

SUPREME COURT OF THE STATE OF NEW MEXICO

Moses v. Skandera

9 N.M. 87 (2015) · No. S-1-SC-34974 · Decided December 17, 2015

SUMMARY

The New Mexico Supreme Court considers whether the state's instructional-material loan program may provide books to students attending private schools. The Court holds that Article XII, Section 3 of the New Mexico Constitution prohibits using funds appropriated, levied, or collected for educational purposes to support private schools, whether secular or sectarian. The Court reverses the Court of Appeals and the district court and withdraws and substitutes its prior opinion.

OPINION

CHAVEZ, J.

1 IN THE SUPREME COURT OF THE STATE OF NEW MEXICO 2 Opinion
Number:_____ 3 Filing Date:_____ 4 NO. S-1-SC-34974 5 CATHY
MOSES and PAUL F. 6 WEINBAUM, 7 Plaintiffs-Petitioners, 8 v. 9 HANNA SKANDERA,
Designate 10 Secretary of Education, New Mexico 11 Public Education Department, 12
Defendant-Respondent, 13 and 14 ALBUQUERQUE ACADEMY, et al., 15
Defendants/Intervenors-Respondents.

16 ORIGINAL PROCEEDING ON CERTIORARI 17 Sarah M. Singleton, District Judge 18
Graeser & McQueen, LLC 19 Christopher L. Graeser 20 Santa Fe, NM 21 Frank Susman 22 Santa
Fe, NM 23 for Petitioners 1 New Mexico Public Education Department 2 Albert V. Gonzales,
Deputy General Counsel 3 Santa Fe, NM 4 Sutin, Thayer & Browne, P.C. 5 Susan M. Hapka 6
Albuquerque, NM 7 for Respondent 8 Modrall, Sperling, Roehl, Harris & Sisk, P.A.

9 R.E. Thompson 10 Emil J. Kiehne 11 Jennifer G. Anderson 12 Sarah M. Stevenson 13
Albuquerque, NM 14 Becket Fund for Religious Liberty 15 Eric S. Baxter 16 Washington, DC 17
for Intervenors-Respondents 1 OPINION 2 CHÁVEZ, Justice. 3 {1} Intervenors' motion for
rehearing is denied.

However, our prior opinion filed 4 on November 12, 2015 is withdrawn and the following is
substituted in its place. 5 {2} Since the adoption of the New Mexico Constitution on January 21,
1911, New 6 Mexico has had a constitutional responsibility to provide a free public education for
7 all children of school age. N.M. Const. art. XII, § 1.

However, “no part of the 8 proceeds arising from the sale or disposal of any lands granted to the
state by 9 congress, or any other funds appropriated, levied or collected for educational 10

purposes, shall be used for the support of any sectarian, denominational or private 11 school, college or university.” N.M. Const. art. XII, § 3 (emphasis added).

The New 12 Mexico Department of Public Education’s (Department) Instructional Material 13 Bureau purchases non-religious instructional materials selected by public or private 14 schools, with funds appropriated by the Legislature and earmarked for the schools, 15 and lends these materials to qualified students who attend public or private schools. 16 NMSA 1978, § 22-15-7 (2010); see also NMSA 1978, § 22-8-34 (2001).

The 17 question we address in this case is whether the provision of books to students who 18 attend private schools violates Article XII, Section 3. We conclude that the New 19 Mexico Constitutional Convention was not willing to navigate the unclear line 1 between secular and sectarian education, or the unclear line between direct and 2 indirect support to other than public schools.

Indeed, in 1969 the voters rejected a 3 proposed constitutional amendment that would have required New Mexico to provide 4 free textbooks to all New Mexico school children. See Proposed New Mexico 5 Constitution (as adopted by the Constitutional Convention of 1969) 45 (October 20, 6 1969).

