

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill No: SB 462

48th Legislature, 2nd Session, 2008

Short Title: Certain Scholarship Donations Tax Credit

Sponsor(s): Senator James G. Taylor and Others

Analyst: Kathleen Forrer

Date: February 4, 2008 (revised)

Bill Summary:

SB 462 adds a new section to the *Income Tax Act* and a new section to the *Corporate Income and Franchise Tax Act*, creating the “equal opportunity scholarship tax credit”:

- The credit may be taken against a New Mexico taxpayer’s income tax or corporate tax liability for contributions in the same amount made to a 501(c) (3) charitable organization that allocates at least 90 percent of its annual revenue for educational scholarships or tuition grants to “eligible” students to attend a “qualified” nonpublic elementary or secondary schools in New Mexico.
- In any taxable year, the personal income tax credit may not exceed \$500 for an individual or \$1,000 for a married couple filing jointly; however, the corporate income tax deduction may be claimed “in an amount equal to the total contributions made.”
- The credit must be taken in lieu of a deduction from the taxpayer’s federal tax obligation.

SB 462 defines an eligible student as a student who:

- is a member of a household whose total annual income does not exceed an amount used to qualify for a reduced-price lunch through the federal school lunch programs.... Once a student receives a scholarship pursuant to the program, the student will remain eligible regardless of household income until the student graduates from high school or reaches 21-one years of age; and
- resides in New Mexico while receiving a scholarship from a scholarship granting organization.

SB 462 defines a “qualified school” as an accredited nonpublic elementary or secondary school in New Mexico that:

- does not discriminate in admissions or treatment of students on the basis of a student’s race, national origin or ethnicity;
- has been granted exemption from the federal income tax as an organization qualified pursuant to Section 501(c) (3) of the Internal Revenue Code;
- requires students to take an annual academic test with individual scores provided to the parents of students;
- complies with all state laws that apply to nonpublic schools regarding criminal background checks for employees and exclude from employment any person not permitted by state law to work in a nonpublic school; and

- fills available spaces by a random selection process, except that a qualifying school may give preference to siblings of enrolled students and previously enrolled scholarship students, if a qualifying school has more eligible students applying than spaces available.

Fiscal Impact:

According to the Legislative Finance Committee Fiscal Impact Report (FIR), if the tax credit created in SB 462 is implemented, the potential loss of revenue to the General Fund is approximately \$4.8 million annually beginning in FY 10. The estimate is based on the impact of a similar credit enacted in Arizona. Using data from both Arizona and Ohio, the Taxation and Revenue Department (TRD) estimates the impact to the General Fund to be a loss of approximately \$6.4 million beginning in FY 10 with increases of approximately \$200,000 per year in each of the subsequent fiscal years.

SB 462 contains a “sunset clause.” The tax credit would apply to taxable years beginning on or after January 1, 2009, but not to taxable years beginning after January 1, 2013.

According to data available on the Public Education Department (PED) website, during school year 2006-2007 there were 16,260 students enrolled in accredited nonpublic schools. However, there is no way of determining how many of those students have received or are eligible to receive a scholarship from a 501(c) (3) charitable organization.

One organization in New Mexico that would meet the criteria in SB 462 for a 501(c) (3) charitable organization is Educate New Mexico. Educate New Mexico describes itself as “an independent, nonprofit organization established by volunteers ... to assist low-income families with children entering grades K-12 [to] offset the cost of tuition at the school of their choice through a program of tuition assistance,” funding for which is provided “from private business and charitable and individual contributions.” According to information available on Education New Mexico’s website, families qualify for assistance on the basis of income levels similar to those “used by the United States Department of Agriculture to determine if a family qualifies for the federally-funded school lunch program.”

Issues:

In its analysis of SB 462, PED notes that because SB 462 allows a taxpayer to take the credit even if the taxpayer’s contribution is to a 501(c) (3) charitable organization that primarily supports private religious schools, “the state may find itself indirectly supporting private religious schools,” thus possibly coming into conflict with the First Amendment (Establishment Clause) of the federal Constitution. The First Amendment of the federal Constitution—the so-called “Establishment Clause”—states that “Congress shall make no law respecting an establishment of religion....”

