



2013 Policy Priorities Handbook for Alabama

The Alabama Policy Institute (API) is an independent, non-profit research and education organization that is issue-centered and solution-oriented. We provide in-depth research and analysis of Alabama's public policy issues to impact policy decisions and deepen Alabama citizens' understanding of, and appreciation for, sound economic, social, and governing principles.

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2013 Policy Priorities Handbook for Alabama

Policy Priorities for Alabama is a handbook compiled specifically for each legislative session as a research and education guide on the issues facing our state. The 2013 edition consists of 23 policy briefs taken from the Alabama Policy Institute's *Guide to the Issues* which provide background, policy considerations, and recommendations, along with research citations. There are more than 50 *Guide to the Issues* available free of charge at the Alabama Policy Institute website, www.alabamapolicy.org. The Alabama Policy Institute believes that a more informed electorate will lead to a stronger state.

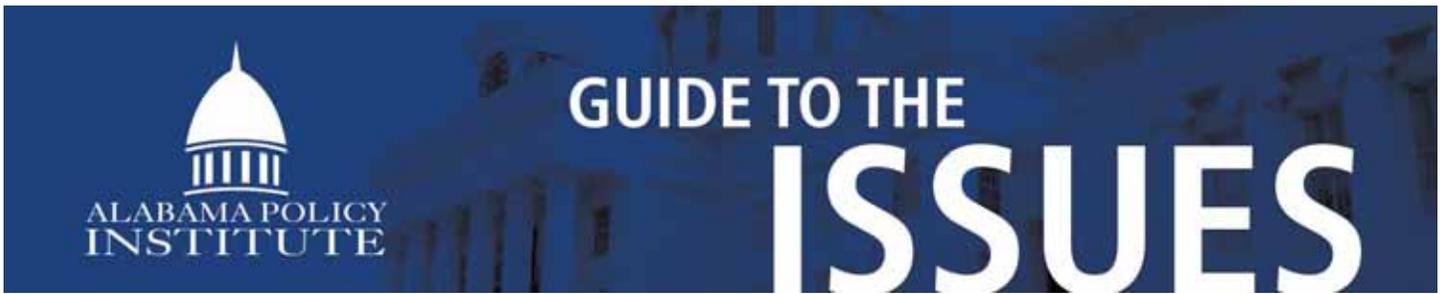
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Reforming Alabama State Government



Establishing Home Rule in Alabama

Background

Home rule is the power and authority of local governments to run their own affairs without the oversight of the state legislature.¹ In Alabama, the local decision-making power offered by home rule is significantly limited by the state constitution.

When Alabama's Constitution was first enacted in 1901, no provisions were made for the local autonomy and independent decision-making authority of the State's local governments. The Constitution affords Alabama's 67 counties little power to independently govern their own affairs, and local governments must pass routine ordinances and local regulations through statewide constitutional amendments.²

In order to craft their own regional-specific policies, local officials submit constitutional amendments to the entire State Legislature. As a result, over 70% of Alabama's nearly 900 constitutional amendments apply to a single city or county, and State legislators spend considerable amounts of time in legislative sessions debating such local matters.³

Because the Alabama State Legislature convenes for only 30 days per legislative session, on average only 40 percent of local bill requests will make it through the legislative process during the first session the bill is introduced. The result is that many local issues remain idle and unaddressed for long periods of time.⁴ Furthermore, when an amendment passes the Legislature, the amendment must be approved by popular vote. Amendments are usually not voted on until a regular election takes place, which can be long after the Legislature has passed an amendment. For example, on June 9, 2011 state legislators passed Senate Bill 466

ISSUE SNAPSHOT

Over 70% of Alabama's nearly 900 constitutional amendments apply to a single city or county, and state legislators spend considerable amounts of time in state legislative sessions debating local matters.

Many states implement home rule to cities and counties based on their population.

The State already classifies cities based on population. A similar metric should be developed for Alabama's counties. These classifications should then be used to develop uniform home rule for cities and counties, respectively.

relating to Mobile County and the city of Prichard consolidating their water and sewer boards.⁵ This local amendment did not go to statewide vote until November 6, 2012.⁶

No uniform system of home rule exists for cities and counties. While municipal corporations are provided some local decision-making powers in Sections 220-228 of the state constitution, there is no constitutional equivalent for counties.⁷

Policy Considerations

In the early part of the twentieth century, Texas's legislative sessions were becoming increasingly preoccupied with granting more authority to local governments for issues that would have been quickly resolved through home rule. At that time the growth of cities in Texas was outstripping the Legislature's ability to deal with local matters in a timely manner. After

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various unsuccessful attempts at negotiating individually-granted home rule charters on a case-by-case basis, it was decided that a single streamlined amendment would provide any city with a population greater than 5,000 the privilege to adopt a home rule charter through local popular vote.⁸

Using a population metric like Texas's is the most popular framework for the establishment of limited home rule in other states. This system automatically grants municipalities or counties within a particular population range the authority to put home rule to popular vote on their local ballot. For example, Colorado grants home rule privileges to towns with populations as low as 2,000,⁹ whereas Illinois only grants home rule privileges to cities with a population greater than 25,000.¹⁰

In Alabama, municipalities have a great deal of room to exercise independent decision-making because of delegated "general law" powers conferred by Section 110 of the state constitution.¹¹ Furthermore, the Code of Alabama classifies municipalities by population for purposes of adopting general laws without having to pursue statewide legislative approval. This means the Legislature, through general legislation rather than by a local law requiring legislative action and popular vote, can confer more extensive legislative and administrative privileges upon all "Class 1" municipalities (population 300,000 or more) or all "Class 8" municipalities (population 5,999 or less).¹² Expanding Section 110 of the state constitution to cover counties as well would create a similar framework to grant limited home rule to qualified counties based on population size.

Recommendations

The introduction of limited home rule would simultaneously solve three challenges facing the state constitution and state and local legislative processes. First, by eliminating locality-specific amendments, home rule reform could result in a 70% reduction in the size of the Alabama Constitution. Second, by not having to

wait until the next legislative session to enact change, local officials would more effectively and efficiently serve their constituents. Third, provisions for home rule would allow state legislators to utilize their limited time and resources towards more pressing issues of statewide and national relevance as opposed to addressing such mundane issues as rodent control, landscape maintenance, billboard regulation, among a long list of others.¹³

Citizens are entitled to county governments that are held accountable for stable financial and operational structures. Therefore, decisions regarding significant changes to the financial policies, debt accumulation, or operational structure of the county must be made at the local level. Local governments need a clear delineation of their authority, and the eight classes of population categories already being used to classify municipalities provide simple and well-established criteria legally-recognized by the State of Alabama which can be replicated to similarly classify counties. Streamlining the granting of home rule privileges to cities and counties through an automatic privilege based upon population criteria is the preferred option among most states that currently implement home rule.

¹ See *Home Rule*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/270114/home-rule> (last visited Feb. 20, 2013).

² See ALA CONST. available at http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/Constitution/1901/Constitution1901_toc.htm.

³ *Why We Need a New Constitution*, ALABAMA CITIZENS FOR CONSTITUTIONAL REFORM, 2010, <http://www.constitutionalreform.org/whyreform.shtml> (last visited Feb. 20, 2013).

⁴ *The Alabama Legislature: Facts and Issues*, THE LEAGUE OF WOMEN VOTERS OF ALABAMA EDUCATION FUND (2006), 3, 24 http://www.lwval.org/legstudy/factsandissues/AL_Leg_F&I_whole.pdf.

⁵ S.B. Bill 466, 2011 Regular Sess., <http://alisondb.legislature.state.al.us/acas/ACTIONViewFrameMac.asp?TYPE=Instrument&INST=SB466&DOCPATH=searchableinstruments/2011RS/Printfiles/&PHYDOCPATH=//alisondb/acas/searchableinstruments/2011RS/Printfiles/&DOCNAMES=SB466-int.pdf,,SB466-enr.pdf>.

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⁶ Beth Chapman, *Proposed Amendments to Appear on the Ballot Statewide*, ALA. SECRETARY OF STATE,

<http://www.sos.state.al.us/downloads/election/2012/general/statecert-amendments-2012-06-08.pdf>.

⁷ ALA CONST. art. XII, § 220-228 available at

http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/Constitution/1901/Constitution1901_toc.htm.

⁸ Terrell Blodgett, *Home Rule Charters*, HANDBOOK OF TEXAS ONLINE, TEXAS STATE HISTORICAL ASSOCIATION,

<http://www.tshaonline.org/handbook/online/articles/mvhek> (last visited Feb. 20, 2013).

⁹ Kenneth G. Bueche, *A History of Home Rule*, COLORADO MUNICIPAL LEAGUE (Nov. 2009) 7

http://www.cml.org/uploadedFiles/CML_Site_Map/_Global/pdf_files/09_home_rule.pdf.

¹⁰ ILL. CONST. art. VII § 6 (a) available at

<http://www.ilga.gov/commission/lrb/con7.htm>.

¹¹ ALA. CONST. art. IV, § 110 available at

<http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/Constitution/1901/CA-245645.htm>.

¹² ALA. CODE §11-40-12 available at

<http://alisondb.legislature.state.al.us/acas/codeofalabama/1975/coatoc.htm>.

¹³ *Why We Need a New Constitution*, ALABAMA CITIZENS FOR CONSTITUTIONAL REFORM, 2010, <http://www.constitutionalreform.org/whyreform.shtml> (last visited Feb. 20, 2013).



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State Government Efficiency: Information Technology

Background

The State of Alabama has had multiple entities which perform information technology (IT) tasks: the Information Systems Division (ISD)¹, the Telecommunications Division², the Alabama Supercomputer Authority (ASA)³, the Office of Information Technology (OIT)⁴, and the Division of Data Systems Management (DSM).⁵

In addition to those technology service providers, at least eight other groups provide IT services. Among these groups are two state universities and six private firms.⁶ Furthermore, various agencies within the State employ their own IT staff. In 2010, the Alabama Department of Transportation employed 153 IT staff, more IT staff than any other agency. The Department of Finance (the Department under which ISD resides) employed 145 IT staff. The top ten IT staff employers, excluding DSM, had 729 IT staff.⁷ In 2010, the agencies with the top 10 highest IT expenditures spent \$114,847,076.90.⁸

During the 2013 Regular Session, Senator Phil Williams and other senators introduced two bills to consolidate the management of Alabama's IT: Senate Bill (SB) 116 and SB117. SB116 “. . . creat[es] the Alabama Technology Authority to coordinate with the Alabama Secretary of Information Technology” The Authority is meant to replace the Division of Data Systems Management and other entities in the State that provide IT service.⁹ SB117 creates the Office of Secretary of Information Technology and a Permanent Legislative Oversight Committee on Information Technology.¹⁰ SB117 also repeals the sections of the Alabama code¹¹ creating the Office of Information

ISSUE SNAPSHOT

Alabama's Information Technology (IT) management is highly decentralized.

Senate bills 116 and 117 move to consolidate and eventually privatize the State's IT operations.

Changes in IT need to include the consolidation of all IT entities and the outsourcing of all IT needs. These changes must be well-outlined and benchmarked.

Technology¹² and eliminates the power of the Division of Data Systems Management to oversee all of the State's data processing services.¹³

Policy Consideration

Currently, there is no entity in state government that has the responsibility and authority for overseeing IT from an enterprise perspective. Alabama state government's highly decentralized organization results in a tendency for departments and agencies to blaze different technology trails to fulfill their individual missions. While some technology diversification is necessary, many of the IT needs of the State are duplicative. Adopting standard technologies and moving the commonly redundant platforms into a shared services model could result in significant savings to state agencies.

SB116 creates the Alabama Technology Authority (ATA) to serve all state entities, except the Department of Education, which will still be served by the Alabama

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Supercomputer Authority (ASA). According to SB116, one entity overseeing all IT in the State would “encroach upon [and] impede the cost effective and efficient informational technology service delivery for the state’s educational institutions.”¹⁴ By not including Department of Education IT services within the ATA, the State is not able to realize full economies of scale and efficiency. Each state department plays a unique role, but each department can use similar IT tools to achieve those goals. For example, most state departments utilize IT tools to perform word processing. Tools such as these are not specific to Department of Transportation or Education functions; many agencies throughout the State can utilize these tools. By giving Education an individual IT service provider, optimum economies of scale cannot be realized and inefficiencies perpetuate. Furthermore, entities, public and private, other than the Department of Education utilize the services of the ASA.¹⁵ The ASA website has information offering their services for “commercial uses,”¹⁶ including internet service, email/anti-spam, content filtering, and shared memory computing.¹⁷ The ASA already constructed the framework to manage services for a wide variety of users, and therefore should be able to easily transition to providing IT services for all state entities.

SB116 also requires the transfer of all state employees currently providing IT services to the ATA.¹⁸ This consolidation will improve communication throughout the State’s IT structure. SB116 intends to eventually replace all of these employees with private contractors. Moving to private contractors would save money for the State in both the short- and long-term. Alabama’s Legislature would be wise to impose a timeline for these changes to ensure that they come to fruition.

SB117 creates the Office of Secretary of Information Technology. The bill tasks the Secretary with coordinating the ATA, created in SB116, and the ASA to develop a four-year strategic plan aimed at “reducing redundant expenditures and maximizing the return on information technology investments.”¹⁹ The steps necessary for the Secretary to achieve the stated goal of

efficiency are well outlined.²⁰ The bill advocates for “developing a unified and integrated structure and enterprise architecture for information technology systems for all state agencies.”²¹ This goal conflicts with the delineation between IT authorities for separate government entities: the ASA for education-related entities and the ATA for all other state entities.

Recommendation

Alabama must move to consolidate and streamline its information technology. As noted, a more comprehensive consolidation will likely bring about the maximum level of operational efficiency and ability to leverage economies of scale. In addition, the transition from multiple IT entities to the single ATA should include benchmarks and deadlines to ensure a timely and predictable transition. Likewise, the transition to outsourcing IT must be well-structured.

Abolishing the OIT, ISD, ASA, the Telecommunications Division, along with the other fragmented IT entities and consolidating IT services under one Authority will increase efficiency, improve communication, and decrease expenses.

¹ INFORMATION SYSTEMS DIVISION, ALABAMA DEPARTMENT OF FINANCE, <http://isd.alabama.gov/> (last visited Feb. 14, 2013).

² ALA. CODE §41-4-281, available at <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/41-4-281.htm>.

³ ALA. CODE §41-10-391, available at <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/41-10-391.htm>.

⁴ ALA. CODE §16-61D-1, available at <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/16-61D-1.htm>.

⁵ ALA. CODE §41-4-220, available at <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/41-4-220.htm>.

⁶ ALABAMA COMMISSION ON IMPROVING STATE GOVERNMENT SUBCOMMITTEE ON EXECUTIVE MANAGEMENT TAB IX, 3

⁷ *Id.* at 2.

⁸ Author’s calculations: Add all of “*Estimated Total Data Processing Services” in the table “Executive Branch Agencies with the largest expenditures involving *Estimated Total Data Processing Services as of 3/25/2011 (Fiscal Year 2010 Data).” *Id.* at 3.

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⁹ S.B. 116, 2013 Regular Session, 2 (Ala. 2013) *available at* <http://alisondb.legislature.state.al.us/acas/ACTIONViewFrameMac.asp?TYPE=Instrument&INST=SB116&DOCPATH=searchableinstruments/2013RS/Printfiles/&PHYDOCPATH=//alisondb/acas/searchableinstruments/2013RS/PrintFiles/&DOCNAMES=SB116-int.pdf,SB116-eng.pdf>.

¹⁰ S.B. 117, 2013 Regular Session, 1 (Ala. 2013).

¹¹ *Id.* at 9.

¹² ALA. CODE §16-61D-[1-6], *available at* <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/153212.htm>

¹³ S.B. 117 *supra* note 10 at 9.

¹⁴ S.B. 116 *supra* note 9 at 2.

¹⁵ *ASA Clients*, Alabama Super Computer Authority, <http://www.asc.edu/clients/index.shtml> (last visited Feb. 14, 2013).

¹⁶ *ABOUT ASA*, Alabama Supercomputer Authority, <http://www.asc.edu/aboutasa/index.shtml> (last visited Feb. 14, 2013).

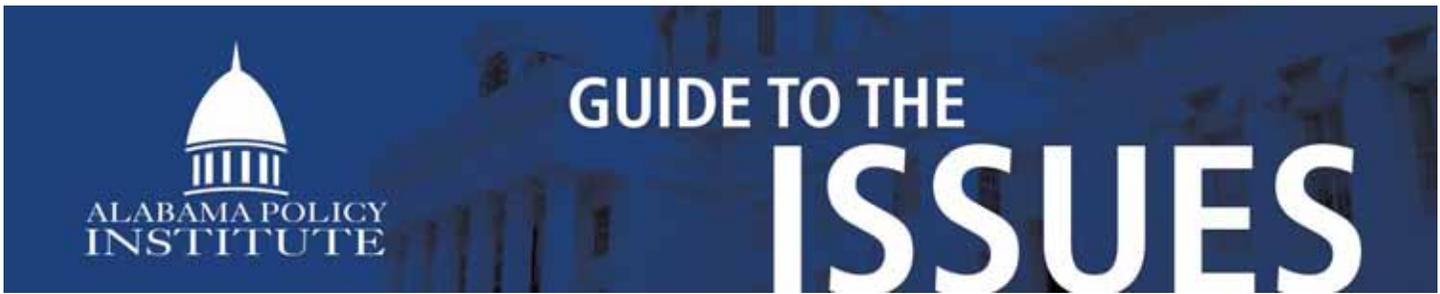
¹⁷ *ASA Services*, Alabama Supercomputer Authority, http://www.asc.edu/asa_services/index.shtml (last visited Feb. 14, 2013).

¹⁸ S.B. 116, 2013 Regular Session, 6 (Ala. 2013).

¹⁹ S.B. 117, 2013 Regular Session, 4 (Ala. 2013) *available at* <http://alisondb.legislature.state.al.us/acas/ACTIONViewFrameMac.asp?TYPE=Instrument&INST=SB117&DOCPATH=searchableinstruments/2013RS/Printfiles/&PHYDOCPATH=//alisondb/acas/searchableinstruments/2013RS/PrintFiles/&DOCNAMES=SB117-int.pdf,SB117-eng.pdf>.

