

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

CATHY MOSES and
PAUL F. WEINBAUM,

Plaintiffs,

vs.

NO.: D-101-CV-2012-00272

HANNA SKANDERA, SECRETARY
OF EDUCATION, NEW MEXICO,
PUBLIC EDUCATION DEPARTMENT,

Defendant.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT**

Introduction

Plaintiffs seek to halt permanently the distribution and funding of textbooks and other instructional materials, at public expense, to private schools in the State of New Mexico (the "State"), pursuant to the statutory scheme codified as NMSA, §§ 22-15-1 to 14 (the "Act"), by reason of its facial violation of Article IX, § 14, Article XII, § 3, Article IV, § 31, and Article II, § 11, of the New Mexico Constitution (the "Constitution").

The Act provides for the unlimited distribution, at public expense, of instructional materials defined as "school textbooks and other educational media that are used as the basis for instruction, including combinations of textbooks, learning kits, supplementary materials and electronic media" to private schools, the majority of which are sectarian. (Act, at § 12-15-2.D.)

The Law

In direct response to an information and records request (pursuant to NMSA § 14-2-1, *et seq.* made by Plaintiffs' counsel), information provided by the State's Public Education Department (*see* Plaintiffs' attached composite Exhibit 1) discloses that the yearly average of Instructional Material Final Allocation under the Act for the two, fiscal years (2008-2010) was \$1,843,002 and that a cursory review of the recipients reveals that approximately 44% of the private schools receiving this financial assistance were sectarian in nature for fiscal year 2009-2010 and 49% of the private schools receiving this financial assistance were sectarian in nature for the fiscal year 2008-2009.

In *Baca v. New Mexico Department Of Public Safety*, 132 N.M. 282 (N.M. 2002), 47 P.3d 441, the New Mexico Supreme Court noted that “ ‘It must be presumed that the people know the meaning of the words they use in constitutional provisions, and that they use them according to their plain, natural and usual significance and import . . . ’ [w]e believe it is unnecessary to go beyond the common sense meaning . . . ” (*citing, in part, Alaska v. State*, 51 N.M. 13, 22 (N.M. 1946), 177 P.2d 174, 179).

Article IX, § 14, of the Constitution (in relevant 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 . . .

In *Hutcheson v. Atherton*, 44 N.M. 144 (N.M. 1940), 99 P.2d 462, the New Mexico Supreme Court unanimously affirmed the trial court's finding that the financing of an auditorium involved extending aid to a public or private corporation, contrary to Article IX, § 14, of the State's Constitution. *Id.*, 44 N.M. at 147, 161, 99 P.2d at 464, 473. A plain reading of the wording of this Constitutional section, applied to the facts at

hand, would unequivocally result in a determination that the lending of free textbooks and other instructional materials at public expense to private schools constitutes a “donation to or in aid of [a] person, association or public or private corporation.” See: *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 28 (N.M. 1956), 303 P.2d 920, 926 (accepting the appropriate definition of “ ‘donation’ ” as a “ ‘gift’ ” and as a “ ‘gratuitous transfer of property from one to another . . . anything voluntarily transferred by one person to another without compensation; a present’ ”).

Article XII, § 3, of the Constitution (in relevant part)

[N]o 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 . . .

Initially, it must be noted that 60 years ago in *Zellers v. Huff*, 55 N.M. 501 (N.M. 1951), 236 P.2d 949, the New Mexico Supreme Court in an unanimous decision has previously held that “the furnishing of free textbooks to schools other than tax supported schools of this State, violates . . . Section 3, Article 12, of the Constitution of the State of New Mexico.” *Id.*, 55 N.M. at 512, 531, 236 P.2d at 956, 968.

At least five other State Supreme Courts in states having similar constitutional provisions to those of the New Mexico Constitution at issue here have so held under the provisions of their own state constitutions.

In *California Teachers Association v. Riles*, 29 Cal.3d 794 (Cal. 1981), 176 Cal.Rptr. 300, 632 P.2d 953, plaintiffs challenged a statutory scheme authorizing “the Superintendent of Public Instruction to lend without charge, textbooks used in the public schools to students attending nonprofit nonpublic schools, and which provide[d] funds for that purpose.” *Id.*, 29 Cal.3d at 797, 176 Cal.Rptr. at 301, 632 P.2d at 954. Article IX,

Section 8, of the California Constitution “prohibits the appropriation of public money for the support of sectarian schools or schools not under the jurisdiction of the officers of the public schools” and Article XVI, Section 5, forbids the legislature of California from granting “ ‘anything to or in aid of’ any church or religious sect or to ‘help to support’ any school controlled by a church or sectarian denomination.” *Id.* The California Supreme Court unanimously held that the statutory scheme violated both of these constitutional provisions. *Id.*, 29 Cal.3d at 813, 176 Cal.Rptr. at 311, 632 P.2d at 964.

