Although opponents assert that tuition vouchers will destroy public education and provide a windfall to middle and upper income families, the proposed program, like those in Milwaukee and Cleveland, limit benefits to lower income families. In addition, the subsidy given to parents will generally cover the average tuition costs at the majority of private schools in New Jersey.[246] Finally, the interim nature of the proposal forestalls the claim that vouchers would threaten public schools. Opponents also claim that vouchers would place additional administrative burdens on school districts, encourage the brightest students to leave and subsidize religious institutions. First, no evidence exists to demonstrate that school districts would be unduly burdened by a voucher plan. Moreover, the proposed voucher plan could leave most of the administrative tasks to the state. Second, the public schools do not have a right to retain smart students merely because they happen to be poor. If the public schools can not offer an attractive educational environment, they should not expect to retain quality students. Third, the proposed voucher plan allows students to select nonpublic and public schools, thereby providing parents with true educational choice. Religious institutions benefit only as a result of the private and independent choices of parents. Consequently, the primary beneficiaries of the voucher plan are the students most in need. Although tuition

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[245]*See* Abbott v. Burke, 149 N.J. 145, 189, 693 A.2d 417, 439 (1997).

[246]*See* Lawler, *supra* note 67, at 43 (noting that in 1994, the average tuition cost at Jersey City's private high schools was only $3,500 and even less for elementary schools).

vouchers remain a controversial idea, the need exists to deliver a constitutionally adequate education to disadvantaged urban school children. Providing tuition vouchers is one constitutionally-permissive method of fulfilling the state's obligation.