LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS

Bill Number: SB 31 **50th Legislature, 2nd Session, 2012**

Tracking Number: .188001.2

Short Title: Special Needs Student Scholarship Act

Sponsor(s): Senator Gerald Ortiz y Pino

Analyst: Kevin Force **Date: February 7, 2012**

Bill Summary:

SB 31 creates new sections of law and amends the *Public School Finance Act* to:

- create the *Special Needs Student Scholarship Act*;
- provide for tuition scholarship organizations to grant educational scholarships to special needs students;
- create income tax and corporate income tax credits for contributions to tuition scholarship organizations;
- require that the membership and, as a result, the program units be deducted or reduced in the State Equalization Guarantee (SEG, or Public School Funding Formula) for a public school student that participates in the scholarship program.

A section-by-section analysis of SB 31 follows:

Section 1 cites Section 1 through Section 5 as the *Special Needs Student Scholarship Act* (effective July 1, 2012).

Section 2 defines certain terms used in the act, including:

- "eligible student" as a "special needs student" who attended a public school for the semester prior to first receiving an educational scholarship under the act;
- "qualified school" as a public or nonpublic elementary, middle, or secondary school located in New Mexico that a parent has chosen;
- "special needs student" as a student who is eligible to have:
  - an individualized education plan (IEP) as defined by the federal *Individuals with Disabilities Education Act* (IDEA); or
  - a plan created pursuant to the federal *Rehabilitation Act of 1973*; and
- "tuition scholarship organization" (TSO) as an organization that provides educational scholarships to students attending qualified schools of their parents' choice that meet the criteria established in the act.

Section 3 prescribes the requirements for certification as a tuition scholarship organization, including documentation to the Public Education Department (PED) to verify that:

- the organization is exempt from federal income tax under Section 501(c)(3) of the *Internal Revenue Code of 1986*;
- the scholarships are funded from contributions received by the organization in or prior to the current calendar year;
- at least 90 percent of contributions are awarded as educational scholarships; and a scholarship award does not exceed 80 percent of the three-year rolling average of the SEG for an eligible student;
- the organization distributes scholarship payments as checks issued to the parent of an eligible student but mailed to the qualified school in which a qualified student is enrolled;
- a scholarship award can be used at any qualified school during the school year and prorated between schools based on the number of days attended at each school;
- criminal background checks of the organization's employees and board members have been conducted;
- the organization has systems in place that provide financial accountability; and
- the organization is likely to have received donations of $50,000 or more during a school year.

Section 4 outlines the duties of a tuition scholarship organization, among them:

- providing PED, no later than 30 days prior to the start of a school year, with the name and previous school district or charter school attended of students awarded a scholarship;
- assuring that a school participating in the program certifies that it has complied with certain requirements, including:

  - health and safety laws or rules;
  - a valid occupancy permit;
  - nondiscrimination in admissions on the basis of race, color, or national origin; and
  - school employee background checks; and

- certain reporting requirements, including student academic developmental information and information for taxation purposes.

Section 5 includes the administrative duties of PED, including:

- calculating the reductions of amounts in the SEG associated for a student receiving an educational scholarship pursuant to this act.

Section 6 adds a new section to the *Income Tax Act* that, pursuant to Section 9, applies to taxable years beginning on or after January 1, 2013 but before January 1, 2017 (effective January 1, 2013) to:

- allow taxpayers to take an income tax credit for contributions to a tuition scholarship organization for up to 90 percent of total contributions, but not exceeding 50 percent of a taxpayer's total income tax liability for a taxable year;
- require that the Taxation and Revenue Department (TRD) develop contribution receipts and determine what may be included in reported tax credits;
- allow contributions or 50 percent or more of a taxpayer's total income tax liability to be carried over for three consecutive years;
- limit a husband and wife who file separate returns for a taxable year (in which they could have filed jointly) to claim only one-half of the scholarship income tax credit;

- prohibit a taxpayer from claiming the same credit both as an individual contribution credit and a corporate contribution credit;
- limits the maximum annual aggregate amount of special needs student scholarship income tax credits and special needs student scholarship corporate income tax credits to $5.0 million, and requires that any amount over that limit shall be placed in a queue, by date of receipt, to be paid first in the subsequent tax year before any new tax credits are applied; and
- authorize TRD to disclose the amount of claimed credit to the Revenue Stabilization and Tax Policy Committee of the Legislature.

