



## WYOMING LEGISLATIVE SERVICE OFFICE

# Memorandum

**DATE** July 24, 2023

**TO** Joint Education Interim Committee

**FROM** Tania Hytrek, Operations Administrator, Legislative Service Office

**SUBJECT** Privileged and Confidential: 24LSO-0052 (WD 0.5), Wyoming education savings accounts.

### **Summary:**

The purpose of this memo is to outline constitutional concerns with 24LSO-0052, Wyoming education savings accounts. Specifically, the appropriation of state funds to entities not under the control of the state, including individuals and religious and private schools, under the following provisions Article 1, Section 19, Article 3, Section 36, Article 7, Sections 8 and 12, Article 16, Section 6, and Article 21, Section 28.

Additionally, the proposed bill presents constitutional considerations related to the various provisions governing public education and the Legislature's responsibility to establish a thorough and efficient system of public schools that is uniform and available to all students against the backdrop of over 40 years of school finance and education related litigation specific to Wyoming. See Article 1, Section 34; Article 7, Sections 1, 2, 4, 5, 6, 7, 8, 9; *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*); *State v. Campbell County School District*, 2008 WY 2, 181 P.3d 43 (Wyo. 2008) (*Campbell IV*). The fact that the State is actively involved in litigation related to public school finance, which includes claims of underfunding, may present a heightened concern.

LSO cannot predict the outcome if 24LSO-0052 were enacted and challenged in court. Similar programs have been the subject of lengthy legal proceedings across the nation.

### **Legal Analysis and Explanation:**

#### **A. Expenditure of Public Funds**

The Wyoming Education Savings Accounts Act authorizes children, beginning at age three (3), to receive three thousand dollars (\$3,000.00) each year from public funds to pursue an education with an "education service provider[.]" Recipients must be Wyoming residents and must have a household income that is at or

below two hundred fifty percent (250%) of the federal poverty level, using the most recent federal poverty guidelines for the student's household size and income.

An education service provider is broadly defined to include "a person or organization, including a qualified school, that receives payments authorized by a parent from education savings accounts to provide educational goods and services to ESA [Education Savings Account] students[.]" The act authorizes public funds to be placed in an account in the name of the student to be used for educational expenses. The program does not contain any prohibition on the expenditure of the funds to attend private or religious institutions and specifically authorizes payment to a "qualified school" which is defined as "a preschool or a nonpublic primary or secondary school, certified by the state superintendent of public instruction pursuant to W.S. 21-2-906(a), located in or that provides education services in this state, that may include through online means[.]" The draft bill states students are not required to enroll in a nonpublic school to receive funds and "[n]othing in this act shall be deemed to limit the independence or autonomy of an education service provider...".

These elements of 24LSO-0052 raise constitutional concerns under Article 1, Section 19, Article 3, Section 36, Article 7, Sections 8 and 12, Article 16, Section 6, and Article 21, Section 28 of the Wyoming Constitution. Those constitutional provisions read in relevant part as follows:

**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 7, Section 12 Sectarianism prohibited.**

No sectarian instruction, qualifications or tests shall be imparted, exacted, applied or in any manner tolerated in the schools of any grade or character controlled by the state, nor shall attendance be required at any religious service therein, nor shall any sectarian tenets or doctrines be taught or favored in any public school or institution that may be established under this constitution.

**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[.]

**Article 21, Section 28 Legislature to provide for public schools.**

The legislature shall make laws for the establishment and maintenance of systems of public schools which shall be open to all the children of the state and free from sectarian control.

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. There is no specific income or other test that determines who are the "poor" or what is "necessary support." Those determinations are for the Legislature in the first instance, with the Wyoming Supreme Court making the ultimate determination should the Legislature's choices (as established by law) be subject to challenge in the court system. The courts generally give deference to legislative determinations, but that deference is not unlimited. The "donations" clause has been addressed on several occasions in Wyoming jurisprudence. But there is no single case nor Attorney General opinion which provides clear lines demarking "poor" versus "nonpoor" or "necessary" versus "unnecessary" support. Overall, the case law might be seen as an evolving liberalized reading of Article 16, Section 6, or perhaps fact specific determinations.

