STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM NO. 7
COUNTY OF MARION	)	CAUSE NO. 49D07-1107-PL-025402

TERESA MEREDITH, DR. EDWARD E. EILER, RICHARD E. HAMILTON, SHEILA KENNEDY, GLENDA RITZ, REV. MICHAEL JONES, DR. ROBERT M. STWALLEY III, KAREN J. COMBS, REV. KEVIN ARMSTRONG, DEBORAH J. PATTERSON, KEITH GAMBILL, and JUDITH LYNN FAILER,

Plaintiffs,

v.

MITCH DANIELS, in his official capacity as Governor of Indiana; and DR. TONY BENNETT, in his official capacity as Indiana Superintendent of Public Instruction and Director of the Indiana Department of Education,

Defendants,

and

HEATHER COFFY AND MONICA POINDEXTER,

Defendant-Intervenors.

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND DEFENDANT-INTERVENORS

Plaintiffs have brought this litigation challenging the constitutionality, under several provisions of the Indiana Constitution, of the Choice Scholarship Program (CSP) enacted by the 2011 Indiana General Assembly. The matter is now before the Court on Defendants' Motion to Dismiss, Defendant-Intervenors' Motion for Judgment on the Pleadings, Plaintiffs' Motion for Summary Judgment and Defendant-Intervenors' Motion for Summary Judgment.

Upon consideration of the submissions and arguments of counsel, this Court determines that this case is more appropriately decided on summary judgment, and the Court finds that there

is no genuine issue as to any material fact and that Defendants and Defendant-Intervenors are entitled to judgment as a matter of law on all of Plaintiffs' claims for the reasons set forth below.

LEGAL CONCLUSIONS

Summary Judgment Standard

A motion for summary judgment must be denied unless "the evidence shows no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Travelers Indem. Co. of Am. v. Jarrells*, 927 N.E.2d 374, 376 (Ind. 2010) (citing Ind. Trial Rule 56(C)). The trial court must "construe all factual inferences in the nonmoving party's favor and resolve all doubts as to the existence of a material issue against the moving party." *Id.*

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)). "[T]he burden to rebut this presumption is upon any challenger and all reasonable doubts must be resolved in favor of an act's constitutionality." *Id.* (citing *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 214 (Ind. 1981)). Overcoming such a burden is particularly difficult in a facial challenge such as this, where the Plaintiffs must demonstrate that "no set of circumstances" exists "under which the statute[s] can be constitutionally applied." *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999).

Degree of Religiosity

The Court notes that the only new argument before it from either side, since the Order denying Plaintiffs' Motion for Preliminary Injunction, entered on August 15, 2011, pertains to the degree of religiosity – the extent to which religion is pervasive – of the religious schools – that participate in the program. The Court holds that whether the religious schools in the CSP are pervasively sectarian is immaterial. CSP recipients have a choice as to which school to

attend, religious or non-religious. If a parent wishes to send her child to a "pervasively sectarian" institution, then that is her choice. The precise degree of religiosity of schools participating in the CSP has no bearing on the program's constitutionality.

Additionally, determining the degree of religiosity of a religious school is disfavored because it requires courts to scrutinize the religious views of an institution and to make subjective judgments on the role of religion within the school. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) ("[T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs.").

This Court therefore concludes that the degree of religiosity of the participating schools is immaterial to the case at hand.

Article 8, Section 1

Article 8, Section 1 of the Indiana Constitution, 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.

This provision bestows two duties upon the General Assembly – to encourage education "by all suitable means" and to require "a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." Thus, the overall command to the General Assembly is to encourage learning "by all suitable means," including, but not limited to, provision of a uniform and general system of common schools.

In *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 518 (Ind. 2009), the Court 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. These duties exist separately, and the second duty should not be seen as the only means to carry out the first duty.

Further, the history of the times 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. 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 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.

Based on the text and structure of Article 8, Section 1, and the history of educational funding in Indiana, the Court concludes the CSP does not violate Article 8, Section 1, and the "all suitable means" clause authorizes educational options outside of the public school system.

Article 1, Section 4

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." Article 1, Section 4's prohibition of compelled "support" for "any place of worship" or "ministry" does not restrict the state from creating a program under which general tax revenues are given to a private citizen who may then choose to use those funds to pay tuition at religious schools.