Section 7 creates a new section of the *Corporate Income and Franchise Tax Act* pursuant to Section 9, applies to taxable years beginning on or after January 1, 2013 but before January 1, 2017 (effective January 1, 2013) to:

- allow a corporate taxpayer to take an income tax credit for contributions to a tuition scholarship organization for up to 90 percent of their total contributions but not exceeding 50 percent of a taxpayer's total tax liability for a taxable year;
- require the TRD to develop contribution receipts and determine what may be included in reported tax credits;
- allow contributions totaling more than 50 percent of a corporate taxpayer's total income tax liability to be carried over for three consecutive years;
- direct the TRD to determine, every three years, whether the corporate tax credit is fulfilling its purpose;
- prohibit a corporate taxpayer from claiming the same credit both as a corporation contribution and as an individual contribution credit;
- limits the maximum annual aggregate amount of special needs student scholarship income tax credits and special needs student scholarship corporate income tax credits to $5.0 million, and requires that any amount over that limit shall be placed in a queue, by date of receipt, to be paid first in the subsequent tax year before any new tax credits are applied; and
- authorize the TRD to disclose the amount of claimed credit to the Revenue Stabilization and Tax Policy Committee of the Legislature.

Section 8 amends the *Public School Finance Act* in the *Public School Code* to require that the membership and, as a result, the program units be deducted or reduced in the SEG for a public school student that participates in the scholarship programs of the *Special Needs Student Scholarship Act*, effective July 1, 2012, pursuant to Section 10.

Fiscal Impact:

SB 31 does not contain an appropriation.

According to the Legislative Finance Committee (LFC) Fiscal Impact Report (FIR) of SB 31:

- There would be recurring losses to the General Fund, estimated at:
  - $80,000 in FY 13;
  - $5.75 million in FY 14; and
  - $6.0 million in FY 15.

- Proponents of the bill argue that the *Special Needs Student Scholarship Act* would result in a net savings to the General Fund, as the loss incurred by the awarding of tax credits would be outweighed by the reduction in the SEG.

Among other points, the FIR of HB 510 (2011), a bill virtually identical to SB 31[1], notes that:

- PED reported that there have been an average of about 131 students with disabilities in New Mexico parochial and private schools over the last three years;
- assuming that the average tuition payment, net of current scholarships is $4,000, and that half of the parents have sufficient liability to cover the full amount of the credit and the other half can cover 20 percent of tuition, the impact to the General Fund would be $312,000, the first half of which should appear in FY 12, with the full amount appearing beginning in FY 13; and
- this analysis assumes that TSOs would receive donations to cover operating costs from Political Action Committees, or other out-of-state nonprofits.

In its analysis, the TRD notes that it would bear recurring costs of around $40,000 per year for the development and maintenance of the necessary forms, as well as for staff to administer the requirements of the program.

According to TRD, based on the experiences of Ohio and Arizona, and factoring in the differences between those two states' populations and the population of New Mexico, the fiscal impact of the bill would include recurring losses to the General Fund, estimated to be:

- $80,000 in FY 13;
- $575,000 in FY 14;
- $600,000 in FY 15; and
- $630,000 in FY 16.

According to the PED analysis, reversions to the SEG will be:

- $551,100 in FY 13; and
- $567,700 in FY 14.

Thus, considering losses to the General Fund that TRD estimates, above, net revenues will be:

- $471,100 in FY13; and
- -$7,300 in FY14.

Fiscal Issues:

While the PED analysis of HB 510 (2011) did not indicate a fiscal impact, other than department costs, SB 31 would result in a reduction of funding from the SEG for public schools if an enrolled public school student accepts a scholarship as provided in the act.

According to the FIR of HB 510 (2011):

[1] The only substantive difference to between HB 510 (2011) and the current bill is the addition of a $5.0 million aggregate annual cap on scholarship tax credits.