We hold that the plain meaning and history of Article XII, Section 3 forbids 7 the provision of books for use by students attending private schools, whether such 8 schools are secular or sectarian. 9 I. The Instructional Material Law is funded by appropriations 10 {3} The Instructional Material Law (IML), NMSA 1978, §§ 22-15-1 to -14 (1967, 11 as amended through 2011), grants the Department’s Instructional Material Bureau 12 statutory authority to lend approved instructional materials¹ to “[a]ny qualified 13 student... attending a public school, a state institution or a private school approved 14 by the department in any grade from first through the twelfth grade of instruction 15....” Section 22-15-7(A) (emphasis added). “Instructional material shall be 16 1 “ ‘[I]nstructional material’ means school textbooks and other educational 17 media that are used as the basis for instruction, including combinations of textbooks, 18 learning kits, supplementary material and electronic media.” Section 22-15-2(C); see 19 also § 22-15-3(A) (“The ‘instructional material bureau’ is created within the 20 department of education [public education department].” (alteration in original)).

2 1 distributed to school districts, state institutions and private schools as agents for the 2 benefit of students entitled to the free use of the instructional material.” Section 22- 3 15-7(B) (emphasis added). In turn, “[a]ny school district, state institution or private 4 school as agent receiving instructional material pursuant to the Instructional Material 5 Law is responsible for distribution of the instructional material for use by eligible 6 students and for the safekeeping of the instructional material.” Section 22-15-7(C) 7 (emphasis added).

Students or their parents are “responsible for the loss, damage or 8 destruction of instructional material while the instructional material is in the 9 possession of the student.” Section 22-15-10(B). 10 {4} The Department is required to publish a “multiple list” of state-approved 11 instructional materials. Section 22-15-8(A), (B); § 22-15-2(D) (“ ‘[M]ultiple list’ 12 means a written list of those instructional materials approved by the department.”).

13 Using the multiple list of state-approved instructional materials, “each school district, 14 state institution or private school as agent may select instructional material for the use 15 of its students....” Section 22-15-8(B). “At least ten percent of instructional 16 material on the multiple list concerning language arts and social studies shall contain 17 material that is relevant to the cultures, languages, history and experiences of multi- 18 ethnic students.” Section 22-15-8(A).

Moreover, “[t]he Department shall ensure that 3 1 parents and other community members are involved in the adoption process at the 2 state level.” Id. 3 {5} The IML is funded through a non-reverting “instructional material fund” 4 established by the State Treasurer “consist[ing] of appropriations, gifts, grants, 5 donations and any other money credited to the fund.” Section 22-15-5(A).

In 1931, 6 the Legislature enacted the State School Building, Text Book and Rural Aid Fund to 7 purchase instructional materials with unappropriated federal funds obtained through 8 the Mineral Lands Leasing Act (MLLA), 30 U.S.C. §§ 181 to 287 (1920, as amended 9 through 2012). N.M. Laws 1931, ch. 138, § 2 (“There is hereby appropriated for the 10 purposes of this fund, annually, all of the balance, not otherwise appropriated, in the 11 [MLLA] Fund....”).

Today the Department’s Instructional Material Bureau 12 continues to purchase instructional materials for New Mexico students using federal 13 MLLA funds. See § 22-8-34(A) (“Except for an annual appropriation to the 14 instructional material fund and to the bureau of geology and mineral resources of the 15 New Mexico institute of mining and technology... all other money received by the 16 state pursuant to the provisions of the federal [MLLA], shall be distributed to the 17 public school fund.” (citation omitted)).

18 {6} Each public and private school is allocated a percentage of money available in 4 1 the IML fund based on the number of students enrolled in their school. Section 22- 2 15-9(A). “Private schools may expend up to fifty percent of their instructional 3 material funds for items that are not on the multiple list; provided that no funds shall 4 be expended for religious, sectarian or nonsecular materials....” Section 22-15-9(C) 5 (emphasis added).

Such instructional material purchases must be identified and 6 purchased through the Department’s in-state depository. Section 22-15-9(C), (E); see 7 also § 22-15-4(D). “Any balance remaining in an instructional material account of 8 a private school at the end of the fiscal year

shall remain available for reimbursement 9 by the department for instructional material purchases in subsequent years.” Section 10 22-15-9(F).

The Department’s Instructional Material Bureau has the authority to 11 “withdraw or withhold the privilege of participating in the free use of instructional 12 material in case of any violation of or noncompliance with the provisions of the 13 Instructional Material Law or any rules adopted pursuant to that law.” Section 22-15- 14 4(C). 15 {7} In summary, the Legislature appropriates instructional materials funds and 16 private schools are allocated a percentage of the funds based on the number of 17 students enrolled in their schools.

