The Constitutionality of Education Savings Accounts in New Hampshire

An Analysis By

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Institute for Justice

Foreword By

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The Josiah Bartlett Center for Public Policy

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Foreword

By Eugene M. Van Loan III

In its most recent session (2016-2017), the New Hampshire Legislature considered a bill to create what are known as "education savings accounts" or ESAs. That bill, SB 193, was neither passed nor defeated, but was instead "retained in committee" by a committee of the NH House so as to be considered again in the forthcoming 2017-2018 session. What follows is an articulate, comprehensive and thoroughly persuasive legal argument as to why ESAs, if such were to be authorized under New Hampshire law, would be constitutional under both the New Hampshire Constitution and the Constitution of the United States.

What is an ESA? An ESA is a device to facilitate and fund educational choice. It is like a scholarship program in that its grants are made to children and their parents who then may use the money to select from a menu of educational choices which meet minimum government standards, but which are not necessarily provided by government. ESAs, however, can be much broader than traditional scholarship programs which typically fund only tuitions. On the contrary, depending upon the breadth of the authorizing legislation, ESA grants may permit families to put the money they receive towards a much wider array of educational uses, including paying for education-related therapies, tutors, textbooks and other educational materials.

New Hampshire already has a state-authorized educational scholarship program. Under this program, corporations can obtain a credit against their NH business profits taxes in exchange for voluntary donations to private charitable entities called scholarship organizations. These scholarship organizations, in turn, qualify eligible students and their families to receive scholarship funds which the families use to pay for the tuition at an elementary or secondary school of their choice (whether public or private) or for the expenses of homeschooling.

What both the ESAs being proposed by the bill pending before the NH Legislature and the current tax-credit-incentivized program have in common is that among the educational choices

which students and their families are permitted to make, and for which they may use their funds, are educational services provided by religious institutions.

The constitutionality of the provision of the tax-credit program which allowed religious schools to be selected by scholarship beneficiaries was challenged by several parties in the case of *Duncan v. State*. The claim was made that two provisions of the NH Constitution were violated. One states that no person shall be "compelled" to support schools of any religious sect. The other states that no "money raised by taxation" should be granted or applied for the use of schools of a religious sect. Among the counter-arguments by those who sought to defend the legality of the tax credit program were the fact that (a) since donations to the program were voluntary, no one was being "compelled" to pay towards the support of religious schools, and (b) albeit that the donations generated tax credits to the donors, the donated money to fund the scholarships did not, in fact, constitute "money raised by taxation."[1]

What distinguishes the ESAs being proposed by the bill pending before the NH Legislature from the current tax-credit-incentivized program (in addition to the broader uses to which the grant monies may be put, as described above), is the fact that the source of the funding for the proposed ESAs would clearly be state tax revenues. Accordingly, there is no doubt that the two provisions of the NH Constitution which, in the *Duncan* case, were only tendentiously implicated are now more of a potential obstacle.

Without trying to steal the thunder – and it is thunder – of the legal brief which follows, let me try to summarize what the legal eagles have to say:

1. As has been long established under federal First Amendment jurisprudence, the U.S. Constitution permits the beneficiaries of public funds—such as school vouchers or ESAs—to use them at secular or religious institutions. So long as the program has a secular purpose (expanding educational opportunity) and is religiously neutral (neither favoring nor disfavoring religion), then it does not violate the First Amendment's prohibition upon a governmental "establishment" of religion.

[1] The *Duncan* case went up to the NH Supreme Court, but (as is explained in the following legal brief), the Court dismissed the plaintiffs' challenges on grounds unrelated to their funding-of-religion claims. Accordingly, the NH tax-credit scholarship program is alive and well – and presumptively constitutional.

2. The eligibility under the proposed ESA law of religious schools as institutions at which families could spend their taxpayer-funded grants would not violate the NH Constitution – in particular, it would not violate the two anti-aid-to-religion provisions of the NH Constitution which were at issue in the *Duncan* case.

3. If, however, it were determined that the eligibility under the proposed ESA law of religious schools as institutions at which families could spend their taxpayer-funded grants would violate the aforesaid provisions of the NH Constitution, those provisions themselves would violate the U.S. Constitution – in particular, they would violate the First Amendment's guarantee of the "free exercise" of religion.

