

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAN SCHWARTZ, in his official capacity as Treasurer of the State of Nevada,

Appellant,

v.

HELLEN QUAN LOPEZ, individually and on behalf of her minor child, C.Q.; MICHELLE GORELOW, individually and on behalf of her minor children A.G. and H.G.; ELECTRA SKRYZDLEWSKI, individually and on behalf of her minor child, L.M.; JENNIFER CARR, individually and on behalf of her minor children, W.C., A.C., and E.C.; LINDA JOHNSON, individually and on behalf of her minor child, K.J., and SARAH SOLOMON AND BRIAN SOLOMON, individually and on behalf of their minor children, D.S. and K.S.,

Respondents.

Supreme Court No. 69611

District Court No. 15-00207-1B
Electronically Filed
May 20 2016 03:37 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

**UNOPPOSED MOTION FOR
EXPEDITED ORAL
ARGUMENT AND DECISION**

AND

NOTICE OF RELATED RULING

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On May 18, 2016, the Honorable Eric Johnson of the Eighth Judicial District Court, in and for Clark County, Nevada, issued an order granting the State of Nevada’s motion to dismiss in *Duncan v. State of Nevada*, Case No. A-15-723703-C, a constitutional challenge to Nevada’s Education Savings Account (“ESA”) program. A copy of the ruling is attached hereto as Exhibit 1.

Specifically, the *Duncan* court concluded that the ESA program is constitutional under Article XI, Sections 1 and 2 of the Nevada Constitution because the Legislature is not limited to encouraging education “by all suitable means” solely through the public school system. Rather, the Legislature’s duty to encourage education “by all suitable means” is “*in addition* to the provision for the common school system.” Ex. 1 at 23:11-14.

The *Duncan* court also ruled that the ESA program does not violate Article XI, Section 10 of the Nevada Constitution. After an extensive analysis of its text, history, and precedent, the court determined that Section 10 should be read congruously with the federal Establishment Clause and that Section 10 was intended to forestall only those legislative enactments whose “purpose” is to “build up a religious sect.” *Id.* at 31:13-15; 36:13-15. Under the ESA program, the court wrote, public money is not used for a “sectarian purpose” since the funds are received—if at all—by religiously affiliated schools through the independent

decisions of parents. *Id.* at 37:12-38:18. The beneficiaries of SB 302 are Nevada students; schools benefit only incidentally. *Id.* at 37:23-38:3; 41:24-42:17.

Because the Eighth Judicial District Court dismissed the *Duncan* case, the preliminary injunction issued by the District Court in *Lopez* is the only impediment to implementing the ESA program before next academic year. But the window is rapidly closing to obtain a decision from this Court soon enough so that the Treasurer's office can implement the ESA program before the funding deadline for the coming school year, and so that the thousands of families who have applied for ESAs will know, one way or the other, whether ESA funds will be available.

If this Court decides to dissolve the injunction in this case, the Treasurer will need approximately three weeks to process thousands of pending applications and administratively restart the program before tendering the first quarterly payment to the ESA accounts. The first quarterly payment for the coming school year is scheduled for August 1, 2016. Therefore, in order to make that payment, the Treasurer will need a ruling from this Court lifting the preliminary injunction no later than July 8, 2016. A decision favorable to the Treasurer issued after that date would not only leave the Treasurer unable to timely fund ESAs for the coming school year, but would also leave thousands of families in limbo whether to enroll

their children in public school or make other education plans.¹ Faced with such uncertainty, many parents will be forced to either forgo ESAs for another entire school year or subject themselves to considerable financial risk. If at all possible, and consistent with this Court's decision to expedite, the Treasurer respectfully requests a decision in this case by July 8, 2016.

To make that possible, the Treasurer respectfully requests that the Court schedule this matter for argument at one of the Court's currently scheduled *en banc* settings on June 6, 2016 or June 7, 2016.² Mr. Paul Clement of Bancroft PLLC will be arguing on behalf of the Treasurer. Unfortunately, Mr. Clement is unavailable for the Court's June 14th and June 16th panel argument settings due to three other scheduled arguments in other matters between June 10th and June 21st.³ In light of the Court's summer calendar, June 6th and June 7th appear to be the only available argument dates that would allow the Court to render a decision with enough time for the Treasurer, if successful, to fund the ESA accounts prior to the school year.

¹ If a child enrolls in a public school before the Court issues a favorable decision, that child will not be able to obtain ESA funds until the next quarter.

² The State is scheduled to argue before the *en banc* Court on June 7, 2016 in *Southern California Edison v. The State of Nevada Department of Taxation*, Case No. 67497. The State is willing to have argument in that case moved to either the July 6 or July 7, 2016 *en banc* argument calendar date to accommodate argument in this case, if necessary. State's counsel has contacted Appellants' counsel in the *Southern California Edison* case, and they have confirmed that they do not oppose moving the argument date in that case to July 6th or 7th.

³ Mr. Clement will also be out of the country between June 23, 2016 and July 11, 2016.

The Treasurer's counsel has conferred with Respondents' counsel and they consent to arguing this case on June 6th or June 7th, if possible.

Nevada's parents and children deserve assurance regarding their educational options for next year. The Eighth Judicial District Court's decision dismissing the *Duncan* case has lifted one shadow of uncertainty. An expeditious resolution of this appeal will remove the final cloud hanging over the ESA program and allow Nevada's families, after months of stress and delay, to plan for their scholastic futures.

Dated: May 20, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on May 20, 2016.

The following participants in the case are registered CM/ECF users will be served by the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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