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BRYCE'S LAW REVISITED:

SERVING MISSOURI'S NEEDIEST STUDENTS THROUGH TARGETED SCHOLARSHIPS

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KEY TAKEAWAYS

1. In 2013, Missouri enacted Bryce's Law. This law recognizes that children with disabilities such as autism, cerebral palsy, and Down syndrome need education options other than a traditional, residentially assigned public school.

2. As enacted, Bryce's Law contemplates the creation of scholarship-granting organizations (SGOs) that receive tax-deductible gifts from donors. This structure mimics what federal law already allows. Unfortunately, Bryce's Law, unlike federal law, also imposes significant compliance and reporting obligations on SGOs.

3. As of today, no scholarships have been provided under Bryce's Law.

4. The current funding structure under Bryce's Law is not achieving, and will not achieve, its objective and should be revised.

5. Pursuant to the Supreme Court's recent decision in *Trinity Lutheran v. Comer,*[1] Missouri should fund Bryce's Law by making public money available to the students who qualify.

INTRODUCTION

When his grandson, Bryce, was born with autism, State Representative Dwight Scharnhorst learned firsthand the difficulties parents face in raising children with special needs. After his grandson passed away at the age of six, Rep. Scharnhorst began pushing for a new state program that would support parents of children with special needs as they sought the best educational options for their children.[2] Bryce's Law was initially designed as a tax-credit scholarship program, in which individual donors would receive a credit towards their taxes for contributions to scholarship-granting organizations (SGOs) that would grant scholarships to students with special needs. Parents could use the funds to seek the customized education that would best fit the needs of their children with autism-spectrum disorders, Down syndrome, Angelman syndrome, cerebral palsy, or other special needs.[3]

After eight years of pushing for Bryce's law, Rep. Scharnhorst saw it signed into law by Governor Jay Nixon in July 2013. There was just one problem; by the time the law went through the legislative sausage-making process, it was no longer a tax-credit program. The final version of the bill allowed for the granting of scholarships to students with special needs by SGOs but was structured in a way that, as time has shown, made it unlikely that any scholarships would be granted. Under Bryce's Law, the SGOs have to raise scholarship funds, as nonprofits generally do. Those donations, however, are only tax deductible by the donor. Accordingly, the benefit to the donor is the same as for any donation to a charitable organization. Unlike other nonprofit SGOs, SGOs under Bryce's Law also need to comply with a complex and onerous set of laws and regulations.[4]

Bryce's Law expressly states that the Department of Elementary and Secondary Education ("DESE") "shall . . . actively seek financial resources "including grants and donations for the program." Aside from the question of whether DESE has ever actively sought financial resources, it is difficult to see how doing so would be effective. Why would an SGO subject itself to the regime of Bryce's Law when it can achieve the same result by operating under existing federal law? Accordingly, to date there are no SGOs, no funds, and not a single student has benefitted from Bryce's Law. When it comes to serving Missouri's neediest students, we are far from "Mission Accomplished."

It is time to revisit Bryce's Law. After explaining why Bryce's Law was initially designed as a tax credit program, we'll show why a recent decision from the U.S. Supreme Court has changed this dynamic and opened the door for a direct appropriation to fund scholarships under Bryce's Law.

TAX CREDITS AND BLAINE AMENDMENTS

Like 37 other states, Missouri's constitution has a Blaine Amendment. James G. Blaine was a politician in the late 19th century who unsuccessfully attempted to amend the U.S. Constitution to bar public aid to sectarian or denominational religious organizations. There was a strong current of anti-Catholic sentiment in the United States at that time, which Blaine hoped to exploit as he ascended the political ladder. While he was unsuccessful in amending the U.S. Constitution, his ideological fellow travelers were able to amend state constitutions to insert anti-Catholic aid language. In Missouri, this language is found in Article I (Section 7) and Article IX (Section 8) of the State Constitution.

These provisions have been construed as forbidding elementary and secondary schools that have a religious affiliation from receiving public dollars. Interestingly, this prohibition has only applied at the K-12 level. In 1976, the Missouri Supreme Court, in *Americans United v. Rogers,*[5] held that publicly funded college scholarships to private and religious schools did not violate the state's Blaine Amendment. The Court, in that case, said the state's interest in promoting higher education overrode any incidental benefit to private and religious colleges. This incongruity notwithstanding, the state's Blaine Amendment has been cited as a reason that Missouri may not have a school voucher or education savings account program directly funded by the state. Tax credits, however, have been suggested as a method to fund school choice programs that would not violate the Missouri constitution.[6] In a tax-credit program, donors contribute money to the scholarship organization and receive a credit toward their state taxes. Since the dollars never enter the public treasury, they are not "public dollars." Such a program would not violate the Blaine Amendment because the program would not be funded by public dollars.

