

## **Opinion No. 99-01**

January 29, 1999

**OPINION OF:** Patricia A. Madrid, Attorney General

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**TO:** The Honorable Luciano "Lucky" Varela, State Representative, 1709 Callejon Zenaida, Santa Fe, New Mexico 87501

### **QUESTIONS**

Is a school voucher program involving the use of public money to provide parents of children attending private schools with tuition assistance permissible under the New Mexico Constitution?

### **CONCLUSIONS**

A school voucher program involving the use of public money to provide parents of private school children with tuition assistance raises serious and substantial state constitutional questions, most significantly under Article XII, Section 3, which proscribes the use of public money for the support of private schools, and the antidonation clause of Article IX, Section 14. .

### **FACTS**

Legislation has been and is expected to continue to be introduced to provide for a school voucher program under which vouchers would be issued to parents of children attending private schools and used to defray the tuition costs of those schools. The vouchers would be redeemed by the private schools and paid with public money.

### **ANALYSIS**

A school voucher program involving the use of state money for tuition assistance to parents of private school children raises significant questions under the New Mexico Constitution. The most serious constitutional questions arise under Article XII, Section 3, which prohibits the use of public money for private schools, and Article IX, Section 14, which prohibits donations of public money or property to private persons and institutions. In addition, the following provisions are implicated by the proposed school voucher program: Article II, Section 11, which prohibits the state from giving any special preferences to religion; Article IV, Section 31, which prohibits appropriations for educational purposes to persons and educational institutions not controlled by the state; and Article XII, Section 1, which provides for a uniform system of free public schools.

Article XII, Section 3.

Article XII, Section 3 of the New Mexico Constitution provides, in pertinent part:

no part of the proceeds arising from the sale or disposal of any lands 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.

Under statutory construction principles, which also apply to the interpretation of constitutional provisions, **see Postal Finance Co. v. Sisneros**, 84 N.M. 724, 725, 507 P.2d 785 (1973), the intent of a provision's drafters is to be determined primarily by the language of the provision. **See Roberts v. Southwest Community Health Services**, 114 N.M. 248, 251, 837 P.2d 442 (1992). Legislative enactments must be interpreted to accord with common sense and reason. **See Morningstar Water Users Ass'n, Inc. v. Farmington Mun. Sch. Dist.**, 120 N.M. 307, 319, 901 P.2d 725 (1995). **See also State ex rel. Udall v. Colonial Penn Ins. Co.**, 112 N.M. 123, 128, 812 P.2d 777 (1991) (the constitution is interpreted to carry out its spirit, avoiding legal technicalities and subtle niceties).

Applying these rules to Article XII, Section 3, the language of the provisions is straightforward: it provides, without any qualification, that funds appropriated for educational purposes shall not be used for the support of religious or private schools. Without any indication that the drafters of Article XII, Section 3 intended differently, the prohibition applies to all state financial support of private schools, regardless of the means used to provide it. **See also Almond v. Day**, 89 S.E.2d 851 (Va. 1955) (payment of public money to parents for tuition at private schools violated Virginia constitution's prohibition against the "appropriation of public funds ] to any school or institution of learning not owned or exclusively controlled by the State]").

Despite the clear language of Article XII, Section 3, past opinions issued by the Attorney General's Office have concluded that the provision does not necessarily preclude legislation granting tuition assistance to students attending private schools or to their parents. N.M. Att'y Gen. Op. No. 79-7 (1979) (addressing a bill that authorized tuition grants to students attending private colleges and universities); N.M. Att'y Gen. Op. No. 76-6 (1976) (addressing a proposed voucher program under which the parents of "exceptional" children whose needs were not being met by the public schools could use the funds the school district would otherwise spend on the children to purchase special education at private, nonsectarian institutions). The opinions concluded, without any apparent judicial support, that Article XII, Section 3 prohibited only **direct** state support of private schools. Based on the plain language of Article XII, Section 3 and on the legal authority discussed below, we do not believe that such a restrictive reading of the prohibition is justified.