Note that, on the surface, all of these issues concerning the proposed ESA law purport to relate to whether using public money at or in connection with religious schools is legal. Nevertheless, one cannot help harboring a suspicion that all the sound and fury about religion is a proxy for something else – and that the something else is the issue of school choice itself. In other words, some of us question whether the real objection of many opponents of the proposed ESA law is not that public money may arguably benefit private *religious* schools, but that public money could be used to benefit *any* non-public school. Accordingly, as powerful as are the arguments put forth below as to whether we may legally create a system of public funding for non-public education which includes religious schools, the question remains as to whether we should create a system which allows for the use of public money in support of schools that are **not run by the government**.

In the opinion of many, the reason that we should do so is that the public schools in America have are unable to meet the needs of every child. There certainly is a good argument that public school systems have become captives of the teachers' and administrators' unions, whose focus is the welfare of their members, not the public benefit. At the same time, well-intentioned, but misguided, legislators have loaded up our public schools with all kinds of social service functions that not only relieve parents from performing their parental responsibilities, but also over-burden the schools with tasks that divert them from the job that they are supposed to be doing – educating students. And, finally, our judicial systems, which are focused upon individual cases and not upon institutional consequences, have issued numerous edicts in cases involving student discipline, rights of the handicapped, and racial and other types of real or imagined discrimination, which

have resulted in an incredible and, ultimately, unsustainable diversion of resources from the many to the few. So, why should it be a surprise that so many want to opt out of our public school systems?

I personally believe that a healthy, vibrant public school system is critical to our democratic society. But quasi-monopolies are rarely healthy or vibrant, and our government-run school system is no exception. The most effective way to improve their quality and spur innovation without emasculating the public school system is to foster some healthy competition. Accordingly, that is the reason why I and many other supporters of public education favor the passage of some form of an ESA law (including one which allows families to choose to spend their grants at religious schools). Ultimately, if an ESA law were adopted but public schools proved capable of serving every children, then no students or their families would apply for ESA funds – and that would be just fine. But what matters most of all is that our state government ensure that every child has access to a quality education. ESAs are a constitutional method to further that worthy goal.

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An Analysis

By Richard D. Komer and Timothy Keller

Question Presented:

Would an ESA program comport with the New Hampshire state constitution, specifically Part I, Art. 6 and Part II, Art. 83?

Brief Answer:

Based on the text and history of these two provisions, and the legal precedent and advisory opinions interpreting them, an ESA program would pass constitutional muster. These two provisions, properly interpreted, do not preclude religiously neutral educational assistance programs that aid parents and families rather than private and religious schools per se.

Constitutional Provisions in Question:

Part I, Article 6 reads, in part, that "[N]o person shall ever be compelled to pay towards the support of schools of any sect or denomination. And every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established."

The most relevant language of Article 83 of Part II, which was added in 1877 and is modeled after the federal Blaine Amendment that Congress rejected the year before, reads as follows, "[N]o money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination."

Legal Analysis:

The failed federal Blaine Amendment, considered in 1876, would have imposed at the national level a prohibition against funding "sectarian" schools, where sectarian was widely understood to mean "Catholic."[2] *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.) (acknowledging that it was an open secret that "sectarian" was code for "Catholic."). Both the New Hampshire language and the federal version were intended to rebuff efforts by the Catholic Church to obtain tax support for its parochial schools. New Hampshire's public schools were, at that time, nondenominationally Protestant. *See* Charles B. Kinney, Jr., *Church and State: The Struggle for Separation in New Hampshire, 1630-1900* (1955). They were also inhospitable to Catholics, which led the Catholic Church to establish their own system of parochial schools. *See generally* Lloyd Jorgenson, *The State and the Non-Public School: 1825-1925* (1987).

It is important to note that the addition of the Blaine language in 1877 did not create a restriction of funds to public schools only. Rather, it restricted the use of tax revenues for sectarian schools. This restriction allowed the public schools to continue to be generically Protestant in orientation, as Protestantism was not considered to be a "sect" or "denomination" (such as Congregationalism or Lutheranism), while prohibiting tax support for parochial schools.