In 2011, the U.S. Supreme Court upheld this notion in *Arizona Christian School Tuition Organization v. Winn*.[7] The court ruled the plaintiffs in the case lacked standing

to sue the state of Arizona because funds for the program were not public dollars. Writing the opinion of the court, Justice Anthony Kennedy stated, "Respondents' contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the Arizona State Treasury."[8] To date, every appellate court that has considered whether tax-credit-eligible donations to privately operated scholarship organizations are public or private funds has concluded that the donations are private dollars.[9]

Since Missouri has a Blaine Amendment, proponents of Bryce's Law sought a tax-credit program. Lobbyists for public education groups fiercely opposed this effort, as they have consistently opposed expanding school choice in Missouri. The ability of donors to receive tax credits was stripped from the bill and the current nonfunctioning structure was put in place. As a result, while Missouri recognizes the special educational needs of children with disabilities and the importance of giving parents of such children options for maximizing their children's education opportunities, Bryce's Law has yet to serve a single student.

But all hope is not lost. Now, it seems, the Blaine Amendment may not pose the limitation that school choice opponents claim it does.

TRINITY LUTHERAN

The question of the constitutionality of Missouri's Blaine Amendment actually arises from a court case from our own backyard that made it to the U.S. Supreme Court. On June 26, 2017, in a 7-2 decision, the U.S. Supreme Court overruled the lower court's decision in *Trinity Lutheran v. Comer*. At face value, the case was about scrap tires, and whether or not a small Christian preschool and daycare center could get reimbursed by the state for using them to resurface their playground. But in trying to determine the answer to that question, the court touched on issues of religious liberty that may have far-reaching effects in the Show-Me State and beyond.

Specifically, the court's ruling in *Trinity Lutheran* has implications for educational choice in Missouri. The Court found that reliance on Missouri's Blaine Amendment to exclude Trinity Lutheran from the program violated the free-exercise rights of the church and its members. The logical implication of this holding is that Missouri can make public funds available to provide scholarships for students who qualify for them under Bryce's Law.

How did a little school in Columbia become the center of a national conversation about religious liberty? It wanted to resurface its playground to make it safer for their kids. In 2012, the school applied to participate in the Department of Natural Resources' scrap tire recycling program to replace its pea gravel playground with one made of more knee-friendly soft rubber. Their application was ranked 5th out of the 44 organizations that applied, easily qualifying Trinity, but their application was denied, per Missouri's Blaine Amendment, because the school was a religious institution.

The Blaine language shows up in two clauses in Missouri's constitution that bar aid to religious organizations. In Article I, Section 7, the Missouri Constitution states:

> *That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof.*

According to the state, reimbursing Trinity Lutheran would have violated Article 1, Section 7, of the Missouri Constitution, and therefore the school could not be allowed to participate in the program. The lower federal courts agreed, and given the constitutional language it is clear to see why. Reimbursing Trinity Lutheran for its playground could be seen as granting aid either directly or indirectly to a church.

Trinity Lutheran argued that these state constitutional provisions violated its federal constitutional rights, namely its right to free exercise of religion. Trinity Lutheran argued that it was being discriminated against because of its religious character, even though the program that it wanted to participate in was religiously neutral. Trinity Lutheran simply wanted to participate in the program equally with other non-religious organizations. Similarly, if a church wanted to reserve a park shelter for a picnic, it would be discriminatory to deny it the reservation just because a church is a religious organization. A church should be treated equally to all who want to reserve the shelter.

The writing on the wall became clear during oral arguments. Justice Elena Kagan stated her opinion quite directly, saying:

> *But here's the thing. There's a constitutional principle. It's as strong as any constitutional principle that there is, that when we have a program of funding—and here we're funding playground surfaces—that everybody is entitled to—to that particular funding, whether or not they exercise a constitutional right; in other words, here, whether or not they are a religious institution doing religious things. As long as you're using the money for playground services, you're not disentitled from that program because you're a religious institution doing religious things. And I would have thought that that's a pretty strong principle in our constitutional law.*[10]

Later, she even went further, responding to the state's attorney's argument that reimbursing Trinity would amount to an endorsement of or entanglement with the school:

> *I don't mean to say that those are not valid interests. But it does seem as though this is a clear burden—looked at that way, this is a clear burden on a constitutional right. And then your interests have to rise to an extremely high level. . . . It's a burden on a constitutional right, in other words, because people of a certain religious status are being prevented from competing in the same way everybody else is for a neutral benefit.*[11]

When the decision finally came down, Justice Kagan's argument was prescient. Chief Justice Roberts wrote the decision, stating:

> *Trinity Lutheran is not claiming any entitlement to a subsidy. It is asserting a right to participate in a government benefit program without having to disavow its religious character. . . . The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.*[12]

There was one wrinkle in the ruling though. Footnote 3 of the decision reads:

> *This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.*[13]

This footnote has caused some confusion as to the extent of *Trinity*'s ruling. It says that *Trinity* only addresses discrimination with respect to playground resurfacing, but the logic could be extended to a number of other government programs, not the least of which are school scholarships for students who qualify for them.