²⁰ S.B. 117, 2013 Regular Session, 5 (Ala. 2013) *available at* <http://alisondb.legislature.state.al.us/acas/ACTIONViewFrameMac.asp?TYPE=Instrument&INST=SB117&DOCPATH=searchableinstruments/2013RS/Printfiles/&PHYDOCPATH=//alisondb/acas/searchableinstruments/2013RS/PrintFiles/&DOCNAMES=SB117-int.pdf,SB117-eng.pdf>

²¹ S.B. 117, 2013 Regular Session, 6 (Ala. 2013) *available at* <http://alisondb.legislature.state.al.us/acas/ACTIONViewFrameMac.asp?TYPE=Instrument&INST=SB117&DOCPATH=searchableinstruments/2013RS/Printfiles/&PHYDOCPATH=//alisondb/acas/searchableinstruments/2013RS/PrintFiles/&DOCNAMES=SB117-int.pdf,SB117-eng.pdf>



State Land and Space Management

Background

The Department of Conservation and Natural Resources' (DCN) State Lands Division Land Resource Information Center (LRIC) currently oversees the "State-Owned Land Registry," a database which includes information on state-owned real property.¹ The responsibility for data submission falls on each agency. No penalties currently exist for agencies or the DCN for failure to keep accurate records.² Additionally, the State Lands Division manages lands from state institutions to harvest timber, minerals, and other natural resources in order to gain revenue for both their office and the state institution which owns the land and natural resources.³

Many entries in the current LRIC database are incomplete while some offer insight into the shortfalls of the current property management system.⁴ Below are some examples:

- 2409 properties listed with no classification of USED or UNUSED
- 542 properties listed as UNUSED
- 152 PO Boxes listed as addresses for state properties
- Finance Department owns "UNNAMED ABANDON BUILDING"
- Finance Department owns "WINN DIXIE-PRATTVILLE"
- University of Alabama Birmingham owns "HOUSE AND PROPERTY IN VESTAVIA"
- CONS-LANDS owns "BAYWATCH MARINA, SUNSET GRILL"
- CONS-LANDS-MH S&O owns "DELCHAMPS" in Mobile (this is listed twice)

ISSUE SNAPSHOT

The Department of Conservation and Natural Resources' (DCN) currently oversees a database which includes incomplete information on state-owned real property.

This database shows 2409 properties listed with no classification of USED or UNUSED and the State owns "UNNAMED ABANDON BUILDING," "WINN DIXIE-PRATTVILLE," and "DELCHAMPS."

House Bill 82 contains provisions to significantly improve the State's database on real property. Along with these improvements, hiring a property management firm could result in significant savings for the State.

The Department of Examiners of Public Accounts maintains a similar, more complete list of state leases from private entities, but it does not include properties leased from one agency to another. This document includes a variety of useful information such as the number of leases by each agency, the annual cost of leases, and square footage of individual properties.⁵

Policy Consideration

The DCN lacks the means to effectively manage the state property list, much less develop plans for the best use for all properties. Furthermore, without the authority to require each state entity to submit complete and accurate information, obtaining comprehensive data is very unlikely.

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The State is most likely underutilizing many of its property holdings. Also, the State may overlap leased and owned properties, creating significant inefficiencies. Without access to accurate and complete information state property managers lack the knowledge to make sound decisions for the State.

During the 2013 regular legislative session, Representative Paul DeMarco introduced House Bill 82 (HB82) which makes improvements to the existing owned and leased property database.⁶ HB82 “require[s] the State Department of Finance to develop and maintain an automated inventory of all facilities and lands owned, leased, rented, or otherwise occupied or maintained by any [state entity].”⁷ Maintaining comprehensive data allows the group managing the state property to be able to effectively create a plan of action for each piece of property as well as coordinate space and property among many state entities. After data is gathered, the state real property management plan may consist of selling property, consolidating offices, or utilizing land for the highest return on use. By ensuring entities with property holdings and leases submit accurate and complete information, the state property manager will be able to perform a holistic analysis of the State’s current land and space.

The courts do recognize the necessity of regulating the issuance of permits, but require the reasons for restriction to be clear and judicious.

Recommendation

Alabama must first gather comprehensive information on property owned and leased by the State. To encourage compliance, agencies not providing information as required should be ineligible to receive funds for purchasing property and capital improvements. Once this information is gathered, the State should develop a strategy to determine best use of each piece of property which, among other things will eliminate leases that are above market rents, poorly located or underutilized, cross reference owned and leased properties in order to better utilize the property the State

has available, and utilize the “strength and stability” of a government tenant to negotiate better deals with landlords. If this analysis finds properties the State can sell, part of the revenue from the sale of properties should be returned to the agency which held the property; this will further encourage agencies to provide information to the state property manager.

The state property manager will continue to coordinate the purchase, sale, and lease of all state properties. This does not mean the State will also manage the use and maintenance of property; this responsibility will remain with the state agency best suited.

¹ LAND RESOURCES INFORMATION CENTER, ALA. DEPT. OF CONSERVATION AND NATURAL RESOURCES, <http://www.outdooralabama.com/public-lands/stateLands/LRIC.cfm> (last visited Feb. 12, 2013).

² ALA. CODE. §9-2-121 *available at* <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/9-2-121.htm>.

³ STATE LANDS, ALA. DEPT. OF CONSERVATION AND NATURAL RESOURCES, <http://www.outdooralabama.com/public-lands/stateLands/> (last visited Feb. 12, 2013).

⁴ STATE-OWNED LAND REGISTRY - 8.17.11, LAND RESOURCES INFORMATION CENTER, ALA. DEPT. OF CONSERVATION AND NATURAL RESOURCES (2011).

⁵ REPORT SEARCH, ALA. DEPT. OF EXAMINERS OF PUBLIC ACCOUNTS, <http://www.examiners.alabama.gov/ReportSearch.aspx> (in the section “Entity:” type “Real Property Leased from Private Entities, as of October 1, 2012”).

⁶ H.B. 82, 2013 Regular Session, (Ala. 2013) *available at* <http://alisondb.legislature.state.al.us/acas/ACTIONViewFrameMac.asp?TYPE=Instrument&INST=HB82&DOCPATH=searchableinstruments/2013RS/Printfiles/&PHYDOCPATH=//alisondb/acas/searchableinstruments/2013RS/PrintFiles/&DOCNAMES=HB82-int.pdf>.

⁷ H.B. 82, 2013 Regular Session, (Ala. 2013) 1 *available at* <http://alisondb.legislature.state.al.us/acas/ACTIONViewFrameMac.asp?TYPE=Instrument&INST=HB82&DOCPATH=searchableinstruments/2013RS/Printfiles/&PHYDOCPATH=//alisondb/acas/searchableinstruments/2013RS/PrintFiles/&DOCNAMES=HB82-int.pdf>.



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Retirement Systems of Alabama (RSA) Pension Reform

Background

The promise of a fully funded retirement for the nation's state employees is becoming harder to keep. Of the 149 state plans reporting their funding ratios for 2010, 93 were less than 80% funded. (Funding ratios are the difference between asset values and future liabilities, which are the promises made to current and future retirees.) Since 2008, the number of states failing to make full annual contributions to their state pension funds rose from 23 to 30 in 2010.¹ In response to these declining ratios, most states have reduced retiree benefits, increased employee contribution requirements, or pursued a combination of benefit cuts and contribution increases, some more than once.

Several factors have created this crisis in pension funding: a dramatic decline in the number of workers per retirees; overly optimistic returns on investments by pension funds; the continued effects of the 2008 financial crisis; and the use of defined benefit (DB) plans by almost all state pension programs. Unlike defined contribution (DC) plans, DB plans guarantee an uninterrupted stream of revenue for retirees, and are usually based on formulas including years of service and salary at retirement.²

The fiscal crises facing Alabama's Retirement Systems of Alabama (RSA) are just as serious as those facing the rest of the nation. In addition to being in the 12th percentile for public pension performance for the past 10 years,³ the RSA's teachers' retirement fund (TRS) and employees' retirement fund (ERS) have gone from being fully funded in 2001 to only 71% and 67% funded, respectively.⁴ Moreover, the RSA was among the worst-

ISSUE SNAPSHOT

The RSA has between \$10 billion and \$40 billion in unfunded liabilities over the next 30 years.

Since 2003, employer costs to the RSA have risen from \$296 million to \$999 million per year.

The RSA had the worst-performing public pension fund in the nation in 2008 and 2009, with total losses of approximately \$13 billion.

performing public pension funds in the nation in 2008 and 2009, with total losses of approximately \$8.6 billion.⁵

Policy Considerations

Much of the RSA's funding problem can be attributed to the use of an overly optimistic 8% rate of return on its investments. While the national average assumed return rate is also around 8%,⁶ a rate of 3.1%, based on 30-year Treasury bonds, is probably more realistic. Using the current rate of 8%, the RSA has unfunded liabilities totaling about \$10 billion over the next 30 years. If the 3.1% rate is used, this number becomes more than \$40 billion. To help cover these gaps, the required contributions of state employees have been raised from 5% to 7.25% and eventually 7.5%, but these increases will not keep the RSA financially stable.

Since 2003, employer contributions to the RSA have risen from \$296 million to \$999 million per year.⁷ These skyrocketing costs are largely the result of three causes:

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(1) RSA employees can retire with full benefits at any age with only 25 years of service, or at age 60 with at least 10 years of service; (2) current retirees have received generous cost of living (COLA) adjustments that have often exceeded inflation rates; and (3) the introduction of the (now-repealed) Deferred Retirement Option Plan (DROP) in 2002, costing the RSA almost \$60 million per year.⁸

Recommendations

Unless these problems are addressed soon, state employees face an eventual reduction in benefits, an increase in their contributions, and a later retirement than they originally planned. Alabama must implement long-term reforms that protect taxpayers from the RSA's unfunded liabilities.

To understand the full extent of the RSA's financial situation, an independent firm must complete an audit of the RSA's investments and liabilities. Using the results of this audit as a guide, the RSA must commit itself to five core principles:

1. Alabama lawmakers should adopt a conservative accounting approach where “worst case” scenarios are assumed and liabilities are properly counted. This will involve more than targeting future employees with reduced benefits and higher costs. To meet its current shortfall in funding, rosy assumptions about expected returns must be abandoned in favor of conservative ones that take into account the worst that can happen.
2. Legislators should move the risk of retirement plans from the taxpayer to the individual employee by moving away from the DB pension model. The state should implement DC plans, which are more flexible, portable, and less risky to the RSA because they are more protected from political decisions.
3. The “transition costs” of reform can be handled through buyouts and one-time government borrowing. By buying out its current employees and closing the

state's DB plan, the state could transition to a DC plan immediately.⁹

4. Radical reform will be unpleasant and met with resistance from employees and their representatives, but the long-term pain of further program modifications and benefit erosion will be far worse.

5. Alabama underestimates the ability of its employees to manage their own money. Risk-averse employees could safely park their assets in low-yield accounts, financial planners could help them make good portfolio selections, or a limited selection of higher-yield, lower-risk options could be offered.

¹ Hazel Bradford, *Public Pension Plan Woes Less General, More State-Specific, Study Finds*, PENSIONS & INVESTMENTS (Dec. 27, 2011), available at www.pionline.com/article/20111227/REG/11229916.

² For more on the growing reliance on defined contribution plans in the private sector, see Alicia Munnell, *Private Sector Defined Benefit Plans Vanishing*, SMART MONEY, Dec. 30, 2011, available at <http://blogs.smartmoney.com/encore/2011/12/30/private-sector-pensions-are-really-disappearing/>. According to Maria Shao, just 11 of 50 state pension plans have a hybrid or DC option. Maria Shao, *Public Sector Pension Plans: Change is Underway*, STANFORD KNOWLEDGEbase, Aug. 4, 2011, www.stanford.edu/group/knowledgebase/cgi-bin/2011/08/04/publicsector-pension-plans-change-is-underway/.

³ David White, *Teachers' Retirement System Trails Most Pension Plans*, THE BIRMINGHAM NEWS, June 4, 2011.

⁴ ERS data from CAVANAUGH MACDONALD CONSULTING, REPORT ON THE ACTUARIAL VALUATION OF THE EMPLOYEES' RETIREMENT SYSTEMS OF ALABAMA PREPARED AS OF SEPTEMBER 30, 2010 (July 22, 2011), available at www.rsa-al.gov/ERS/Pubs%20and%20forms/ERS%20Pubs/ERS-Val-2010-9-30.pdf, and earlier editions. TRS data from CAVANAUGH MACDONALD CONSULTING, REPORT ON THE ACTUARIAL VALUATION OF THE TEACHERS' RETIREMENT SYSTEMS OF ALABAMA PREPARED AS OF SEPTEMBER 30, 2010 (July 22, 2011), available at www.rsa-al.gov/TRS/Pubs%20and%20forms/TRS%20Pubs/TRS-2010-9-30-Val.pdf, and earlier editions.

⁵ Scott Beaulier, *Principles for Pension Reform in Alabama: Rethinking the Defined Benefit in Alabama's Retirement System*, Alabama Policy Institute (2012), available at <http://www.alabamapolicy.org/pdf/API%20Study%20Retirement%20System%202012.pdf>.

⁶ See *California Dreaming No More*, FINANCIAL TIMES, Mar. 5, 2010.

⁷ LEGISLATIVE FISCAL OFFICE, STATE OF ALABAMA, BUDGET FACT BOOK (Nov. 2010), www.lfo.state.al.us/pdfs/FY%202011%20Budget%20Fact%20Book.pdf.

⁸ Dana Beyerle, *DROP Program Has Non-public Employees at the Top of 'Retirement' List*, THE GADSDEN TIMES, Mar. 11, 2011.

⁹ See Scott Beaulier, *From Defined Benefit to Defined Contribution* (Mercatus Center Working Paper No. 11-37, 2011), http://mercatus.org/sites/default/files/publication/Defined_contribution_Beaulier_WP1137_0.pdf.



GUIDE TO THE ISSUES

State-Sponsored Lobbyists in Alabama

Background

Like many states in recent years, Alabama has faced budgetary shortfalls requiring state entities to execute their responsibilities with fewer resources. As a result, each agency, board, or commission has an increased interest in advocating directly to the State Legislature for appropriations.

In Alabama, the Governor submits his budget recommendations for the Legislature to consider. Typically, the legislative appropriations committees consider those proposals and develop budgets that are ultimately enacted. Frequently, agencies disagreeing with proposed budgetary or policy changes advocate directly to the Legislature in ways that may be inconsistent with the Governor's proposals. Currently, there are no restraints on the ability of agencies, boards, or commissions to lobby for increased funding, in opposition to budgetary cuts, or against policy changes recommended by the Governor.

As a result, the Alabama State Legislature may react to information or pressure from executive branch entities that hold positions contrary to those of the state's chief executive, the Governor.

Ethics changes in 2010 and 2011¹ excluded state agency heads and their designees from the designation of "lobbyist" so Alabama taxpayers have little idea how many non-elected state employees are paid to advocate for policies or funding levels inconsistent with those of their elected Governor.

The "2010 Registered Lobbyist List"² was issued prior to the changes in the ethics law. This list shows 170 lobbyists were hired by 59 state agencies and entities

ISSUE SNAPSHOT

In 2010, 139 Alabama state employees were registered as lobbyists in Alabama. Ethics law changes no longer require them to register with Alabama's Ethics Commission.

State agencies, entities and commissions should coordinate their fiscal and policy requirements with the Governor's Office rather than individually lobbying the Alabama Legislature.

If state agencies employ individuals to influence legislation and budgets in the Alabama Legislature, those individuals should register as lobbyists but pay no lobbying fee.

tasked with lobbying the Legislature on policy and budgetary issues affecting their operations. Of those registered lobbyists, 139 were also employees of the State. The "2011 Registered Lobbyist List"³ shows a decrease in state lobbyists. Only 3 employees of the State registered as lobbyists. This trend continued with the "2012 Registered Lobbyist List" where only 1 employee of the State registered.

Policy Considerations

Using state money to hire lobbyists in an effort to influence voting in the State Legislature dilutes the voice and vote of Alabama's citizens and may be viewed as a conflict of interest for public entities. Changes in the ethics law with respect to state employees give an inaccurate impression of lobbying activities. Lobbying by agencies and state entities directly to the Legislature

GUIDE TO THE ISSUES

continues to occur, but Alabamians have little access to information about how those government resources are utilized.

Recommendations

The State could save funds by reallocating certain lobbying expenditures and resources to the Governor's office to encourage communication between the Governor's office and the departments under his authority.

Alabama should create a reliable stream of communication, particularly for fiscal and budgetary matters, for requests and concerns from state agencies and entities through the executive branch to the State Legislature.

In order to maintain public transparency, agency employees who lobby the Governor's office and State Legislature should be required to register as lobbyists without paying a fee.

¹ ALA. CODE § 36-25-1 was modified by ALA. Act No. 2010-764, which took effect on March 20, 2011.

² ALA. ETHICS COMM'N., *2010 Registered Lobbyist List available at <http://ethics.alabama.gov/news/LobbyistsPDF2010.pdf>.*

³ ALA. ETHICS COMM'N., *2012 Registered Lobbyist List available at http://ethics.alabama.gov/Reports/WebDataLobbyistsPDF_2010.aspx.*

Limiting Alabama State Government



GUIDE TO THE ISSUES

Exploring a Constitutional Expenditure Limit for Alabama

Background

The State of Alabama continues to face a number of difficult and, frequently, unforeseen budgetary challenges. As a result of miscalculations and in accordance with Amendment 26 of the Constitution of Alabama,¹ proration of the Education Trust Fund occurred in FY 2001 (6.2%); FY 2003 (4.4%); FY 2008(6.5%); FY 2009 (18.0%); FY 2010 (9.5%); and FY 2011 (3%). Likewise, proration of the State General Fund recently occurred in FY 2010 (20.0%), FY 2011 (15%), and FY 2012 (10.62%).² In short, current budgetary practices provide unreliable controls for state spending.