While there are no reported New Mexico cases on point, the United States Supreme Court has reviewed various government programs that reimburse parents or students for tuition and other educational expenses, generally in the context of determining the programs' constitutionality under the Establishment and Free Exercise Clauses of the

First Amendment to the United States Constitution<sup>1</sup>. The Supreme Court has reached varying conclusions regarding the permissibility of those programs under the First Amendment. **Compare Committee for Public Education v. Nyquist**, 413 U.S. 756 (1973) (tuition reimbursements to parents of children attending private, mostly sectarian, schools effectively provided state support for religious schools in violation of Establishment Clause) with **Mueller v. Allen**, 463 U.S. 388 (1983) (state tax deduction for public and private school expenses did not violate the Establishment Clause). Regardless of its conclusion, however, the Court consistently has acknowledged that the effect of tuition assistance paid to parents is to provide financial support for the schools their children attend. As it explained in **Mueller**, "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children." 463 U.S. at 399. **See also Witters v. Washington**, 474 U.S. 481, 487 (1986) (state aid may have the effect of a direct subsidy to a religious school even though it takes the form of aid to students or parents)<sup>2</sup>

Based on these decisions, and absent any contrary New Mexico cases, we conclude that the prohibition in Article XII, Section 3 is not limited to direct payments from the state to private schools. It seems reasonable to conclude that the prohibition may also extend to tuition assistance provided to private school students or their parents. As a result, we believe that a New Mexico court addressing the issue would likely conclude that tuition assistance under a voucher program constitutes the unconstitutional use of public money for the support of "sectarian, denominational or private" schools, whether the money is paid directly to the schools, the students or the parents.

#### **Article IX, Section 14**

The antidonation clause of Article IX, Section 14 provides that "[n]either the state nor any county, school district or municipality, except as otherwise provided in this constitution, 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]. A "donation" for purposes of this section has been described as "a 'gift,' an allocation or appropriation of something of value, without consideration." **Village of Deming v. Hosdreg Co.**, 62 N.M. 18, 28, 303 P.2d 920 (1956).

Past judicial decisions have held the clause violated whenever the state or local governments have made outright gifts of money or property, or have effectively relieved private persons and entities from obligations they would otherwise have to meet. **See, e.g., Chronis v. State ex rel. Rodriguez**, 100 N.M. 342, 670 P.2d 953 (1983) (tax credit to liquor licensees against taxes owed was an unconstitutional subsidy of the liquor industry); **Hutcheson v. Atherton**, 44 N.M. 144, 99 P.2d 462 (1940) (use of public money to finance construction of auditoriums to be used by a private corporation during a celebration of the 400th anniversary of Coronado's exploration was unconstitutional). A donation to a private person or entity violates the antidonation clause even if it is used for a public purpose. **See Harrington v. Atteberry**, 21 N.M. 50, 54, 153 P. 1041 (1915) (holding that the use of county funds to pay prizes at county fair

conducted by a private association violated the antidonation clause even though the fair was "educational in its nature" and served a public purpose).

The Attorney General's Office in the past has applied the antidonation clause to tuition grants and scholarships for private school education, and has concluded generally that they would probably violate the antidonation clause. **See** N.M. Att'y Gen. Op. No. 97-02 (1997) (concluding that to be permissible under the antidonation clause, a scholarship must be for the purpose of obtaining public education provided by a government entity); N.M. Att'y Gen. Op. No. 79-7 (1979) (proposed legislation appropriating state money for tuition grants to students attending private colleges and universities appeared to be an outright gift to students in violation of Art. IX, § 14); N.M. Att'y Gen. Op. No. 69-6 (1969) (state reimbursement paid to private, secular schools for educating nonpublic school students would violate antidonation clause). **But see** N.M. Att'y Gen. Op. No. 76-6 (1976) (suggesting that use of state money to purchase special education for exceptional children that the state otherwise had a legal obligation to provide would not violate Art. IX, § 14).

As interpreted by New Mexico courts, the antidonation clause appears to prohibit the state from providing tuition assistance in the form of vouchers to private school students. 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<sup>3</sup>. The educational purpose of private schools, an undeniably public purpose, is not sufficient to immunize the voucher program from constitutional challenge.

