



February 7, 2017

Senator Joyce Woodhouse
Chair Senate Finance Committee
Nevada Legislature, 79th Session

Re: Schwartz budget request for ESA funds and administrative costs

Dear Senator Woodhouse and Senate Finance committee members,

Senate Bill 302 created “education savings accounts” or universal vouchers. *Universal vouchers* have no restrictions as to who can qualify -- it does not matter whether a child is zoned for a high performing or low performing school; her family is affluent or poor; she is special ed child, or not. SB302’s sole requirement was that a child needed to attend public school for 100 continuous days. Vouchers were to be funded by taking away dollars (90% to 100% of the calculated per pupil public budget allocation, or \$5,100 or \$5,700 per pupil.) from the school district in which an applicant child resided. Proponents claimed that SB302 vouchers would have no overall fiscal impact -- assuming that school districts would save the entire per pupil DSA amount as a student exited public schools -- however, no cost studies were ever performed.

SB302 passed the Legislature along party lines in the last days of 2015 session.

SB302 never went into effect because as soon as it was enacted, Educate Nevada Now, and its pro bono attorneys, as well as ACLU Nevada, set to work researching whether SB302 violated the Nevada Constitution, 1) Education article (ENN’s litigation) or 2) separation of church and state mandate (ACLU-NV litigation). Both ACLU and ENN filed a lawsuit within three months.

1. Secretary Schwartz ploughed ahead incurring significant administrative costs although SB302 was in legal limbo.

SB 302 recognized that the program would require a data system, auditing services, and other expenses, such as personnel and equipment. The Treasurer’s Office submitted a fiscal note detailing that these expenses would cost about \$600,000 over the biennium, about \$285,000 in the first year alone. SB302 allows the Treasurer to charge an administration fee on each voucher to cover expenses, so this fee would have made the program fiscally neutral. SB302 states, “*The State Treasurer may deduct not more than 3 percent of each grant for the administrative costs of implementing the provisions of sections 2 to 15.*” SB 302, § 8(4).

The Treasurer’s fiscal note anticipated approximately \$920,000 in revenue from the 3% administrative fee over the biennium, which would have offset the cost estimate of \$600,000.

The Treasurer began marketing ESAs in regulatory workshops open to the public, beginning in July 2015. As early as the first workshop, Treasurer Schwartz announced an aggressive implementation schedule, opening “pre-application” process, allowing parents to “apply” even prior to public schools opening and a child complying with 100-day public school attendance requirement. NPRI **praised** Treasurer Dan **Schwartz** for his eagerness in implementing Nevada's ESA program. Meanwhile, private school parents decried the statutory requirement that their children had to attend public school (LVRJ, July 17, 2015)

At the August 11, 2015, Board of Examiners meeting, Treasurer Schwartz requested **\$247,500** from the Interim Finance Committee's contingency account to implement what the office called Phase I of the bill's implementation. Fred Cooper, the Chair of Washoe Ed Committee Dems testified:

"State Treasurer's Office has recklessly proposed in draft form [ESA implementation] imposing his own 'enhancements' of the program... I ask [you] .. to respect legislative intent .. do not provide additional funding for an expanded project that was never the intent of the legislature." (Minutes of the Aug 19, 2015 meeting)

The BOE approved the request allowing the Treasurer to present the request to the IFC.

At the August 19, 2015, IFC meeting, the Treasurer's Office requested \$116,213 (amending their initial request) from the IFC contingency account to begin implementation of the program. The request included **\$82,313** for implementation and \$5,650 monthly fee for maintenance from January to June 2016. The Treasurer's Office indicated that it anticipated receiving the 3% administrative fee revenue commencing April of 2016. The Treasurer's Office estimated the annual cost for the voucher program, excluding staffing, was **\$322,000**, which included \$67,000 for i2net, \$100,000 survey costs, random auditing of \$150,000. The office also anticipated hiring five staff members to handle implementation.

These funds were part of the Phase I budget requests to enter into contract with i2net to develop and design an enrollment process and database. The Treasurer's Office sought a waiver from the bidding process to expedite the process, claiming that they wanted to begin the process of creating a fully automated system to reduce the cost of staffing.

Assembly members expressed concern over the Treasurer's proposal:

- Rushing with applications when regulations were not completed was unfair to families, especially if a mistake was made in the process and they would have to resubmit;
- i2net's business license in Nevada had been permanently revoked, so they were not confident in the contract;
- The emergency waiver of bidding process is only for actual emergencies, and there was concern over how fast paced program going into effect. A member questioned why there was no bidding for i2net and BenefitWallet.

The Treasurer's Office stated that the purchasing division said it was appropriate to ask for a waiver given the January 1, 2016 deadline, and that the BenefitWallet proposal was a sole source waiver, which is a different statute than an emergency waiver.

The Treasurer's Office indicated that the no-bid contracts would go before the BOE in September 2015.

On August 27, 2015, the ACLU filed suit against the program based on the Establishment Clause of the Nevada Constitution in *Duncan v. State of Nevada* in Las Vegas. On September 9, 2015, Educate Nevada Now filed a lawsuit, *Lopez v. Schwartz*, based on the Education Article of the Constitution in Carson City. *Lopez* ultimately knocked down SB302.

After ACLU lawsuit was filed, on August 31, 2015, the Treasurer's Office posted a request for proposal for IT services for the voucher program, with a deadline of September 2015. The RFP was for services the Office had initially sought waivers for.