For many years, the standard in deciding so-called “establishment” cases was *Lemon v. Kurtzman* (403 US 602). This 1971 Supreme Court nearly unanimous decision (with one justice not participating) established a three-part test for laws dealing with religious establishment. The Court found that, to be constitutional, a statute:

- must have a “secular legislative purpose;”
- must have principal effects that neither advance nor inhibit religion; and
- must not foster “an excessive entanglement with religion.”

However, PED indicates that the language in SB 462 “does not reflect all three prongs” of the test in *Lemon v. Kurtzman*.

PED also notes that on November 27, 2006, the US Supreme Court refused to hear a challenge (by a writ of certiorari) to an April 2006 decision of the Maine Supreme Judicial Court that upheld a Maine law that prohibited the use of public funds to send students to private religious schools.

In addition, PED provides the following synopses of US Supreme Court decisions since *Lemon v. Kurtzman* that have a bearing on this issue:

- *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (The Supreme Court upheld an Establishment Clause challenge against an Ohio pilot scholarship program that sought to give aid primarily to families below the poverty line with children at a failing school district so they could choose to either attend another public or private school, receive tutorial assistance, enroll in a magnet school, or receive a scholarship.)
- *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970) (The Supreme Court upheld the city’s granting of property tax exemptions to religious organizations for properties used solely for religious worship, which was authorized by the state constitution and the implementing statute providing for tax exemptions for property used exclusively for religious, educational, or charitable purposes.)
- *Mueller v. Allen*, 463 U.S. 388 (1983) (The Supreme Court upheld a Minnesota law that allowed state taxpayers, in computing their state income tax, to deduct expenses incurred in providing “tuition, textbooks and transportation” for their children attending an elementary or secondary school and was challenged on the basis that it violated the Establishment Clause.)
- *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (“The system of providing income tax benefits to parents of children attending New York’s nonpublic schools also violates the Establishment Clause because, like the tuition reimbursement program, it is not sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.”) (emphasis added)
- *Byrne v. Public Funds for Public Schools of New Jersey*, 442 U.S. 907 (1979) (The Supreme Court summarily affirmed a lower federal court holding that a state tax deduction for taxpayers with children attending nonpublic school violated the Establishment Clause.)
- *Franchise Tax Board of California v. United Americans for Public Schools*, 419 U.S. 890 (1974) (The Court summarily affirmed a lower federal court judgment that struck down a state statute providing income-tax reduction for taxpayers sending children to nonpublic schools.)
- *Hibbs v. Winn*, 542 U.S. 88 (2004) (Despite the federal *Tax Injunction Act* that prohibits federal courts from restraining the implementation of state tax laws, the Supreme Court here allowed Arizona taxpayers to proceed, on the basis of violation of the Establishment Clause, in a suit seeking to enjoin the operation of an Arizona tax law that authorizes an income tax credit for payments to nonprofit “state tuition organizations” that awards scholarships to students in private elementary/secondary schools including those attending religious-based schools.)

New Mexico Constitution

- In addition, Article 12, Section 3 of the New Mexico Constitution states in part, “...no part of the proceeds arising from the sale or disposal of any land granted to the state by congress, or any other funds appropriated, levied or collected for education purposes, shall be used for the support of any sectarian, denominational or private school, college or university.” Proceeds from state income taxes are the second largest (after gross receipts taxes) source of General Fund dollars, and General Fund dollars are the source of an average of 90 percent of funding for public schools in New Mexico.
- The New Mexico Constitution’s so-called “Anti-Donation Clause” (Article 9, Section 14) is often interpreted as a prohibition against public support of private interests. It states in part, “Neither the state nor any county, school district or municipality...shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation....”

Related Bills:

HB 269a *Classroom Supply Tax Credit*

HB 633 *Expert Volunteers for Schools Tax Credit*