In *Dickman v. School District No. 62C, Oregon City, of Clackamas County, Oregon*, 232 Or. 238 (Or. *banc* 1961), 366 P.2d 533, plaintiff taxpayers challenged a statutory scheme providing for each state district school board to “ ‘provide textbooks, prescribed or authorized by law, for the free and equal use of all pupils residing in its district and enrolled in and actually attending standard elementary schools or grades seven or eight of standard secondary schools.’ ” *Id.*, 232 Or. at 241, 366 P.2d at 535. Plaintiff taxpayers contended that the scheme violated Article I, § 5, of the Oregon Constitution providing “ ‘[n]o money shall be drawn from the Treasury for the benefit of any religious (*sic*), or theological institution . . . ’ ” (*id.*, 232 Or. at 240, 266 n. 2, 366 P.2d at 535 n. 2); and violated Article VIII, § 2, of the Oregon Constitution which after listing various sources of state funding “ ‘with all other revenues derived from the school lands mentioned in this section shall be exclusively applied to the support, and maintenance of common schools in each School district, and the purchase of suitable libraries, and apparatus therefor.’ ” *Id.*, 232 Or. at 240 n. 3, 366 P.2d at 548 n. 3. The Oregon Supreme Court in a six to one opinion reversed in favor of plaintiff taxpayers holding that the statutory scheme violated both of these provisions of the Oregon Constitution.

In *Bloom v. School Committee of Springfield*, 376 Mass. 35 (Mass. 1978), 379 N.E.2d 578, plaintiff taxpayers “presented the question whether a statute requiring school committees to loan textbooks to pupils attending private schools (sectarian and nonsectarian) offends against the provision of the Constitution of the Commonwealth which forbids the use of public money or property ‘for the purpose of founding, maintaining or aiding’ such schools.” *Id.*, 376 Mass. at 36, 379 N.E.2d at 579. In an unanimous decision, the Supreme Judicial Court of Massachusetts held that the statutory scheme violated its Constitution anti-aid statute. *Id.*, 376 Mass. at 38, 379 N.E.2d at 580.

In *Gaffney v. State Department of Education of the State of Nebraska*, 192 Neb. 358 (Neb. 1974), 220 N.W.2d 550, “at issue [was] the constitutionality, under the Constitution of Nebraska . . . of the ‘Nebraska Textbook Loan Act, originally L.B. 659.’ ” *Id.*, 192 Neb. at 359, 220 N.W.2d at 552. “. . . Article VII, section 11, of the Constitution of Nebraska . . . provides in part: ‘Neither the state Legislature nor any county, city or other public corporation, shall Ever make Any appropriation from any public fund . . . In aid of any sectarian or denominational School or college, or any educational institution which is not Exclusively owned and controlled by the State or a Governmental subdivision thereof.’ ” *Id.*, 192 Neb. at 361, 220 N.W.2d at 553. In a five to two decision, the Nebraska Supreme Court held that “under Article VII, section 11, of the Constitution of Nebraska, that L.B. 569 is unconstitutional.” *Id.*, 192 Neb. at 370, 220 N.W.2d at 557. The Nebraska High Court, in a manner equally applicable here, stated: “It seems to us that to state the constitutional provision is to answer our question . . . It would be difficult to find a constitutional . . . provision that is more precise in its

meaning, purpose, and terms. It says what it means and means what it says.” *Id.*, 192 Neb. at 361, 220 N.W.2d at 553.

And in *Paster v. Tussey*, 512 S.W.2d 97 (Mo. banc 1974), in a suit brought by plaintiff taxpayers, the Missouri Supreme Court in a six to one opinion held that:

Those portions of § 170.051 requiring public school boards to provide textbooks to pupils attending private schools are violative of Art. IX, § 8, of the Missouri Constitution . . . which, in part, provides: ‘Neither the general assembly, nor . . . [other governmental units] shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose . . .’

Id., 512 S.W.2d at 104.

Article IV, § 31, of the Constitution (in relevant part)

No appropriation shall be made for charitable, educational or other benevolent purposes to any, corporation, association, institution or community, not under the absolute control of the state . . .