Private schools select instructional materials from 18 a multiple list, but they may spend up to 50 percent of their instructional materials 5 1 funds on items that are not on the multiple list, as long as the material is not religious 2 in content. Any money remaining in the private schools instructional material fund 3 may be carried over to subsequent years.

Once the materials are purchased, the 4 materials are loaned to the students. Hereafter in this opinion we will refer to this 5 process as a “schoolbook loan program” for ease of reference. 6 II. Procedural history 7 {8} Plaintiffs-Petitioners Cathy Moses and Paul F. Weinbaum (Petitioners) are New 8 Mexico residents and have been taxpayers for at least the past five years.

Petitioners 9 currently have one or more children enrolled in elementary and/or secondary public 10 schools in New Mexico. As New Mexico residents and taxpayers, Petitioners assert 11 that the IML violates their constitutional rights because it supposedly forces them to 12 “support[] and aid[] the religious dictates of others with whom they disagree”; 13 appropriates or donates public funds to private parties; and supports “sectarian, 14 denominational or private school[s].” 15 {9} Petitioners filed a verified complaint for declaratory judgment in the district 16 court against Defendant-Respondent Hanna Skandera (Respondent), Secretary of the 17 Department, seeking a declaration that the State issuing instructional materials to 18 students attending private schools is unconstitutional because doing so supports 6 1 sectarian, denominational, or private schools in violation of New Mexico Constitution 2 Article XII, Section 3; forces them as taxpayers to support the religious dictates of 3 others in violation of New Mexico Constitution Article II, Section 11; and 4 appropriates or donates public funds to private parties in violation of New Mexico 5 Constitution Article IX, Section 14.

Petitioners also relied on *Zellers v. Huff*, 1951- 6 NMSC-072, 55 N.M. 501, 236 P.2d 949 to support their allegation that the 7 schoolbook loan program is unconstitutional. 8 {10} Petitioners filed a motion for summary judgment, and Respondent and 9 Albuquerque Academy, et al. (Intervenors) each filed a memorandum in opposition. 10 The district court ruled that Zellers did not control and the provisions of the IML 11 challenged by Petitioners did not violate the New Mexico Constitution.

The district 12 court then entered its order denying Petitioners’ motion for summary judgment and 13 granted summary judgment to Respondent. 14 {11} Petitioners appealed to the Court of Appeals, which affirmed the district court’s 15 grant of summary judgment to Respondent. *Moses v. Skandera*, 2015-NMCA-036, 16 ¶¶ 3, 54, 346 P.3d 396, cert. granted, 2015-NMCERT-001.

We granted Petitioners’ 17 petition for writ of certiorari to consider the following issues: (1) whether this 18 Court’s decision in *Zellers* constituted dicta; (2) whether the IML violates Article XII, 7 1 Section 3 of the New Mexico Constitution; (3) whether the IML violates Article IV, 2 Section 31 of the New Mexico Constitution; (4) whether the IML violates Article IX, 3 Section 14 of the New Mexico Constitution; and (5) whether the IML violates Article 4 II, Section 11 of the New Mexico Constitution.

5 {12} We conclude that the schoolbook loan program violates Article XII, Section 6 3, and therefore we do not address the remaining issues. We reverse both the Court 7 of Appeals and the district court. 8 III. The IML violates Article XII, Section 3 of the New Mexico Constitution 9 {13} Article XII, Section 3 provides: 10 The schools, colleges, universities and other educational institutions 11 provided for by this constitution shall forever remain under the 12 exclusive control of the state, and no part of the proceeds arising from 13 the sale or disposal of any lands granted to the state by congress, or any 14 other funds appropriated, levied or collected for educational purposes, 15 shall be used for the support of any sectarian, denominational or private 16 school, college or university.

17 (Emphasis added.) 18 {14} Whether the schoolbook loan program violates the New Mexico Constitution 19 is a question of law that we review de novo. *Tri-State Generation & Transmission 20 Ass’n v. D’Antonio*, 2012-NMSC-039, ¶ 11, 289 P.3d 1232. “It is well settled that 21 there is a presumption of the validity and regularity of legislative enactments.” 8 1 *Bounds v. State ex rel.*

D’Antonio, 2013-NMSC-037, ¶ 11, 306 P.3d 457 (internal 2 quotation marks and citations omitted). Petitioners bear the burden of proof to 3 overcome the presumption of the validity and regularity of the IML. *Id.* We will 4 uphold the constitutionality of the IML unless we are satisfied beyond all reasonable 5 doubt that the Legislature exceeded the bounds of the New Mexico Constitution in 6 enacting the IML.