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. Courts have also developed general limitations on legislative spending for private purposes that are not necessarily divined from any particular language of a constitution. These limitations overlay the specific Constitutional provisions. The Wyoming Supreme Court has stated, "for it is elementary that the legislature cannot levy a tax or make an appropriation except only for public purposes, and this is true whether the constitution so expressly provides or not." *State v. Carter*, 30 Wyo. 22, 215 p. 477, 479 (Wyo. 1923). In general terms, the standard for upholding any scheme for the spending of state funds is that the purpose must be for the public good. The good to the public must be substantial; an "incidental good" to the public is insufficient. 63 C Am. Jur. Public Funds, § 3. But again, there is no absolute judicial definition of a "public" as distinguished from a "private" purpose.

The general statement that public funds must be used for public purposes provides background regarding the limitations of Article 1, Section 19, Article 3, Section 36, and Article 16, Section 6. To a large extent all three implement in some fashion this general restriction on taxation and spending. As construed by the Wyoming Supreme Court the provisions can be read together. The exception for the necessary support of the poor contained in Article 16, Section 6, does not swallow the prohibitions contained in Article 1, Section 19 and Article 3, Section 36; meaning a claim that the recipient of a legislative appropriation is poor does not render the other provisions of the Wyoming Constitution void. *State v. Carter*, 215 P. at 479.

The applicability of Article 7, Section 8 is a bit more nuanced and is somewhat dependent upon the funds utilized. The noted bill draft appropriates forty million dollars (\$40,000,000.00) from the General Fund to the Wyoming education savings accounts expenditure account, as created by the act. Public school funds would not be eligible to fund the expenditure account. Article 7, Section 8 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 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.

## B. 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 "thorough 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*).

While the educational service providers defined under the draft bill 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.

Interpretation of 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 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 providing a per pupil amount for K-12 students that is less than the amount generated by the Education Resource Block Grant Model, as contained in 24LSO-0052, and that does not reflect the cost differences associated with educating students, may run afoul of the educational protections under Wyoming's Constitution.

This bill draft does include minimal educational requirements by mandating educational service providers be certified by the State Superintendent of Public Instruction and, for those students in grades K-12, that those students receive instruction in reading, writing, mathematics, civics, history, literature, and science, and participate in the statewide assessments administered pursuant to W.S. 21-2-304(a), but it does not ensure the basket of goods is delivered. This may pose a 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, a question exists whether the Legislature can meet this obligation given the variation in the academic requirements associated with the proposed bill draft when compared to the detailed obligations required under Wyoming's traditional public school system.

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. It could be argued that the program created by 24LSO-0052 competes 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, such as the General Fund. 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.

### **C. School Choice Litigation**

Many states have litigated school choice programs. 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.

Two relatively recent United States Supreme Court dealt with school choice programs. Both cases, *Espinoza v. Montana Department of Revenue*, 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 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 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.

These cases do not provide guidance on Wyoming's constitutional framework and the hurdle posed 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 provided for under Wyoming's Constitution and presents unique legal arguments as outlined in the section above titled "Constitutional Education Obligations."

The following cases from other jurisdictions were illustrative of varying outcomes for litigation of state 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).
- 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 of 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.

This continues to be an evolving area of jurisprudence and the cases listed above are not an exhaustive list of the decisions litigating school choice.

### **Conclusion:**

This memo is intended to draw your attention to constitutional concerns related to 24LSO-0052, Education savings accounts. It cannot be predicted whether the bill if enacted will be challenged, and if challenged, what the outcome would be. That said, numerous Wyoming constitutional provisions are potentially implicated by the program. Additionally, school choice programs have been heavily litigated across the United States. The outcomes vary and are dependent upon the program enacted, the state's constitutional provisions, and previous caselaw. Please advise of any questions or additional research requests.