There are no cases interpreting these two provisions that are directly on point. There is, however, one case, *Warde v. Manchester*, on a related issue that was decided during the time period when New Hampshire was concerned with state aid to Catholic schools. In addition, the New Hampshire Supreme Court has issued four advisory opinions involving either one or both of these provisions. Although advisory opinions are not accorded precedential weight, because they do not involve a case or controversy between true adversaries, *see Piper v. Town of Meredith*, 109 N.H. 328 (1969) (noting that when the New Hampshire Supreme Court issues an advisory opinion it is acting as constitutional advisers to the requesting body and not as a court), they do elucidate the

[2] As Steven K. Green has argued in *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992), the federal "Blaine Amendment came about in response to two related controversies: the public funding of sectarian education and the [Protestant] religious exercises in the public schools." *Id*. at 42. He characterizes those exercises as "the obvious evangelical Protestant overtones to public education," to which Catholics were reacting in seeking "shares of the common school funds or exemptions from taxation." *Id*. at 41.

views and approaches of the supreme court justices, and are routinely referenced by the New Hampshire Supreme Court in its actual decisions.

Warde v. Manchester

The one relevant case is *Warde v. Manchester*, 56 N.H. 508 (1876). In *Warde*, the city of Manchester sought to deny the statutory property tax exemption to a school operated by the Sisters of Mercy, a Catholic religious order. Manchester was the center of the Catholic Church in New Hampshire, where jobs at the mills along the Merrimack River attracted Catholic immigrants from Ireland and Canada. The presence of a significant Catholic minority in Manchester made it the focal point for anti-Catholic sentiment, and several unsuccessful attempts to burn down Catholic churches occurred there, beginning with the Know Nothing period in the 1850s. *See* Wilfrid H. Paradis, *Upon This Granite: Catholicism in New Hampshire, 1647-1997* (1998). The New Hampshire Supreme Court ruled in *Warde* that the equal protection language of Article 6 protected the Catholic school from Manchester's discriminatory application of the tax system.

Nor was Manchester's effort to deny the Catholic school the property tax exemption the only action taken against Catholic interests in Manchester in the first half of the 1870s. Efforts to accommodate Catholic demands for support for their schools equal to that given the generically Protestant public schools had resulted in provision of a large school building to the Catholic minority and payment of teachers' and principals' salaries in four Catholic schools. This arrangement was terminated, however, when it became controversial and after a new school board was elected. One of the new members of the school board, Marshall P. Hall, was subsequently elected to the constitutional convention in 1876, where he sponsored the Blaine language amending Article 83. *See Journal of the Constitutional Convention of the State of New Hampshire, December 1876-January 1977*, 124 (Delegate Hall alluding to Catholic efforts to obtain public support for their schools in his explanation of his proposal to the constitutional convention). That language, once incorporated into the Constitution, ensured that no future school board could share school resources with the Catholic schools like Manchester had.

Thus, both the federal Blaine Amendment and New Hampshire's Blaine amendment shared a common purpose of preserving a Protestant monopoly on public school funds. Indeed, confirmation of the linkage between the two efforts comes from the author of the federal Blaine Amendment, Senator James G. Blaine of Maine, who had a letter published in the *Concord Monitor* praising the inclusion of the amendment to Article 83 and expressing his hope that it would be adopted.[3] By amending Article 83, the Protestant majority ensured that the rationale of *Warde* could not be used to require equal support for Catholic institutions, including schools.

The Four Advisory Opinions

In addition to *Warde*, the New Hampshire Supreme Court has issued four advisory opinions relating to Articles 6 and 83 concerning private education, beginning in 1955. All four came after the U.S. Supreme Court had applied the federal Establishment Clause to the states in *Everson v. Board of Education*, 330 U.S. 1 (1947). The advisory opinions frequently rely on federal precedent in interpreting these articles, which is understandable given the dearth of New Hampshire precedent and the fact that any program must pass muster under both constitutions.