In *Harrington v. Atteberry*, 21 N.M. 50 (N.M. 1916), 153 P. 1041, the New Mexico Supreme Court in an unanimous decision held that the appropriation of annual funds to a non-public fair association violated this constitutional provision. *Id.*, 21 N.M. at 52-53, 75, 153 P. at 1041-42, 1050. Once again, the New Mexico Supreme Court was quick to note: “The language of the constitutional provision is so clear and explicit that it does not require construction; all that need be done is to read it and apply the language in its ordinary sense.” *Id.*, 21 N.M. at 54, 153 P. at 1042. Similarly here and using ordinary language, the language of this constitutional provision is facially in direct conflict with the Act.

Article II, § 11 of the Constitution (in relevant part)

Every man shall be free to worship God according to the dictates of his own conscience . . .

Plaintiffs maintain that the use of their tax dollars to fund the Act unduly imposes upon them an obligation of having their tax dollars used to support and to aid the religious dictates of others with whom they disagree. To the extent such tax dollars under the Act support sectarian or denominational private schools, the Act violates this provision of our State Constitution. Case law under this provision is sparse and, if existent, is not particularly relevant.

The United States Constitution

Although the United States Supreme Court has repeatedly held that the use of public funds to provide or to loan textbooks to elementary and secondary sectarian schools does not violate the proscriptions of the First Amendment to the United States Constitution, these holdings have neither relevance nor bearing here; since Plaintiffs have raised no federal constitutional claim nor is the language of the religious clauses of the First Amendment anywhere near as specific as our State's constitutional provisions, above quoted and upon which Plaintiffs solely rely. *See: Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968), 88 S.Ct. 1923; *Meek v. Pittenger*, 421 U.S. 349 (1975), 95 S.Ct. 1753; and *Mitchell v. Helms*, 530 U.S. 793 (2000), 120 S.Ct. 2530. The fact that respective, state constitutions may be more explicit and restrictive than the Establishment Clause of the United States Constitution has been recognized and appreciated by the United States Supreme Court in *Wheeler v. Barrera*, 417 U.S. 402 (1974), 94 S.Ct. 2274.

New Mexico Attorney General's Opinion

Although of no binding legal precedence, it should be noted that New Mexico Attorney General Gary K. King in Opinion No. 10-06 ("Opinion") dated December 27,

2010, while delicately side-stepping any express or concrete opinion, stated that “[j]udicial and legal authority from New Mexico and other states indicate that PED’s payment of public money for textbooks that are provided to students attending private schools, including sectarian and denominational schools, may violate Article IX, Section 14 and Article XII, Section 3 of the New Mexico Constitution.” (Opinion at 2.) Any fair reading of the Opinion would lead a reader to believe that not only do such violations exist, but that Attorney General King believes that they do.

Initial Challenge

Lastly, Article XIX of the New Mexico Constitution clearly sets out the exclusive methods of amending our Constitution. The fact that the Act and its preceding versions have to date not been previously challenged is of no legal import. Our Constitution is not subject to amendment by neglect or a blind eye.

Conclusion

WHEREFORE, Plaintiffs pray for judgment declaring as unconstitutional NMSA §§ 22-15-1 to 14, whereby public funds are authorized and mandated to be used for the distribution of textbooks and other instructional materials to private schools, as violative of Article IX, § 14, Article XII, § 3, Article IV, § 31, and Article II, § 11, of the New Mexico Constitution, granting such other and further relief as this Honorable Court deems appropriate under the circumstances and taxing all costs herein against Defendant.