- Tuition scholarship organizations presumably would receive donations to cover operating costs from Political Action Committees, or other out-of-state, not-for-profit entities.
- Funds donated by a national donor organization would not reduce General Fund revenues, since the credit is not only not refundable, but is limited to 50 percent of the taxpayers' liability after other credits are applied.
- Nonprofits would have no personal or corporate income tax liability, hence no tax credit. Further, unlike donations to not-for-profit organizations under the federal IRS code, the state tax credit does not prohibit the donor of the funds from receiving any services or goods in exchange for the donation.
- The bill prohibits a taxpayer from claiming a credit for donations that are claimed as deductions on personal or corporate income tax return, and from claiming both a personal and corporate credit on the same donation.
- For genuine deductions from third parties, the state tax credit is worth substantially more than a combined federal and state tax deduction.
- Since IDEA guarantees specialized and highly qualified teachers for students with IEPs, the pool of applicants for these vouchers is quite limited:

    - there is no particular benefit of these vouchers conferred on parents enrolling their special needs children in public school;
    - there is no compelling reason for these parents to make donations to the TSO in exchange for a special needs scholarship;
    - the major participation in this scholarship plan would be from parents with special needs students enrolled in private or parochial schools; and
    - there would be some growth in out-years in parents taking up these credits for use in private and parochial schools, but growth might be in the 10 percent to 15 percent per year.

- If a voucher program were made general and expanded, parents could donate money to a scholarship organization and receive a tax credit for 90 percent of the amount donated. The donation would be a legal fiction really intended to allow parents to receive almost dollar-for-dollar credit against the cost of their children's private or parochial education.
- If the program became general, then the fiscal impact on state revenues could be very large. However, the impact on enrollment would probably not be nearly as great as the impact on revenue.
- The revenue cost would come from "buying the base," that is, if the program became general, the parents of every student enrolled in private or parochial schools would be eligible for a credit equal to 90 percent of the amount they currently pay for tuition. This is not applicable to HB 510, but to the extent that this bill creates a precedent, policymakers should understand the larger consequences of this proposal:

    - the bill will likely be strongly litigated by parties on both sides of the issue;
    - this litigation implies additional fiscal impact; and
    - policymakers should consider soliciting the Attorney General's (AG) opinion regarding the likelihood of prevailing against a suit to authorize or negate this bill, and the costs of pursuing such litigation.

Technical Issues:

According to the FIR of HB 510 (2011):

- It is not clear that any rollover tax credit in excess of 50 percent of the current year's personal or corporate income tax liability would be limited in the rollover year to 50 percent of that year's liability. A case could certainly be made that the entire amount of excess could be used up in the first subsequent year.
- Similarly, it is not clear that a rollover credit in excess of 50 percent of the current year's tax liability would not be fully refundable in the rollover year, even in excess of the rollover year's total liability.
- It is unclear from the phrase "shall not exceed eighty percent of the three-year rolling average of the State Equalization Guarantee distribution for the respective level of an eligible student as calculated for the associated program units" includes or excludes the adjustment in the SEG for special needs students.

According to PED's analysis of HB 510 (2011):

- The bill may conflict with the provisions of the *Open Enrollment Statute*, which establishes priorities for enrollment for students, in the public schools, as follows:

  - first, students residing within the school district or attendance area;
  - second, students enrolled in a school ranked as a school that needs improvement or a school subject to corrective action;
  - third, students who previously attended the public school; and
  - fourth, all other applicants.

- The *Open Enrollment Statute* states that as long as the maximum allowable class size established by law or by rule of a local school board, whichever is lower, is not met or exceeded in a public school by enrollment of first and second priority persons, the public school shall enroll other persons applying in the priorities stated. If the parents of a student awarded a scholarship desired to enroll their child in a district outside of their attendance area, the award of the scholarship would not change the priorities established by the *Open Enrollment Act*.
- The bill uses the term "individualized education plan." IDEA uses the term "individualized education program." Using the word "program" instead of "plan" would align with the federal law.

According to TRD:

- The requirements that "all pertinent findings" from employee and board member background checks, names of eligible students who receive scholarships, and other personal information be provided to the department would make that information subject to the *Inspection of Public Records Act*.
- SB 31 allows TRD to impose a bill for each contribution receipt they issue, but makes no provision for the distribution of this fee.
- Since the bill imposes a fee, that fee should be referenced in the title of the bill.
- The bill suggests that TRD may be required to disclose the amount of the tax credit claimed by a taxpayer.
- It may be necessary to amend the bill to permit TRD to release such information without violating confidentiality provisions.
- The bill limits the total amount of credit that can be approved to no more than "fifty percent of the taxpayer's income tax liability for the taxable year," which does not appear to reflect the intent of this section, and conflicts with language that permits carryover of

credit amounts that exceed the 50 percent limitation. This language should be modified to clarify that the 50 percent limitation limits the amount of a credit that can be claimed in a particular tax year.
- There is no guidance on how to deal with taxpayers whose contribution receipts become revoked, denied, or canceled.

