

limitations on its powers, the legislature's determination of what constitutes good public policy is a matter for that branch of government, not for the courts. The only issue that is within this Court's jurisdiction, and the only issue that the Court addresses in this ruling, is whether, in enacting the CSP, the Indiana General Assembly has in any respect gone beyond the bounds set by the Indiana Constitution.

The Court, having considered the arguments of Plaintiffs, Defendants, and Defendant-Intervenors at a hearing held on August 11, 2011, and being duly advised in the premises, hereby issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Plaintiffs are twelve Indiana citizens and taxpayers, including educators, clergy, and parents of children in both public and private schools.

2. The Defendants are the Governor of the State of Indiana, Mitch Daniels, and the Superintendent of Public Instruction, Dr. Tony Bennett. Both are sued in their official capacities.

3. The Defendant-Intervenors are two parents of Indiana school children who expect to use Choice Scholarships to pay in part for their children's tuition at private schools in Indiana in the coming year.

4. The CSP was enacted by the 2011 Indiana General Assembly as part of H.E.A. 1003. Beginning this school year, the CSP allows disadvantaged Indiana primary and secondary school students to receive scholarships to attend private schools or public schools in other districts that charge transfer tuition. *See* Ind. Code §§ 20-51-4 et seq.; 20-51-1-4.7.

5. The scholarships are statutorily designed to be the lesser of three amounts,

including: the amount of the tuition of the eligible school, 90% (if student's household income is within 100% of amount required for federal free or reduced lunch program), or 50% (if student's household income is between 100 and 150% of amount required for federal free or reduced lunch program) of the amount of tuition support of student's school corporation of legal residence, or \$4,500 for first through eighth grade. Ind. Code § 21-51-4-4.

6. The difference between the amount of the choice scholarship and amount of tuition support that would have gone to the student's school corporation of legal residence is then returned to public schools through a special distribution. *See* H.E.A. 1001, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

7. A scholarship recipient must meet certain criteria: (1) the student must have a "legal settlement" in Indiana; (2) the student must be between five and twenty-two years old; (3) the student must live in a household "with an annual income of not more than" 150% of the income level "required to qualify for the federal free or reduced price lunch program;" (4) the student must either be enrolled in or previously have been enrolled in an accredited school; and (5) the student must have either attended a school for the previous year that did not charge transfer tuition or have received a scholarship to attend school for that year. Ind. Code § 20-51-1-4.5

8. A participating school must also meet certain criteria: (1) the school must be located in Indiana; (2) the school must require students to pay tuition or transfer tuition in order to attend; (3) the school must be "accredited by either the state board or a national or regional accreditation agency that is recognized by the state board" and provide the Department of Education with all the same data that a public school would have to provide in order for the Department to assign a category designation under Ind. Code § 20-31-8-3; (4) the school must test all students in compliance with the ISTEP program; (5) the school must not be either a

charter school or a public school within the school corporation where that student lives; and (6) the school must accept the student's application for admission. Ind. Code § 20-51-1-4.7.

9. Eligible schools are prohibited from discriminating “on the basis of race, color, or national origin” or on the basis of whether a student has applied for or received a choice scholarship during the admissions process, and if a school receives more applicants from choice scholarship students than it has openings, the school must, at a public meeting, choose students in a random drawing of all students “who meet the requirements for admission.” Ind. Code § 20-51-4-3.

10. Indiana Code § 20-51-4-1(a) provides that private schools are not subject to any other curricular or administrative regulation as a consequence of accepting a Choice Scholarship.

11. In the CSP's initial two years, the total number of scholarships that can be awarded is capped at 7,500 for 2011-12 and 15,000 for 2012-13. Thereafter, there are no limits on the number of scholarships that may be awarded. Ind. Code. § 20-51-4-2.

12. It is undisputed that once the CSP is fully implemented in the 2013-14 school year, approximately 60% of all Indiana schoolchildren will be legally entitled to receive a scholarship upon application.

13. According to officials of the Indiana Department of Education, as of August 10, 2011, 255 schools have been approved for participation in the CSP, and 2,853 students have been approved to receive a Choice Scholarship. Defs.' Ex. 1. Of the 255 approved schools, 51 have received no applications from a student for a Choice Scholarship. *Id.*

CONCLUSIONS OF LAW

Preliminary Injunction Standard

1. To be entitled to a preliminary injunction, plaintiffs must show a likelihood of success on the merits, the threat of irreparable harm in the absence of the injunction, and the favor of both public policy and a balancing of the equities. *See Apple Glen Crossing, LLC v. Trademark Retail, Inc.*, 784 N.E.2d 484, 487-488 (Ind. 2003). A preliminary injunction “should not be granted except in rare instances in which the law and facts are clearly within the moving party’s favor.” *Bigley v. MSD of Wayne Twp. Schs.*, 823 N.E.2d 278, 282 (Ind. Ct. App. 2004).

