

Memorandum

DATE: January 18, 2012

TO: Allen Sánchez, President & CEO
St. Joseph Community Health

FROM: David P. Buchholtz

RE: Information Regarding a Proposed Amendment to the New Mexico Constitution Providing Revisions to Article XII, Section 7 of the New Mexico Constitution to Provide For Annual Distributions for Early Childhood Educational Programs

You have asked us to present our analysis of a proposed constitutional amendment authorizing expenditures from the permanent school fund for early education programming. The following points represent a summary of our analysis.

- The Early Learning Constitutional Amendment, 2012, introduced by Representative Miera and others, provides for revisions to Article 12, Section 7 of the New Mexico Constitution by increasing the distribution from the Land Grant Permanent Fund by 1.5 per cent per year during fiscal years 2014-2023 and requiring that the increased distributions from the permanent school fund be used for early childhood education programs.
- The proposed constitutional amendment does not violate the Anti-Donation Clause (Article IX, Section 14) or the provision restricting appropriations for charitable, educational or other benevolent purposes to entities not under the absolute control of the state (Article IV, Section 31) in the New Mexico Constitution.
- The Early Learning Constitutional Amendment is a proposed constitutional amendment, not mere legislation. The proposal stands on equal footing with other state constitutional provisions.
- Article IX, Section 14 specifically acknowledges in its text that its provisions are subject to other provisions of the Constitution.

- Even if these constitutional provisions were applicable, the proposed amendment provides for the contracting for services as a quid pro quo for expenditures which are permissible activities.
- Criticism of the proposal that state and federal constitutional provisions relating to sectarian schools and religious preferences might be violated by activities contemplated by the proposed change is unfounded as it is, at best, premature.
- While the First Amendment to the United States Constitution and Article XII, Section 11 of the New Mexico Constitution contain well known regularly litigated provisions relating to restrictions on the establishment of, and protecting the free exercise of, religion, the case law on these provisions are far too numerous and judicial doctrine far too complex to reach any definitive conclusions on programs not yet in place. This area is continually evolving and the United States Supreme Court and other federal courts have upheld a variety of contractual relationships between government and religious entities, but the results are not easily predictable.
- The proposed text of the change to Article XII, Section 7 is facially neutral and silent regarding control of schools and appropriations to sectarian, denominational or private schools. Any challenge in that respect is at best premature until a program is developed implementing the constitutional change.
- The text says that early childhood programs will be operated by the public schools (clearly consistent with current provisions) or pursuant to contracts between the state and private entities (similar to current contracts between the state and various private entities for educational and other services). As to the latter provision, not until the details of legislation and contracts are developed can one determine whether such legislation and contracts will violate the related provisions of the New Mexico or United States Constitutions.
- We have not concluded that any change to the New Mexico Constitution adding early childhood education to the required uses of funds distributed from the permanent school fund for early childhood education, conclusively constitutes a change in the compact between New Mexico and the United States created by the New Mexico Constitution and the Enabling Act of 1910, requiring approval by the United States Congress through an amendment to the Enabling Act, as well as by the people of New Mexico through a state constitutional amendment.

- Even if this is the case, obtaining the approval of Congress on this matter does not present significant difficulties.
- The Enabling Act of 1910 and the New Mexico Constitution form a compact akin to an agreement of trust in which the United States is the grantor, and the State of New Mexico is the trustee for the beneficiaries, the named institutions created for the people of the state. The historic literature as well as United States and New Mexico Supreme court cases confirm this understanding. Our constitution provides, in Article XXI, Section 10, for approvals of such changes by both the people of the state and the government of the United States. Because of the trust relationship, the courts have, when asked, opted for a strict interpretation of the Enabling Act of 1910.
- Whether the proposed state constitutional amendment, allowing distributions from the school permanent fund for early childhood education programs constitutes a departure from the original agreement made at statehood is a close question. In the modern era of preschool education, early educational programs would seem to have much of the same educational objectives as the more traditional K (or even 1st grade)-12 schooling.
- At this point, absent further guidance, it is difficult to predict how a court might decide this question.
- Recent New Mexico judicial actions infer that the court will not intervene prematurely when the voters are faced with a constitutional amendment. In 2000, the Supreme Court refused to intervene in a suit challenging an amendment relating to city county consolidation.
- Further, seeking the consent of the United States, if necessary, is a manageable assignment.
- The New Mexico Enabling Act has been amended by Act of Congress several times, most recently in 1990 and 1997, without controversy. The 1990 amendment, authorizing a state constitutional amendment regarding land exchanges, was ultimately not adopted by New Mexico voters, but the 1997 change, authorizing a different state constitutional amendment modernizing the distribution of earnings provisions, was adopted. If New Mexico voters chose to amend the state constitutional provisions so that early education programs would be included in school permanent fund distributions, it is reasonable to assume that Congress could be persuaded to concur.

David Buchholtz is a shareholder in Brownstein Hyatt Farber Schreck's New Mexico Office. His practice includes government finance law, including state constitutional finance issues, economic development and state tax incentive law, government relations, and financial institutions. He has counseled private businesses in regard to a variety of matters pertaining to growth, corporate governance affairs and government relations. He has been the primary drafter of two recent changes to Article IX, Section 14 of the New Mexico Constitution, the Anti-Donation Clause. Mr. Buchholtz is a member of the Albuquerque and American Bar Associations and the State Bar of New Mexico, as well as the National Association of Bond Lawyers. He is rated "A-V" by *Martindale-Hubbell*. He has been listed for over ten years in the *Best Lawyers in America* most recently under the five separate categories of Banking and Finance Law, Corporate Law, Mergers and Acquisitions Law, Municipal Law and Public Finance Law. He has been named in the *Chambers USA America's Leading Business Lawyers* since its first edition in 2004 and as a Tier 1 "Leading Individual" since its 2006 edition of Corporate/M&A Law in New Mexico. He was recently named the 2011 New Mexico Public Finance Lawyer.