Substantive Issues:

According to the *Individuals with Disabilities Education Act*, if a parent chooses to place a special needs student in a private school, they forgo certain entitlements and remedies to which they would otherwise have access. For example, a special needs student enrolled in a private or sectarian school would not be entitled to a Free Appropriate Public Education (FAPE)[2]; nor would such a student be entitled to remedies for failure to provide FAPE, such as compensatory education.[3] Indeed, private schools are not under any obligation to provide special education services.

According to the FIR of HB 510 (2011):

- It appears that this bill creates a very limited voucher program intended to strategically establish the constitutionality and legality of the concept.
- While it is not likely to happen in amounts that would devastate state revenues, the provisions of the bill give individuals the ability to direct their tax payments based on their own wishes and not the wishes of the Legislature and the governor.
- An individual who wanted to support special needs education and not, for example, general assistance or Medicaid, could give their tax money to a TSO and get a tax credit for 90 percent of the amount donated.
- The amount of the credit would be limited to 50 percent of the taxpayer's net liability, but the credit amount would not be available to the Legislature for appropriation.

According to the TRD analysis:

- The bill requires a TSO to certify that a school participating in the tuition scholarship program is in compliance with certain health and safety laws or rules, but that the school itself may be in a better position to certify such compliance.
- The definition of "educational scholarships" may require further clarification, because:

  - it is unclear to what extend students would qualify for scholarships to public schools, where tuition is not required;
  - the definition suggests that scholarships may include costs for transportation not covered by a qualified public school; and

[2] "Free and Appropriate Public Education" means special education and related services that:
- have been provided at public expense, under public supervision and direction, and without charge;
- meet the standards of the State educational agency;
- include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- are provided in conformity with the IEP required under IDEA.

[3] "Compensatory education" is a form of relief under IDEA that requires a school board to provide a child with appropriate educational services to compensate for its past failure to provide a FAPE, such as occupational or physical therapy, summer school, tutoring, and small group instruction. (See, e.g.: Wrightslaw, at http://www.wrightslaw.com/info/fape.graduate.comped.htm, or UNC School of Government School Law Bulletin, at http://sogpubs.unc.edu/electronicversions/slb/slbspr04/article2.pdf.

- it does not specify whether scholarships are for costs paid by the student for attendance at a qualified school.

- The bill includes no guidance on how to deal with taxpayers whose contribution receipts are revoked, denied, or cancelled.

According to the PED analysis:

- The number of children with disabilities whose parents place them in private schools is a small percentage compared to all children with disabilities in New Mexico. The bill provides for the educational scholarships for special needs students to attend public or private schools of the student's parents' choice.
- IDEA includes federal regulations regarding students with disabilities parentally placed in the private schools.
- The provision of special education services in private schools differs from the services provided in the public schools:

  - in public schools, students with disabilities according to IDEA or the New Mexico *Administrative Code* are required to have an IEP;
  - children enrolled by their parents in private schools or facilities are not entitled to an IEP. According to IDEA, no parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive in a public school;
  - children with disabilities enrolled by their parents in private schools are not entitled to a FAPE;
  - the school district is responsible for making the final decisions with respect to the services to be provided to the parentally placed private school student; and
  - IDEA requires a service plan to be developed and implemented for each private school child with a disability, who has been designated by the local education authority in which the private school is located, to receive special education and related services.[4]

- Children with disabilities enrolled by their parents in private schools are counted in the enrollment of the school district where the private school is located. The school district uses the enrollment count to determine the proportionate amount of IDEA funds to be utilized to provide services for students in the private schools.
- Students enrolled in the public schools are entitled to be taught by highly qualified teachers under the *Elementary and Secondary Education Act* (ESEA) and highly qualified special education teachers under the IDEA. However, these requirements do not apply to teachers hired by private elementary and secondary schools including private school teachers hired by school districts to provide equitable services to parentally placed private school children with disabilities.
- Ten New Mexico private schools were randomly selected and researched regarding student admission process and tuition costs:

[4] Guidance on the development of service plans can be found at http://www.ped.state.nm.us/SEB/law/Private%20School%20Q%20and%20A.pdf.

