



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE September 7, 2022

TO Members, Joint Education Interim Committee

FROM Tania Hytrek, Operations Administrator

SUBJECT Constitutional Considerations and Relevant Case Law – School Choice

INTRODUCTION

Under Priority #6, School Choice, the Joint Education Interim Committee's (Committee) interim topics include consideration of educational options that can be offered separate and apart from the public school system for Wyoming's K-12 population. In that vein, and as directed by Chairman Scott and Chairman Paxton, this memo provides an overview of constitutional considerations and relevant case law to be considered in discussion of this topic. This memo is not intended to outline every constitutional or legal consideration that may be associated with a specific school choice program. There are infinite possibilities for school choice programs that could be created that are separate and distinct from Wyoming's public education system. The architecture of such programs and the policy choices made by the Legislature will dictate the specific constitutional provisions that may be implicated.

School choice programs as enacted in other states outside of the traditional public education system generally involve allocation of state financial resources to school aged children to pursue educational opportunities through private schools that may include religious or parochial schools. Some programs involve appropriation of funds that would otherwise go directly to the public school system and in other instances, the appropriations are made from general funds or other available resources or involve tax credits. The educational requirements vary as well depending on the program. Some approaches more strictly adhere to the content requirements associated with attendance of public schools and others have very minimal requirements to receive state funds to attend a private or religious school.

Against this backdrop, such programs present the following considerations under the Wyoming Constitution: 1) expenditure of public funds for a private purpose or to an individual or entity not under the control of the State, that may include private and religious schools; and 2) educational adequacy and equity, particularly given Wyoming's complex and lengthy history in the area of school finance litigation.

EXPENDITURE OF PUBLIC FUNDS

The Wyoming Constitution addresses the expenditure and appropriation of public funds. The following provisions are relevant to the discussion of school choice programs where state funds may be appropriated to individuals or entities not under the control of the state, which may include religious and private schools:

Article 1, Section 19 Appropriations for sectarian or religious societies or institutions prohibited.

No money of the state shall ever be given or appropriated to any sectarian or religious society or institution.

Article 3, Section 36 Prohibited appropriations.

No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

Article 7, Section 8 Distribution of school funds.

Provision shall be made by general law for the equitable allocation of such income among all school districts in the state. But no appropriation shall be made from said fund to any district for the year in which a school has not been maintained for at least three (3) months; nor shall any portion of any public school fund ever be used to support or assist any private school, or any school, academy, seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatsoever.

Article 16, Section 6 Loan of credit; donations prohibited; works of internal improvement.

Neither the state nor any county, city, township, town, school district, or any other political subdivision, shall . . . loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor[.]

The plain language of Article 16, Section 6 prohibits the State in the broadest sense from making donations or aiding individuals, except for the necessary support of the poor. Article 3, Section 36 provides that appropriations to individuals or entities not under the absolute control of the State are prohibited. It further specifies that appropriations to any denominational or sectarian institution or association are prohibited. Article 1, Section 19 restates the prohibition of giving or appropriating state money to sectarian or religious entities. The applicability of Article 7, Section 8 is a bit more nuanced and is somewhat dependent upon the funds utilized. If the school choice program contemplates use of the public school funds, this provision strictly prohibits those funds from being used to support or assist schools that are private or religious in nature and it more generally requires the equitable allocation of those funds across the school districts in the State. Additional provisions that provide specific guidance of the expenditure and appropriation of funds dedicated to the operation of public schools include: Article 7, Section 2, School Revenues; Article 7, Section 4, Restriction in use of revenues; Article 7 Section 5, Fines and penalties belong to

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public school fund; Article 7, Section 6, State to keep school funds; investment; Article 7, Section 7, Application of school funds; Article 7, Section 8, Distribution of school funds; and Article 7, Section 9, Taxation for schools.

CONSTITUTIONAL EDUCATION OBLIGATIONS

Wyoming's Constitution requires the Legislature to establish and maintain a system of public schools that "shall be open to all the children of the state and free from sectarian control." Article 21, Section 28. The Legislature is required to establish a public education system that is "complete and uniform" and "through and efficient...[and] adequate to the proper instruction of all youth of the state, between the ages of six and twenty-one years, free of charge." Article 7, Sections 1 and 9. The Wyoming Supreme Court has "unequivocally held that the Wyoming constitution establishes education as a fundamental right." *State v. Campbell County School District*, 2008 WY 2, ¶11, 181 P.3d 43 (Wyo. 2008) (*Campbell IV*).

Generally speaking, a party challenging the constitutionality of a statute bears the burden in proving the statute is unconstitutional beyond a reasonable doubt. *Gordon v. State*, 2018 WY 32, ¶ 12, 413 P.3d 1093 (Wyo. 2018). The Court begins from the premise that statutes are constitutional and any doubt must be resolved in favor of the statute's constitutionality. *Id.* That said, in the context of public education, "[b]ecause the right to an equal opportunity to a proper public education is constitutionally recognized in Wyoming, any state action interfering with that right must be closely examined before it can be said to pass constitutional muster. Such state action will not be entitled to the usual presumption of validity; rather, the state must establish its interference with that right is forced by some compelling state interest and its interference is the least onerous means of accomplishing that objective." *Campbell II*, ¶42.