2. As this is a constitutional challenge, it is also worth observing that the high burden for a preliminary injunction is in addition to the already high burden of successfully challenging the validity of a statutory scheme on constitutional grounds. Statutes come to the courts “clothed with the presumption of constitutionality.” *Bunker v. Nat’l Gypsum Co.*, 441 N.E.2d 8, 11 (Ind. 1982) (quoting *Sidle v. Majors*, 341 N.E.2d 763, 766 (Ind. 1976)). “The burden to rebut this presumption is upon any challenger and all reasonable doubts must be resolved in favor of an act’s constitutionality.” *Bunker*, 441 N.E.2d at 11 (citing *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 214 (Ind. 1981)).

Article 8, Section 1

3. Plaintiffs’ first claim is that the CSP violates the General and Uniform System of Common Schools Clause of Article 8, Section 1 of the Indiana Constitution, which provides as follows:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

4. This provision first directs the legislature to encourage education “by all suitable means.” Then, using the conjunction “and,” it expands the legislature’s responsibilities by specifically requiring “a general and uniform system of Common Schools[.]” Thus, the overall command to the General Assembly is to encourage knowledge and learning “by all suitable means,” including, but not limited to, provision of a uniform and general system of common schools.

5. The Indiana Supreme Court has long understood the “all suitable means” clause to permit the General Assembly, not courts, taxpayers or school corporations, to decide what “means” are “suitable” for encouraging “intellectual” (and other) improvement, even if the legislature goes beyond creating a “general and uniform system of common schools.” *Robinson v. Schenck*, 1 N.E. 698, 705 (Ind. 1885) (holding that it is for the legislature “to select the means of building up and encouraging schools”).

6. In *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 518 (Ind. 2009), the Court essentially deemed issues of education policy authorized by the General and Uniform Clause to be political questions off limits to judicial intervention. The Court held that, to the extent there is “a right, entitlement, or privilege to pursue public education, any such right derives from enactments of the General Assembly, not from the Indiana Constitution.” *Id.* at 522. The Court also made clear that “the text of the Education Clause expresses two duties of the General Assembly.” The first duty being “to encourage moral, intellectual, scientific, and agricultural improvement,” and the second “is the duty to provide for a general and uniform system of open common schools without tuition.” *Id.* at 520. The Court described the first duty as “general and aspirational,” and the second as “more concrete--the assignment of a specific task.” *Id.*

7. Plaintiffs cite *Bush v. Holmes*, 919 So. 2d 392, 412 (Fla. 2006), where the Florida Supreme Court ruled that a specific textual requirement that “[a]dequate provision shall be made by law for a uniform . . . system of free public schools,” Fla. Const. art. IX § 1(a), enumerated precisely how the Florida legislature was to carry out a separate state constitutional command for “adequate provision for the education of all children.” According to the Court, “adequate provision,” because it was used in both clauses, meant one thing only: public schools. *Holmes*, 919 So.2d at 407.

8. Indiana’s Constitution, however, not only lacks the text and structure of Florida’s dual “adequate provision” clauses, but also includes the “all suitable means” clause that Florida’s constitution does not have.

9. A review of the historical record is instructive. When the State constitution was revised in 1851, the delegates considered an amendment to prohibit the establishment “at the public charge, [of] any schools or institutions of learning other than district or township schools,” but did not adopt it. See *Journal of the Convention of the People of the State of Indiana to Amend the Constitution* 63 (1851) (recording the referral of the amendment to the Committee on Education). Then, shortly after the adoption of the 1851 Indiana Constitution, the General Assembly created the Indiana public school system, but did not reverse the longstanding policy of financing private schools. See generally Act of June 14, 1852, 1852 Ind. Rev. Stat. ch. 98. In fact, the School Law of 1855 permitted cities and towns to “recognize any school, seminary, or other institution of learning, which has been or may be erected by private enterprise, as a part of their system, and to make such appropriation of funds . . . as may be deemed proper.” Act of March 5, 1855, § 2, 38th Gen. Assemb., Reg. Sess., 1855 Ind. Acts ch. 87. Yet, such action

would not “supersede the common schools established under the authority of this State and supported by the public funds.” *Id.* at § 3.

