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## Point of View

# Gene Nichol: Law takes a beating in NC voucher saga

By Gene Nichol

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Superior Court Judge Robert Hobgood

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North Carolina's move to introduce a voucher program, offering millions of public dollars to fund private schools, says much about the General Assembly's desire to debase public education. The unfolding voucher saga also illustrates, pointedly, the temper, arrogance and overreach of governance in the new North Carolina.

The "Opportunity Scholarship Program" – passed in the 2013 session – appropriated \$10 million to fund "scholarships" for eligible children to use at private primary and secondary schools. In turn, it reduced the public system budget by about \$11.8 million.

Schools receiving tax dollars are not required under the statute to be accredited by any state or national agency, to hire teachers who are licensed or have any stated set of credentials, to meet any meaningful

curriculum standards, to demonstrate any level of student achievement or to show they won't discriminate on the basis of race, sex, sexual orientation, disability or religion.

Such is our fervor to turn over scarce education funds to 700 private, mostly religious, schools without a whiff of accountability. All that is demanded is they not be deemed "public." No matter what nonsense (or venom) they teach, we stand ready to subsidize it.

In December, a group of public school enthusiasts sued to block the program. They alleged it violates the N.C. Constitution's Article IX, Section 6 demand that education appropriations be "used exclusively for establishing and maintaining a uniform system of free public schools."

On Feb. 28, Wake County Superior Court Judge Robert Hobgood – for decades one of North Carolina's most highly regarded jurists – issued an injunction stopping implementation of the Opportunity Scholarship Program. Hobgood concluded that providing public funds to private schools likely violates Article IX, Section 6. "Exclusively for free public schools," he surmised, means what it says. The legislation redirects funds from the public schools to private ones. That may, or may not, be a good idea, but the state constitution clearly forbids it. The Court of Appeals quickly affirmed.

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**Legislators howled.** Sen. Phil Berger and House Speaker Thom Tillis called the suit a "defeatist effort to trap underprivileged children in low-performing schools." They theorized, without basis, that Hobgood's tight conclusion would throw an array of state-supported educational efforts under the bus. Lawyers defending vouchers claimed Hobgood was making policy, not enforcing law.

Then matters got weirder.

In May, the N.C. Supreme Court issued a one-sentence order lifting Hobgood's injunction. Acting like a closed caucus of the Republican Party, the justices neither explained their rationale nor revealed their votes. No need. They had their marching orders. Our highest tribunal is no longer supreme or, in any meaningful sense, a court.

Things didn't stop there.

Deep inside a 250-page Senate budget passed a couple weeks ago, Republicans placed a provision designed to limit the jurisdiction of state judges to entertain constitutional challenges to acts of the legislature. Under the provision's terms, facial constitutional claims would be directed to a three-judge panel appointed by the (new Republican) chief justice. Having repeatedly fared poorly in such actions, the Senate opted to try to change the rules.

Recalling Judge Hobgood, the measure would also automatically stay enforcement of any ruling invalidating a statute pending appeal, raising significant due process and separation of powers concerns. Constitutional accountability has apparently grown tiresome. The senators aren't even willing to wait for their fellow partisans on the Supreme Court to scuttle the effort.

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**Berger gleefully supported the jurisdiction-altering measure** by citing a more modest provision requiring similar panels in redistricting cases passed by the Democrats in 2003. Payback on stilts.

When our legislators move beyond the enactment of preferred policies to restrict access to the courts, or breach judicial independence, or constrain rights of expression and petition, or trump local government prerogative, or tilt the electoral playing field, they alter the structure, balance and legitimacy of government. They declare: "There's a new sheriff in town, it's our way or the highway and we've widened the on-ramp." Huey Long must be proud.

It's also ironic that, in the convoluted voucher episode, only one player (putting aside the affirming Court of Appeals) took the notion of constitutional accountability seriously – Robert Hobgood.

Berger and Tillis also take oaths to uphold the constitution, but they cast aside in favor of potent ideological ambition. (They vowed on Thursday to expand the voucher effort.) The North Carolina Supreme Court has sheepishly traded its independence for the boon and ascendancy of dark money politics.

Hobgood, though, is old school. He's no liberal. But he reads the law books. He enforces what they demand, not what he chooses. So he was castigated and reversed, and steps were launched to curtail his power. He's an inconvenience in the new Carolina. Heaven help us.

Gene Nichol is Boyd Tinsley Distinguished Professor at UNC-Chapel Hill. He doesn't speak for UNC.

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