While the schools, organizations, and individuals that receive funds under school choice programs are not "public schools" in the traditional sense, providing state funds for the education of Wyoming's youth outside of the constitutionally mandated public education system raises the question of whether such a program is an extension of Wyoming's K-12 public education system. As detailed below, challenges may be raised under Wyoming's Constitution related to: (1) adequacy and equity of funding; (2) fulfillment of the basket of educational goods and services required; and (3) the impact to Wyoming's existing public K-12 school finance system.

The constitutional provisions related to school finance and equity of educational opportunities is a well-developed area of jurisprudence in Wyoming. Over 40 years of caselaw informs the discussion of the Legislature's constitutional obligations related to the statewide system of public education. *Washakie County School District No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980); *Campbell County School District v. State*, 907 P.2d 1238 (Wyo. 1995) (*Campbell I*); *State v. Campbell County School District*, 2001 WY 19, 19 P.3d 518 (Wyo. 2001) (*Campbell II*); *State v. Campbell County School District*, 2001 WY 90, 32 P.3d 325 (Wyo. 2001) (*Campbell III*); *Campbell IV*. At the heart of the *Campbell* and *Washakie* decisions was the issue of wealth-based and educational opportunity disparities. The Court repeatedly emphasized that the Legislature's constitutional obligation is to "define and specify what a proper education is for a Wyoming child[,]" determine the cost of that education, and then fund the cost by whatever means necessary. Under these cases, disparities in funding of public education must be the result of cost-based

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differences. *Campbell IV*, ¶¶ 12-14; *Campbell III*, ¶¶ 2, 7, 47; *Campbell II*, ¶¶ 42-45; *Campbell I*, 907 P.2d at 1257-1259; *Washakie*, 606 P.2d at 337. Wyoming's current K-12 funding structure involves a nuanced and detailed formula to calculate funding for each of the 48 school districts; the amount each school district receives on a per pupil basis varies substantially across districts and is dependent upon many variables, such as the individual characteristics of the staff and the students of each district. An argument exists that a school choice program that dedicates a per pupil allotment based on the statewide average amount under the K-12 public school system or another amount that does not reflect cost differences associated with the students and their educational needs is not cost-based and thus, subject to strict scrutiny analysis by the Court.

School choice programs that include minimal educational requirements or that do not ensure the basket of goods is delivered poses the constitutional question of whether the Legislature has established a "complete and uniform system of public instruction" that is "thorough and efficient" and "adequate to the proper instruction of all youth[.]". To ensure educational parity across the state, and again in response to the *Campbell* cases, the Legislature identified what is commonly termed the "basket of educational goods and services" that every student in Wyoming is entitled to receive whether they live in Sundance or Laramie. W.S. 21-9-101 and 102. The State Board of Education (State Board) is then charged with establishing uniform content and performance standards for each of the areas defined by statute and setting corresponding graduation standards. W.S. 21-2-304(a)(ii) and (iv); 21-9-101(b). The State Board ensures districts deliver the basket of goods through evaluation and accreditation of school districts and through the statewide student assessment and accountability systems. W.S. 21-2-304(a)(ii), (v) and (vi). The Court has directed that "[t]he state financed basket of quality educational goods and services available to all school-aged youth must be nearly identical from district to district." *Campbell I*, 907 P.3d at 1279. Under this constitutional framework, depending on the structure of the school choice program, a question may exist whether the Legislature has met this obligation if the traditional public education program required for receipt of state funds varies greatly from the educational program required in those schools that receive funding under a school choice program.

The current financing of Wyoming's existing public K-12 school finance system, both operational and capital construction costs, presents an additional layer of complexity. An argument exists that school choice options may compete with the financial needs of Wyoming school districts – whether the appropriation is made from those funds specifically dedicated for the operation of public schools or from an alternative source. The *Campbell* and *Washakie* cases made it clear that public education in Wyoming is a fundamental right and that it is a paramount priority in allocation of state resources. The Court directed: "[b]ecause education is one of the state's most important functions, lack of financial resources will not be an acceptable reason for failure to provide the best educational system. All other financial considerations must yield until education is funded." *Campbell I*, 907 P.3d at 1279. Within the discussion of whether the constitutional restrictions applied to only those funds specifically mentioned in the Constitution, dedicated to the public school fund, the Court stated it was clear the framers of the Constitution contemplated "all funds were educational resources for all of the state's youth[.]" *Id.* at 1272. A structural deficit associated with the accounts allocated to fund the operation or construction of public schools may make such an argument more persuasive. Likewise, a program that reduces funds in any manner or diverts

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funds from public education may present a clearer challenge under Wyoming’s Constitution and the guiding caselaw.

LITIGATION OF SCHOOL CHOICE PROGRAMS

School choice programs as enacted by legislative bodies have been the subject of litigation. The outcomes vary based on the state, the specific details of the school choice program, and the specific state constitutional provisions relating to public education.