Respectfully submitted,

/S/

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Mescalero Apache	\$28,965.00	\$14,550.18	\$0.00
Mesilla Valley Christian Schools	\$45,396.45	\$30,091.77	\$5,445.15
Mountain View West	\$2,041.57	\$8,299.47	\$0.00
Nativity of the Blessed Virgin Mary	\$269.00	\$0.00	\$545.98
Navajo Preparatory School	\$14,543.17	\$19,409.11	\$8,635.01
Nenahnezad Community School (Bia) (B)	\$12,382.63	\$1,200.13	\$0.00
New Mexico Academy for Sci & Math	\$0.00	\$0.00	\$0.00
New Sunrise Regional Treatment Center	\$0.00	\$0.00	\$0.00
Ohkay O'Wingeh (San Juan Day School)	\$0.00	\$0.00	\$0.00
Ojo Encino Day School	\$5,874.40	\$5,926.66	\$3,486.08
Our Lady of Assumption	\$4,425.20	\$11,007.70	\$0.00
Our Lady of Fatima	\$3,595.25	\$13,159.37	\$8,150.00
Pinehill (Ramah Navajo)	\$74,473.18	\$4,514.78	\$1,361.93
Pueblo Pintado Community School	\$0.00	\$0.00	\$0.00
Queen of Heaven School	\$4,689.25	\$4,384.92	\$0.00
Rehoboth Christian School	\$4,538.48	\$22,337.57	\$0.00
Rio Grande School	\$4,189.73	\$12,883.67	\$42.50
River Academy	\$0.00	\$0.00	\$0.00
Sacred Heart Elem - Farmington	\$4,782.75	\$277.50	\$732.24
Salam Academy	\$3,251.27	\$4,961.32	\$2,953.98
San Felipe Catholic School(ALB)	\$11,295.02	\$9,240.36	\$4,594.65
San Felipe Elementary School	\$27,454.44	\$36,129.43	\$0.00
San Ildefonso	\$466.74	\$0.00	\$0.00
Sandia Preparatory School	\$87,767.66	\$13,791.43	\$8,699.13
Sandia View Academy (No Gov \$)	\$0.00	\$0.00	\$0.00
Sanostee Day School	\$4,639.47	\$0.00	\$0.00
Santa Clara Day School	\$9,276.41	\$14,383.28	\$10,596.72
Santa Fe Indian School	\$35,842.63	\$6,454.87	\$0.00
Santa Fe Preparatory School	\$26,630.34	\$15,155.48	\$1,229.97
Santo Nino	\$23,064.95	\$9,177.19	\$319.66
Shiprock Northwest High School	\$26,439.24	\$21,890.50	\$4,680.70
Sky City Community School	\$2,830.94	\$4,238.34	\$0.00
Soloman Schechter Day School	\$3,028.50	\$2,453.00	\$1,135.90
St. Andrew's Episcopal School	\$323.04	\$0.00	\$0.00
St. Anthony Indian School	\$4,707.19	\$794.42	\$0.00
St. Bonaventure (Blessed Kateri)	\$7,069.14	\$7,855.18	\$0.00
St. Charles Borromeo School	\$8,499.16	\$1,400.34	\$0.00
St. Edward School	\$1,208.32	\$6,158.86	\$134.22
St. Francis Elem. School (LUMBERTON)	\$3,881.79	\$1,476.25	\$0.00
St. Francis of Assisi (GALLUP)	\$10,051.67	\$526.81	\$0.00
St. Helena Elem. School	\$2,556.07	\$139.74	\$268.25
St. Joseph School	\$0.00	\$2,078.00	\$0.00
St. Mark in the Valley	\$0.00	\$0.00	\$0.00
St. Mary's Elem & High School(ALB)	\$38,536.23	\$32,904.02	\$0.00
St. Mary's Elementary School (BELEN)	\$5,882.93	\$4,971.90	\$0.00
St. Michael's High School	\$37,924.54	\$67,064.42	\$1,654.02
St. Pius X High School	\$41,410.95	\$60,105.03	\$22,166.74

St. Theresa of Avila School	\$6,604.39	\$5,683.98	\$368.96
St. Therese School (ALB)	\$10,162.06	\$4,476.23	\$0.00
St. Thomas Aquinas	\$27,653.90	\$2,054.26	\$0.00
Sunset Mesa Schools, Inc.	\$12,430.46	\$4,548.28	\$0.00
T'siya Elementary And Middle School	\$0.00	\$0.00	\$0.00
Taos Day School	\$3,222.89	\$24,364.10	\$0.00
Te Tsu Geh Oweenge (Tesuque School)	\$3,543.35	\$2,639.70	\$46.00
Temple Baptist Academy	\$1,942.98	\$96.04	\$0.00
Temple Beth Shalom Pre School	\$0.00	\$0.00	\$0.00
Tohaali' Community School	\$985.09	\$0.00	\$0.00
To'Hajilla Community School	\$12,508.44	\$13,356.91	\$0.00
Torreon Christian School	\$0.00	\$0.00	\$0.00
Valley Christian Academy	\$0.00	\$0.00	\$0.00
Victory Christian School	\$0.00	\$0.00	\$0.00
Wingate Elementary	\$43,636.81	\$39,861.27	\$1,928.82
Wingate High School	\$17,191.49	\$86,444.42	\$6,328.15
Yaxche Learning Center	\$18,749.16	\$0.00	\$0.00
Zuni Christian Reform School	\$2,046.77	\$4,545.45	\$0.00
Total	\$1,378,327.62	\$1,025,049.94	\$134,280.41