The body of federal jurisprudence under the Establishment Clause, however, has evolved substantially over time. As a result, certain distinctions that are critical to the U.S. Supreme Court's interpretation of the Establishment Clause with respect to educational choice programs have only crystalized in recent years. The four advisory opinions date from 1955, 1967, 1969, and 1992. The U.S. Supreme Court only definitively recognized a distinction between programs that aid families in choosing schools and programs that aid schools as institutions in 2002 in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Although *Zelman* traces this distinction back through *Everson*, it is only with *Zelman* that the Court made it clear that different principles apply to religiously neutral

[3] In his letter, Blaine endorsed the constitutional convention's efforts to "strengthen your system of common schools with all the sanctions and safeguards of organic law," saying that "the Catholic priesthood of the United States of America seem determined to break down the system of non-sectarian public instruction so happily established and so prosperous in most of the United States." Blaine's Dec. 15, 1876 letter to the *Concord Monitor* can be found in *The New-Hampshire Vote; Special Dispatch to the New York Times*, N.Y. Mar. 11, 1887 in *America's Historic Newspapers*. Electronic database, The New York Public Library.

programs in which parents make free and independent choices among educational alternatives, including religious private schools. Further complicating the analysis of the advisory opinions is that, perhaps due to the non-adversarial nature of advisory opinions themselves, none of the New Hampshire Supreme Court's opinions evidence any awareness of the controversial origins of the 1877 amendment of Article 83.

The 1955 Opinion of the Justices (The Nursing Opinion)

The first and oldest advisory opinion concerned a proposed program of state aid for nursing education. *Opinion of the Justices*, 99 N. H. 519 (1955). The program had two components, scholarships for nursing students and grants in aid to all hospitals offering training in basic professional nursing. The opinion concluded that neither component violated Article 83's Blaine language, despite the fact that several of the eligible hospital nursing programs were operated by churches, including at least three Catholic hospitals. The Justices concluded that: "What was intended to be forbidden by the amendment of 1877 was support of a particular sect or denomination by the state, at the expense of taxpayers of other denominations or of no denomination. It was not intended that members of a denomination should be deprived of public benefits because of their beliefs." *Opinion*, 99 N.H. at 522. Moreover, in addressing the question that religious institutions would receive aid, the Court relied on federal precedent to conclude that because the training was secular in nature Article 83 was not violated. Finally, the opinion focuses entirely on the institutional grants and appears to assume the student scholarship component either does not raise an Article 83 issue or was similarly limited to secular purposes.

The 1967 Opinion of the Justices (The Sweepstakes Opinion)

The second of the advisory opinions came 12 years later and again relied on federal precedent. *Opinion of the Justices*, 108 N.H. 268 (1967). The opinion concerned an amendment to the statute distributing the proceeds of the New Hampshire sweepstakes, which would provide proceeds to certain non-public schools in addition to public schools, on a per capita basis. The first question asked was whether Article 83 would be violated, the second question asked whether any other provisions of the state constitution would be violated, and the third asked whether the federal

establishment clause would be violated. Four of the justices concluded that distributing funds to religious private schools would violate the Establishment Clause and declined to answer any of the other questions. The fifth justice concluded that the answers to the first three questions was "no." With respect to the Article 83 question he concluded that sweepstakes proceeds are obviously not funds raised by taxation. Consequently, this opinion really does not assist in the interpretation of Article 83.

The 1969 Opinion of the Justices

The third opinion, *Opinion of the Justices*, 109 N. H. 578 (1969), addressed whether five proposed statutes/programs would comport with the federal Establishment Clause and Article 83. In addressing the proposals, the Justices did not distinguish between an analysis under Article 83 and an analysis under the Establishment Clause, instead continuing to rely on federal precedent, as it had in their two previous opinions. Thus the key language of the *Opinion* with respect to Article 83 states:

> Our State Constitution bars aid to sectarian activities of the schools and institutions of religious sects or denominations. It is our opinion that since secular education [at sectarian schools] serves a public purpose, it may be supported by tax money if sufficient safeguards are provided to prevent more than an incidental and indirect benefit to a religious sect or denomination. We are also of the opinion as expressed in *Opinion of the Justices*, 99 N.H. 519, [the Nursing Opinion] that members of the public are not prohibited from receiving public benefits because of their religious beliefs or because they happen to attend a parochial school.

After making this statement, the Justices relied on the federal test for Establishment Clause challenges in evaluating the five programs under scrutiny: that the program have a secular purpose and a primary effect that neither advanced nor inhibited religion. The opinion concluded that three of the proposals were constitutional, one unconstitutional, and the fifth of "doubtful

constitutionality." The Justices concluded that proposals that would: (1) allow districts to include nonpublic school students in their student counts for purposes of computing foundation aid; (2) allow districts to provide child benefit services to non-public school students, including physician, nursing, health, guidance, psychologist, educational testing, and others desirable for the well-being of the students; and (3) provide secular textbooks for non-public students would be constitutional.