Members inquired about the impact of two relatively recent United States Supreme Court cases on the provisions in Wyoming’s Constitution that prohibit appropriations to denominational or sectarian institutions or associations. Both cases, *Espinoza v. Montana Department of Revenue*, 591 U.S. ___, 140 S. Ct 2246, 207 L. Ed. 2d 679 (2020) and *Carson v. Makin*, 142 S. Ct. 1987, 213 L. Ed. 2d 286 (2022), involved programs enacted by state legislatures that provided state aid to private schools, but failed to provide the same benefits to individuals to attend religious schools. Both cases were analyzed under the Free Exercise Clause of the First Amendment to the United States Constitution. The Court held that the programs established by Maine and Montana violated the Free Exercise Clause given the disparate treatment of those individuals wishing to pursue an education at a religious institution.

These recent cases stand for the premise that “[a] State need not subsidize private education...but once a State decides to do so, it cannot disqualify some private schools solely because they are religious.” *Espinoza*, 207 L. Ed. 2d at 697; *Carson*, 142 S. Ct. at 1991. What these cases do not provide guidance on is Wyoming’s constitutional framework and the hurdle posed by Article 16, Section 6 and Article 3, Section 36 in appropriating or making donations to individuals or entities that are not under the control of the state, regardless of religious or secular association. Additionally, the two cases were not analyzed under the guise that public education is a fundamental right, which is the case under Wyoming’s Constitution and presents unique legal arguments as outlined in the section above titled “Constitutional Education Obligations.” What can be gleaned from the two cases is if Wyoming enacts a school choice program that treats religious schools differently than other private schools eligible to participate in the program, the Free Exercise Clause will likely be implicated.

The following cases were also identified in researching the subject of school choice programs:

- In Nevada, the Legislature enacted a program establishing educational savings accounts for all school-aged children. Scholarships could be utilized at “participating entities” which included private and religious schools. Nevada has a per-pupil allotment distributed to school districts and under the school choice program, when an educational savings account was created for a student, an equal amount was deducted from that student’s home school district. Recognizing the Legislature’s obligation to fund public education, the Nevada Supreme Court ruled the Legislature’s failure to fund the program and effectively reducing the funds distributed to public schools contravened their specific state constitutional provisions. *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (Nev. 2016).

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- Florida created a scholarship program that permitted payment of a student’s tuition to attend a private school when the public school that the student attended failed to meet certain minimum state educational standards. In *Bush v. Holmes*, 919 So. 2d 392 (Fl. 2006), the Florida Supreme Court concluded the program “diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida’s children. This diversion not only reduces money available to the free schools, but also funds private schools that are not ‘uniform’ when compared with each other or the public system.” *Id.* at 398.
- In 2020, the Governor of South Carolina allocated federal funds available under the Coronavirus Aid, Relief, and Economic Security (CARES) Act as one-time tuition grants to eligible students to attend private and independent primary and secondary schools. A public school district and the South Carolina Education Association challenged the program under their state constitutional provision that prohibits the use of public funds by private educational institutions, religious or otherwise. In *Adams v. McMaster*, 432 S.C. 225, 851 S.E. 2d 703 (S.C. 2020), the South Carolina Supreme Court held the funds would provide a direct benefit to independent private educational institutions in violation of their state constitutional provision and concluded allocation to the student, as opposed to the institution, did not rectify constitutional concerns. Following this decision, the Bishop of Charleston and South Carolina Independent Colleges and Universities filed a motion for a preliminary injunction in United States District Court for the District of South Carolina seeking access to the federal CARES Act funds, citing violations the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Free Exercise Clause of the First Amendment of the United States Constitution as a basis for relief. In *Bishop of Charleston v. Adams*, 538 F. Supp. 3d 608 (2021), the District Court failed to grant the relief requested and distinguished the case from *Espinoza* on the basis that the South Carolina’s constitutional provision prohibits aid to religious and private institutions alike.
- West Virginia’s Legislature enacted the Hope Scholarship Program in 2021, authorizing educational saving accounts for students to pursue education opportunities outside of the public school system, which included private and religious schools. On July 6, 2022, a circuit court judge ruled the scholarship program was unconstitutional and issued an injunction permanently enjoining the Hope Scholarship Program. News articles indicate the West Virginia State Treasurer will appeal the circuit court’s decision.

This continues to be an evolving area of jurisprudence, as proved with the *Carson v. Makin*, issued June 21, 2022, and the recent West Virginia circuit court case and South Carolina cases. The cases listed above are not an exhaustive list of the decisions litigating school choice.

In conclusion, there are policy choices that the Legislature can make that may reduce or minimize potential challenges in creation of a school choice program. For example, appropriating from resources other than those guaranteed to school districts and assigned by the Wyoming Constitution for the operation of public schools or aligning educational requirements to those

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required of public schools may be relevant policy considerations. That said, the basic question of the constitutionality of appropriating or giving public funds to private schools, including religious schools, that are not under the control of the state cannot be definitely answered and thus, poses an inherent risk of litigation. The exhaustive school finance litigation in Wyoming presents separate and distinct questions from the analysis of expenditure of public funds as outlined above.

Should you have further questions or need any additional details regarding this information, please advise.

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