Policy Consideration

In an attempt to remedy these budgetary faults, the Alabama State Legislature enacted The Education Trust Fund Rolling Reserve Act (ERRA) during the 2011 session.³ This act provides for an appropriations cap for the Education Trust Fund, based on a fifteen-year average growth rate in revenues.⁴ This may seem reasonable; however, because the ERRA cap is based on past revenues, the ERRA cap's growth simply mimics past revenues, revenues which may or may not be realized for the current fiscal year.

Tax and expenditures limits (TELS) have been used since 1875 when Missouri enacted the first property tax limitation.⁵ Recently, TELS have faced increased pressure due to the economic recession, and some TELS, such as Colorado's Tax Payer Bill of Rights (TABOR), have been repealed.⁶ Research shows

ISSUE SNAPSHOT

The State of Alabama continues to face a number of difficult and, frequently unforeseen budgetary challenges.

Current budgetary processes fail to effectively manage the budget.

The Alabama Dynamic Expenditure Limit (ADEL) creates a spending limit which automatically adjusts to the needs of Alabama citizens and provides for flexibility during tight budgetary situations.

TELS to be effective only if carefully constructed to accommodate a wide range of economic conditions.⁷

Recommendation

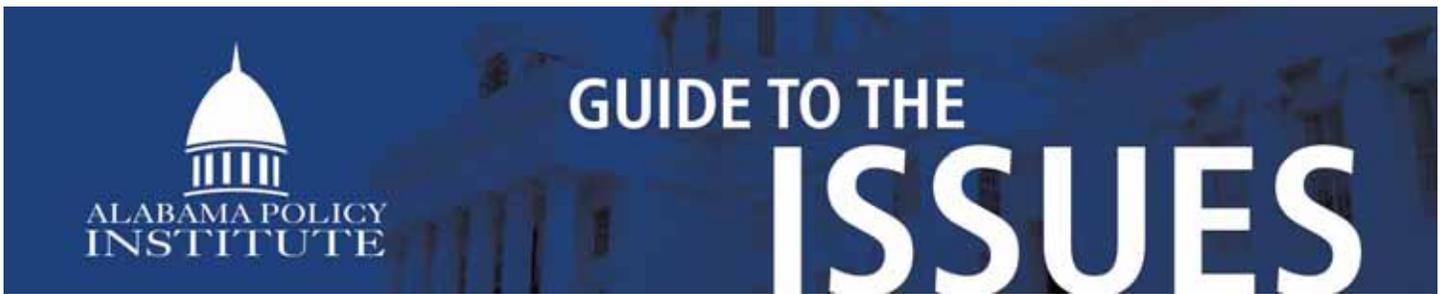
In order to prevent similar budgetary short falls in the future, the State of Alabama should install a well-constructed expenditure limitation. The Alabama Policy Institute proposes the Alabama Dynamic Expenditure Limitation (ADEL).⁸ ADEL utilizes changes in Alabama's population, inflation, and economic output to create an expenditure limit which moves with the economy to accommodate the needs of Alabama's citizens. ADEL works in conjunction with a reserve fund where revenue above the ADEL expenditure cap provides a buffer in times of revenue contraction. When funds received exceed the maximum amount allowed in the reserve fund, excess

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revenues will be transferred into a Citizen's Referendum Account where the citizens have a voice in spending the excess revenues.

As in many other areas, the private sector is better equipped to provide customizable options to its customers and accountability for results than a government bureaucracy. Introducing an element of market competition to public healthcare delivery has succeeded in other states and it can work in Alabama, too.

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- ¹ ALA. CONST. amend. 26, *available at* <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/Constitution/1901/CA-887808.htm>.
<http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/Constitution/1901/CA-887808.htm>
- ² NORRIS GREEN, *Budget Fact Book FY 2013*, ALABAMA LEGISLATIVE FISCAL OFFICE, 3 (Jan. 22, 2013), <http://www.lfo.alabama.gov/pdfs/Budget%20Fact%20Book/2013%20BUDGET%20FACT%20BOOK%20FINAL%20Website.pdf> (last visited Feb. 15, 2013).
- ³ H.B. 57, 2011 Reg. Sess., 9 (Ala. 2011), <http://alisondb.legislature.state.al.us/acas/ACTION/viewFrameMac.asp?TYPE=Instrument&INST=HB57&DOCPATH=searchableinstruments/2011RS/Printfiles/&PHYDOCPATH=//alisondb/acas/searchableinstruments/2011RS/PrintFiles/&DOCNAMES=HB57-int.pdf,HB57-eng.pdf,HB57-enr.pdf> (last visited Feb. 15, 2013).
- ⁴ *Id.* at 3.
- ⁵ STEVEN DELLER & JUDITH I. STALLMAN, *Tax and Expenditure Limitations and Economic Growth*, 90 MARQ. L. REV. 497, 497 (2006), http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1035&context=mulr_conferences.
- ⁶ BERT WAIANEN, STATE TAX AND EXPENDITURE LIMIT – 2008, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/IssuesResearch/BudgetTax/StateTaxandExpenditureLimits2008/tabid/12633/Default.aspx> (last visited Feb. 15, 2013).
- ⁷ JAMES M. POTERBA & KIM S. RUEBEN, *Fiscal Rules and State Borrowing Costs: Evidence from California and Other States*, PUBLIC POLICY INSTITUTE OF CALIFORNIA, vi (1999), http://www.ppic.org/content/pubs/report/R_1299JPR.pdf (last visited Feb. 15, 2013).
- ⁸ ANDREW KINNAIRD, EXPLORING A CONSTITUTIONAL EXPENDITURE LIMIT FOR ALABAMA, THE ALABAMA POLICY INSTITUTE, Feb. 2013.



The Alabama Trust Fund Payback

Background

On September 18, 2012, 65% of Alabama voters approved¹ the annual transfer of \$145,796,943 to the State General Fund (SG) from the Alabama Trust Fund (ATF) for fiscal years 2012, 2013, and 2014 for a total of \$437,390,829. The constitutional amendment (CA 856) contains no provision requiring repayment of the funds.²

Prior to the passage of this amendment, state legislators and Governor Bentley made promises to pay back all funds borrowed from the ATF.³

In addition to the \$437 million taken from the ATF in 2012, the Education Trust Fund (ETF) and the State General Fund owe the ATF a total of \$599 million (ETF borrowed \$437 million in 2009; GF borrowed \$162 million in 2010).⁴ The Legislature must repay the total amount from ETF by 2015⁵ and from the GF by 2020.⁶

The Alabama Legislature and the Governor enacted legislation during the 2013 session designed to repay the money taken from the ATF.⁷ The new law, House Bill 94 (HB94) introduced by Representative Jay Love, states “the Legislature shall provide for the repayment of all funds transferred from the Alabama Trust Fund to the State General Fund . . . [by] 2026.”⁸

Policy Considerations

By 2015, the ETF must repay \$437 million, the total amount borrowed from the ATF in 2009. If legislation is introduced in 2013 to pay back the ATF in equal installments, the ETF would annually pay the ATF \$146 million until 2015. Considering the ETF’s budget has been prorated in five of the last ten years⁹ and faced

ISSUE SNAPSHOT

From 2012-2013 the Alabama Trust Fund (ATF) will transfer \$437 million to the State General Fund (GF).

Although the constitutional amendment authorizing this transfer provides no provisions for repayment, the Alabama Legislature passed legislation in 2013 to repay the ATF by 2026.

The State Legislature must handle the budgetary problems the State has faced over the past decade, make lasting changes, and avoid temporary fixes.

a 3.7% decrease in budgeted funds in FY2013,¹⁰ the Legislature may find budgeting another \$146 million to be quite challenging.

In addition, by 2020, the GF must repay the \$162 million borrowed in 2010. The GF recently faced proration, as well. The governor declared proration in the GF budget in 2010 (20%), 2011 (15%), and 2012 (10.62%).¹¹ Furthermore, the funds taken from the ATF via CA856 must come from the GF.

HB94, recently enacted by the Alabama Legislature, clearly states the amount and timing of repayments to the ATF. The Legislature will repay the ATF annually, beginning in 2014 with a payment of \$5,000,000. Each following year, the amount to be paid increases by \$5,000,000, thus the payment is \$10,000,000 in 2015 and \$15,000,000 in 2016 until the full amount is repaid in 2026.¹²

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Recommendations

The Legislature's repayment, or lack thereof, of the \$599 million borrowed from the ATF in 2009 and 2010 offers some indication of how they might have handled the repayment of the additional \$437 million taken from the ATF in 2012, absent the strict payback requirements.

Faced with debts to the ATF totaling over \$1 billion¹³ to be paid in the next 13 years, the Legislature must continue the pattern of structured repayments. The Legislature should consider consolidating all ATF debts and extending the payback period to 2026 for total repayment. The schedule could be along the lines of the one proposed in HB94, but with higher annual payments and payments that increase in larger increments.

While Alabama's legislators made good on their promise to pay back the money taken from the ATF, they must also continue to honor their promises to reform state government in a manner that will prevent such transfers from being necessary in the first place. Alabama's political leaders must continue to make tough fiscal decisions in order to correct, not perpetuate, the financial problems former Alabama Legislatures created over the past decade in both the State General Fund and Education Trust Fund.

<http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/Constitution/1901/CA-1842681.htm>.

⁶ Author's Calculations: 2010 + 10 = 2020. *Id.*

⁷ Brooks Simmons, "We Dare Defend Our Rights" 2013 Legislative Agenda, Alabama Republican Party, Jan. 18, 2013, <http://algop.org/we-dare-defend-our-rights-2013-legislative-agenda/>.

⁸ Ala. House Bill 94 (2013 Regular Session), 2 available at

<http://alisondb.legislature.state.al.us/acas/ACTIONViewFrameMac.asp?TYPE=Instrument&INST=HB94&DOCPATH=searchableinstruments/2013RS/PrintFiles/&PHYDOCPATH=//alisondb/acas/searchableinstruments/2013RS/PrintFiles/&DOCNAMES=HB94-int.pdf>.

⁹ NORRIS GREEN, *BUDGET FACT BOOK: FY 2013*, STATE OF ALA. LEGISLATIVE FISCAL OFFICE 3 (January 22, 2013)

<http://www.lfo.alabama.gov/pdfs/Budget%20Fact%20Book/2013%20BUDGET%20FACT%20BOOK%20FINAL%20Website.pdf>.

¹⁰ ¹⁰ EDUCATION TRUST FUND COMPARISON SHEET, STATE OF ALA. LEGISLATIVE FISCAL OFFICE 9 (July 2, 2012)

<http://www.lfo.alabama.gov/pdfs/FY2013%20Budget%20Info/FY2013%20ETF/ETF%20FY%202013%20ENACTED%207-2-12.pdf>.

¹¹ Norris Green *supra* note 10 at 3.

¹² Ala. House Bill 94 *supra* note 8 at 2-3.

¹³ Author's calculations: \$437 million (ETF) + \$162 million (GF) + \$437 million (CA 856) = \$1.036 billion

¹ STATE OF ALABAMA, CANVASS OF RESULTS, SPECIAL CONSTITUTIONAL AMENDMENT ELECTION, SEPT. 18, 2012, SECRETARY OF THE STATE OF ALABAMA BETH CHAPMAN, <http://www.sos.alabama.gov/downloads/election/2012/scae/scae-results-certified-2012-10-09.pdf>.

² ALA. CONST. 1901 Amend. 856 available at <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/Constitution/1901/CA-2517997.htm>.

³ DAVID WHITE, *Alabama trust fund referendum Sept. 18 may mean major financial shift*, THE BIRMINGHAM NEWS, Sept. 9, 2012 available at http://blog.al.com/spotnews/2012/09/alabama_trust_fund_referendum.html.

⁴ Author's calculations: \$161.6 + \$437.4 = \$599 million. MARQUITA F. DAVIS, COMPREHENSIVE ANNUAL FINANCIAL REPORT, STATE OF ALA. OFFICE OF THE STATE COMPTROLLER, 71-72 (Mar. 30, 2012) <http://comptroller.alabama.gov/pdfs/CAFR/CAFR.Ala.2011.pdf>.

⁵ Author's Calculations: 2009 + 6 = 2015. Ala. Const. 1901 Amend. 803 available at



GUIDE TO THE ISSUES

Certificate of Need (CON) Laws

Background

Alabama State government has the power to determine whether a need exists for new medical facilities prior to construction. Once need is determined, the applicant organization is granted permission to begin a project. This approval is known as a "Certificate of Need" (CON).ⁱ

At present, 36 states—including Alabama—have some form of CON program. The program, which first appeared in 1964 in New York, was originally designed to help control the price of medical care.

The assumption with CON regulation is that excess capacity (in the form of overbuilding) directly results in health care price inflation. When a hospital cannot fill its beds, fixed costs must be met through higher charges for the beds that are used. Larger institutions have greater costs, so CON supporters say it makes sense to limit facilities to keep facilities at capacity to meet actual needs.

Little or no money saved: Since 1987, when states were set free from the federal requirement to have CON laws, numerous studies have examined the change in health care costs as states eliminated their laws.ⁱⁱ If CON truly controls prices, health care costs would rise when the laws are eliminated. However, this is not the case:

- In 1998, Duke University professors Christopher Conover and Frank Sloan found that CON restrictions led to higher costs and higher profits for existing providers. While CON laws led to a small reduction in acute care spending, they also led to a reduction in hospital bed supply and “higher costs per day and per admission, along with higher profits.” Overall, the study found no decrease in

ISSUE SNAPSHOT

At present, 36 states—including Alabama—have some form of CON program.

The assumption with CON regulation is that excess capacity (in the form of overbuilding) directly results in health care price inflation.

Because CON regulations restrict the supply of medical facilities and equipment, making them more expensive, they should be abolished.

per-capita health care spending that could be attributed to CON.

- An earlier study by Joyce Lanning and her associates found even more dramatic results. After studying years of data, Lanning found that CON were associated with a 20 percent increase in hospital spending and a nine percent increase in spending on other health care, for an overall per-capita spending increase of about 13 percent on personal health care services.
- The Federal Trade Commission (FTC) has conducted several studies on the effects of CON laws. According to one study, released jointly with the Department of Justice in 2004: “The Agencies believe that CON programs can pose serious competitive concerns that generally outweigh CON programs’ purported economic benefits. Where CON programs are intended to control health care costs, there is considerable evidence that they can actually drive up prices by fostering anti-competitive barriers to entry.”

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Some supporters of CON believe the laws are necessary in order for hospitals to make enough in profits to provide adequate levels of indigent care. This, however, is simply a hidden tax. Health care consumers are forced to pay the premium created by CON laws and the proceeds from this premium are used to pay for indigent care. If nothing else, this is dishonest.ⁱⁱⁱ

Another way in which CON imposes a hidden tax on the health care system relates to the resources hospitals and other health care entrepreneurs must use to obtain the certificate. The process of obtaining a CON is time-consuming and expensive. In North Carolina, for example, a group of neurologists spent more than \$250,000 just to receive a CON for MRI equipment. The request, which ultimately failed, was an additional cost of doing business that ultimately raises health care expenses across the board.^{iv}

Less choice and less innovation: According to the American Hospital Association, there are about 1.7 outpatient surgeries performed in U.S. hospitals for every surgery that requires an overnight stay.^v In some states like Alabama, Georgia, and North Carolina, a CON is needed to open a freestanding outpatient surgery center, which means that existing hospitals have a tremendous influence over whether such centers can open, even in areas where they are needed.^{vi}

Limits choices for existing providers: Along Highway 280 in Birmingham and in Madison County near Huntsville, rapid growth has translated into longer travel times to the nearest hospital. In both locales, existing providers have expressed interest in building hospitals to serve increasing populations in growth areas. The CON process has hindered their plans to expand because other health care providers consider them a disruption of their established patient flow.^{vii}

Policy Consideration

The accepted proposition in economics is the idea that if you want to reduce the cost of something, you foster an environment that encourages open competition and

entrepreneurship and discourages monopoly. However, the role of competition goes well beyond this. Rivalry among businesses—health care providers are no exception—stimulates new technologies and innovative and more efficient ways of delivering goods and services to customers. Existing providers continuously have to keep their costs low and their products desirable in order to fend off potential competitors looking for an opportunity to earn profits.^{viii}

Recommendation

Because CON regulations restrict the supply of medical facilities and equipment, making them more expensive, they should be abolished.

Further Reading

- Roy Cordato, “Certificate-of-Need Laws: It’s Time for Repeal.” Alabama Policy Institute, 2007. Available at <http://tinyurl.com/5usdp3x>. Access verified February 9, 2011.
- “Certificate of Need: State Health Laws and Programs.” National Conference of State Legislatures, January 20, 2010. Available at <http://tinyurl.com/3xear7q>. Access verified December 28, 2010.

ⁱ “Certificate of Need: State Health Laws and Programs.” National Conference of State Legislatures, January 20, 2010. Available at <http://tinyurl.com/3xear7q>. Access verified December 28, 2010.

ⁱⁱ Roy Cordato, “Certificate-of-Need Laws: It’s Time for Repeal.” Alabama Policy Institute, 2007. Available at <http://tinyurl.com/5usdp3x>. Access verified February 9, 2011.

ⁱⁱⁱ *Ibid.*

^{iv} *Ibid.*

^v American Hospital Association, *AHA Hospital Statistics* (Chicago: Health Forum, LLC: 2006), p. 11.

^{vi} Roy Cordato, “Certificate-of-Need Laws: It’s Time for Repeal.”

