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## FISCAL IMPACT REPORT

SPONSOR Townsend/Lane/Scott/ ORIGINAL DATE 1/30/2022  
Montoya, R./Lord LAST UPDATED \_\_\_\_\_ HJR 11 \_\_\_\_\_

SHORT TITLE Expanding Options For Educational Choice, CA \_\_\_\_\_ SB \_\_\_\_\_

ANALYST Gaussoin \_\_\_\_\_

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

|                      | FY22          | FY23 | FY24        | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|----------------------|---------------|------|-------------|-------------------|---------------------------|---------------|
| Payments to Parents* |               |      | \$109,900.0 | \$109,900.0       | Recurring                 | General Fund  |
| Secretary of State   | Up to \$375.0 | NFI  | NFI         | Up to \$375.0     | Nonrecurring              | General Fund  |

(Parenthesis ( ) Indicate Expenditure Decreases)

\*Assumes the earliest legislation could be enacted, if the proposed amendment is adopted, approved by Congress, and free of court challenges.

Relates to House Joint Resolution 1 and Senate Joint Resolution 7.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Public Education Department (PED)  
 New Mexico Attorney General (NMAG)  
 State Auditor (OSA)

#### No Response Received

Department of Finance and Administration (DFA)  
 Public School Facilities Authority (PSFA)  
 Albuquerque Public Schools (APS)

### SUMMARY

#### Synopsis of House Joint Resolution 11

House Joint Resolution 11 (HJR11) would ask voters to amend articles 4, 9, and 12 of the state constitution to, with congressional approval, allow the state to divert public school funding to parents and guardians of children whose children attend home school or private nonsectarian school, including virtual private nonsectarian school. More specifically, if approved by voters, HJR11 would

- Create an exemption to the requirement in Article 4, Section 31 that appropriations be under the absolute control of the state;
- Add an exception to Article 9, Section 14—widely known as the anti-donation clause—to allow the state to give money to parents or guardians of school-age children who are schooled outside of the public school system either at home or in a nonreligious school;
- Strike “uniform” in Article 12, Section 1, from the guarantee the state provide a “uniform system of free public schools”; and
- Amend language in Article 12, Section 3, prohibiting the use of state money for private schools to prohibit it only for sectarian schools.

If approved by the Legislature, voters would consider the amendment during the next general election in November 2022 or during a special election called for the purpose of considering the question. The amendment would need congressional approval to take effect.

## **FISCAL IMPLICATIONS**

If the constitution is amended as provided under HJR11, the fiscal impact could be, depending on the legislation enacted as a result, significant. The cost would depend on how much the state is expected to provide to parents and guardians who qualify and whether that money would be part of or in addition to existing funding to public schools. Legislators, in the past, have been reluctant to cut funding for public schools—school districts were protected from enrollment declines distorted by the pandemic—so the funding likely would be in addition to public school funding.

If the state gave to parents and guardians of the 10,376 home-schooled children reported to PED in fall 2021 a payment equal to the current unit value of \$4,864<sup>1</sup>, the cost to the state would be about \$50.5 million for home-school students alone. While most sources do not differentiate private school enrollment by sectarian or nonsectarian, the website Private School Review lists half of the 10 largest private schools in New Mexico and 47 percent of the total enrollment in those schools as nonsectarian. The website lists 213 private elementary and high schools with a total enrollment of about 26 thousand. If 47 of those students are enrolled in nonsectarian schools, a \$4,864 payment for each student would cost more than \$59.4 million.

If the per-child payment were lower, the cost to the state, obviously, would be lower. However, should the availability of public money for private and home school encourage more parents and guardians to choose private and home school or prompt the conversion of existing religious schools into nonsectarian schools, the cost to the state could be higher.

NMAG anticipates it would be required to devote resources to defend likely litigation challenging the amendment.

Under Section 1-16-4 NMSA 1978, the Secretary of State is required to print the full text of each proposed constitutional amendment, in both Spanish and English, in a voters’ guide. The cost of producing the guide will change depending on the number and length of the constitutional amendments passed and the number of registered voters but can be estimated at \$25 thousand.

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<sup>1</sup> The unit value is not the per-student appropriation. Each student generates a different number of units based on the student’s specific needs and certain conditions in the school district or charter school.

The SOS is also constitutionally required to publish the full text of each proposed constitutional amendment once a week for four weeks preceding the election in one newspaper in every county in the state. In 2020, the SOS spent \$351,015 for the required newspaper publications; however, the cost is dependent on the number and length of the constitutional amendments passed. For planning purposes, an estimate of \$20.72 per word may be used to represent the costs realized in the 2020 general election to estimate the cost of publishing each constitutional amendment.

The number of constitutional amendments that pass may also impact the page size of the ballot, or if the ballot size becomes greater than one page, front and back, which may increase the cost of producing the ballots for the general election. In addition to the cost of the ballot, there may be time added to the voting process, which would require additional ballot printing systems to ensure a smooth and efficient voting process within the bounds of national best practices. The additional requirement the SOS publish a certificate for every law that is repealed by the counties will be an added cost to the SOS, although it is difficult to estimate the cost at this time.

