MEMORANDUM

TO: Nevada Legislature

FROM: Tamerlin Godley, Munger Tolles & Olson, LLP
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DATE: April 26, 2017

RE: Impact of Nevada Supreme Court Ruling on SB 302

I. Introduction

In *Schwartz v. Lopez*, the Nevada Supreme Court permanently struck down SB 302, holding that its use of public school funds to pay for education savings accounts ("ESAs") is unconstitutional. To address any confusion or misinformation regarding the status of SB 302, especially given the Treasurer's recent comments to the Legislature, this memorandum briefly explains the legal challenges brought to SB 302, the Nevada Supreme Court's ruling, and the impact of that ruling on any voucher legislation proposed in the biennium session.

In short, SB 302's fundamental premise—the establishment of a non-targeted, uncapped voucher program paid for by public school funds—has been deemed unconstitutional by the Nevada Supreme Court. It has been permanently enjoined and cannot go forward. After *Lopez*, any proposal for a new voucher program would require an entirely new statute that does not use public school funds or run afoul of the requirement to fund public schools first. Of course, any such proposal would have to meet all constitutional and other legal requirements.

II. Background

A. The Nevada Constitution Guarantees the Right to Public Education Which Must Be Funded Before Any Other Government Function

From the outset, Nevada's founders were concerned with ensuring a sufficiently funded system of public schools. The Nevada Constitution requires the legislature to "provide for a uniform system of common schools . . . ."[1] and to "provide for the[] support and maintenance [of the common schools] by direct legislative appropriation from the general fund."[2] The Nevada

[1] Nev. Const. art. XI, § 2.

[2] Nev. Const. art. XI, § 6.1.

Supreme Court has previously ruled that public education is a "basic constitutional right in Nevada."[3]

In 2006, Nevada citizens reaffirmed and strengthened the State's commitment to the maintenance and support of a uniform system of public schools when they passed the "Education First" ballot initiative to amend Section 6 of the Education Article. The Education First Amendment mandates that the Legislature fund public education first, before any other appropriation in the State budget, in an amount it deems sufficient to operate the public schools:

> During a regular session of the Legislature, *before any other appropriation is enacted* to fund a portion of the state budget for the next ensuing biennium, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools in the State for kindergarten through grade 12 . . . .[4]

B. Education Funding in Nevada

Since 1967, the Legislature has funded the public school system through the "Nevada Plan" and other categorical grants. Under the Nevada Plan, the Legislature determines, for each biennium, the amount of funding necessary, when combined with certain categorical funding outside the Nevada Plan, to operate the public schools. It guarantees that amount to school districts through the Basic Support Guarantee ("BSG"), in addition to the categorical grants.

The BSG is funded by the Legislature through a combination of state monies appropriated to the State's Distributive School Account ("DSA") and local taxes. The DSA is comprised primarily from the appropriations of state revenue made by the Legislature each biennium for the operation of Nevada's public schools pursuant to Article XI, Section 6, of the Nevada Constitution.[5]

C. SB 302

On June 2, 2015, Governor Sandoval signed SB 302. SB 302 authorized the State Treasurer to divert funds from the Legislature's appropriation for the operation of Nevada public schools into private ESAs. Specifically, the law provided that when an ESA was established, the Treasurer was required to deposit into the ESA an amount equal to 90 percent of the statewide average BSG per pupil—$5,139 for the 2015-2016 school year.[6] Children with disabilities and children in households with an income of less than 185 percent of the federal poverty level would have received 100 percent of the BSG—$5,710 for 2015-2016.

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[3] *Guinn v.* Legislature *of Nev.*, 119 Nev. 277, 286, 71 P.3d 1269, 1275 (2003), *overruled on other grounds by Nevadans for Nev. v. Beers*, 122 Nev. 930, 142 P.3d 339 (2006).

[4] Nev. Const. art. XI, § 6.2 (emphasis added).

[5] NRS 387.030.

[6] SB 302 § 8.

The total amount of the BSG transferred to each ESA was to be deducted from the funding appropriated by the Legislature in the 2015-2017 biennium for the operation of the public school district in which the child receiving the ESA resided.[7] Each ESA would have represented a loss to that student's public school district of either $5,139 or $5,710 per year. Because the state only funds a portion of the BSG, SB 302 authorized the deduction from public school budgets of an amount well in excess of the State's share of the BSG for each ESA.

To qualify for an ESA, a student need only spend 100 days in a public school prior to submitting an initial ESA application.[8] Once that requirement was met, a child was entitled to an ESA for the rest of their academic career through twelfth grade.[9] Subsequent regulations eliminated this requirement for kindergarten students and children of veterans, and also allowed for the 100 day requirement to be met by a single class in public school.[10]

III. Legal Challenges to SB 302

On September 19, 2015, parents of children enrolled in the Nevada public schools sued State Treasurer Dan Schwartz to enjoin enforcement of SB 302 as unconstitutional. The parents' suit argued that SB 302 impermissibly used funds that the Legislature had appropriated for public schools and diverted them to private educational purposes. They contended that the law's funding mechanism violated the express language and fundamental purpose of the Education First Amendment—to ensure that public education was funded first, before any other legislative priority, and the funds appropriated were used solely for the operation and maintenance of the public schools. On January 11, 2016, Judge Wilson of the First Judicial District Court entered a preliminary injunction barring implementation of SB 302 as unconstitutional.