^{vii} *Ibid.*

^{viii} *Ibid.*



GUIDE TO THE ISSUES

The Regulatory Flexibility Act (RFA)

Background

The Regulatory Flexibility Act (RFA) was passed by the federal government in 1980 as an attempt to address the ever-growing burden on small businesses posed by federal regulations. If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis must be prepared. According to the U.S. Small Business Administration:

This is done in order to ensure that the agency has considered all reasonable regulatory alternatives that would minimize the rule's economic burdens or increase its benefits for the affected small entities, while achieving the objectives of the rule or statute. The analysis describes the objectives of the proposed rule, addresses [sic] its direct and indirect effects and explains why the agency chose the regulatory approach described in the proposal over the alternatives.ⁱ

Each RFA analysis is required to address five specific items:

- Reasons why the agency is considering the action;
- The objectives and legal basis for the proposed rule;
- The type and number of small entities to which the proposed rule will apply;
- The projected reporting, recordkeeping and other compliance requirements of the proposed rule; and
- All federal rules that may duplicate, overlap or conflict with the proposed rule.ⁱⁱ

In addition, each analysis must also contain a description of any significant alternatives to the proposal that allow it to accomplish its objectives while minimizing its

ISSUE SNAPSHOT

Alabama is one of only six states, two territories, and the District of Columbia that does not have any Regulatory Flexibility statutes.

Regulatory flexibility statutes ensure that agencies have considered all reasonable regulatory alternatives in order to create the least oppressive regulations possible.

impact on small businesses. These can include the following accommodations to small businesses:

- Establishing different compliance or reporting requirements or timetables;
- Clarifying, consolidating or simplifying compliance and reporting requirements;
- Using performance rather than design standards; or
- Exempting small businesses from any or all parts of the rule.ⁱⁱⁱ

When completed, the initial analysis or a summary of it must be published in the *Federal Register* with the proposed rule, as well as any significant alternatives.

At present, Alabama is one of only six states, two territories, and the District of Columbia that does not have any Regulatory Flexibility statutes.

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How has RFA helped small businesses in other states?

In early 2011, the U.S. Small Business Administration's Office of Advocacy released a report detailing the impact of RFA and Executive Order 13272, which strengthens the RFA. They found that in 2010 the Act had helped small businesses save almost \$15 billion in regulatory costs, and almost \$5.5 billion in annually recurring savings.^{iv}

Recommendation

Alabama should develop RFA requirements for regulations generated by state agencies.

ⁱ U.S. Small Business Administration, "A Guide to the Regulatory Flexibility Act." May 1996. Available at <http://tinyurl.com/654xxn3>. Access verified July 15, 2011.

ⁱⁱ *Ibid.*

ⁱⁱⁱ *Ibid.*

^{iv} U.S. Small Business Administration, Office of Advocacy, "Report on Regulatory Flexibility Act, FY 2010." March 2011. Available at <http://tinyurl.com/5vmttf6>. Access verified July 15, 2011.

Reforming Alabama Education



GUIDE TO THE ISSUES

Repealing the Anti-Religious Blaine Amendment in Alabama

Background

Blaine Amendments are provisions in state constitutions that prohibit the use of state funds at “sectarian” schools.¹ Such amendments are named for the failed amendment to the United States Constitution championed by U.S. Representative James G. Blaine (R-Maine) in 1875 that would have forbidden states from funding religious schools.² There are currently thirty-eight states, including Alabama that have Blaine Amendments in their state constitutions.³ The amendments originated during a strong anti-Catholic sentiment that swept the nation in the late nineteenth century.⁴ As Blaine Amendment expert Joseph Viteritti explains, “Taken as a whole, these measures reflect the confluence of political forces that erupted when strong nativist sentiment was joined with the common-school movement at the turn of the century to stem the growth of religious schools and their support with state funds.”⁵

Alabama’s Blaine Amendment reads: “No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school.”⁶

Policy Considerations

The term “sectarian” had a very different meaning when the Blaine Amendments were codified during the nineteenth century. It was used to differentiate between the “common religion,” Protestantism, then being taught in the “common schools.” In other words, state constitutional amendments that prohibit “sectarian” groups had less to do with the separation of church and state, and were more concerned with creating a

ISSUE SNAPSHOT

Alabama’s Blaine Amendment was passed as part of the 1901 Constitution.

There are currently 38 states with Blaine Amendments.

The U.S. Supreme Court has already ruled in two separate cases that it is appropriate for taxpayer funding to support religious schools under certain circumstances.

disadvantage for the faiths of immigrants, particularly Catholicism.⁷

Two Supreme Court decisions, *Mitchell v. Helms* and *Zelman v. Simmons-Harris*, have found that it is permissible for taxpayer funds to be used for educational purposes by religious organizations, providing that, in *Zelman*, the parents decide which religious or non-religious school their child attends, or in *Mitchell*, that the funds were used for a secular purpose.⁸ Many proponents of Blaine Amendments cite the Establishment Clause of the First Amendment of the U.S. Constitution. However, the Court stated in *Zelman*, “Because the program was enacted for the valid secular purpose of providing educational assistance... this Court’s jurisprudence makes clear that a government aid program is not readily subject to challenge under the Establishment Clause if it is neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine

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and independent private choice.”⁹ Similarly in *Mitchell*, the majority held, “...We conclude that [Chapter 2] neither results in religious indoctrination by the government nor defines its recipients by reference to religion.”¹⁰

Conclusion

During the current effort to reform and modernize Alabama’s Constitution, state lawmakers should give the citizens of Alabama an opportunity to repeal this egregious assault on religion. Allowing state programs to cooperate with parochial and other private schools can illuminate a whole world of educational options for Alabama’s children.

¹ BECKET FUND FOR RELIGIOUS LIBERTY, *What are Blaine Amendments?* (2008), www.blaineamendments.org/Intro/whatis.html (last viewed Jan. 28, 2013).

² SCHOOL CHOICE FOUNDATION, *Blaine Amendments in Other States* (2012), <http://schoolchoicefoundation.org/other-states/litigation-in-other-states/> (last viewed Dec. 13, 2012).

³ *Id.*

⁴ *Supra* note 1.

⁵ *Supra* note 2.

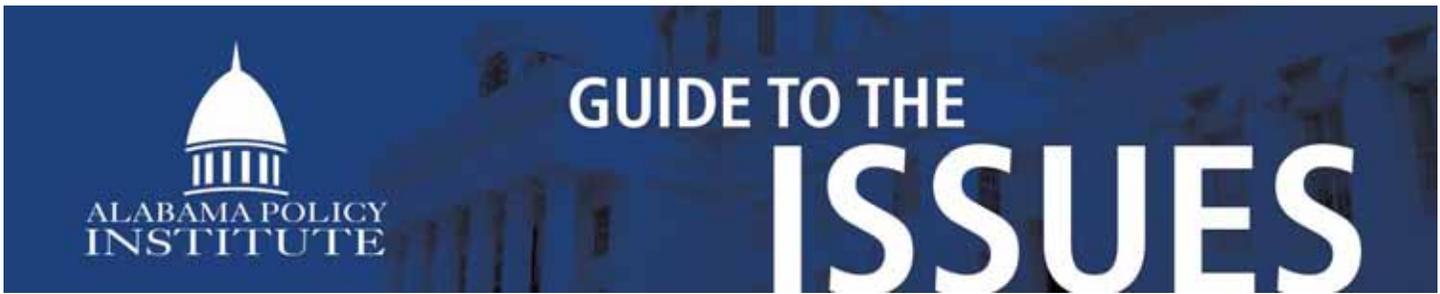
⁶ Ala. Const. art. 1 §263.

⁷ Anthony Picarello, U.S. Commission on Civil Rights, *School Choice: The Blaine Amendments & Anti-Catholicism* (Jan. 13, 2011), *available at* www.usccr.gov/pubs/BlaineReport.pdf.

⁸ *Mitchell v. Helms* 530 U.S. 793 (2000); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁹ *Zelman v. Simmons-Harris et al.* 536 U.S. 639 (2002).

¹⁰ *Supra* note 8.



Education Options in Alabama: Tax Credit Scholarships

Background

As states look for improved public education options, some of them have employed various tax incentives to achieve those objectives. Typically, education tax credits are given to individuals for approved educational expenses; usually including private school tuition, books, supplies, computers, tutors, and transportation.

Tax credit scholarships are tax credits received by individuals or organizations that make donations to nonprofit organizations which, in turn, use the donated money to fund private school scholarships for certain eligible students. In another form, any parents who meet the criteria set out by the state are able to obtain a tax credit for the amount spent on educational expenses.

On February 28, 2013, the Alabama State Legislature passed The Alabama Accountability Act which, in addition to expanding educational flexibility with respect to state requirements, also establishes a tax credit scholarship program for Alabama. According to the American Federation for Children, twelve other states currently possess either a tax credit scholarship or individual tax credit program.¹

Policy Considerations

Criteria for school and scholarship eligibility as well as structure of the credit vary between the twelve states that already operate tax credit scholarships. Some states cap total tax credit outlays, awarding them to those businesses who claim the credit first, and some a cap on the credit amount received by each business or individual.

ISSUE SNAPSHOT

Tax credit scholarships provide a significant financial incentive for individuals and businesses to provide educational options for children in failing schools.

Alabama's Tax Credit Scholarship program could nearly 6,000 students in failing school districts through scholarship funding organizations.

According to the American Federation for Children, twelve states currently possess either a tax credit scholarship or individual tax credit program.

A strong tax credit scholarship program should be designed to support children in underperforming schools as well as students with special needs who elect to remain in the public school system.

The Alabama Accountability Act will allow the parents of students in the worst performing schools to receive a tax credit to offset the cost of sending a student to a non-failing public school, or a private school. The tax credit will be capped at 80 percent of the average annual state cost of attendance for a public school, or approximately \$4,000 in 2013.²

Additionally, the law creates tax credits for individuals and businesses who donate to a non-profit scholarship funding organization (SFO), which must spend 95 percent of its receipts on providing scholarships. Businesses who donate to SFOs will receive an income

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tax credit equal to 50 percent of their donation, up to 50 percent of their tax liability. Individuals who donate will receive an income tax credit equal to 100 percent of their donation, up to 50 percent of their tax liability, not to exceed \$7,500. The extent of the tax credits cannot exceed \$25 million annually. The \$25 million cap could provide nearly 6,000 scholarships to children zoned for failing schools³.

Conclusions & Recommendations

A Tax Credit Scholarship can be both advantageous to businesses and improve education in Alabama. With enactment of the Alabama Accountability Act, Alabama has made a large and vitally important step in improving the lives and education of its young men and women in failing schools. Now Alabama must take the necessary steps to ensure that the new program will be fully and honestly utilized. Alabama should strongly consider indexing the cap on tax credits to track future increases in state revenues. Additionally, the program should be expanded to enable children with exceptional educational needs to receive tutoring or other services that will increase their learning capacity.

¹ AMERICAN FEDERATION FOR CHILDREN, *In Your State* (2013), www.federationforchildren.org/school_choice (last visited Oct. 19, 2012).

² *Substitute 149517-8 for HB84*, Reg Session 2013, available at: <http://alisondb.legislature.state.al.us/acas/ACTIONViewFrame.asp?TYPE=Substitute&AMDSUB=149517-8&DOCNAME=149517-8.pdf&DOCPATH=searchableinstruments/2013RS/Printfiles&PHYDOCPATH=//alisondb/acas/searchableinstruments/2013RS/PrintFiles/&INST=HB84>.

³ Author's Calculations: \$25 million*95%=\$23,750,000/\$4,000 (Approx. 80% of state expenditures per student in 2013)= 5,937.5



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Education Options in Alabama: Tenure Reform

Background

Teacher tenure—sometimes referred to as “professional service” or a “continuing contract”—gives teachers the right to due process before they can be dismissed.¹ Alabama took steps to reform teacher tenure in 2011 with the enactment of the Students First Act,² but it is still behind other states in treating teachers like professionals whose opportunity for advancement and job security depends on demonstrated effectiveness.

Several other states and municipalities, including New York City and New Jersey, have made great strides in linking teacher tenure to student performance. New Jersey’s TEACHNJ Act, which earned bipartisan support, including the eventual backing of the New Jersey Education Association (NJEA),³ requires teachers and administrators to undergo yearly evaluation. After four consecutive years of evaluations which show that “the employee meets the performance standards established by the board of education for his position”⁴ tenure is awarded. Once tenure is achieved, failure to be deemed an effective instructor for two years in a row results in the loss of the privilege. A concession was made by the Republican leadership who developed the bill to gain the support of Democrats and the NJEA; the bill keeps in place the policy of “last in, first out” during layoffs.

New York City also made significant changes to its tenure program. The city eliminated automatic tenure for New York teachers in the country’s largest public school district, no matter the length of service; tenure was awarded to only 55 percent of eligible teachers last year, compared to 97 percent in 2007.⁵

Policy Consideration

As has been seen in the past, any attempt to reform a system that has thousands of constituents who have an interest in maintaining the status quo will be met with significant opposition. The effective reforms of New York and New Jersey have different attributes that should be considered by policymakers in Alabama. New York’s reforms were the result of what was essentially an executive order, but they only apply to the schools in the New York City Public School System.⁶ New Jersey’s reforms came after months of negotiations and compromises between interested parties.

Conclusion & Recommendations

Alabama has the opportunity to be among the nation’s trendsetters with positive reforms that protect quality educators while providing the flexibility needed to improve classroom instruction. API recommends tenure reform consistent with the following considerations:

- Teachers should be eligible for tenure only after five to eight years in a single district, compared to the three years in one district required now.
- Teachers should achieve an annual evaluation score of “Highly Effective” for a majority of their probationary years rather than the current automatic system which does not include an objective, standard measure of performance.
- Any tenure system should consider provisions that would revoke tenure for consistently poor performance after tenure is awarded. Alabama is offering compensation that is competitive with other states to its educators, and there is little evidence that increased spending in education has produced corresponding results in educational outcomes.

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The following rubric is an example on what may be used to evaluate teachers. (Modeled after the guidelines of the 1.NYC DOE and the 2.NJ DOE)

	Student Achievement – 50%	Instructional Development- 25%	Professional Contributions- 25%
Highly Effective: ¹ Exceeds standards and expectations of effective teaching for student learning and professional contributions for at least five consecutive years.	Multiple sources of evidence indicating that nearly all students showed substantial improvement as measured by objective, standardized tests and records.	Multiple sources of evidence showing a desire to further develop professionally. Including, but not limited to degree and certification attainment, and research publication.	Multiple sources of evidence citing professional contributions to the atmosphere of enthusiastic educational attainment.
Effective: ¹ Meets standards and expectations of effective teaching for student learning and professional contributions for at least five consecutive years.	Evidence indicating that a majority showed substantial improvement as measured by objective, standardized tests and records.	Evidence showing a desire to further develop professionally. Including, but not limited to degree and certification attainment, and research publication.	Evidence citing professional contributions to the atmosphere of enthusiastic educational attainment.
Developing: ¹ Has fewer than the five requisite years to be considered for tenure, but has the potential to meet the standards and expectations over time.	Multiple sources of evidence indicating that a majority showed substantial improvement as measured by objective, standardized tests and records.	Multiple sources of evidence showing a desire to further develop professionally. Including, but not limited to degree and certification attainment, and research publication.	Multiple sources of evidence citing professional contributions to the atmosphere of enthusiastic educational attainment.
Ineffective: ¹ Has not met the standards and expectations of effective teaching for student learning and professional contributions.	Evidence that the majority of students did not show substantial improvement as measured by objective, standardized tests and records.	Evidence showing the applicant has shown no desire to further develop professionally. Including, but not limited to degree and certification attainment, and research publication.	Evidence citing a lack of professional contributions to the atmosphere of enthusiastic educational attainment.
Evidence of a teacher's efficacy may include: ¹	<ul style="list-style-type: none"> • Student work product • Promotion and retention rates • Relative progress on standardized testing 	<ul style="list-style-type: none"> • Attainment of degrees and certification pertaining to the subject taught • Classroom observations¹ • Annual reviews¹ 	<ul style="list-style-type: none"> • Attendance and punctuality¹ • Colleague feedback¹ • Parent and student reviews¹

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- ¹ Derrick Meador, *Teacher Tenure*, ABOUT.COM (2013), <http://teaching.about.com/od/pd/a/Teacher-Tenure.htm> (last visited Dec. 13, 2012).
- ² S.B. 310, 2011 Gen. Assemb. (Ala. 2011).
- ³ Jarrett Renshaw, *Gov. Christie Signs Teacher Tenure Overhaul Bill*, NEW JERSEY REAL-TIME NEWS (Aug. 6, 2012, 6:52 PM), www.nj.com/news/index.ssf/2012/08/gov_christie_signs_teacher_ten.html (last visited Oct. 23, 2012).
- ⁴ S.B. 407, 215th Legislature (N.J. 2012).
- ⁵ Al Baker, *Many New York City Teachers Denied Tenure in Policy Shift*, N.Y. TIMES (Aug. 17, 2012), www.nytimes.com/2012/08/18/nyregion/nearly-half-of-new-york-city-teachers-are-denied-tenure-in-2012.html?pagewanted=1&_r=2&nl=todaysheadlines&emc=edit_th_20120818.
- ⁶ Press Release, Office of the Mayor, New York City, Mayor Bloomberg Outlines New Reforms to Prepare Students for College and Careers in a Global Economy in "Education Nation" Summit's Kickoff Address (Sept. 27, 2010), available at www.nyc.gov/cgi-bin/misc/pfprinter.cgi?action=print&sitename=OM&p=1359407935000.



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Educational Options in Alabama: Vouchers

Background

First proposed by Nobel-winning economist Milton Friedman in the 1950s, school vouchers have become a more prominent option for improving the education of the underserved in recent years. Vouchers provide the recipients, and their parents, a choice in education by partially alleviating the financial burden that can result from enrolling in private schools. Over the last several years, eleven states have adopted voucher programs.¹

Voucher programs take several different forms: universal, which are available to all children; means-tested, which are given to children from families from below a pre-determined income level; failing schools, which gives the students in under-performing schools the option to move to the private school of their choice; special needs, which allow children with special educational needs to move to a school that offers programs specifically tailored for them; and town tuitioning, which provides options for children who live in towns that do not operate public schools at their grade levels.² Some states, such as Louisiana, have a combination of these programs in order to serve as many students as possible.

In Alabama, 342 public schools, or 25.25 percent, did not make Adequate Yearly Progress for the 2011-2012 school year.³ These schools represent thousands of Alabama's children who are trapped in under-performing schools, with little or no option to move to a school where their educational needs will be met.