### SIGNIFICANT ISSUES

The court rulings in both the *Martinez-Yazzie* educational sufficiency lawsuit and the *Zuni* lawsuit on public school capital outlay are based in part on the use of “uniform” in the constitution, and deleting the constitutional requirement that New Mexico provide a “uniform” public school system raises concerns about equity and fairness and could open the door to inequities most likely to harm children already at risk for failing because of socio-economic conditions. From PED:

Removing the requirement of uniformity in public education may have profound implications for equity and equality in education, which in turn have the potential to affect any number of aspects of quality of life for New Mexico’s citizens, going forward. It is axiomatic that education is necessary for children to grow into happy, successful, productive citizens. ...

In its Decision and Order, the [*Martinez-Yazzie*] Court noted that New Mexico’s constitutional requirement for uniformity in education had become another avenue, aside from state equal protection clauses, by which the state’s marginalized at-risk student groups, including economically disadvantaged students, English learners, Hispanic students and Native American students, and special education students, might beg relief from the courts for inequalities in the provision of education. Deleting this constitutional requirement of uniformity may in-turn have the effect of removing those vital protections from our at-risk students, leaving them at even greater risk of falling behind not only in the achievement of a sufficient public education, but of a secure and successful life beyond public schools.

NMAG raises concerns about potential “unintended consequences” of striking “uniform” and raises additional concerns about conflicts with the U.S. Constitution:

Also, the exclusion of the sectarian and denominational schools from HJR 11 may be subject to challenge under the Free Exercise Clause of the First Amendment. The United States Supreme Court’s recent jurisprudence in this area has been skeptical of educational funding that excludes religious schools, at least where funding is not specifically directed to religious education. *See, e.g., Espinoza v. Montana Dep’t of Revenue*, 591 U.S. \_\_\_\_

(2020) (holding that once a state decides to subsidize private education it “cannot disqualify some private schools solely because they are religious); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. \_\_\_ (2017) (holding that exclusion of church preschool from state program for playground grants violated First Amendment).

The State Auditor raises concerns about violating the intent of the anti-donation clause and oversight of public spending for home- and private school.

## **PERFORMANCE IMPLICATIONS**

Performance measures for the public schools include student achievement on standardized tests, graduation rates, and other data that might not be available, or could be unreliable, for students outside the public school system. In addition, nothing in the proposed amendment would require students to attend an accredited private school or for home-school coursework to include any particular subject matter or meet any standards, although these could be addressed through statute.

## **ADMINISTRATIVE IMPLICATIONS**

PED notes, assuming the constitutional amendment were adopted and approved by Congress and laws enacted, it would likely have additional responsibilities managing a home-school and private school database, responding to inquiries, and completing verification documentation.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

House Joint Resolution 1 and Senate Joint Resolution 7 would add a different exception, one for public assistance for essential household services, to the anti-donation clause in Article 9, Section 14.

HJR11 is substantially the same as House Joint Resolution 7 introduced in the 2021 regular legislative session. The Legislature took no action on that bill.

## **OTHER SUBSTANTIVE ISSUES**

From PED:

Section 6 of the joint resolution requires the consent of the United States Congress in order for the provisions of HJR7 to take effect. Congressional consent is required for the effectuation of these proposed amendments because it would amend Article 12, Section 3 of the New Mexico Constitution, which mirrors the language of Section 8 of the Enabling Act of 1910, prohibiting the state from using any moneys from the sale or disposition of lands granted for educational purposes for the benefit of any sectarian or denominational schools; Article 12, Section 3 also explicitly includes private schools in this prohibition.

As noted by Attorney General Opinion No. 12-03, February 1, 2012, the Enabling Act set the terms by which New Mexico was admitted to the Union...terms to which New Mexico agreed, by the ratification of Article 21, Section 9 of the New Mexico Constitution (“This state and its people consent to all . . . the provisions of the said act of Congress. . .”) Article 21, Section 10 of the state constitution goes on to state, “[t]his ordinance is irrevocable without the consent of the United States and the people of this

state, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of congress.” Further, the New Mexico Supreme Court has stated that Section 10 of the Enabling Act became a part of the state’s “fundamental law to the same extent as if it had been incorporated directly into the Constitution.” (See *State ex rel. Interstate Stream Commission v. Reynolds*, 71 N.M. 389, 396, 378 P.2d 622, 627 (1963).)

Further, according to Attorney General Opinion No. 12-03, if the Enabling Act and state constitution were amended to permit the state to finance a private entity under Article 12, Section 3, the anti-donation clause’s prohibition against grants of public money to private entities would not apply in these particular instances, as constitutional provisions should be read together and harmonized if possible, rather than as groupings of isolated and discordant rules. (See *Denish v. Johnson*, 1996 NMSC 5, ¶ 32, 910 P.2d 914, 922.)

Should the amendment to Article 12, Section 3 of the state constitution be ratified by the people and permitted by United States Congress, constitutional impediments in the anti-donation clause of Article 9, Section 14 to allocating public funds to parents of children who attend home or private schools would be rendered obsolete. In effect, any previously impermissible donations or allocations to those particular classes of individuals would be permitted, in perpetuity, via the regular legislative process.

HFG/SEC/acv