On appeal, the Nevada Supreme Court unanimously ruled that SB 302 was unconstitutional because it diverted funds guaranteed to public education in violation of Article 11, Sections 2 and 6 of the Nevada Constitution. The Court's ruling expressly held that the ESA program authorized by the statute before it—SB 302—was unconstitutional.

The Court first found that SB 302 itself did not contain an appropriation to fund its enactment, either explicitly or implicitly, because "SB 302 contains no limit on the number of education savings accounts that can be created or the maximum sum of money that can be utilized to fund the accounts for the biennium."[11] Further, even "[I]f SB 302 contained an appropriation to fund the education savings accounts, it would violate Nevada Constitution Article 11, Section 6(2), requiring that before any other appropriation is enacted the Legislature shall appropriate the money to fund the operation of the public schools."[12]

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[7] SB 302 § 16(1).

[8] SB 302 § 7.

[9] *Id*.

[10] Third Revised Proposed Regulations § 9.7.

[11] *Schwartz v. Lopez*, 132 Nev. Adv. Op. 73, 382 P.3d 886, 891 (2016).

[12] *Id*. at 901.

The Court next rejected the Treasurer's argument that SB 515, which appropriated funds to the operation of the public schools for the ensuing biennium, had also appropriated funds to ESAs. The Court noted that neither SB 515's text nor its legislative history indicated that it was meant to fund ESAs. As such, the Court held that SB 515 did not appropriate money for SB 302, because it "d[id] not, by its terms, set aside funds for the education savings accounts."[13]

Having concluded that SB 302 contained no independent appropriation, the Court then examined whether SB 302 could permissibly divert money that had been appropriated to the public schools. The Court concluded that "the use of any money appropriated in SB 515 for K–12 public education to instead fund the education savings accounts contravene[d] the requirements in Article 11, Section 2 and Section 6 and must be permanently enjoined."[14]

Having permanently enjoined the use of public school funds to support ESAs, and finding no other appropriation, the Court further held that SB 302 was "without an appropriation to support its operation" and violated the Nevada Constitution's provision that "'[n]o money shall be drawn from the treasury but in consequence of appropriations made by law.'"[15][16]

IV. Status of SB 302

Despite recent commentary on the *Lopez* ruling to the contrary, SB 302 is *permanently* enjoined. SB 302's fundamental premise—the establishment of an uncapped voucher program paid for by public school funds—has been deemed unconstitutional by the Nevada Supreme Court. It cannot go forward or be re-authorized in separate legislation.

After *Lopez*, it is clear that any new voucher proposal would require an entirely new statute and one that conformed with the constitutional mandates to fund public schools first and use such appropriations only for the public schools. Eligibility requirements, caps on participation and other limits in such a proposal would, of course, be dependent upon the amount of the separate, non-public school appropriation. Any new voucher proposal would also have to meet all constitutional and other legal requirements.

The Court in *Lopez* was unequivocal that the Legislature must fulfill its obligation to appropriate sufficient funds for the operation of the public schools first and foremost, and those funds cannot be used to fund vouchers. Despite the *Lopez* ruling, Treasurer Schwartz continues to accept applications for a voucher program that has been declared unconstitutional. Not only is this action misleading children and parents who may apply, the Treasurer is also utilizing public funds in administering a program that cannot be implemented.[17] As mentioned above, any new

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[13] *Id.* 382 P.3d at 902.

[14] *Id.*

[15] *Id.* (quoting Nev. Const. Art. 4 § 19 (alteration original)).

[16] A separate suit brought by different parties had objected to SB 302's use of funds for sectarian purposes. A different district court had rejected that argument, which the Nevada Supreme Court also rejected. This was not at issue in the *Lopez v. Schwartz* matter.

[17] *See* https://esa.nevadatreasurer.gov/user/selected.

voucher program will necessarily require eligibility criteria different from those in SB 302 and will cap enrollment so as not to exceed its general fund appropriation.

Thus, the Treasurer is soliciting and accepting "applications" under SB 302 that have no legal effect. We note that the Treasurer's administrative costs for engaging in this activity, including payment of various vendors for website and data hosting, is funded by a loan to his Office from the Interim Finance Committee Contingency Account.[18] That loan was provided as an advance on administrative fees that SB 302 authorized his Office to deduct from ESA accounts. Now that SB 302's funding mechanism has been deemed unconstitutional, the Treasurer cannot collect the administrative fee, raising serious concerns as to how the loan funds for past and current administrative activities will be repaid.

Thank you for the opportunity to clarify this matter.

[18] As Schwartz's Chief of Staff, Grant Hewitt, explained to Governor Sandoval, the chair of Nevada's Board of Examiners, the Treasurer borrowed more than $500,000 from the Interim Finance Committee Contingency Account to implement SB 302. Minutes of meeting of the board of examiners of October 13, 2015, at P. 9.