

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill No: SB 603

49th Legislature, 1st Session, 2009

Short Title: Private School Tuition Tax Deduction

Sponsor(s): Senator Pete Campos

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Bill Summary:

SB 603 adds a new section of the *Income Tax Act* to allow, for tax years beginning on or after January 1, 2010, a taxpayer to claim a deduction from net income for up to \$500 for the payment of tuition for the taxpayer's dependent to attend a private, nonprofit elementary or secondary school during the taxable year for which the deduction is being claimed.

Among its provisions, SB 603:

- provides that, in the case that a husband and wife file separate tax returns in a year in which they could have filed jointly, each may claim only one-half of the deduction;
- defines "private nonprofit elementary or secondary school" as an elementary or secondary school granted tax-exempt status by the Internal Revenue Service and accredited by the Public Education Department (PED); and
- defines "tuition" as the amount of money charged to students for instructional services, which may be per term, per course, or per credit and does not include required fees.

Fiscal Impact:

SB 603 contains no appropriation.

The Legislative Finance Committee (LFC) Fiscal Impact Report (FIR) notes that SB 603 would incur a negative fiscal impact of approximately \$300,000 to the General Fund for FY 11, and that that impact would grow by 4.0 percent in each subsequent fiscal year.

Issues:

According to the PED analysis of SB 603, since "non-public schools necessarily include religious schools, this section implicates the Establishment Clause of the United States Constitution and would be deemed to be unconstitutional state support of religion." The Establishment Clause states, "Congress shall make no law respecting an establishment of religion...."

For many years, the standard in deciding so-called "establishment" cases was *Lemon v. Kurtz*, 403 US 602 (1971). This nearly unanimous Supreme Court 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.”

US Supreme Court Decisions

Since the *Lemon* decision, the Supreme Court has announced several other opinions regarding the constitutionality of state assistance to nonpublic schools, leaving the law in this area little less settled.

- In *Mueller v. Allen*, 463 U.S. 388 (1983), on a five-to-four vote, the Supreme Court *upheld* a Minnesota law, challenged on the basis that it violated the Establishment Clause, that allowed state taxpayers, in computing their state income tax, to deduct expenses incurred in providing “tuition, textbooks and transportation” for their children attending a private elementary or secondary school.
- In *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.
- In *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.
- In *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the court stated, “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.”

New Mexico Constitution

The tax deduction proposed in SB 603 may pose a conflict with several provisions of the New Mexico Constitution.

- 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 educational 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 source (after gross receipts taxes) 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....”

The New Mexico Attorney General has also considered the question of the constitutionality of state assistance to private school students on several occasions, most recently in an opinion dated January 29, 1999.

- Citing the federal decisions in *Nyquist* and *Mueller*, above, the opinion stated that the prohibition in Article 12, Section 3 is not limited to direct payments from the state to private schools, but prohibited payments provided to private school students or their parents.
- In addition, the opinion stated that the anti-donation clause in Article 9, Section 14 appears to prohibit the state from providing tuition assistance in the form of vouchers to private school students, stating, “Whether the beneficiary of the assistance is the parents or the schools, the use of public money to subsidize the education of private school students, without more, is a donation to private persons or entities in violation of the state Constitution.”
- The opinion also suggested that a voucher program might run afoul of Article 12, Section 1, which states that a “uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.” If it diverted funds from the public schools to the extent that it compromised the state’s ability to meet its obligation to establish and maintain a public school system sufficient to educate all school-age children in the state, such a program might be found to be unconstitutional.

Technical Issues:

The LFC FIR points out that:

- SB 603 does not address the case in which a taxpayer has multiple dependents attending private schools;
- SB 603 does not provide for validation that the taxpayer is paying tuition for the dependent to attend a private school; and
- there is a potential conflict with the provisions in HB 262, *Income Tax Credits*, which removes the definition and use of the term “net income” from the *Income Tax Act*.

Related Bills:

SB 355 *Nonpublic School Scholarship Tax Credit*
SB 575a *Instructional Material Purchases*