The history and structure of the Indiana Bill of Rights suggest that Section 4's protection against being "compelled to support any place of worship" is less about restricting the 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. Specifically, Article 1, Section 6 of the Indiana Constitution sets forth restrictions against using general tax revenues "for the benefit of religious institutions." Holding that Article 1, Section 4 provides similar protection against religious establishment would be structurally suspect because there would not have been a need for the drafters of the 1851 Constitution to supplement Section 4 by adding the broader language of Section 6. *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."); *see also Hendricks v. State*, 196 N.E.2d 66, 70 (Ind. 1964) ("One of the fundamental rules of constitutional construction is that no word shall be assumed to be mere surplusage.").

Moreover, 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.

Furthermore, 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). Additionally, the Pennsylvania Supreme Court has held that that state's compelled support clause – which is a model for and has very similar language to Section 4 – does not bar aid to children who attend religious schools. *Springfield Sch. Dist. v. Dep't of Educ.*, 397 A.2d 1154, 1170 (Pa. 1979).

This Court therefore concludes that Article 1, 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.

Article 1, Section 6

Article 1, Section 6 of the Indiana Constitution, provides that "[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution." 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 education services, including the teaching of secular subjects by teachers paid with public funds, 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.).

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.* *Embry* focused on whether the benefits the schools received were incidental to the accomplishment of the state's broader educational purposes, rather than on whether those benefits crossed some subjective threshold from insignificant to substantial. Specifically, the Court stated that "[c]ompared with the substantial educational benefits to children . . . we find any alleged 'savings' to parochial schools and their resulting opportunities for curriculum expansion would be, at best, relatively minor and incidental benefits of the dual-enrollment programs." *Id.*

Like the dual enrollment program in *Embry*, the CSP is religion-neutral and was enacted "for the benefit" of students, not religious institutions or activities. Additionally, the CSP is based on individual choice of each scholarship recipient's parents. 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, and also permits taxpayer funds to be paid as tuition to religious schools only upon private, individual choices of parents. Ind. Code § 20-15-1-4.7. *See also 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"). The CSP does not guarantee direct benefit to participating schools at all, unlike the dual-enrollment program; rather, only eligible students have a guaranteed benefit that their parents can, by exercising individual choice in a program open to both public and private schools, use to pay for them to attend any participating school. Therefore, the cost-savings and curriculum expansion benefits to religious schools are incidental to parents choosing to provide their children with a religious education.

Furthermore, other states that have the precise "for the benefit" language contained in Section 6 have allowed similar situations of tax revenues being used for the benefit of students' education with incidental benefits to religious schools. *See Jackson*, 578 N.W.2d at 620-21 (interpreting the Wisconsin analogue to Section 6 as allowing Milwaukee's Parental Choice Scholarship Program, a program similar in legal structure to the CSP, although limited to one city); *Advisory Opinion re Constitutionality of P.A. 1970, No. 100,* 180 N.W.2d 265, 274 (1970) (holding the Michigan analogue to Section 6 to allow Michigan to pay teachers with state funds to teach secular subjects in religious schools). States that have held differently have significant differences between their state constitutions and Section 6 of the Indiana Constitution. *See, e.g., Larue v. Colorado Baord of Education*, No. 11cv4424 (Aug. 12, 2011) (holding that the Colorado Constitution prohibits public funds to help sustain any school controlled by any church

or sectarian denomination, where Colorado's "no aid" clause is very different from Indiana's Section 6).

Finally, interpreting Article 1, Section 6 to prohibit programs like the CSP would cast doubt 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. For example, the State Student Assistance Commission of Indiana 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.

This Court concludes that the CSP is not in place "for the benefit" of religious schools. To the contrary, the CSP bestows benefits onto scholarship recipients who may then choose to use the funding for education at a public, secular private, or religious private school. Therefore, the CSP does not violate Article 1, Section 6.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that pursuant to Indiana Trial Rule 56, Plaintiffs' Motion for Summary Judgment is hereby DENIED and Defendant-Intervenors' Motion for Summary Judgment is hereby GRANTED. Accordingly, the Court enters judgment in favor of the Defendants and Defendant-Intervenors on all of Plaintiffs' claims.

Date: January 13, 2012

Michael D. Keele
Judge, Marion Superior Court
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