Id. 7 {15} “[T]he rules of statutory construction apply equally to constitutional 8 construction.” *State v. Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d 830 (internal quotation 9 marks and citation omitted). “[W]e examine the plain language of the statute as well 10 as the context in which it was promulgated, including the history of the statute and 11 the object and purpose the Legislature sought to accomplish.” *State v. Nick R.*, 2009- 12 NMSC-050, ¶ 11, 147 N.M.

182, 218 P.3d 868 (internal quotation marks and citation 13 omitted). 14 {16} The Court of Appeals interpreted Article XII, Section 3 to provide protection 15 only against the establishment

of religion, similar to the Establishment Clause of the 16 First Amendment to the United States Constitution and the Establishment Clause of 17 Article II, Section 11 of the New Mexico Constitution.

Moses, 2015-NMCA-036, ¶ 18 22. Accordingly, the Court of Appeals relied primarily on First Amendment cases to 9 1 hold that the IML did not violate Article XII, Section 3. Moses, 2015-NMCA-036, 2 ¶ 34 (citing Elane Photography, LLC v. Willock, 2012-NMCA-086, ¶ 33, 284 P.3d 3 428). 4 {17} We might agree with the Court of Appeals if the language of Article XII, 5 Section 3 only prohibited the use of any public funds for the support of sectarian or 6 denominational schools.

The plain language of Article XII, Section 3 is more 7 restrictive, and it therefore stands as a constitutional protection separate from the 8 Establishment Clause as illustrated by the difference in language in each provision. 9 {18} The Establishment Clause provides, in relevant part, that “Congress shall make 10 no law respecting an establishment of religion....” U.S. Const. amend.

I. In 11 contrast, Article XII, Section 3 provides: 12 The schools, colleges, universities and other educational institutions 13 provided for by this constitution shall forever remain under the 14 exclusive control of the state, and no part of the proceeds arising from 15 the sale or disposal of any lands granted to the state by congress, or any 16 other funds appropriated, levied or collected for educational purposes, 17 shall be used for the support of any sectarian, denominational or private 18 school, college or university.

19 (Emphasis added.) The plain language of Article XII, Section 3 expressly restricts 20 the use of public funds to other than sectarian schools, and therefore our analysis 21 cannot be restricted by cases that analyze the Establishment Clause. 10 1 {19} The historical context in which Article XII, Section 3 was adopted helps 2 explain why this constitutional provision was not a recodification of the 3 Establishment Clause of the New Mexico Constitution.

During the early nineteenth 4 century, public education was provided in public schools known as “common 5 schools.” See Mark Edward DeForrest, An Overview and Evaluation of State Blaine 6 Amendments: Origins, Scope, and First Amendment Concerns, 26 Harv. J.L. & Pub. 7 Pol’y 551, 558 (2003). “The common school was designed to function as an 8 instrument for the acculturation of immigrant populations, rendering them good 9 productive citizens in the image of the ruling majority.” Joseph P. Viteritti, Blaine’s 10 Wake: School Choice, The First Amendment, and State Constitutional Law, 21 Harv.

11 J.L. & Pub. Pol’y 657, 668 (1998). “Protestant ministers and lay people were in the 12 forefront of the public-school crusade and took a proprietary interest in the institution 13 they had helped to build. They assumed a congruence of purpose between the 14 common school and the Protestant churches.” Id. (internal quotation marks and 15 citation omitted). “In many cases, it was

difficult to distinguish between public and 16 private institutions because they were often housed in the same building.” Id. at 664.

17 State statutes at the time authorized Bible readings in public schools and state judges 18 generally refused to recognize the Bible as a sectarian book. G. Alan Tarr, *The New 11 1 Judicial Federalism in Perspective*, 72 *Notre Dame L. Rev.* 1097, 1103-04 nn.22-23 2 (citing *Miss. Const.* of 1890, art. 3, § 18); *Hackett v. Brooksville Graded Sch. Dist.*, 3 87 S.W.