## **Article II, Section 11**

Under Article II, Section 11, "[n]o person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship." A school voucher program may raise questions under this provision if the private schools involved are primarily sectarian.

To date, Article II, Section 11 has been judicially applied in New Mexico according to the same standards the United States Supreme Court has enunciated under the Establishment Clause. **See, e.g., Duffy v. Las Cruces Pub. Sch.**, 557 F. Supp. 1013, 1023 (D.N.M. 1983) (analyzing a statute authorizing a daily moment of silence in public schools under the First Amendment, concluding that the statute violated the Establishment Clause, and concluding that it also violated N.M. Const. art. II, § 11 because "it gives a preference by law to a particular mode of worship"); **Pruey v. Department of Alcoholic Beverage Control of New Mexico**, 104 N.M. 10, 13, 715 P.2d 458 (1986) (statute allowing local option districts to permit or reject Sunday sales of liquor did not advance or inhibit religion in violation of either U.S. Const. amend. 1 or N.M. Const. art. II, § 11).

As indicated above, the United States Supreme Court has determined that not all government aid that benefits sectarian institutions is inconsistent with the Establishment Clause. This does not, however, necessarily answer the question under Article II, Section 11 of the New Mexico Constitution. Particularly in recent years, New Mexico appellate courts have indicated their willingness to accord greater protections under the state constitution than are available under similar provisions of the federal constitution. **See, e.g., New Mexico Right to Choose/NARAL v. Johnson**, No. 23,239 (N.M. Sup. Ct. Nov. 25, 1998), slip. op. at 14 (concluding that the Equal Rights Amendment to N.M. Const. art. II, § 18 establishes a basis for affording Medicaid-eligible women greater protection against gender discrimination than they receive under the federal constitution); **State v. Gomez**, 122 N.M. 777, 932 P.2d 1 (1997) (acknowledging that the state constitution's protections against warrantless searches and seizures have been interpreted more expansively than those of the Fourth Amendment); **City of Farmington v. Fawcett**, 114 N.M. 537, 843 P.2d 839 (Ct. App.) (free speech provisions of the New Mexico constitution offers more protection than the First Amendment), **cert. quashed**, 114 N.M. 532, 843 P.2d 375 (1992).

Legal authorities from other states have concluded that governmental tuition assistance benefiting sectarian institutions violates those state's constitutional provisions protecting religious freedom. **See, e.g., Witters v. State Comm'n for the Blind**, 771 P.2d 1119 (Wash. 1989) (holding, after remand by the United States Supreme Court, which found no Establishment Clause violation, that state financial aid to a visually handicapped student to enable him to attend a private bible college violated the Washington Constitution's prohibition against using public money for religious instruction); Kan. Att'y Gen. Op. No. 94-37 (1994), 1994 WL 109121 (concluding, based on Kansas case law, that a school voucher program for payment of tuition at nonpublic schools, including sectarian schools, amounted to state support of a form of worship in violation of the state constitution)<sup>4</sup>. Therefore, it is possible that a New Mexico court faced with a school voucher program would determine that, to the extent the program provided support to sectarian schools, it would violate Article II, Section 11's proscription against religious preferences, independent of any potential Establishment Clause violation.

#### **Article IV, Section 31.**

Article IV, Section 31 provides, in pertinent 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].

A school voucher program would violate this provision if the legislature appropriated money directly to parents or private schools. The New Mexico Supreme Court has suggested, however, that a constitutional issue is not raised if appropriations are made to a state agency, which in turn distributes the money. **State ex rel. Interstate Stream Commission v. Reynolds**, 71 N.M. 389, 396, 378 P.2d 622 (1963). That case involved an appropriation to the State Engineer for constructing and improving irrigation systems

in certain counties. According to the Court, "[t]he fact that non-profit organizations may incidentally benefit from the appropriations made to the State Engineer, who has absolute control of their expenditure" took the appropriations out of Article IV, Section 31's coverage.