Policy Considerations

A recent study conducted by the Brown Center on Education Policy at Brookings and Harvard's Program on Education Policy and Governance tracked the long-term outcomes of voucher recipients in New York City. They found that African-American students who participated in the voucher program offered to 1000 students in grades 1-4 or entering the first grade were 24 percent more likely to enroll in a higher education program than those students who were not awarded the voucher.⁴ The study was able to determine this information by requiring the recipients of the vouchers to take a standardized test and provide their social security number and other identifying information.

A key consideration during these times of lean revenue and difficult decisions is how a voucher program would impact the fiscal considerations of the state.⁵ Each state that has enacted a form of voucher program has instituted a system of student eligibility or scholarship cap that ensures a net savings to the state. Often, the voucher offered is less than the state would have spent to educate that child in a public school. For example, the Alabama state government spends approximately \$4,800 dollars per pupil, per year for students in public k-12 schools.⁶ If the vouchers offered were priced at \$4,000, the state would incur a net savings of over \$800 per student, per year. The average private school tuition in Alabama's major metropolitan areas is approximately \$5,619.⁷ For many parents, the option to improve their children's educational prospects might suddenly be affordable at less than \$2,000 a year, even without the possibility of financial aid from the private schools themselves.

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Conclusions and Recommendations

Much like charter schools, vouchers are only as effective as the strength of the legislation that authorizes them. The following are the criteria API has developed as markers of strong and effective voucher programs that would be best for Alabama:

1. Alabama should develop two types of vouchers:
 - a. For students in failing schools and school districts; and
 - b. For students who have special educational needs that are not adequately met in their current school or school district.
2. Eligibility for the first voucher program would be determined by enrollment in a school or school district that has been designated as a failing school or school district by an objective state grading system.
3. Neither participation in the voucher program, nor acceptance of a voucher should be mandatory.
4. In compliance with the U.S. Supreme Court Decision in *Zelman v. Simmons-Harris*, the voucher must be granted to the parent or legal guardian of the student, and not directly paid to the private school.⁸

¹ AMERICAN FEDERATION FOR CHILDREN, *In Your State*, www.federationforchildren.org/school_choice (last visited Oct. 16, 2012).

² THE FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE, *Types of School Choice*, www.edchoice.org/School-Choice/Types-of-School-Choice.aspx (last visited Oct. 17, 2012).

³ ALABAMA STATE DEPARTMENT OF EDUCATION, *Schools that Did Not Make AYP*, (Aug. 8, 2012), www.alsde.edu/Accountability/2012Reports/Status/2012SchoolsThatDidNotMakeAYP.All.pdf?1stSchoolYear=10&1stReport=2012Reports%2FStatus%2F2012SchoolsThatDidNotMakeAYP.All.pdf.

⁴ MATTHEW M. CHINGOS & PAUL E. PETERSON, HARVARD KENNEDY SCHOOL, *THE EFFECTS OF SCHOOL VOUCHERS ON COLLEGE ENROLLMENT: EXPERIMENTAL EVIDENCE FROM NEW YORK CITY* (Aug. 2012), www.hks.harvard.edu/pepg/PDF/Impacts_of_School_Vouchers_FINAL.pdf.

⁵ ALLIANCE FOR SCHOOL CHOICE, *How School Voucher Programs Can Help States Save Money*, http://s3.amazonaws.com/assets.allianceforschoolchoice.com/admin_assets/uploads/23/School%20Voucher%20Programs%20and%20Taxpayer%20Savings.pdf?1316640158 (last visited Oct. 17, 2012).

⁶ NATIONAL EDUCATION ASSOCIATION, *RANKINGS & ESTIMATES 2012 42*, available at www.nea.org/assets/docs/NEA_Rankings_And_Estimates_FINAL_20120209.pdf.

⁷ Author's calculations from a sample of 40 private schools in Baldwin, Jefferson, Madison, Mobile, Montgomery, and Shelby counties.

⁸ *Zelman v. Simmons-Harris et al.* 536 U.S. 639 (2002).



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Federalization of Education in Alabama

Background

In an effort to create consistency among state curricula and improve college and workforce readiness in both the domestic and international workplace, the National Governors Association's Center for Best Practices (NGA) and the Council of Chief State School Officers (CCSSO)ⁱ announced the creation of the Common Core State Standards ("Common Core") in June 2010.ⁱⁱ According to the Common Core, the standards:

- Are aligned with college and work expectations;
- Are clear, understandable, and consistent;
- Include rigorous content and application of knowledge through high-order skills;
- Build upon strengths and lessons of current state standards;
- Are informed by other top-performing countries; and
- Are evidence-based.ⁱⁱⁱ

After three public meetings, the Alabama State Board of Education voted 7-2 in November 2010 to adopt the Common Core, making Alabama the 41st state to do so.^{iv} At present, 45 states, three territories and all K-12 schools operated on military bases controlled by the Department of Defense have formally adopted the Common Core.^v

In November 2011, the State Board of Education met to consider rescinding its earlier vote, but eventually decided 6-3 in favor of following the Common Core. Gov. Robert Bentley joined the opposition on the grounds that he believed the standards were an attempt at a federal takeover of education. "We want our standards to be extremely strong," Bentley said. "They just don't need to be tied to a federal core."^{vi}

ISSUE SNAPSHOT

The Common Core State Standards (Common Core) are designed to unify state education curricula and better prepare students for college and the modern workforce.

Despite its good intentions, the program raises serious legal questions, as three federal Acts prohibit the federal government from creating a nationalized, standardized curriculum.

Alabama may agree with many of the standards outlined in the Common Core, but it should not be forced to agree with all of them as a condition for receiving federal funds or receiving waivers to avoid complying with burdensome NCLB requirements.

Policy Considerations

While the Common Core proponents tout the initiative as voluntary, the program may be more involuntary than advertised and may raise legal and constitutional questions. First, when the Obama Administration signed into law the American Recovery and Reinvestment Act in February 2009,^{vii} one of the programs funded by the Act was the Race to the Top Fund, which provided up to \$4.35 billion to states that attempted to make reforms in student achievement, graduation rates, and workplace readiness.^{viii} To apply for these funds, states had to show that they were working toward adopting "internationally benchmarked K-12 standards."^{ix} While these did not have to be the Common Core standards themselves, a review of the applications of the 12 states that eventually received Race to the Top funds found that all of them had already adopted or intended to adopt Common Core standards to satisfy this requirement.^x

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Second, states that choose to adopt the Common Core may also receive a waiver from the No Child Left Behind (NCLB) requirements, which otherwise might keep them from receiving federal education funding. Among the conditions needed to receive a waiver, state education associations must declare whether they have adopted “college- and career-ready standards” that are “common to a significant number of States” or are state-specific but already consistent with the Department of Education’s definition of such standards: in both cases, the Common Core standards.^{xi} Each state must note that it has already adopted, or is planning to adopt the Common Core-style assessments in reading and math.^{xii} At present, the Alabama State Department of Education is seeking a waiver from the U.S. Department of Education to end Annual Yearly Progress (AYP) reporting, one of the benchmarks of NCLB.^{xiii}

Third, the Obama Administration has proposed that the receipt of Title I funds for low-income schools should directly relate to the adoption of Common Core standards. In the words of the U.S. Department of Education, “[i]t is the expectation of the Department that States that adopt assessment systems developed with [Race to the Top Assessment Program grants] will use assessments in these systems to meet the assessment requirements in Title I of the ESEA.”^{xiv}

Finally, and most important, the federal government does not have the legal authority to create a nationalized, standardized curriculum. With only a few exceptions, “[three existing federal acts] ban federal departments and agencies from directing, supervising, or controlling elementary and secondary school curriculum, programs of instruction, and instructional materials.”

Conclusion

While the Common Core standards to which the State Department of Education has committed itself may or may not be the best guidelines by which to teach Alabama’s students, the State of Alabama’s agreement to follow them has serious repercussions, both legally and in terms of state sovereignty. At least three federal Acts indicate that it is not the place of the federal government to create national curricula, which the Common Core clearly is. Despite

these prohibitions, the Obama Administration, using Race to the Top and NCLB, has established grants and waivers that make agreeing to the Common Core hard to resist, particularly in tough economic times. Taken together, these grants and waivers offered by the Common Core “are herding education authorities into accepting elementary and secondary school standards and assessments favored by the Department,” with the risk that “states will be little more than administrative agents for a nationalized K-12 program of instruction.”^{xv}

Alabama may agree with many of the standards outlined in the Common Core, but it should not be forced to agree with all of them as a condition for receiving federal funds or receiving waivers to avoid complying with burdensome NCLB requirements. These conditions move the Common Core standards from simple voluntary suggestions to the next step in the federalization of Alabama’s education system.

If Alabama chooses to seek a waiver from NCLB requirements it should explicitly state that it is not seeking a waiver of Section 9527 of the No Child Left Behind Act of 2001 which provides clear and specific protections against the federal government controlling state education.

ⁱ COMMON CORE STATE STANDARDS INITIATIVE, ABOUT THE STANDARDS (2012), www.corestandards.org/about-the-standards (last visited Aug. 27, 2012).

ⁱⁱ INTRODUCTION TO THE COMMON CORE STATE STANDARDS (June 2, 2010), www.corestandards.org/assets/ccssi-introduction.pdf (last visited Aug. 27, 2012).

ⁱⁱⁱ COMMON CORE STATE STANDARDS INITIATIVE, *supra* note 1.

^{iv} Marie Leech, *Alabama Board of Education Approves Common Core Standards for Schools*, THE BIRMINGHAM NEWS BLOG (Nov. 18, 2010, 12:32 PM), http://blog.al.com/spotnews/2010/11/alabama_board_of_education_app.html.

^v COMMON CORE STATE STANDARDS INITIATIVE, IN THE STATES (2012), www.corestandards.org/in-the-states (last visited Aug. 27, 2012).

^{vi} Marie Leech, *Alabama School Board Votes to Keep Common Core National Education Standards*, THE BIRMINGHAM NEWS BLOG (Nov. 10, 2011, 1:06 PM), http://blog.al.com/spotnews/2011/11/alabama_school_board_votes_to.html.

^{vii} Pub. L. No. 111-5, 123 Stat. 115 (2009).

^{viii} 74 Fed. Reg. 59,688 (Nov. 18, 2009).

^{ix} *Id.*

^x Eitel & Talbert, *supra* note 7, at 17.

^{xi} *Id.* at 20.

^{xii} *Id.*

^{xiii} Bryan Lyman, *Alabama Seeks Waiver on No Child Left Behind*, MONTGOMERY ADVERTISER BLOG (Aug. 3, 2012, 1:08 AM), www.montgomeryadvertiser.com/article/20120803/NEWS02/308030019/Alabama-seeks-waiver-No-Child-Left-Behind.

^{xiv} 75 Fed. Reg. 18,171-18,172 (Apr. 9, 2010).

^{xv} *Id.*



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Educational Options in Alabama: Public Charter Schools

Background

Many students in Alabama's public education system are mired in failing schools. In the last five years, almost half of all public schools in Alabama have had at least one year in which they failed to make their Adequate Yearly Progress (AYP) goals.¹

According to the latest data from the National Assessment of Academic Progress (NAEP), only 27 percent of Alabama's 4th graders are proficient or better in math, 30 percent in science, and 31 percent in reading. Proficiency scores on NAEP exams for 8th graders are equally dismal: 20 percent are proficient or better in math, 26 percent in reading and 19 percent in science. Many of these students would benefit from attending high-quality public charter schools.²

Charter schools are independent public schools authorized through an agreement with a sponsor—usually a school district, state governmental body, or university. Unlike traditional public schools, charter schools are overseen by a governing board of parents and members of the local community.

Policy Consideration

Public charter schools have greater autonomy over daily operations, academic programs, and human resources than traditional public schools. They have considerable discretion over how they hire, train, evaluate, compensate, and retain employees. Public charter schools oversee their own budgets including capital construction and maintenance costs. In exchange for the increased flexibility, public charter schools often have heightened accountability standards.

Like other public schools, charter schools must adhere to state and federal laws regarding civil rights, testing, students with disabilities, reporting and other accountability measures, and building and safety codes.

ISSUE SNAPSHOT

Since 2007, more than 48 percent of all public schools in Alabama have had at least one year in which they failed to make their Adequate Yearly Progress (AYP) goals.

Alabama is one of only nine states without public charter schools. Every southern state except Alabama and Kentucky has public charter schools.

Among districts with high percentages of minorities and low-income homes, students in public charter schools tend to make greater academic progress than their peers.

Alabama is one of only nine states without public charter schools. Every southern state except Alabama and Kentucky has public charter schools. For the 2011-12 school year, there are more than 5,500 public charter schools nationwide, over 500 of which were added in the past academic year.³ Together, these schools have more than two million students enrolled.⁴

One of the most important aspects of public charter schools is that they are schools of choice. Many families are drawn to public charter schools because of their unique program of study. Likewise, public charter schools enable teachers to choose a school that matches their skills and preferred teaching methods. Authorizing legislation has enabled education leaders and educators to create innovative learning environments tailored to community needs.

Students in public charter schools generally perform better than students in traditional public schools. According to a 2011 meta-analysis of studies on public charter school achievement conducted by the University of California San Diego, public charter schools outperform traditional public schools in elementary reading and math, middle school math, and urban high school reading.⁵ Also, according to a 2011 review of the literature by the National Alliance for Public Charter Schools,

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as students' length of time in a public charter school program increases, their academic gains are greater than those in traditional public schools.⁶ Among districts with high percentages of minorities and low-income homes, students in public charter schools tend to make greater academic progress than their peers.⁷

Public charter schools also have a positive impact on graduation rates and post-secondary attainment. In 2009, researchers at RAND compared Chicago's public charter high schools with traditional public high schools and found that attending a public charter high school had a positive effect on ACT scores, graduation rates, and college enrollment rates. Both the control group and the treatment group attended public charter schools prior to enrolling in high school.⁸ Researchers found similar results for public charter schools in Florida.⁹

Conclusion

While the academic literature showing the success of public charter schools as compared to traditional public schools is considerable, public charter schools are only as effective as the legislation that authorizes them. API has created a list of 12 recommended components for establishing high-quality charter schools in Alabama:

1. Place no cap on the number of charter schools.
2. Offer a variety of different charter schools, including distance learning schools, new startups, and public school conversions.
3. Establish an independent Public Charter School Board along the lines of the state Ethics Commission.
4. Develop performance-based contracts with comprehensive, individual student record-keeping.
5. Create clear processes for renewal, nonrenewal, and revocation of school charters.
6. Develop clear standards for recruitment, enrollment, and lottery procedures for charter schools.
7. Keep charter schools fiscally autonomous and exempt from many district laws and regulations.
8. Prohibit multi-school "umbrella" contracts in order to allow each charter school to succeed on its own.
9. Allow charter school students to participate in extracurricular and interscholastic activities at traditional public schools.
10. Clearly identify any special education responsibilities with charter schools and the local school district.

11. Ensure equitable operational funding and equal access to all state and federal categorical funding, including capital funding and facilities.

12. Provide charter school teachers and staff with access to state retirement systems, or to an equivalent program.

¹ ALABAMA STATE DEPARTMENT OF EDUCATION, *2012 Adequate Yearly Progress School Summary (Excel file)*, available at www.alsde.edu/Accountability/preAccountability.asp (last viewed Dec. 10, 2012).

² NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, U.S. DEPARTMENT OF EDUCATION, *State Profile*, Dec. 10, 2012, <http://nces.ed.gov/nationsreportcard/states/>.

³ NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS, *Schools Overview: 2011-2012 National*, n.d., <http://dashboard.publiccharters.org/dashboard/schools/page/overview/year/2012>.

⁴ *Id.*

⁵ JULIAN R. BETTS & Y. EMILY TANG, NATIONAL CHARTER SCHOOL RESEARCH PROJECT, THE EFFECT OF CHARTER SCHOOLS ON STUDENT ACHIEVEMENT: A META-ANALYSIS OF THE LITERATURE (Oct. 2011), http://www.crpe.org/sites/default/files/pub_NCSRP_BettsTang_Oct11_0.pdf.

⁶ NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS, MEASURING CHARTER PERFORMANCE: A REVIEW OF PUBLIC CHARTER SCHOOL ACHIEVEMENT STUDIES (6th ed. 2011), http://publiccharters.org/data/files/Publication_docs/NAPCS_AchvmtStdY_D8.pdf_20110330T165151.pdf.

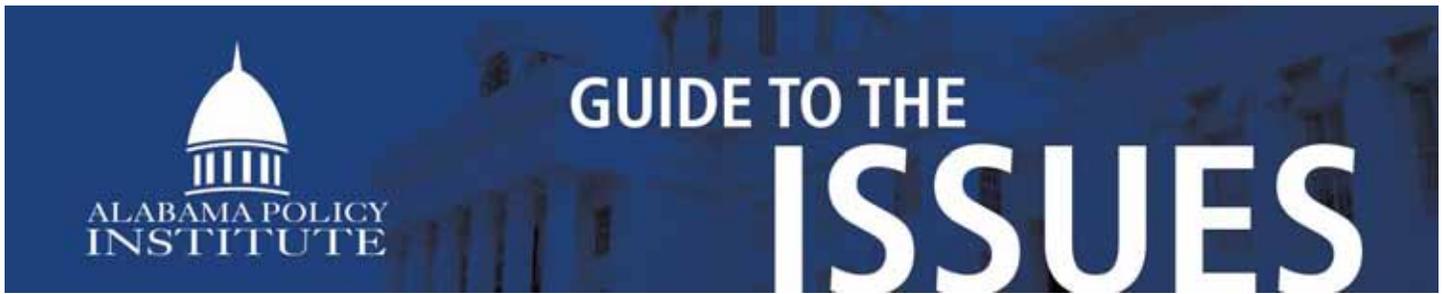
⁷ JEFFREY R. HENIG, GREAT LAKES CENTER FOR EDUCATION RESEARCH & PRACTICE, WHAT DO WE KNOW ABOUT THE OUTCOMES OF KIPP SCHOOLS? (Nov. 2008), http://greatlakescenter.org/docs/Policy_Briefs/Henig_Kipp.pdf;

KATRINA R. WOODWORTH ET AL., SRI INTERNATIONAL, SAN FRANCISCO BAY AREA KIPP SCHOOLS: A STUDY OF EARLY IMPLEMENTATION AND ACHIEVEMENT (final report, Sep. 2008), available at http://policyweb.sri.com/cep/publications/SRI_ReportBayAreaKIPPSchools_Final.pdf.