792 (Ky. 1905); *Donahoe v. Richards*, 38 Me. 379 (1854)); Viteritti, *supra*, 4 at 667-68. 5 {20} By the middle of the nineteenth century, the Catholic immigrant population 6 rose significantly. Viteritti, *supra*, at 669.

The influx of Catholic immigrants created 7 a demand for Catholic education, and consequently Catholics and other minority 8 religionists challenged the Protestant influence in the common schools. Id. at 667-68; 9 Steven K. Green, *The Blaine Amendment Reconsidered*, 36 *Am. J. Legal Hist.* 38, 44 10 (1992). By the 1870s, Catholic church leaders began to lobby their state legislatures 11 for public funds to develop their own educational system.

Viteritti, *supra*, at 668; 12 Green, *supra*, at 44. This rise in Catholic influence created an obvious tension 13 between the Protestant majority and the mostly Catholic minority on the issue of 14 education, see Viteritti, *supra*, at 670-72, because the Protestant-run “common school 15 was designed to function as an instrument for the acculturation of immigrant 16 populations, rendering them good productive citizens in the image of the ruling 17 majority.” Id. at 668.

18 {21} In response, “[o]pposition to aid to ‘sectarian’ schools acquired prominence in 12 1 the 1870’s....” *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). “[I]t was an open 2 secret that ‘sectarian’ was code for ‘Catholic.’ ” Id. Common school leaders 3 successfully lobbied their state legislatures to adopt amendments prohibiting the use 4 of state funds to support sectarian schools by the mid-to-late nineteenth century.

See, 5 e.g., *Colo. Const.* art. IX, § 7; *Del. Const.* art. X, § 3; *N.D. Const.* art. VIII, §§ 1, 5; 6 *Ohio Const.* art. VI, § 2. “In September of 1875, President Ulysses S. Grant 7 responded to mounting political pressure when he publicly vowed to ‘[e]ncourage 8 free schools, and resolve that not one dollar be appropriated to support any sectarian 9 schools.’ ” Viteritti, *supra*, at 670 (alteration in original).

President Grant called on 10 Congress to draft a proposed constitutional amendment that would deny public 11 support to religious institutions. Id. 12 {22} Congressman James G. Blaine of Maine agreed to sponsor an amendment to 13 the First Amendment that fulfilled President Grant’s request. See id. at 670-71. 14 Congressman Blaine’s proposed constitutional amendment read: 15 No State shall make any law respecting an establishment of religion, or 16 prohibiting the free exercise thereof; and no money raised by taxation 17 in any State for the support of public

schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects and denominations.

Green, *supra*, at 38 n.2 (quoting 4 Cong. Rec. 5453 (1876) (quotation marks omitted)). Congressman Blaine believed that his proposed constitutional amendment would correct a “constitutional defect” because at the time, the Establishment Clause had not been interpreted to apply to the states under the Fourteenth Amendment. Viteritti, *supra*, at 671 n.66 (citing *Permoli v. Municipality No. 1 of New Orleans*, 44 U.S. (3 How.)

589, 609 (1845) (“The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws....”). Despite the fact that Congressman Blaine’s proposed amendment failed to pass in the United States Senate, several states amended their constitutions to include a ban on funding of sectarian education.

Viteritti, *supra*, at 672. “By century’s end [congressional] leaders had come to understand that federal aid could be used as a wedge for manipulating public policy.... Particularly vulnerable to the Republican agenda were those new territories seeking statehood.” *Id.* at 672-73. “As a matter of course, [new territories seeking statehood] would be required to incorporate Blaine-like provisions into their new constitutions in order to receive congressional approval.” *Id.* at 673.

{24} Congress granted New Mexico statehood on the explicit condition that it adopt a similar “Blaine” provision in the New Mexico Constitution. See Enabling Act for New Mexico of June 20, 1910, 36 Stat. 557, ch. 310, § 8 (Enabling Act).² In the Enabling Act, “Congress set forth the terms by which New Mexico would be admitted as a state.” *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 6, 130 N.M.

368, 24 P.3d 803. In an election held on January 21, 1911 to vote on the New Mexico Constitution adopted by the Constitutional Convention of 1910, New Mexico voters ratified all of the terms of the Enabling Act in Article 21, Section 9 of the 1911 New Mexico Constitution. See *Constitutions of New Mexico 1910-34*. Article 21, Section 8 of the 1911 New Mexico Constitution provides that “[t]his ordinance is irrevocable without the consent of the United States and the people of this State, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of Congress.” *Id.*; Enabling Act § 2; see also N.M.