For example, the federal Pell Grant program provides federal scholarship aid for postsecondary students who meet the program's income limitation. The scholarship money is sent directly to the institution of the student's choice—public or private, including religiously affiliated private colleges. As discussed previously, according to the Missouri Supreme Court, such college scholarships are even permissible under the state's Blaine Amendment. In fact, aspects of the Bryce's Law scholarship program are very similar to the design of the Pell grant program. Qualifying SGOs are required to issue a check in the name of the student's parent or guardian that is to be sent the student's chosen school.

Education scholarship programs would seem to function just like scrap tire recycling programs. They exist to perform a secular purpose (educating children) and in fact, only interact with religious organizations incidentally, after parents have actively chosen to pursue a religious option for their child's education. Parents are free to choose from a variety of religious and non-religious options. Furthermore, the scholarship often covers only a portion of the tuition.

This wouldn't be the first time that the constitutionality of a school scholarship program has been considered. The U.S. Supreme Court upheld vouchers in the 2002 decision *Zelman v. Simmons-Harris,*[14] with Chief Justice William Rehnquist writing of the Cleveland Scholarship Program:

> *It is neutral in all respects toward religion, and is part of Ohio's general and multifaceted undertaking to provide educational opportunities to children in a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion and permits participation of all district schools—religious or nonreligious—and adjacent public schools. . . . No reasonable observer would think that such a neutral private choice program carries with it the imprimatur of government endorsement. Nor is there evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options: Their children may remain in public school as before, remain in public school with funded tutoring aid, obtain a scholarship and choose to attend a religious school, obtain a scholarship and choose to attend a nonreligious private school, enroll in a community school, or enroll in a magnet school.*[15]

Given this analysis, and the decision in *Trinity Lutheran*, Missouri's constitution should not bar the state from creating a publicly funded school scholarship program and religious schools should not be barred from accepting the scholarships.

FUNDING BRYCE'S LAW

In 2013, the Missouri legislature passed Bryce's Law in order to help students with autism-spectrum disorders and other special needs. In addition to developing lists of resources available to parents, the law created a program designed to provide scholarships for students with special needs to get services outside of traditional public schools. The law directs DESE to try to find funding for the program from grants or other means. The law also defines which students should be eligible and which service providers would be eligible to receive funds.

It is clear that both public and private providers would be eligible, as the law includes language identifying a "nonpublic elementary or secondary school in Missouri that complies with all of the requirements of the program and complies with all state laws that apply to nonpublic schools regarding criminal background checks for employees and excludes from employment any person not permitted by state law to work in a nonpublic school" as a "qualified school."[16]

The problem, as discussed above, is that the current structure of Bryce's Law has resulted in no funding.

The solution seems clear at this point: Missouri simply needs to fund Bryce's Law. It should appropriate sufficient funding for which approved SGOs can apply.

A reasonable concern for many Missourians might be: "We don't want to create a new state program that takes funding from something else."

As it turns out, the cost to the state should be minimal. The amount the state spends per student depends on five key factors: the state adequacy target, whether the student has an Individualized Education Plan (IEP), if the student has limited English proficiency (LEP), if the student qualifies for free or reduced-price lunches (FRL), and where the student lives.[17] In fiscal year 2020, the state adequacy target will be $6,375.[18] This is the minimum amount of funding that the state guarantees for each student in Missouri. Schools can and do raise more funding than this, but here we are primarily concerned with the cost the state might incur in funding Bryce's law.

In the state's funding formula, IEP, LEP, and FRL students receive more than students not classified in one of these three groups. This classification system is a way of providing extra funding to school districts serving students with special needs. The formula also provides extra funding to school districts in areas of the state with a higher cost of living. Using these weights and the cost-of-living adjustment, we can calculate the range of funding the state guarantees to districts per pupil. Through the funding formula, the state guarantees between $6,375 for a student with no "weights" and $18,099 for a student with multiple weights who lives in the St. Louis metropolitan area. If the state were to simply follow the funding formula when creating the funding stream for Bryce's Law, the program could be fiscally neutral for the state. It is spending the money to educate the child wherever he or she goes, so sending the money to a traditional public school district, a charter school, or to a private school via a scholarship is mathematically identical from their perspective. To reiterate: If Bryce's law were funded by simply allowing students with special needs to direct their funding into a scholarship program, it would be revenue-neutral for the state.