10. The history of the times therefore suggests that the 1850 convention delegates did not view the General and Uniform Clause as implying any restriction on other “suitable means” by which the General Assembly might “encourage . . . moral, intellectual, scientific and agricultural improvement.” Ind. Const. Article 8, § 1.

11. Plaintiffs next argue that, because eligible private schools may deny admission to school-choice scholarship students for any reason except race, color and national origin, and because they may charge admitted students more in tuition than a State scholarship pays, the new scholarship law runs afoul of the constitutional requirement that public schools be “without charge, and equally open to all.” If schools that qualify to admit scholarship students are not public schools, then those schools are not bound by the “free tuition” and “equally open to all” clauses of Article 8, Section 1 that apply to public schools. *See Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992) (rejecting argument that a private school becomes part of the public school system once the school accepts public funds). Alongside the CSP, the State continues to maintain the system of common schools required by the State constitution, which fulfills the “free tuition” and “equally open to all” requirements.

12. Based on the text and structure of Article 8, Section 1, and the history of education funding in Indiana, the Court concludes that Plaintiffs are unlikely to succeed on the merits of their claim that the CSP violates Article 8, Section 1.

Article 1, Section 4

13. Next, the Plaintiffs contend that the CSP, because it permits students to use state-funded scholarships to attend religious schools, violates two provisions of the Indiana Bill of

Rights, namely Article 1, Section 4 and Article 1, Section 6.

14. Article 1, Section 4 of the Indiana Constitution provides, “No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.”

15. Plaintiffs argue that Section 4’s prohibition of compelled “support” for “any place of worship” includes “the compelled payment of taxes” to support ministries or places of worship, and that the CSP runs afoul of this restriction.

16. The history and structure of the Indiana Bill of Rights, however, suggest that Section 4’s protection against being “compelled to support any place of worship,” is less about restricting government’s use of general tax revenues and more about protecting citizens from forced tithing or other similar government-coerced direct, individual support for churches or ministries. Section 4 may provide protection against a tax levied specifically “to support any ministry or mode of worship,” Robert Dale Owen, Address to the People of Indiana, in *Journal of the Convention of the People of the State of Indiana to Amend the Constitution* 964 (1851), but that is not the same as, in pursuit of a secular objective, paying or awarding general tax revenues to individuals or families who in turn make individual decisions to use the funds to donate to a ministry or purchase education from a religious school.

17. Particularly because Article 1, Section 6 affords restrictions against using general tax revenues “for the benefit of religious institutions,” it would be structurally suspect to understand Section 4 to provide similar protection against religious establishment. See *Jackson v. Benson*, 578 N.W.2d 602, 622-23 (Wis. 1998) (“We will not interpret the compelled support

clause as prohibiting the same acts as those prohibited by the benefits clause. Rather we look for an interpretation of these two related provisions that avoids such redundancy.”).

18. Furthermore, during the period 1816-1850, when Indiana’s first constitution was in force, taxpayer funds were commonly used to fund private religious schools. *See* Art. 5, §116, 1843 Ind. Rev. Stat. ch. 15. This is significant because the 1816 Indiana Constitution contained a clause materially identical to today’s Article 1, Section 4. *See* Ind. Const. of 1816, art. 1, § 3 (“no man shall be compelled to attend, erect, or support any place of Worship, or to maintain any ministry against his consent”). The historical record thus makes clear that citizens of that era did not view the restriction against coerced support to apply to use of general tax revenues.

19. Furthermore, both the Ohio and Wisconsin Supreme Courts rejected constitutional challenges under their compelled support clauses—which contain language very similar to that of Article 1, Section 4—to publicly funded scholarship programs like the CSP. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 211-12 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 623 (Wis. 1998).

20. This Court therefore concludes that Section 4 does not preclude the use of general tax revenues to fund scholarships that may be used, at the discretion of scholarship recipients, to pay for education at religious schools. Accordingly, Plaintiffs are unlikely to succeed on the merits of this claim.

Article 1, Section 6

21. Article 1, Section 6 restrains direct government support for religion by stating that “[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution.” Plaintiffs contend that, because it allows state funds to wind up in the coffers of

religious schools, the CSP must be understood to be “for the benefit” of such schools, and thus in violation of Section 6.