- the majority of these schools have a lengthy admission process beginning with an application; some schools require letters of recommendation, school visit, and an interview;
- through this research, it was found that the smaller private schools referenced having very limited resources, and therefore, students with "special needs" would most likely not be admitted because the school would not be able to provide the services required;
- the larger schools accept students with "special needs" but every application is reviewed carefully to make a decision based on the best interest of the student and the school;
- tuition costs for one year range from $2,500 at a small day-school in a mid-sized district to $19,000 at a large school in a large school district. $10,000 was the average of the 10 schools' tuition costs; and
- the rigorous process, letters of recommendations, and interviews, may be difficult for students with "special needs." It is unclear if some of these requirements would be waived because of the scholarship process.

In 2009 and 2010, according to the PED analyses of SB 355 (2009), *Nonpublic School Scholarship Tax Credit*, and SB 198 (2010), *Scholarship Donation Tax Credit* (both bills substantially similar to SB 31):

- there was a potential conflict between the bill's provisions and the Establishment Clause of the US Constitution, and the anti-donation clauses of the New Mexico Constitution;
- because the bill allows a taxpayer to take a tax 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 coming into conflict with the Establishment Clause of the First Amendment to the US Constitution, which 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), where the Supreme Court's nearly unanimous decision established a three-part test for laws dealing with religious establishment. To be constitutional, a statute must:

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

- the language in these bills does not reflect all three prongs of the "*Lemon* test"; and
- since the *Lemon* decision, the Supreme Court has announced a string of opinions on the constitutionality of state assistance to nonpublic schools, leaving the law in this area less settled.

According to the analysis from the AG's staff:

- because HB 65 contemplates that these scholarships would be funded entirely by private donations they do not appear to implicate:

  - Article 9, Section 14, the anti-donation clause; or
  - Article 12, Section 3 of the Constitution of New Mexico, which proscribes the use of public money for the support of private schools; and

- because the tax credits are available to all individuals and corporate entities, they may be permissible under the establishment clauses of the federal and state constitutions. (See *Mueller v. Allen*, 463 U.S. 388 (1983) (state statute providing tax *deduction* for public and private school expenses held not to violate the establishment clause of the First Amendment) (emphasis added.)

US Supreme Court Decisions

- In *Hibbs v. Winn*, 542 U.S. 88 (2004), despite a provision in the federal *Tax Injunction Act* prohibiting federal courts from restraining the implementation of state tax laws, the Supreme Court asserted the jurisdiction of the federal courts in such cases. At issue was a claim 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 award scholarships to students in private elementary and secondary schools, including those attending religious-based schools. The case did not resolve the main question regarding the constitutionality of the tax credit.

  - In April 2009, in *Winn v. Arizona Christian School Tuition Organization*, the 9th Circuit Court of Appeals ruled that a group of taxpayers had stated a valid legal claim that an Arizona tuition tax credit law similar to that proposed in SB 31 violates the US Constitution's Establishment Clause. In that case, the statute allowed for contributions to "state tuition organizations (STOs)" that "allow them to attend *any* (emphasis added) qualified school of their parents' choice" – language identical to that in HB 510.
  - In April 2011, in a 5-4 decision, the US Supreme Court reversed the 9th Circuit Court of Appeals' decision in *Winn*, for want of jurisdiction. According to the majority opinion:

    - Plaintiffs lacked standing to bring suit under the doctrine of taxpayer standing, which holds that the mere fact that a plaintiff is a taxpayer is insufficient to seek relief in federal court.
    - Unless the plaintiff falls within a narrow exception to this doctrine, articulated in *Flast v. Cohen* (392 U.S. 83, 1968), they must show an injury in fact in order to bring suit alleging that a government action violates the Establishment Clause.
    - According to *Flast*:

      - ✓ There must be a "logical link" between the plaintiff's taxpayer status and the "type of legislative action attacked."
      - ✓ A "nexus" must exist between the plaintiff's taxpayer status and "the precise nature of the constitutional infringement alleged."
      - ✓ Thus, individuals suffer a particular injury for standing purposes when, in violation of the Establishment Clause, and by means of "the taxing and spending power," their property is transferred through the Government's Treasury to a sectarian entity.

    - The Court stated that the plaintiffs in *Winn* failed to meet the conditions imposed by *Flast*, and thus did not fall within this narrow exception.
    - Further, according to the majority opinion, tax *credits* do not enter the public fisc, and as the money involved is never within government control, the actions alleged to be in violation of the Establishment Clause were not accomplished by means of the taxing and spending power, thus making *Flast* inapplicable in this case.