On September 15, 2015, a prominent attorney, Andy Wolf wrote, *"my initial reaction is that the two lawsuits present significant and very serious legal challenges to Nevada's school voucher program... the stakes couldn't be higher."*

Yet, at the October 13, 2015, IFC meeting, the Treasurer's Office requested \$128,555 for temporary contracts with three vendors for implementation of Phase II, pending approval of funds from IFC. The request included funds for temporary contract employees through March 2016 and FY 16 to process payments to qualified entities. The request included:

- 1) A no-bid contract with Benefit Wallet in Nov BOE meeting for \$128,555.
- 2) Hiring three temporary employees.
- 3) Hiring Neil Weisman (Interactive Ideas) to build database and enrollment process and user interface.

The Treasurer's Chief of Staff Hewitt described the contracts, *"...Benefit Wallet that is the payment. You have the Neil Weisman contract which is the database and user interface and then you have the State Treasurer's Office which will do the enrollment process and verify. So, those are kind of the three legs and how they all work together."*

The Treasurer's Office acknowledged the two lawsuits. Rather than exercise prudence and slow down an unauthorized "pre-application" process and implement SB302 only after having certainty about its legality, Schwartz ploughed ahead. The office's only nod to the serious litigation going on in state courts was that the five employees would be "temporary," until the lawsuits were worked through.

In total, the Treasurer's Chief of Staff Hewitt stated they would be requesting in total about a half million dollars, but he described the request as a **loan** to begin implementing the program. Hewitt acknowledged that there was a pending injunction and lawsuits:

*"I would have to say and **assume that there is the risk** there that if the courts, at some point, offer permanent injunction or say the law violates the constitution and we're no longer allowed to implement the program, **the State Treasurer's Office does not have the revenue sources on its own to repay.**"*

On October 22, 2015, ENN filed a motion for a preliminary injunction in *Lopez v Schwartz*, and Judge Wilson would eventually grant it on January 11, 2016, halting the ESA program. All through the injunction, Secretary Schwartz's website continue to take pre-applications. Warnings of legal fight were scant and hard to find. Most parents would not have been aware that ESA was under serious legal threat.

At the November 2015 BOE meeting, the Treasurer's office discussed the contracts for the voucher program, specifically discussing BenefitWallet's \$150,000 contract for claims processing.

2. ESA universal vouchers are ruled unconstitutional, NOW WHO PAYS?

It is not clear exactly how much money has been “loaned” to the Treasurer’s Office, but it is over \$150,000 and may be as high as \$600,000.

Lopez plaintiffs prevailed in the Nevada Supreme Court on September 29, 2017. Consider what the Nevada Supreme Court found and held:

The basis of *Lopez* challenge was that the Education article of the Nevada Constitution that empowers the Legislature to create a system of public (“common”) schools by any “suitable” means. Under the leadership of Governor Gibbons, Nevadans added the Education First Amendment, which orders the Legislature to fund first public education, and then other needs. In addition, Education First clause prohibits the Legislature from taking funds from the public education budget, once it is settled, for other budget uses, thus creating a “lockbox” for public education, and deterring any political grandstanding that would threaten public education. The Court found that the Legislature had passed SB302 not knowing the budget impact of SB302 to public education. By failing to explicitly appropriate funds to SB302 and account for the impact on the public education budget, the Legislature had broken the public education “lockbox” and violated the Education First Amendment.

Nevertheless, Secretary Schwartz claimed that only the funding mechanism to universal vouchers was faulty. However, consider that *universal* vouchers means EVERYONE qualifies, all 460,000 children in public schools, all of the 30,000 kids in private schools and approximately 5,000 children who are home schooled. The amount of the “funding mechanism” that needs filling is \$2.5 billion, about what Nevada spends on public education. So the claim that ESAs are legal “but for” the small detail of funding mechanism cannot be sustained by budget realities. Moreover, as the discussion in Section 1 shows, administrative costs are substantial. So ESAs are NOT budget-neutral.

For the last year and a half, Secretary Schwartz has continued to incur ESA administrative expenses, all the while knowing that these expenses may fall solely on the taxpayer, and that 3% fee that made the bill budget-neutral would be unfunded, because it would have come from the DSA that no longer was a viable option under *Lopez*.

3. Governor’s Budget throws out a life-line to Secretary Schwartz’s unauthorized “loan.”

In the Governor’s proposed 2017-19 budget there is a request for \$60 million to fund ESA vouchers. There is also a separate budget account (BA1097) to cover “four new staff and associated operating costs .. not to exceed 3% of grants made. Administrative fees will also start to pay back IFC Contingency and Statutory Contingency Fund allocation previously made to implement and provide legal defense of the program.” (Governor’s Proposal Highlights, p. 9)

HOW MUCH in administrative expenses have already been incurred by Secretary Schwartz? On page 311 of the Governor’s budget, BA 1097 allocations total close to \$600,000, but it is not clear from the Governor’s budget how much of that was an unauthorized “loan” for the period covering 2015-17.

Even after the lower court issued an order in January 2017 clarifying that the district court interpreted the ESA funding mechanism as unconstitutional, Secretary Schwartz has continued to take “pre-applications” for ESA UNIVERSAL VOUCHERS. The Treasurer continues to incur unfunded administrative ESA costs. In the press,



Secretary Schwartz claimed that 8,000 parents “pre-applied” ESA vouchers; over 6,000 parents “pre-applied” after lawsuits were filed.

We ask the committee to take a careful look at the appropriateness of now covering Secretary Schwartz’s “loan” for administrative costs for “pre-applicants,” and the way that parents were never informed on the Secretary’s website that ESA program was under serious legal challenge. In addition, Secretary Schwartz refused our organization’s FOIA requests to examine pre-applicants’ zip code data throughout 2015-17.

Respectfully submitted,



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