22. The most pertinent Indiana Supreme Court discussion of Section 6 is *Embry v. O’Bannon*, 798 N.E.2d 157 (Ind. 2003). There, the Court upheld “dual enrollment” programs whereby parochial school students would also enroll in local public schools, and those public schools would then provide secular educational services to the dual enrolled students at the parochial schools. The Court ruled as it did in *Embry* in light of the religion-neutral nature of the programs, the “obvious significant educational benefits” to Indiana children and the “benefit [to] the State by furthering its objective to encourage education for all Indiana students.” *Embry*, 798 N.E.2d at 167 (opinion of Dickson, J.).

23. The benefits that parochial schools received from the program—including cost-savings and curriculum expansion that allowed them to enroll more students—were “incidental” when compared to the overarching educational benefits the program provided. *See id.* The decision in *Embry* did not turn on whether the benefits the schools received—viewed in isolation—crossed some subjective threshold from insignificant to significant (or even whether the schools themselves viewed the benefits as significant), but rather whether those benefits were incidental to the accomplishment of the state’s broader educational purposes.

24. Like the dual enrollment program at issue in *Embry*, the CSP is religion-neutral and was enacted “for the benefit” of students, not religious institutions or activities. The program permits any private or public school that requires a student to pay tuition or transfer tuition to be eligible to accept CSP scholarships as payment. Ind. Code § 20-51-1-4.7. Also, it permits taxpayer funds to be paid to religious schools only upon the private, individual choices of parents. *See Jackson*, 578 N.W.2d at 621 (“public funds may be placed at the disposal of third

parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the independent decisions of third parties”).

25. Plaintiffs argue that cases from several other states with provisions similar to Article 1, Section 6 have held that the element of individual choice cannot save a program like the CSP from unconstitutionality. However, Plaintiffs have cited no case from a state that has the precise “for the benefit” language contained in Section 6—language modeled after analogous provisions in Michigan and Wisconsin. *See Embry*, 798 N.W.2d at 165 (Dickson, J.). The Michigan Supreme Court interpreted its analogue to Section 6 to allow Michigan to provide teachers paid with state funds to teach secular subjects in religious schools. *Advisory Opinion re Constitutionality of P.A. 1970, No.100*, 180 N.W.2d 265, 274 (1970). And, significantly, the Wisconsin Supreme Court interpreted its analogue to Section 6 as allowing Milwaukee’s Parental Choice Scholarship Program, a program similar in legal structure to the Choice Scholarship Program, although limited to one city. *See Jackson*, 578 N.W.2d at 620-21.

26. Plaintiffs cite a decision of the District Court, Denver County, Colorado, in *Larue v. Colorado Board of Education*, No. 11cv4424, issued on August 12, 2011, as supplemental authority in support of their motion. There are significant differences between Indiana’s Constitution and the “no aid” clause of the Colorado Constitution which explicitly prohibits public funds to help sustain any school controlled by any church or sectarian denomination. This sort of prohibition was rejected by Indiana’s 1850 constitutional convention. (See Conclusion of Law, #9 herein).

27. Finally, Plaintiffs’ theory of Section 6 would cast doubt not only on the constitutionality of the CSP, but also on the validity of a host of other longtime religion-neutral

state programs whereby taxpayer funds are ultimately paid to religious institutions by way of individual choice.

28. For example, the State Student Assistance Commission of Indiana (SSACI) administers post-secondary grant programs, including the Frank O'Bannon Grant Program and the Twenty-First Century Scholars Program, that permit students to use state scholarships to attend private religious schools. In Fiscal Year 2011, of the nearly \$186 million of O'Bannon grants, approximately \$50 million, or 26.7% of total grants, were awarded to students attending religious private schools. *See* Declaration of Kristin Casper attached to Defendants' Memorandum filed on or about July 21, 2011 as Ex. C. Of the almost \$46.5 million dollars in Twenty-First Century scholarships granted in fiscal year 2011, more than \$3.6 million were given to grantees attending a private religious institution. *Id.*

29. Plaintiffs' Section 6 theory would thus threaten long-established, and apparently unquestioned, Indiana traditions of permitting tax dollars to be spent on religious education by way of private, individual choice. While that longstanding tradition is not itself dispositive, it certainly lends credence to the argument that such programs are not understood to be "for the benefit" of religious institutions, as Section 6 proscribes.

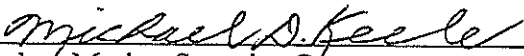
30. Accordingly, Plaintiffs are unlikely to succeed on the merits of their Section 6 claim as well.

31. Because Plaintiffs have failed to demonstrate any likelihood of success on the merits, the Court need not address the other preliminary injunction factors.

ORDER

It is therefore ORDERED by the Court that the Plaintiffs' Motion for Preliminary Injunction is denied.

SO ORDERED this 15TH day of August, 2011.



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