While we focus here on state expenditures, it is important to realize this program would likely yield considerable cost savings for public school districts. Unlike a traditional scholarship program that could serve any student, Bryce's Law is targeted to students with specific special needs. Students with these special needs tend to be extremely costly for school districts. In many cases, schools hire outside therapists and specialists to work with a student who has an IEP. Some hire aides to follow a student all day. Most if not all of these costs could be cut if the student were to leave the district.

In short, funding Bryce's Law would not be fiscally draining to the state or to local school districts. Rather, it could be fiscally neutral for the state and could generate cost savings for the district. To ensure this is the case, lawmakers may want to consider the following:

1. Restricting the program to students who had previously attended a public school.
2. Requiring school districts to remove the student from funding formula calculations in the year the student leaves.[19]
3. Offering students 90 percent of the state funding. This would allow the program to cover administrative costs.

CONCLUSION

Bryce's Law was put into place for a reason. Parents of children with special needs often struggle to make sure that their child is receiving a high-quality education that is appropriate to their needs. A fully operational Bryce's Law would be a boon for thousands of children with special needs across Missouri. It would give them more options to find an education that works for them, with minimal to no repercussions for traditional public schools. It would do all of this at very low cost. Implementation of Bryce's Law would be a win, win, win.

The Blaine provisions in the Missouri constitution should no longer act as a barrier to a private school choice program in Missouri. The *Trinity Lutheran* ruling suggests that as long as scholarships are awarded on a religion-neutral basis, it is a violation of the free-exercise rights of Missouri citizens to deny religious organizations the opportunity to participate in such a program. The First Amendment is a bedrock principle of our nation. Our system of schooling should respect it.

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NOTES

1. 137 S. Ct. 2012 (2017).
2. Lear, M. Sponsor discusses tax credit scholarship for children with autism, other disorders. *Missourinet.* April 1, 2013. Accessed September 6, 2018 at: https://www.missourinet.com/2013/04/01/sponsor-discusses-tax-credit-scholarship-for-children-with-autism-other-disorders/.
3. Mo. Rev. Stat. §161.825 (2017).
4. Mo. Rev. Stat. §161.825 (2017). See C.S.R. §§10-2.010, 10-2020, and 10-2030.
5. 538 S.W.2d 711 (Mo. 1976).
6. Lueken, M. and Michael McShane. Estimating the fiscal impact of a tax-credit scholarship program. Show-Me Institute. July 13, 2016. Retrieved September 6 from: https://showmeinstitute.org/publication/school-choice/estimating-fiscal-impact-tax-credit-scholarship-program.
7. 563 US 125 (2011).
8. 563 US 125, 16-17 (2011).
9. *Mallory v. Barrera,* 544 S.W. 2d 556 (Mo. 1976); *Paster v. Tussey,* 512 S.W. 2d 97 (Mo.1974); see also *Duncan v. New Hampshire,* 102 A.3d 913 (N.H. 2014) (holding taxpayers lacked standing to challenge the state's Education Tax Credit Program because they could not demonstrate impairment or prejudice); *Gaddy v. Georgia Dep't of Revenue,* 802 S.E.2d 225, 230 (Ga. 2017); *Faasse v. Scott,* No. 2014-CA-001859, 2014 WL 6634183 (Fla. Cir. Ct. Oct. 7, 2014) (granting the state's motion to dismiss for plaintiff's lack of standing because plaintiff failed to show a special injury).
10. Transcript of *Trinity Lutheran* oral argument. Retrieved September 6 from: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-577_l64n.pdf.
11. Ibid.
12. 137 S. Ct. at 2022.
13. Ibid.
14. 536 US 639, 640 (2002).
15. 536 US 639 (2002); https://supreme.justia.com/cases/federal/us/536/639/#tab-opinion-1961134.
16. Mo. Rev. Stat. §161.825 (2017).
17. Shuls, J. A primer on Missouri's foundation formula for K-12 public education: 2017 update. Show-Me Institute. March 15, 2017. Retrieved September 6, 2018 from: http://showmeinstitute.org/publication/budget/primer-missouris-foundation-formula-k-12-public-education-2017-update.
18. Missouri Department of Elementary and Secondary Education. June 2018 Newsletter. Retrieved September 6, 2018 from: https://dese.mo.gov/sites/default/files/finance/memos/documents/sf-June2018.pdf.
19. School districts can use the previous two years enrollment figures when seeking state aide. If a district did this, it could still claim the student's enrollment for two years after the student had left the district.

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