The Justices concluded a proposal authorizing districts to grant a $50 property tax exemption to families with one or more students in non-public schools would not pass muster, apparently viewing this exemption as discriminatory since families with students in public schools would not receive it, as well as enabling families to "contribute" the entire $50 to the non-public schools, which contributions would not be limited to secular education in the schools. The justices did not explain why they thought any families would contribute the money to their children's school, given there was no requirement in the program to do so, and why such contributions should be treated as government aid to the schools, rather than gifts from the families. The justices further opined that a proposal allowing districts to pay transportation costs to families sending their children to non-public schools beyond the districts' boundaries to be of doubtful constitutionality because the districts' authority could be discriminatorily applied. However, it is unclear if the discrimination they feared was that public school students attending schools outside the district boundaries would not be treated equally to non-public school students or that students attending only certain non-public schools would be transported.

The key fact to note from this third opinion is that the Court continued the practice it established in the first opinion of relying on federal Establishment Clause precedent.

The 1992 Opinion of the Justices (School Transfer Case)

The final opinion, *Opinion of the Justices*, 136 N.H. 357 (1992), involved a proposal that would have allowed parents who were dissatisfied with their children's public school education to transfer to any state-approved schools (including religious schools) chosen by the parents, along with 75% of the resident school district's funding for that student. This opinion differs from the other opinions by asking whether this compelled any person to pay towards the support of schools

of any sect or denomination in violation of Part I, Article 6. The opinion makes no explicit reference to Part II, Article 83.[4] It does, however, rely on the first and third opinions for its conclusion that the proposal would violate Article 6. And while it contains no explicit reference to federal Establishment Clause jurisprudence, its key conclusion plainly reflects the Establishment Clause distinction between funding restricted to secular aspects of private school education and unrestricted funding that can support religious aspects as well. Thus, it is fair to say that the 1992 opinion applies the same analysis to Article 6 as to Article 83 and that the justices believed that these provisions mandated similar treatment to that provided by the federal Establishment Clause.

Conclusions from the Opinions

In none of the opinions do the justices imply, let alone assert, that the state constitutional provisions mandate a more rigorous separation of church and state than does the federal Constitution. In fact, the justices consistently interpret the two constitutions in a parallel fashion. The plain language of neither Article 83 nor Article 6 speaks in terms of restricted or unrestricted aid to sectarian schools or to aid provided for sectarian as opposed to secular purposes, both federal Establishment Clause concepts the justices imported into their interpretation of Articles 83 and 6. This sustained reliance on federal precedent raises a critical question for consideration of whether an ESA program would comport with these Articles.

While there has been no further development in New Hampshire cases and opinions on the subject of educational choice in the two and a half decades since the 1992 *Opinion*, federal Establishment Clause jurisprudence has continued to evolve. Today, there can be no serious dispute as to whether the federal Establishment Clause permits a state to enact an ESA program—it certainly does. The question thus becomes whether the New Hampshire Supreme Court is likely to reach a similar conclusion under Articles 6 and 83.

[4] Until its amendment in 1968, Article 6 *affirmatively supported* religious education, which is undoubtedly why it did not figure in the first three advisory opinions.

Federal Precedent

Since it first undertook an Establishment Clause analysis in *Everson* in 1947, the U.S. Supreme Court has gradually come to recognize a distinction between two different sorts of state programs. These programs can be characterized as institutional aid programs and student assistance programs. Institutional aid programs are those in which a state provides aid to private schools as institutions. Student assistance programs, on the other hand, are those in which a state provides aid to individuals or families who chose to attend private (including religious) schools, where any benefit to the private schools is an incident of the families choosing them. This distinction was crystalized in 2002—10 years after the justices' 1992 *Opinion of the Justices*—in the case of *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

In *Zelman*, the U.S. Supreme Court upheld an Ohio scholarship program that allowed low-income students to use their state-funded scholarships at the school of their choice, including religious and secular private schools. The Ohio program was challenged as a violation of the federal Establishment Clause in large part because 96% of the scholarship recipients were using their scholarships to attend religious schools. Applying the same Establishment Clause test the New Hampshire Supreme Court used in its third opinion above, the U.S. Supreme Court held that the Ohio program had a secular purpose of increasing educational choices for participating families and did not have a primary purpose or effect of advancing or hindering religion. The Court held that so long as a student assistance program is religiously-neutral and based on the genuine and independent choice of the recipients as to what school to attend it was irrelevant how many recipients chose religious schools.