- However, according to Justice Kagan, who wrote the dissenting opinion:

  - The majority's distinction between appropriations and tax credits has little basis, both in fact and Court precedent.
  - Cash grants and target tax breaks are means of accomplishing the same government objective: that of providing financial support to select individuals or groups.
  - The Court's distinction between tax credits and appropriations threatens to eliminate *all* occasions for a taxpayer to contest the government's monetary support of religion (emphasis in original).
  - Because appropriations and tax breaks can achieve identical objectives, the government can easily substitute one for the other.
  - The Court's decision enables the government to avoid the access to the judiciary guaranteed in *Flast* by subsidizing religious activity through the tax system, and thus precluding taxpayer standing to challenge state funding of religion.
  - plaintiffs have shown that they have standing under the *Flast* exception because:

    - ✓ by challenging legislative action taken under the taxing and spending power, they showed the required "logical link between their taxpayer status and the enactment attacked;" and
    - ✓ by invoking the Establishment Clause, a specific limit on the legislature's taxing and spending power, they demonstrated the necessary "nexus between their taxpayer status and the precise nature of the constitutional infringement alleged."

  - With this decision, the Court has contradicted decades of its own jurisprudence. Since the *Flast* decision, the Court has on many occasions accepted that ordinary taxpayers have standing to challenge tax advantages that benefit religious organizations. While plaintiffs did not always succeed on the *merits*, in no instance had the court dismissed the claims for want of jurisdiction. For example, see:

    - ✓ *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970), where the Court upheld the constitutionality of a property tax exemption for religious organizations;
    - ✓ *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), where the Court struck down a tax deduction for parents who paid tuition at religious and other private schools; and
    - ✓ the Court's decision on a preliminary issue *in the instant case*, where the Court ruled that the *Tax Injunction Act* posed no barrier to plaintiff's litigation, but did *not* dispute the litigants' standing. (See, above, *Hibbs v. Winn*, 542 U.S. 88 (2004)).

- It is important to note that by overturning the 9th Circuit's decision on jurisdictional grounds, the Court has still not addressed the main issue of the constitutionality of the tax credit scholarship legislation.

- In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Supreme Court held that an Ohio pilot scholarship program did *not* violate the Establishment Clause in giving aid primarily to families below the poverty line with children at a failing school district so they could

choose to attend either another public school or private school, receive tutorial assistance, enroll in a magnet school, or receive a scholarship.

- In *Mueller*, 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.
- Earlier, 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 *Nyquist*, the court stated, "The system of providing income tax benefits to parents of children attending New York's nonpublic schools also *violates* (emphasis added) 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

- Article 12, Section 3 of the Constitution of New Mexico 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." According to LFC, proceeds from state income taxes are the second largest source (after gross receipts taxes) of General Fund revenues, 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):

  - 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…"); and
  - is often interpreted as a prohibition against public support of private interests.

- Article 4, Section 31 of the Constitution of New Mexico:

  - states in part, "No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state."; and
  - has been interpreted possibly to prohibit tuition assistance in the form of vouchers. It is arguable, therefore, that subsidies to parents in the form of tax credits might also violate this section.

- The New Mexico AG has considered the question of the constitutionality of state assistance to private school students on several occasions:

  - In Opinion Number 99-01, dated January 29, 1999, the AG:

    - cited the federal decisions in *Nyquist* and *Mueller*, above, and 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;
    - 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.";
    - 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; and
    - noted that a school voucher program would violate Article 4, Section 31 if the Legislature appropriated money directly to parents or private schools. While admitting that the issue of vouchers had not been specifically addressed, the AG stated that it was arguable that such a program might result in a more than incidental benefit to private organizations, and thus might be prohibited.[5]

  - More recently, the AG affirmed those 1999 findings in Opinion No. 10-06, *State funds for private school text books*, dated December 28, 2010. When considering the constitutionality of PED paying a publisher or depository to "reimburse it for the lending of textbooks to sectarian, denominational or private schools for the use of their students," the AG reaffirmed that:

    - Article 12, Section 3 prohibits "direct state aid or *subsidies to private schools or to aid provided to students or parents that effectively subsidize private schools*" (emphasis added); and
    - the anti-donation clause in Article 9, Section 14 probably prohibited a proposed school voucher program under which state money would be used to provide tuition assistance to parents of private school students.

Related Bills:

SB 88 *Equal Opportunity Scholarship Act*
HB 65 *Special Needs Student Scholarship Act* (Identical)

[5] (See *State ex. Rel. Interstate Stream Commission v. Reynolds*, 71 N.M 389, 1963)