⁸ KEVIN BOOKER ET AL., RAND CORPORATION, ACHIEVEMENT AND ATTAINMENT IN CHICAGO CHARTER SCHOOLS (2009), available at www.rand.org/content/dam/rand/pubs/technical_reports/2009/RAND_TR585-1.pdf.

⁹ RON ZIMMER ET AL., RAND CORPORATION, ARE CHARTER SCHOOLS MAKING A DIFFERENCE? A STUDY OF STUDENT OUTCOMES IN EIGHT STATES (2009), available at www.rand.org/pubs/research_briefs/RB9433/index1.html.

Reforming Alabama Medicaid



Medicaid in Alabama: A Primer

What is Medicaid?

In 1970, the federal government created Medicaid to pay for medical and nursing home care for the poor. In Alabama, Medicaid is the largest program providing medical and health-related services to the poor, including children, senior citizens, the blind and/or disabled, and those who are eligible to receive federally-assisted income maintenance payments.¹ Medicaid is the second largest budget item in Alabama, behind only education expenditures.²

Who does Medicaid cover?

In Alabama, Medicaid is available to those whose low income puts them in need of healthcare insurance assistance. It covers state residents, U.S. nationals, citizens, permanent residents, and legal aliens. In addition, applicants must be either pregnant, blind, have a disability or a family member in their household with a disability, be responsible for children under 19 years of age, or be 65 years of age or older.³

How does Medicaid work?

The Medicaid program has several different parts, with each state having slightly different rules and coverage. In Alabama, Medicaid medical coverage includes most common forms of healthcare, including doctor visits, eye exams and corrective lenses, prescription drugs, in- and out-patient hospital care, and medical equipment.⁴ In addition to these services, part of Medicaid covers long-term nursing home care, as well as long-term, in-home personal care.⁵ Currently, Alabama is one of only two states whose Medicaid program does not cover assisted living facilities for Medicaid beneficiaries.⁶

ISSUE SNAPSHOT

In Alabama, Medicaid is the largest program providing medical and health-related services to the poor.

Each dollar Alabama allocates to Medicaid attracts \$2.78 in federal dollars.

The current fee-for-service healthcare delivery model for Medicaid does not focus on a holistic approach to beneficiary care and creates serious budgetary problems for Alabama.

Currently, Alabama pays participating healthcare providers on a fee-for-service basis.⁷ Essentially, the Medicaid agency dictates how much it will pay for a service such as a test for strep throat, or setting a broken bone, and the provider files for reimbursement from the agency.⁸ This method of delivery suffers from two primary challenges. First, it fails to effectively account for a holistic view of patients and their long-term health decisions. In other words, it is oriented towards providing the health care services themselves rather than maintaining and improving the actual health of beneficiaries. Secondly, it provides little cost certainty or stability to state and federal taxpayers. As seen in Alabama, the Medicaid budget can quickly and unpredictably grow out of control. After federal stimulus money ran out in 2011, enrollment continued to grow at an expedited pace, and Medicaid leaders could be constantly found among the pages of Alabama's newspapers speaking of \$100 million holes, with no real solution in sight.⁹ Additionally, with no absolute

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measure of the services needed or budget in a given year, Medicaid budgets can easily grow out of control.

What is Enrollment and Cost for Medicaid in Alabama?

In fiscal year (FY) 1991, the number of Alabamians receiving Medicaid assistance was 469,944 or about 9.9% of the state's population.¹⁰ By FY 2011, that number had risen to 893,312 (18.6%)¹¹, with another 177,469¹² eligible for, but not receiving, Medicaid. Put another way, if every person in Alabama who is eligible for Medicaid received services, approximately 1,070,781 residents would be enrolled or approximately 22.3% of the state population.¹³

If every eligible Alabamian began receiving Medicaid and the expenditure per recipient remained the same, total annual Medicaid expenditures would increase from around \$5 billion to almost \$6.3 billion. This means Alabama's total Medicaid bill would also jump from roughly \$1.38 to \$1.66 billion annually.

Much of the growth in Medicaid recipients and costs has occurred in the past decade. From FY 2001 to FY 2011, the number of Medicaid recipients increased 33.5% in Alabama.^{14,15} At the same time, net inflation-adjusted payments, including administrative costs, for Medicaid in Alabama increased 67.9%, to slightly more than \$5.23 billion in FY 2011.¹⁶ Of this total, 35.1% was spent on hospital care, 18% on nursing facilities, and 10.9% on pharmacy expenses.¹⁷

Federal Involvement

For every dollar spent on Medicaid in Alabama, 27 cents is provided by the state and 73 cents is given by the federal government. Put another way, each dollar Alabama allocates to Medicaid attracts \$2.78 in federal dollars.¹⁸ This gives policymakers an incentive to increase Medicaid spending or, at the very least, maintain the status quo in Medicaid funding. Not only does one dollar bring in over twice as much from the federal government, but the elimination of one state

Medicaid dollar also cuts \$2.78 in federal matching. This creates a political predicament for state policymakers. In *The Conscience of a Conservative*, Barry Goldwater clarifies the degree of the problem by noting that "many legislators feel that to refuse aid would be political suicide."¹⁹

¹ BENEFITS.GOV, *Alabama Medicaid*, www.benefits.gov/benefits/benefit-details/1618 (last visited Apr. 16, 2012).

² State General Fund Comparison Sheet: SGF FY 2013 Enacted, Legislative Fiscal Office 4, 6/12/2012 2:00 PM available at www.lfo.alabama.gov/pdfs/FY2013%20Budget%20Info/FY2013%20SGF/SGF%20FY%202013%20AS%20ENACTED%206-12.pdf.

³ BENEFITS.GOV, *Alabama Medicaid*, *supra* note 1.

⁴ ALABAMA MEDICAID AGENCY, *Alabama Medicaid Covered Services and Co-Payments* (Aug. 2011), available at http://medicaid.alabama.gov/documents/4.0_Programs/4.2_Covered_Services/4.2_Covered_Services_Summary_8-11.pdf.

⁵ Joseph L. Matthews, *How Medicaid Works*, CARING.COM, www.caring.com/articles/how-does-medicaid-work (last visited Apr. 16, 2012).

⁶ ROBERT MOLLIKA, NATIONAL CENTER FOR ASSISTED LIVING, STATE MEDICAID REIMBURSEMENT POLICIES AND PRACTICES IN ASSISTED LIVING V (Sept. 2009), www.ahcancal.org/ncal/resources/documents/medicaidassistedlivingreport.pdf.

⁷ *Fee Schedules*, ALABAMA MEDICAID AGENCY, available at http://www.medicaid.alabama.gov/CONTENT/6.0_Providers/6.6_Fee_Schedules.aspx.

⁸ *Fee-for-Service*, MEDICAID.GOV, available at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Delivery-Systems/Fee-for-Service.html>

⁹ Kim Chandler, *Alabama Medicaid will get through '14 with a prayer and luck, but faces potential crisis in '15, says state health officer*, available at http://blog.al.com/wire/2013/02/alabama_medicaid_will_get_thro.html and Neal Vickers, *Governor promises to pay back the Alabama Trust Fund*, available at: <http://www.examiner.com/article/governor-promises-to-pay-back-the-alabama-trust-fund>.

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- ¹⁰ ALABAMA MEDICAID AGENCY, *1995 Annual Report*, http://medicaid.alabama.gov/documents/2.0_Newsroom/2.3_Publications/2.3.4_Annual_Report_Archive/2.3.4_FY95_Annual_Report.pdf (last visited Jan. 24, 2013).
- ¹¹ ALABAMA MEDICAID AGENCY, *Alabama Medicaid Statistics 2011*, http://medicaid.alabama.gov/documents/2.0_Newsroom/2.3_Publications/2.3.1.6_Annual_Report_FY11/2.3.1.6_FY11_Eligibles_ALPop+Eligibes+Jobs.pdf (last visited Jan. 24, 2013).
- ¹² STATEHEALTHFACTS.ORG, THE HENRY J. KAISER FAMILY FOUNDATION, *Health Coverage & Uninsured*, www.statehealthfacts.org/comparecat.jsp?cat=3&rgn=2&rgn=1 (last visited Jan. 24, 2013).
- ¹³ *Id.*
- ¹⁴ ALABAMA MEDICAID AGENCY, *FY 2001 Annual Report*, http://medicaid.alabama.gov/documents/2.0_Newsroom/2.3_Publications/2.3.4_Annual_Report_Archive/2.3.4_FY01_Annual_Report.pdf (last visited Jan. 24, 2013).
- ¹⁵ ALABAMA MEDICAID AGENCY, *FY 2011 Annual Report*, *supra* note 8.
- ¹⁶ ALABAMA MEDICAID AGENCY, *FY 2011 Expenditures by Type of Service*, http://medicaid.alabama.gov/documents/2.0_Newsroom/2.3_Publications/2.3.1.6_Annual_Report_FY11/2.3.1.6_FY11_Finance_Expenditures_by_type_of_service_wo_rounding.pdf (last visited Jan. 24, 2013).
- ¹⁷ *Id.*
- ¹⁸ Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for October 1, 2011 through September 30, 2012, 75 FED. REG. 69,082, 69,083 (Nov. 10, 2010).
- ¹⁹ Barry Goldwater, *The Conscience of a Conservative*, 21, Bottom of the Hill Publishing, 1st ed, 2010.



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Medicaid in Alabama: Dollars and Sense

Background

From 2001 to 2011, the number of Medicaid recipients increased 33.5% and expenses per recipient increased by 30.5%. These lead to an increase in expenditures of 53% over the last decade.^{1,2}

In 2011, the Alabama Medicaid program spent over \$5 billion dollars on healthcare for 893,312 recipients at an average cost of \$5,859 per recipient. Although the federal government funds the majority of Alabama's Medicaid budget, 73.55% in 2011, the State still spent \$1.4 billion dollars. Over 1 million people were enrolled in Medicaid in 2011, but only 893,312 received benefits. If all those eligible enrolled at the average cost per beneficiary, Alabama's Medicaid program expenses would have been over \$6 billion dollars.

The State General Fund's (GF) largest line item is Medicaid.³ For Fiscal Year (FY) 2001, Medicaid comprised 19.5% of the GF budget.⁴ In FY 2013, the GF budget dedicates 35.8% of its funds to Medicaid.⁵

Alabama's GF required proration during Fiscal Years (FY) 2010 (20%), 2011(15%), and 2012 (10.62%).⁶ In 2012, citizens approved transferring \$437 million, \$146 million annually for three years, from the Alabama Trust Fund to the GF.⁷ According to ballot language, the State will use these funds "to protect critical health services to Alabama children, elderly, and mothers. . . ."⁸

In short, Medicaid in Alabama seems to be on a constant roller coaster of shortfalls and panic, but has yet to truly embrace any reforms that could provide predictability and reduce costs.

ISSUE SNAPSHOT

Medicaid expenditures have increased by over 50% in the last decade, now consuming over 33% of the strained State General Fund budget.

Unlike the current fee-for-service model, a Managed Care Organizations capitated model stabilizes expenses for the State and payments for physicians.

By utilizing Managed Care Organizations, the State can realize up to \$1 billion in reduced Medicaid expenses over the next four years.

Alabama's Medicaid shortfalls are part of a deeper long-term budget crisis that is overextending the capacities of state and federal budgets across the nation. The only factor that distinguishes Alabama's Medicaid shortfall from other states is that it is one of very few states remaining that has yet to embrace any serious reforms.

Policy Considerations

Commercial managed care organizations (MCO) ". . . agrees to provide most Medicaid benefits to people in exchange for a monthly payment from the State."⁹ Unlike the current fee-for-service model, MCOs' capitated model, which would pay MCOs a determined rate per member per month (PMPM rate), stabilizes expenses for the State and payments for physicians. Where the current fee-for-service model charges individual rates for each medical service rendered, the capitated model charges a single flat fee per patient, covering all medical services the patient incurs. Because

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this flat rate is predetermined through a contract with the State, the Medicaid budget becomes more predictable and less susceptible to utilization and cost spikes.

In 2012, Governor Robert Bentley established the Alabama Medicaid Advisory Commission in order to combat the constant cycle of panic within Medicaid, and discover ways to bring Medicaid to a more fiscally sound state. The commission found opportunities for significant cost savings.¹⁰

Program	Predicted Cost for FY 2014-2018
No changes	\$15 billion
State Managed Patient Care Network	\$14.3 billion
Commercial Managed Care Organization	\$14 billion

As shown in the table above, Alabama's Medicaid program realizes the greatest amount of savings by utilizing a system of commercial managed care organizations (MCO).

Recommendation

During the 2013 regular legislative session, Medicaid costs continue to create challenges for leaders.¹¹ As Medicaid continues to consume a larger portion of the state budget, state law makers must embrace system-wide structural changes. Alabama should move to a model that would shift the risk of increased health costs from the State to commercial MCOs, which would be better equipped to provide customizable care than the State is currently able to administer.

¹ R. Bob Mullins, Jr, Alabama Medicaid Commissioner, *Alabama Medicaid Agency FY 2011: Making the Case for Meaningful Change*, Alabama Medicaid Agency, http://www.medicaid.alabama.gov/documents/2.0_Newsroom/2.3_Publications/2.3.1.6_Annual_Report_FY11/2.3.1.6_FY11_An_Rpt-2-19-13.pdf.

² Mike Lewis, Alabama Medicaid Commissioner, *Alabama Medicaid Agency Fy 2001 Annual Report*, Alabama Medicaid Agency, http://medicaid.alabama.gov/documents/2.0_Newsroom/2.3_Publications/2.3.1.1_Annual_Report_Archive/2.3.1.1_FY01_Annual_Report.pdf.

³ *State General Fund Comparison Sheet: FY 2013*, ALA. LEGISLATIVE FISCAL OFFICE, 4 (June, 12 2012) <http://www.lfo.state.al.us/pdfs/FY2013%20Budget%20Info/FY2013%20SGF%20FY%202013%20AS%20ENACTED%206-12.pdf>.

⁴ *State General Fund Comparison Sheet: FY 2002*, ALA. LEGISLATIVE FISCAL OFFICE, 7 (Jan. 10, 2001)

http://www.lfo.state.al.us/pdfs/SGF%20Enacted%20FY02_0003.pdf.

⁵ *State General Fund Comparison Sheet: FY 2013*, *Supra* note 1.

⁶ Norris Green, *Budget Fact Book FY 2013*, LEGISLATIVE FISCAL OFFICE, 3 (Jan. 22, 2013)

<http://www.lfo.state.al.us/pdfs/Budget%20Fact%20Book/2013%20BUDGET%20FACT%20BOOK%20FINAL%20Website.pdf>.

⁷ ALA. CONST. Amend. 856 *available at*

<http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/Constitution/1901/CA-2517997.htm>.

⁸ Beth Chapman, Proposed Statewide Amendment, SECRETARY OF STATE OFFICE (June 7, 2012)

<http://www.sos.alabama.gov/downloads/election/2012/general/statecert-amendment-2012-06-07.pdf>.

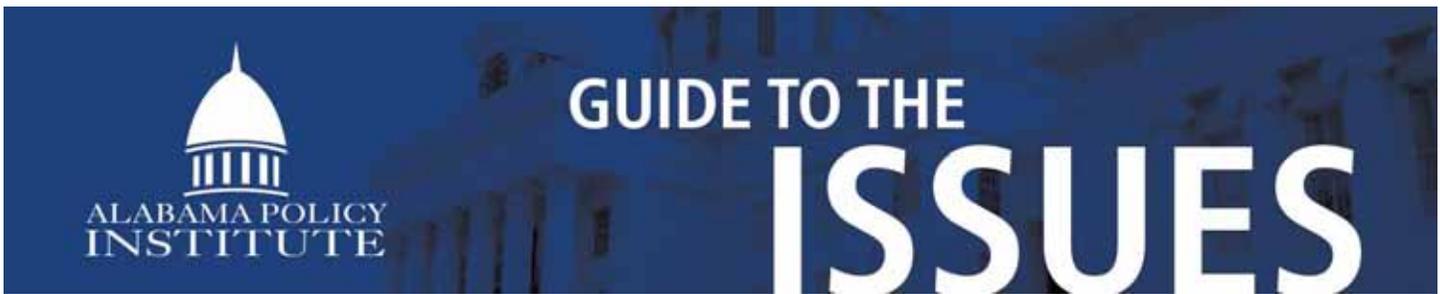
⁹ *Managed Care*, MEDICAID.GOV, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Delivery-Systems/Managed-Care/Managed-Care.html> (last visited Feb. 27, 2013).

¹⁰ Donald E. Williamson, Report of the Alabama Medicaid Advisory Commission, ALABAMA MEDICAID AGENCY (Jan. 2013)

http://www.medicaid.alabama.gov/documents/2.0_Newsroom/2.2_Boards_Committees/2.2.1_Med_Adv_Commission/2.2.1_Final_Commission_Report_1-31-13.pdf.

¹¹ Kim Chandler, *Tough budgets, Medicaid to dominate Alabama legislative session*, AL.COM, Feb. 2, 2013,

http://blog.al.com/wire/2013/02/tough_budgets.html.



Orienting Medicaid toward Outcomes

Background

One of the most startling aspects of Alabama's current Medicaid system is that it provides a relatively limited array of health services at skyrocketing costs. Alabama provides very few services that are not required by the federal government and has among the strictest qualification limits in the country, yet still faces budgets and enrollment far outpacing the growth of available resources.¹

According to Medicaid Director, Dr. Donald Williamson, Alabama Medicaid is facing a potential budget shortfall of \$100 million for fiscal year 2013, and even the current proposal of enhancing the regionally-divided Patient Care Networks (PCN) will not make the substantive changes needed to make the program solvent over the next few years.²

While Medicaid needs to control its short-term budget, the long-term *fiscal* health of the program must be tied to the long-term *physical and mental* health of its enrollees.