ESA programs pass federal constitutional muster because they are religiously neutral and driven by the free and independent choices of individuals. Indeed, because they do not limit the recipients to use of private schools, a large proportion of which remain religious in New Hampshire, the recipient families have more non-religious options than recipients do in a traditional scholarship program. Home schooling families can be eligible for ESA programs, which is rare in traditional scholarship programs. Thus, the question becomes whether the New Hampshire Supreme Court would interpret Articles 6 and 83 to reach a similar conclusion. While

there can be no definitive answer to this question, we conclude that the Court is likely to maintain its practice of interpreting these provisions in a parallel fashion to the federal Establishment Clause. There are five primary reasons underlying this conclusion.

Five Reasons ESAs Are Constitutional Under Articles 6 and 83

First, giving a parallel interpretation is what the justices have always done. Absent a powerful reason to strike a new course, justices tend to follow the beaten path.

Second, in taking a parallel course, the justices have already demonstrated a willingness to allow religious institutions to receive state funding, as reflected in the 1955 and 1969 opinions. Moreover, understood in the proper historical context, Articles 6 and 83 apply *only* to institutional aid and not to aid to families and students.

Third, in the 1955 opinion the Justices approved scholarships for nursing students without blinking an eye.

Fourth, it has become increasingly difficult not to regard prohibiting parents from choosing religious options as a violation of the religious neutrality commanded by both federal and state precedent. Indeed, just this past term, the U.S. Supreme Court held that the state of Missouri violated the U.S. Constitution when it barred a church-run preschool from participating in the state's playground resurfacing program. *Trinity Lutheran Church v. Comer*, ___ U.S. ___ (2017): ("[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand."). It thus seems highly unlikely that the federal Constitution would permit aid to secular private schools while denying aid to religious private schools. Moreover, the New Hampshire Supreme Court's decision in *Warde v. Manchester*, which held that Catholic institutions could not be denied the same benefits as other religious institutions, can be easily extended to say that the state cannot deny religious individuals benefits provided to similar non-religious persons.

Fifth, if the Court is inclined to disallow families from choosing religious institutions it will have to confront the discriminatory origins of the 1877 amendment of Article 83, which was

blatant discrimination against Catholics and in favor of nondenominationally Protestant institutions. The U.S. Supreme Court has overturned state constitutional provisions neutral on their face but intended to discriminate on the basis of race under the Equal Protection Clause, *see Hunter v. Underwood*, 471 U.S. 222 (1985) (invalidating provision of the Alabama Constitution adopted in 1901); *see also Nichol v. Arin Intermediate Unit*, 268 F. Supp.2d 536 (W.D. Pa. 2003) (religious garb statute originally adopted in 1895 to discriminate against Catholics), and also regards religion as a suspect classification for purposes of evaluating discrimination. *See United States v. Carolene Products, Inc.*, 304 U.S. 144, 155 n.4 (1938).

This conclusion is consistent with the actual language of both Articles 6 and 83, both of which clearly prohibit institutional assistance. Providing aid to individuals is neither the same as providing "support [to] the schools of any sect or denomination," in the words of Article 6, nor granting or applying "money raised by taxation . . . for the use of the schools or institutions of any religious sect or denomination," in the words of Article 83. These provisions, properly read, do not limit the genuine and independent choices of students and their families when they are empowered to choose private schools or to home school their children.

Conclusion:

We conclude that based on its past practice, the New Hampshire Supreme Court will continue to follow the lead of the U.S. Supreme Court and thus conclude that an ESA program would not violate the New Hampshire Constitution. ESA programs are not institutional assistance to religious (or other private) schools. ESAs programs are, instead, student assistance programs. The proper interpretation of Articles 6 and 83 prohibit institutional assistance to religious schools, but do not prohibit student assistance programs.

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