The **Reynolds** case did not squarely address the issue raised by a school voucher program, *i.e.*, making grants of state money to private persons and institutions for educational purposes. Arguably, such a program results in more than the "incidental" benefit to private organizations at issue in **Reynolds**. Therefore, a valid constitutional challenge to school vouchers under Article IV, Section 31 is not necessarily foreclosed, even if the appropriation were made to a state agency for distribution to parents of private school students. **Compare** N.M. Att'y Gen. Op. No. 79-7 (1979) (concluding, based on **Reynolds**<sup>3</sup>, that proposed legislation to spend state money for tuition grants might not violate Art. IV, § 31 where the appropriation was made to the Board of Educational Finance and not to students) **with** N.M. Att'y Gen. Op. No. 69-6 (1969) (concluding that proposed legislation authorizing payments to private schools for secular education would violate Art. IV, § 31).

### **Article XII, Section 1.**

Under Article XII, Section 1: "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." State constitutional provisions, like Article XII, Section 1, that provide for a free, uniform public school system generally require the state to provide for the "establishment of schools of like kind" throughout the state and available to all of the state's school age population. **See Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ.**, 285 S.E.2d 110, 113 (N.C. Ct. App.) (quoting **Board of Educ. v. Board of Comm'rs**, 93 S.E. 1001, 1002 (N.C. 1917)), **appeal dismissed**, 291 S.E.2d 150 (N.C. 1981). **See also St. John's County v. Northeast Florida Builders Ass'n**, 583 So.2d 635, 641 (Fla. 1991) (stating that the requirement for a "uniform system of free public schools" in Florida's constitution "only requires that a system be provided that gives every student an equal chance to achieve basic educational goals prescribed by the legislature").

Absent any limitation in the state or federal constitution, the legislative power of the legislature is plenary. **See Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne**, 74 N.M. 487, 494-95, 394 P.2d 998 (1964). On its face, Article XII, Section 1 does not preclude the state from providing tuition assistance for parents of private school children, as long as it continues to maintain a uniform system of free public schools in the state. **See Jackson v. Benson**, 578 N.W.2d 602 (Wis.) (holding that Wisconsin constitution's uniformity provision did not preclude state support of private schools and that such support did not deny any student the opportunity to receive a basic education in the public school system), **cert. denied**, 119 S. Ct. 466 (1998); **Simmons-Harris v. Goff**, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583, at \*12 (Ohio Ct. App.) (state constitution's provision for a "thorough and efficient system of common schools" did not restrict the state's spending on educational programs

unrelated to the constitutionally mandated public school system), **review granted**, 684 N.E.2d 705 (Ohio 1997).

Article XII, Section 1 might nevertheless support a constitutional challenge to a school voucher program if the program diverted state 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. **See** N.M. Att'y Gen. Advisory Letter No. 85-31 (1985) (uniformity requirement of N.M. Const. art. XII, § 1 requires sufficient state funding to maintain minimum or basic education in each school district).

### GENERAL FOOTNOTES

[n1](#) The First Amendment provides, in pertinent part: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. 1.

[n2](#) To the extent that past opinions issued by this office suggest that Article XII, Section 3's prohibition is limited to direct state support or sectarian and private schools, they are overruled by this opinion.

[n3](#) A proviso to the antidonation clause states: "nothing in this section shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons." N.M. Const. art. IX, § 14(A). If a school voucher program were limited to indigent students, this provision might exempt the program from coverage under Article IX, Section 14. However, we do not reach a conclusion on that specific issue in this opinion.

[n4](#) **But see Jackson v. Benson**, 578 N.W.2d 602 (Wis.) (concluding that public financial assistance paid to parents whose children choose to attend private school was consistent with both the Establishment Clause and with a state constitutional provision that prohibited any person from being compelled to support any place of worship, any preference by law for religious establishments or modes of worship, and the use of public money for the benefit of religious societies or seminaries), **cert. denied**, 119 S. Ct. 466 (1998).

[n5](#) The **Reynolds** court also held that the appropriations before it did not violate Article IV, Section 31 because they were not "for charitable, educational or other benevolent purposes." 71 N.M. at 396. In contrast, payments under a school voucher program are for an avowedly educational purpose.

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98-01