Policy Considerations

There are five major cost drivers for Medicaid: utilization, federal match rate changes, benefit changes, enrollment growth, and medical inflation.³ Alabama saw a 25 percent increase in enrollment from 2008-2012, corresponding with the nationwide economic downturn,⁴ but Alabama also has rates of emergency room and inpatient use that are significantly higher than the rest of the country.⁵

ISSUE SNAPSHOT

Alabama has seen a 25 percent increase in Medicaid enrollees since 2008.

Currently, Medicaid in Alabama focuses on delivery of health care services rather than patient outcomes.

Managed Care Organizations (MCOs) have the financial incentives to take a comprehensive look at Medicaid beneficiaries' healthcare and ensure improved outcomes.

Per 1,000 Population	Alabama	US	% Difference
ER visits	482	411	17.27%
Hospital Admissions	134	114	17.54%
Inpatient Days	697	613	13.70%
Outpatient Visits	1839	2106	-12.68%

In order to effectively control costs and improve outcomes, 38 other states have implemented some form of managed care.⁶ Under a managed care program, private providers called Managed Care Organizations (MCOs) contract with the state Medicaid agency to provide, at a minimum, the federally mandated coverage for an agreed-upon, per-person or "capitated" amount.

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Under this model, the MCOs assume *all the financial risk* of coverage, and are thus incentivized to provide this healthcare in the most economically efficient way possible. Some beneficiaries might be concerned that those financial incentives really mean that “managed care” is “rationed care.” But the truth is that MCOs only realize a financial benefit when patients are healthy. Denying care until it becomes necessary for the beneficiary to be admitted to a hospital or emergency room is generally far more expensive than routine visits to a primary care physician or ongoing wellness care. From a cost and care standpoint, the state, the MCO, and the Medicaid patient benefit from early detection and treatment of health concerns before they have the chance to develop into major medical issues.

As an added benefit, MCOs in other states have developed programs that incentivize good health practices in order to holistically improve the health of Medicaid beneficiaries. For example, in Bayou Health, Louisiana’s managed care service, members of some plans are offered unlimited visits to their primary care physician (PCP) as well as free Weight Watchers memberships, emergency-use cell phones, free fitness and nutrition program, family classes, and nicotine replacement products and coaching programs to help smokers quit.⁷ These types of benefits not only improve patient health, but they also lower long-term healthcare utilization.

Rather than Alabama’s current “faceless” Medicaid, MCOs work at a community level to ensure effective delivery of care, thus providing jobs and economic stimulus to the local economy, and even possibly hiring current and former Medicaid enrollees familiar with the system.⁸

Conclusions & Recommendations

As Alabama evaluates potential Medicaid reforms, it should pursue options that align economic incentives with patient outcomes. MCOs and similar organizations that can be held accountable for improving the overall health of Medicaid beneficiaries offer a better option

than the current Medicaid which simply pays for a finite range of services and does little to promote healthy lifestyles for Medicaid beneficiaries.

In short, Alabama will only be able to solve the budget challenges posed by Medicaid if the State is willing to move towards a new Medicaid that simultaneously improves the long-term health of those served by the program.

¹ Donald E. Williamson, M.D., *Report of the Alabama Medicaid Advisory Commission*, January 2013, www.medicaid.alabama.gov/documents/2.0_Newsroom/2.2_Boards_Committees/2.2.1_Med_Adv_Commission/2.2.1_DRAFT_Commission_Report_1-29-13a.pdf.

² Kim Chandler, *Alabama Medicaid will get through '14 with prayer and luck, but faces potential crisis in '15, says state health officer*, available at: http://blog.al.com/wire/2013/02/alabama_medicaid_will_get_thro.html.

³ *Id.*

⁴ *Id.*

⁵ *Alabama Hospital Utilization*, 2010, STATEHEALTHFACTS.ORG, available at www.statehealthfacts.org/profileind.jsp?cat=8&sub=217&rgn=2.

⁶ *Medicaid: States' Use of Managed Care*, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, available at: <http://www.gao.gov/assets/600/593781.pdf>.

⁷ *Amerigroup Real Solutions in Healthcare*, (pamphlet), available at http://new.dhh.louisiana.gov/assets/docs/BayouHealth/HealthPlanBrochures/AGP_LAMKT-003-11-Health_Plan_NetworkBro_ENG.PDF.

⁸ *About Us*, Centene Corporation, available at: <http://www.centene.com/about-us/>.

Restoring Individual Rights



GUIDE TO THE ISSUES

Alabama's Handgun Laws and Constitutional Rights

Background

A federal district court judge recently found that a Maryland statute “require[ing] an applicant to demonstrate ‘good and substantial reason’ for the issuance of a handgun permit...impermissibly infringes the right to keep and bear arms, guaranteed by the Second Amendment.”ⁱ

Before the recent federal court order striking down Maryland’s “may issue” law, Alabama was one of nine states with a “may issue” law and the only one in the South. The other “may issue” states are California, Delaware, Hawaii, Connecticut, Massachusetts, New Jersey, and New York.

District court opinions in Maryland are not binding on Alabama, but the decision does merit a review of Alabama’s gun laws.

Alabama’s Constitution guarantees “[t]hat every citizen has a right to bear arms in defense of himself and the state.”ⁱⁱ However, that right comes with certain qualifications.

Alabama law provides that, with certain exceptions, “no person shall carry a pistol about his person on premises not his own or under his control.”ⁱⁱⁱ The Alabama Attorney General’s office^{iv} and Alabama courts^v have found exceptions permitting Alabamians on foot to carry an unconcealed pistol.

The Code of Alabama also bans individuals from carrying “a pistol in any vehicle or concealed on or about his persons” except on his own property “without a

ISSUE SNAPSHOT

Several Supreme Court cases have upheld the individual right to possess and carry firearms.

Aspects of Maryland’s handgun regulations, nearly exact to those of Alabama, were recently declared unconstitutional by a federal district judge.

The current Code of Alabama’s regulations regarding the right to carry a concealed weapon may infringe upon rights protected under the 2nd Amendment to the United States Constitution.

license”^{vi} In order for an individual who is not a law enforcement officer to carry a pistol in a vehicle or concealed on his person, he must first obtain a license.

The issuance of a license to an individual is contingent upon multiple factors:

First, those who have committed or attempted to commit a crime of violence as well as drug addicts or habitual drunkards are forbidden to possess a pistol.^{vii}

Second, as a minor may not legally obtain a pistol^{viii}, the licensee must be 18 or older.

Third, any person wishing to obtain a license “to carry [a] pistol in [a] vehicle or concealed on person”^{ix} must submit an application to the county sheriff. Upon review of the application, the details of which are not provided explicitly in the text of the Alabama Code, the

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sheriff “may issue a qualified or unlimited license to such a person”^x The issuance of the license, as shown by the phrase “may issue”, depends on the discretion of the sheriff. “If it appears that the applicant has good reason to fear injury to his or her person or property or has any other proper reason for carrying a pistol”,^{xi} a permit may be issued.

Policy Consideration

According to the Second Amendment of the Constitution of the United State of America, “the right of the people to keep and bear Arms, shall not be infringed.” Several Supreme Court cases have found that the right to keep and bear arms is an individual right limiting how the states and the federal government may restrict firearm possession:

- In *District of Columbia v. Heller* (2008), the Court struck down the District of Columbia’s handgun law on the grounds that the Second Amendment “guarantees the individual right to possess and carry weapons in case of confrontation.”^{xii}
- The Court’s *McDonald v. Chicago* holding clarified that guarantee applies not only to federal enclaves like Washington, D.C. but also to the states.”^{xiii}

The courts do recognize the necessity of regulating the issuance of permits, but require the reasons for restriction to be clear and judicious.

Recommendation

Alabama’s current concealed carry law may be unconstitutional. The phrase “may issue” allows county sheriffs discretion in deciding whether each applicant has “good reason” to carry a concealed pistol. In order to ensure that Alabama’s law complies with the requirements of the Second Amendment, Section 13A-11-75 of the Code of Alabama should be changed from a “may issue” law to “shall issue” law where applicants not otherwise prohibited from carrying a pistol are granted a permit. Alabama should also remove issuance provisions conditioning a license on a “good reason” determination. The State of Tennessee Code offers

legislation regarding handgun carry permits which, with the exception of a high licensing fee, creates a strong framework from which Alabama can develop similar provisions.^{xiv}

In order to offer complete transparency, the Legislature should clarify there is no licensing requirement to carry a pistol unconcealed when not in a vehicle, provided that the individual is not otherwise prohibited by law from carrying a pistol.^{xv}

ⁱ Woollard v. Sheridan, No. L-10-2068, slip op. at 23 (D. Md. Mar. 2, 1990) available at <http://www.mdd.uscourts.gov/Opinions/Opinions/WoollardMemo.pdf>.

ⁱⁱ ALA. CONST., art. I, §26.

ⁱⁱⁱ ALA. CODE §13A-11-52 (2011), available at <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/13A-11-52.htm>.

^{iv} ALA. Att’y. Gen. Opinion 8400205 (1984) available at <http://www.ago.state.al.us/opinions/pdf/8400205.pdf>.

^v Looney v. State, 141 So. 2d 535, 535 (Ala. App. 1962) available at <http://www.alabamaopencarry.com/docs/looneyvstate.pdf>.

^{vi} ALA. CODE §13A-11-73 (2011), available at <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/13A-11-73.htm>.

^{vii} ALA. CODE §13A-11-72 (2011), available at <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/13A-11-72.htm>.

^{viii} ALA. CODE §13A-11-76 (2011), available at <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/13A-11-76.htm>.

^{ix} ALA. CODE §13A-11-75 (2011), available at <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/13A-11-75.htm>.

^x *Id.*

^{xi} *Id.*

^{xii} Cameron Smith, *Does Alabama Have an Unconstitutional Gun Control Law?*, ALABAMA POLICY INSTITUTE (Mar. 8, 2012), <http://www.alabamapolicy.org/policyperspectives/legislative.php?ledgeUpdateID=168&dateID=11>.

^{xiii} *Id.*

^{xiv} TENN. CODE ANN. §39-17-1351 (2012).

^{xv} *Morris v. State*, 342 So. 2d 417, 418 (Ala. Crim. App. 1977) available at <http://www.alabamaopencarry.com/docs/morrisvstate.pdf>.



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Sex-Selective Abortion

Background

A sex-selective abortion allows a mother to terminate the pregnancy based upon the predicted sex of the baby. The preference for a child of one sex—almost always a male—is common across Asia, the Middle East, and North Africa, where male children have been considered more valuable than females because of their greater earning potential and their ability to carry on the family line.¹ In India, males are preferred because of the cost of dowries; and in South Korea and China, patriarchal family systems usually involve passing down family assets such as land to sons instead of daughters.²

With the advent of genetic, sex-identification testing in the 1950s and medical ultrasound technology in the 1980s, many of these populations have been able to identify the sex of an unborn child and abort it if they had a preference for a male. Consequently, the sex ratio at birth in some Asian cities has risen to as high as 125 males for every female.³ In fact, it is estimated that there are 32 million more males than females under age 20 in China alone.⁴ The problem is so severe in some countries that in 2005 the United Nations described it as “female infanticide.”⁵

As a result of the rapid increase in males-to-females ratios in many of these countries, five Eastern governments—China, India, Nepal, South Korea, and Vietnam—have implemented laws banning prenatal sex selection.⁶ Several western nations, including Canada, France, Germany and the United Kingdom, also ban sex-selective abortions.⁷

Policy Consideration

Even though the U.S. State Department has published reports critical of the practice of sex-selective abortions,

ISSUE SNAPSHOT

Sex-selective abortions occur when a pregnancy is terminated based upon the predicted sex of the baby.

While many Asian nations and several Western nations have enacted bans on the practice, the United States has no ban on sex-selective abortions.

Pro-choice feminist groups oppose a ban on sex-selective abortions claiming it would interfere with a woman’s right to choose, yet it is discriminatory against the unborn female child whose life is ended.

the United States has no ban on the procedure.⁸ Moreover, census data from 2000 shows some Asian-American subpopulations have begun manifesting skewed sex ratios favoring boys over girls, particularly for third children if the first two children were girls (151:100).⁹

There have been at least three efforts to pass bans on sex-selective abortions in the United States.¹⁰ The most recent of these, the Prenatal Non-Discriminational Act (PRENDA), was introduced in 2012 by Rep. Trent Franks of Arizona. Had it passed, the Act would have prohibited doctors from performing abortions on the basis of the sex of the unborn child. Under the act, doctors who performed sex-selective abortions could face imprisonment, fines, or lawsuits from a patient or her family.¹¹ Although a majority of the House voted in favor of PRENDA, 247-168, it did not pass because Republicans called it to a vote under rules requiring a two-thirds majority.¹²

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Instead of upholding legislation that would ban sex-selective abortions, pro-abortion feminist groups oppose these bans. While stating that the practice is a terrible affront to women's rights, they also state that it does not supersede the right of a woman to choose what to do with her body.¹³ Ironically, the opposition of these groups to this ban is discriminatory against the unborn Asian-American females that are being aborted.

At the state level, sex-selective abortion legislation has been more successful. Since 2009, 13 states have advanced legislation banning sex-selective abortions.¹⁴ Of the 13, Arizona, Illinois, Oklahoma and Pennsylvania have enacted it.¹⁵

Recommendation

Because sex-selective abortions constitute an act of gender-based violence against an unborn child who is almost always female, Alabama should follow the steps of other states and pass a ban on the procedure.

¹ Therese Hesketh, Li Lu, & Zhu Wei Xing, *The Consequences of Son Preference and Sex-Selective Abortion in China and other Asian countries*, 183 CANADIAN MEDICAL ASSOCIATION JOURNAL, 1374, 1374 (2011).

² Monica Das Gupta et al., *Why is Son Preference So Persistent in East and South Asia? A Cross-Country study of China, India and the Republic of Korea*, 40 THE JOURNAL OF DEVELOPMENTAL STUDIES 153, 153-187 (2003).

³ Hesketh, *supra* note 1, at 1374.

⁴ *Id.*

⁵ AMERICANS UNITED FOR LIFE, *Ban on Abortions for Sex Selection and Genetic Abnormalities*, MODEL LEGISLATION & POLICY GUIDE FOR THE 2012 LEGISLATIVE YEAR, www.aul.org/wp-content/uploads/2012/01/Sex-Selective-and-Genetic-Abnormality-Ban-2012-LG.pdf (last viewed Feb. 15, 2013).

⁶ Hesketh, *supra* note 1, at 1374.

⁷ Ed O'Keefe, *Bill Banning 'Sex-Selection Abortions' Fails in the House*, THE WASHINGTON POST (May 31, 2012), http://articles.washingtonpost.com/2012-05-31/politics/35454676_1_abortion-restrictions-prenatal-nondiscrimination-act-ban-abortions

⁸ *Id.*

⁹ Douglas Almond & Lena Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, 105 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA, 5681, 5681-5682 (2008), www.pnas.org/content/105/15/5681.full.pdf+html.

¹⁰ ¹⁰ Jessica Miriam Yeung et al., *What PRENDA Would Mean to Women*, THE HUFFINGTON POST (May 29, 2012, 11:58 AM), www.huffingtonpost.com/miriam-yeung/prenatal-nondiscrimination-act_b_1552924.html.

¹¹ H.R. 3541, 112th Cong. (2012).

¹² Pete Kasperowicz, *House Rejects Bill Penalizing Doctors for Sex-Selective Abortions*, THE HILL (May 31, 2012, 1:15 PM), <http://thehill.com/blogs/floor-action/house/230283-house-rejects-bill-penalizing-doctors-for-sex-selection-abortions>.

¹³ Joerg Dreweke, *Sex-Selective Abortion Bans—A Disingenuous New Strategy to Limit Women's Access to Abortion*, GUTTMACHER INSTITUTE (May 30, 2012), www.guttmacher.org/media/nr/2012/05/30/index.html.

¹⁴ *Id.*

¹⁵ O'Keefe, *supra* note 1.

Upholding the Rule of Law



GUIDE TO THE ISSUES

Consent Decrees

Background

A consent decree is a judge's order based on an agreement between parties in a lawsuit, enforceable by contempt charges and modified only by court order. Consent decrees entered into by private parties provide a reasonable and effective tool for settling lawsuits. But with lawsuits involving state and local governments, consent decrees are a weapon in the arsenal of activist plaintiffs and activist judges that they are more than willing to use.

To obtain a consent decree, an advocacy group identifies a program that needs change, constructs a legal theory that some constitutional or statutory requirement has been violated, and files a lawsuit against a state or local government. Instead of gambling on what could be a long and expensive court trial that they could lose, plaintiffs often try to convince state and local governments to settle the case through a consent decree. As Michael DeBow and his associates note in a 2008 report on consent decrees for the Alabama Policy Institute:

If the lawsuit goes to trial and the judge rules in favor of the plaintiff, the judge would be limited to ordering a remedy based on the facts of the case. But a consent decree can go well beyond what could legally be ordered after a trial. This creates a powerful incentive for plaintiffs because it creates an opportunity to enact reforms well beyond what the law would require.... Activists also have a strong incentive for getting state and local governments to enter into a consent decree because they are much easier to enforce than other judgments and very difficult to terminate and because, in effect, whatever the law actually requires is no longer in dispute or

ISSUE SNAPSHOT

A consent decree is a judge's order based on an agreement between parties in a lawsuit, enforceable by contempt charges and modified only by court order.

In some cases, state and local governments can mount a formidable defense against consent decrees if they force plaintiffs to prove their case in court.

The Attorney General should also be required to present a report to the State Legislature on every consent decree currently affecting state or local government operations, with budgetary and policy implications clearly addressed for each decree.

even applied. By expanding beyond the scope of the requirements of the law, a consent decree can enact a public policy agenda that otherwise would have little or no public support.¹

Several problems arise when consent decrees involving state and local governments are involved. For example, they allow judges to order a remedy to a problem that has not been proven in court. Such remedies may not be the best way to solve the problem, if the problem even exists at all. As a result, taxpayers are hurt twice by paying higher taxes to support questionable judicial remedies, as well as by having their voices in policy-making unduly compromised.

Supporters of consent decrees claim that society and our nation's legal institutions would be much worse off without such decrees. This view unfairly assumes that

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the public and its elected representatives cannot be trusted and therefore must be compelled by court order. In essence, the right to representative government guaranteed by the United States Constitution has been compromised by the arbitrary and unchecked use of federal consent decrees.

The Proper Roles of Government: By design, American courts are reactive. They are established to ensure justice under the law in criminal and civil cases and to ensure the legitimate interpretation of the Constitution. However, judges in both state and federal courts have moved beyond intended functions and have become proactive in the use of the law for policymaking. When courts drift from determining whether rights have been violated and begin to enforce social aspirations, constitutional and other likely serious problems arise.

Policy Consideration

In some cases, state and local governments can mount a formidable defense against consent decrees if they force plaintiffs to prove their case in court. If enough cases were decided by a trial instead of settled by a consent decree, the odds are good that fewer cases of this type would be filed. Even if the state or local government lost the case, the cost of trying the case would likely be less expensive than the cost of settling with a consent decree. Moreover, the judge would be limited to ordering a remedy based only on the facts of the case, nothing more.ⁱⁱ

Recommendation

Because consent decrees violate our representative form of government, Alabama's laws regarding them should be modified.

- An existing provision of the Alabama Constitution requires approval of the Legislature for state court orders requiring disbursement of state funds. In a similar fashion, the Alabama Constitution should be amended to require legislative approval for future federal consent decrees that require additional state expenditures or direct existing state funds.

- Alabama's Attorney General should also be required to negotiate a time limit, keyed to the expiration of the current governor's term of office, in every consent decree entered into by either the state government or any local government.
- The Attorney General should also be required to present a report to the State Legislature on every consent decree currently affecting state or local government operations, with budgetary and policy implications clearly addressed for each decree. The report should also note whether the Attorney General will seek to have any decrees dismissed in the coming year, and state reasons for these decisions.
- Finally, the state Attorney General's office should be required to complete an up-to-date list of consent decrees in force against the state government and local governments, to post such a list on the office's Web site, and to provide links on the Web site to publicly available documents describing the decrees and their administration.

Further Reading

- Michael E. DeBow, Gary J. Palmer, and John J. Park, Jr. "Consent Decrees in Institutional Reform Litigation: Strategies for State Legislatures." Alabama Policy Institute, 2008. Available at <http://tinyurl.com/68lnx5p>. Access verified February 12, 2011.

ⁱ Michael E. DeBow, Gary J. Palmer, and John J. Park, Jr. "Consent Decrees in Institutional Reform Litigation: Strategies for State Legislatures." Alabama Policy Institute, 2008, p. 5. Available at <http://tinyurl.com/68lnx5p>. Access verified February 12, 2011

ⁱⁱ *Ibid.*



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Prison Sentencing Reforms

Background

Alabama's prisons are grossly overcrowded. Since 1980, Alabama's adult corrections population sentenced to more than one year has increased 393%, from 6,543 to 32,316 in 2011.¹ When built, the State's prisons were designed to hold 14,000 inmates.² By the end of 2011, they held 26,268.³ If present trends continue, this number will increase to 27,100 by early 2015.⁴

Alabama's incarceration rate is also the third highest in the nation. In 2011, 650 of every 100,000 residents was in a state or federal prison serving a sentence of at least one year, compared to 492 of every 100,000 persons in the national population.⁵

The cost of keeping Alabama's inmates behind bars is very high. In 2011, Alabama taxpayers spent \$444.7 million on corrections, at a cost of \$15,756 per inmate, or about \$43 per inmate per day.⁶ Incarcerating inmates in Alabama cost \$444.7 million in 2011,⁷ the second-largest line item in the State's 2012 General Fund Budget.⁸

Despite Hollywood and the media portraying prison as the domain of ultra-violent super-criminals, more than half of inmates behind bars in Alabama received their sentences for nonviolent offenses. According to the Alabama Department of Corrections, the largest percentages of prisoners in Alabama at the end of 2011 were incarcerated for drug-related crimes such as possession, trafficking or manufacturing (23%) or theft (21%). By comparison, 14% were behind bars for robbery, and 13% for murder.⁹ In sum, of the 32,000 prisoners in Alabama in 2011, 47.5% of them were there for violent convictions.¹⁰

ISSUE SNAPSHOT

Alabama's prisons are grossly overcrowded. The state has the third highest incarceration rate in the nation, and in 2011, corrections costs in Alabama were approximately \$444.7 million.

Fewer than half of offenders behind bars in Alabama are serving time for violent offenses. Almost a quarter are in prison for drug-related charges, and about one in five is serving time for theft.

The Alabama Sentencing Commission was established in 2000 to address the humanitarian concerns with overcrowding and the fiscal concern of burdening taxpayers with increasing costs.

In addition to established sentencing guidelines, the Commission should consider placing more conservative ranges on sentences for Class A Felonies, especially those involving non-violent crimes.

Policy Consideration

To address the humanitarian concerns with overcrowding and the fiscal concern of burdening taxpayers with increasing costs, the Alabama State Legislature created the Alabama Sentencing Commission (ASC) in 2000.¹¹ The group, which is composed of representatives from the Criminal Justice System, all branches of government, and the general public,¹² is tasked with "establishing and maintaining an effective, fair, and efficient sentencing system for Alabama that enhances public safety, provides truth-in-sentencing, avoids unwarranted disparity, retains

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meaningful judicial discretion, recognizes the most efficient and effective use of correctional resources, and provides a meaningful array of sentencing options.”¹³

Lessons from Virginia

To meet the goal of truth-in-sentencing, the ASC has followed the example of similar groups such as the Virginia Criminal Sentencing Commission (VCSC) in developing sentencing worksheets for judges to use when weighing risk factors for specific crimes. The sheets, which were developed using data from 13,000 incarcerated felons, assign values to different offender risk factors, allowing the judge to weigh the threat of recidivism against the value of an alternative sentence. The first Sentencing Reference Manual was published in 2004, and is updated annually to reflect new rules, statutes, and case law regarding criminal sentencing.¹⁴

As in Virginia, following the sentencing standards in Alabama is voluntary, but judges are required to complete and submit the worksheets.¹⁵ Unlike Alabama, though, judges in Virginia have an almost 100% compliance rate when it comes to completing and submitting their alternative sentencing worksheets. Nevertheless, compliance with these standards in Alabama has been lax, with the required worksheets being filled out completely and submitted to the ASC about half of the time.¹⁶ Conforming to the recommended guidelines has also been less frequent in Alabama than in Virginia; in 2011, criminal sentences in Virginia conformed to the recommended VCSC guidelines almost 80% of the time, as compared to about half of the time in Alabama.¹⁷

One of the reasons the VCSC has a higher degree of compliance with its recommendations is that it was one of the first Commissions to have its recommendations automatically codified, unless they were overturned by the State’s General Assembly.¹⁸ This same action was taken in Alabama in 2012 to give additional powers to the ASC. Effective October 1, 2013, the Commission’s recommendations for non-violent offenses will become law unless specifically rejected by the Legislature. By

doing this, the Commission will have the ability to make difficult sentencing decisions without political pressure.¹⁹

Recommendations

The ASC has made tremendous progress in revising Alabama’s sentencing structure to make it more humanitarian and cost-effective. Nevertheless, additional measures could be taken to make existing sentencing guidelines more proportional to criminal offenses.

For example, the statutory penalty provisions for a Class A Felony in Alabama currently range from 10 years to 99 years, or life. This range includes offenses stretching from an adult selling or furnishing a controlled substance to a minor²⁰ to murder.²¹ Even though judges have discretion regarding aggravating and mitigating circumstances for each particular offense, there is always the possibility they may choose to throw the book at an offender to score political points, to appear “tough on crime,” or both.

For justice to be served, serious crimes should have serious consequences, but the current range of 10 years to life for Class A Felonies is almost meaningless because of the extreme latitude judges can take, particularly on the high end. To remedy this particular imbalance, the ASC should consider placing more conservative ranges on sentences for Class A Felonies, especially those involving non-violent crimes. Similar considerations could also be given to lesser felonies and misdemeanors. One of the most important aspects of the Alabama criminal justice system is ensuring that punishments are proportionate to the offenses requiring them. Narrowing the sentencing ranges for specific crimes would further remove politics from the corrections equation.

¹ ALABAMA DEPARTMENT OF CORRECTIONS, ANNUAL REPORT FOR THE FISCAL YEAR 2011 (2011), available at www.doc.state.al.us/docs/AnnualRpts/2011AnnualReport.pdf.

² EQUAL JUSTICE INITIATIVE, *Prisons and Sentencing Reform* (2012), www.eji.org/prisons (last visited Feb. 5, 2013).

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³ EQUAL JUSTICE INITIATIVE, *Prisons and Sentencing Reform* (2012), www.eji.org/prisons (last visited Feb. 5, 2013).

⁴ VERA INSTITUTE OF JUSTICE, UPDATE AND SUMMARY OF NOVEMBER 9, 2010 MEETING OF THE ALABAMA PUBLIC SAFETY AND SENTENCING COALITION (Dec. 2010).

⁵ CARSON & SABOL, *supra* note 3, at 23.

⁶ *Id.* at 26.

⁷ *Id.* at 8.

⁸ STATE OF ALABAMA, EXECUTIVE BUDGET: FISCAL YEAR 2013 62 (2012), available at <http://budget.alabama.gov/pdf/buddoc/BudDoc2013.pdf>.

⁹ ALABAMA DEPARTMENT OF CORRECTIONS, *supra* note 1, at 52.

¹⁰ *Id.* at 53.

¹¹ ALABAMA SENTENCING COMMISSION, *About the Commission*, <http://sentencingcommission.alacourt.gov/about.html> (last visited Feb. 6, 2013).

¹² ALA. CODE §12-25-34.2.

¹³ ALABAMA SENTENCING COMMISSION, <http://sentencingcommission.alacourt.gov/Default.htm> (last visited Feb. 6, 2013).

¹⁴ See ALABAMA SENTENCING COMMISSION, SENTENCING REFERENCE MANUAL FOR CIRCUIT AND DISTRICT JUDGES (2012), available at http://sentencingcommission.alacourt.gov/Publications/Judges%20Reference%20Manual_July2012.pdf.

¹⁵ ALABAMA SENTENCING COMMISSION, *Initial Voluntary Sentencing Standards & Worksheets*, http://sentencingcommission.alacourt.gov/sent_standards2006.html (last visited Feb. 6, 2013).

¹⁶ Katherine Sayre, *Alabama Judges Following Prison Sentence Guidelines Half the Time*, MOBILE PRESS REGISTER (July 17, 2011, 7:45 AM), http://blog.al.com/live/2011/07/alabama_judges_following_priso.html.

¹⁷ Sayre, *supra* note 18.

¹⁸ *Id.*

¹⁹ ALA. CODE §12-25-34.2.

²⁰ ALA. CODE §13A-12-215.

²¹ ALA. CODE §13A-6-2.



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Strengthening Alabama's Gambling Laws

Background

The State Constitution of Alabama includes many provisions related to games of chance. Section 65 states “the legislature shall have no power to authorize lotteries or gift enterprises for any purpose. . . .”¹ The Alabama State Legislature has, however, ratified several Constitutional Amendments creating exceptions to Section 65. The first, Amendment 386 entitled “Operation of Bingo Games by Nonprofit Organizations in Jefferson County,” became law in 1980.² Subsequent amendments provide similar rights to have bingo games in cities and counties across Alabama.³

Enterprising slot machine operators took advantage of the “vague” definition of bingo provided in the State Constitution, ushering in a period of expansive growth in gambling halls. In November 2009, the Alabama Supreme Court defined “bingo” with a set of six guidelines:

1. Each player uses one or more cards with spaces arranged in five columns and five rows, with an alphanumeric or similar designation assigned to each space.
2. Alphanumeric or similar designations are randomly drawn and announced one by one.
3. In order to play, each player must pay attention to the values announced; if one of the values matches a value on one or more of the player's cards, the player must physically act by marking his or her card accordingly.
4. A player can fail to pay proper attention or to properly mark his or her card, and thereby miss an opportunity to be declared a winner.
5. A player must recognize that his or her card has a "bingo," i.e. a predetermined pattern of matching values, and in turn, announce to the other players and the announcer that this is the case before any other player does so.
6. The game of bingo contemplates a group activity in which multiple players compete against each other to be the first to properly mark a card with the predetermined winning pattern and announce that fact.⁴

ISSUE SNAPSHOT

Alabama Supreme Court cases have strictly defined what forms of gaming are legal in Alabama, specifically developing a six-point test for categorizing bingo.

Although stringently defined, the possibility of gaming facilities reopening and operating still exists.

In order to effectively deter would-be offenders, the punishment for owning and operating illegal gaming paraphernalia should be raised from a Class A misdemeanor to a Class C felony.

In a February 10, 2012 decision, Judge Vowell of the Jefferson County Circuit Court, found several

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confiscated bingo machines to be illegal as they met none of the requirements of the six-point test established in *Barber v. Cornerstone Community Outreach*.⁵ However, clearly establishing the illegality of slot machines has not been sufficient to deter illegal gambling operators.

Sections 13A-12-(20-92) of The Code of Alabama establish the definitions, regulations, and punishments for various gambling, gaming, and lottery offenses. Offenses including promoting gambling, possession of gambling records in the first and second degree, and possession of a gambling device are all considered Class A misdemeanors.⁶

In Section 13A-5-7 of The Code of Alabama, the maximum prison sentence for a Class A misdemeanor is “not more than one year”; Section 13A-5-12 states the maximum fine as \$6,000.

In Section 13A-5-7 of The Code of Alabama, the punishment for a Class A misdemeanor is “not more than one year”⁷; Section 13A-5-12 states the maximum fine as \$6,000.⁸

Policy Consideration

As specific transparent regulations exist for the accurate classification of bingo games, prosecution for the violation is no longer at the heart of the illegal gambling issue. Instead, legislators and law enforcement officials are faced with legal remedies that do not successfully deter those who stand to make enormous profit from breaking the law.

As a result of the law not providing substantial deterrent for offenders, state law enforcement must continue to expend resources in order to seize machines and prosecute those who break the clearly defined law.

The Journal of Economic Crime Management shows one illegal slot machine can provide an average income of \$9,260 per year and a maximum of \$30,000 per year⁹ and cost as little as \$1,000.¹⁰ In contrast, the maximum penalty for owning and operating a machine is \$6,000.¹¹

Having illegal machines seized has become part of doing business.

Recommendations

Alabama’s current gambling provisions offer too weak a punishment and therefore, do not deter those who may make profits far in excess of fines. Furthermore, taxpayers fund the seizing of machines and prosecuting of offenders, only to have them immediately resurface. In order to justly punish those convicted of gaming crimes and to effectively deter those considering entering the illegal gaming industry, Alabama should consider altering the punishment in Sections 13A-12-(22, 23, 24, 25, 27) from Class A misdemeanors (maximum \$6,000 or one year of imprisonment)¹² to Class C felonies (maximum fine of \$15,000¹³ or one year and one day to ten years of imprisonment).¹⁴

¹ ALA. CONST. § 65, available at <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/Constitution/1901/CA-245600.htm>.

² Jennifer Davis Rash, *New electronic style of old familiar game allows gambling operators to skirt law, confuses authorities*, THE ALABAMA BAPTIST, Mar. 27, 2008, www.thealabamabaptist.org/print-edition-article-detail.php?id_art=4310&pricat_art=1.

³ ALA. CONST. § (387; 413; 440; 506; 508; 542; 549; 550; 565; 569; 599; 612; 674; 692; 732; 743; 744), available at <http://alisondb.legislature.state.al.us/acas/ACASLoginMac.asp> (follow “Constitution” hyperlink; follow “View” hyperlink; follow “Section (387; 413; 440; 506; 508; 542; 549; 550; 565; 569; 599; 612; 674; 692; 732; 743; 744)” hyperlink).

⁴ *Barber v. Cornerstone Comm. Outreach*, 42 So. 3d 65, 86 (Ala. 2009), available at http://scholar.google.com/scholar_case?case=13947962529126544924&q=alabama+supreme+court+bingo+six+point+test&hl=en&as_sdt=4,1&as_ylo=2008&as_yhi=2012.

⁵ *State of Alabama v. HP Compaq Monitor et al.*, AlaFile E-Notice 1, 14 (Jefferson Co. Feb. 10, 2012), available at <http://media.al.com/bn/other/Vowell-bingo-machine-ruling-0210-12.pdf>.

⁶ ALA. CODE § 13A-12-(20-92), available at <http://alisondb.legislature.state.al.us/acas/ACASLoginMac.asp> (follow “Code of Ala” hyperlink; follow “Title 13A” hyperlink; follow “Chapter 5” hyperlink; follow “Section 13A-5-(20-92)” hyperlink).

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⁷ ALA. CODE §13A-5-12, *available at* <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/13A-5-12.htm>.

⁸ ALA. CODE §13A-5-12, *available at* <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/13A-5-12.htm>.

⁹ Timothy O'Boyle, *The Illegal Use of Video Poker Machines by Public Bars and Private Social Clubs in Pennsylvania: It's a Rational Choice*, 4 JOURNAL OF ECONOMIC CRIME MANAGEMENT 14, 1, 1-26 (2006), *available at* www.utica.edu/academic/institutes/ecii/publications/articles/E8F951D1-D3FB-76FA-7769E16096CF5B58.pdf.

¹⁰ GAMBLERS CHOICE ONLINE, www.gamblerschoiceonline.com/roundtops?b=1 (last visited Jan. 23, 2013).

¹¹ ALA. CODE, *supra* note 8.

¹² ALA. CODE, *supra* note 6.

¹³ ALA. CODE §13A-5-6, *available at* <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/13A-5-6.htm>.

¹⁴ ALA. CODE §13A-5-11, *available at* <http://alisondb.legislature.state.al.us/acas/CodeOfAlabama/1975/13A-5-11.htm>.



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