Const. art. 21, §§ 1-11 (incorporating all Enabling Act measures into the New Mexico Constitution and making the Enabling Act irrevocable without the consent of Congress and the citizens of New Mexico). Because the Enabling Act was Section 8 of the Enabling Act

explicitly requires that 16 [t]he schools, colleges and universities provided for in this act shall 17 forever remain under the exclusive control of the said state, and no part 18 of the proceeds arising from the sale or disposal of any lands granted 19 herein for educational purposes shall be used for the support of any 20 sectarian or denominational school, college or university.

15 1 adopted during New Mexico's 1910 Constitutional Convention, N.M. Const. art. 21, 2 §§ 1-11, it functions as a "fundamental law to the same extent as if it had been 3 directly incorporated into the Constitution." State ex rel. King v. Lyons, 2011- 4 NMSC-004, ¶ 3, 149 N.M. 330, 248 P.3d 878 (internal quotation marks and citation 5 omitted). 6 {25} Sections 6 through 9 of the Enabling Act pertain to specified public lands that 7 were granted to New Mexico to be held in trust "for the support of common schools." 8 Enabling Act § 6.

To the extent that lands "are mineral, or have been sold, reserved 9 or otherwise appropriated or reserved by or under the authority of any act of 10 congress," they are to be treated as all other public lands specified under Sections 6 11 through 9 of the Enabling Act. Enabling Act § 6. 12 Congress contemplated that any change... to the use of the proceeds of 13 the lands granted to the state should be effectuated by amendment to the 14 Constitution, and... any change in the use and application of the 15 proceeds of these land grants may... be done by way of a constitutional 16 amendment.

17 Lyons, 2011-NMSC-004, ¶ 4 (first and third omissions in original) (internal quotation 18 marks and citation omitted). 19 {26} Grants of land were made to New Mexico specifically for, among other things, 20 "university purposes,... schools and asylums for the deaf, dumb and the blind,... 16 1 normal schools,... agricultural and mechanical colleges,... school of mines, [and] 2 military institutes." Enabling Act § 7.

Lands granted to New Mexico and any 3 proceeds derived from them are to be held in trust. Enabling Act § 10, ¶ 1. If the 4 lands or money so derived are used for something other than the named purposes, it 5 is a breach of the Enabling Act. Enabling Act § 10, ¶ 2.

The Enabling Act "is 6 binding and enforceable and the legislature is without power to divert the fund for 7 another purpose than that expressed." State ex rel. Interstate Stream Comm'n v. 8 Reynolds, 1963-NMSC-023, ¶ 22, 71 N.M. 389, 378 P.2d 622. 9 {27} Specifically relevant to our inquiry is Section 8 of the Enabling Act, which may 10 be characterized as a Blaine provision because of the time of its adoption and because 11 it precludes the use of public funds for the support of sectarian or denominational 12 schools.

13 [T]he schools, colleges, and universities provided for in this act shall 14 forever remain under the exclusive control of the said state, and no part 15 of the proceeds arising from the sale or disposal of any lands granted 16 herein for educational purposes shall be used for the support of any 17 sectarian or denominational school, college or university.

18 Id. This language is nearly identical to that of Article XII, Section 3, with two critical 19 differences. The Enabling Act prohibits the use of “proceeds arising from the sale or 20 disposal of any lands granted [in the Enabling Act] for educational purposes” to 17 1 support sectarian schools. Enabling Act § 8.

In contrast, the drafters of the New 2 Mexico Constitution restricted the use of proceeds from any lands granted to New 3 Mexico by Congress, not only those granted in the Enabling Act, and they also 4 restricted the use of any funds appropriated, levied, or collected for educational 5 purposes for the support of not only sectarian schools, but also the much broader 6 category of private schools.

Through these changes, the Constitutional Convention 7 decided to provide for additional restrictions on public funding of education beyond 8 the restrictions required by Section 8 of the Enabling Act. See Highlights of the 9 August 15, 1969, Session of the 1969 Constitutional Convention Submitted August 10 14, 1969 at 4.

The members of the Constitutional Convention chose to play it 11 safe—by broadening the provision to reach all private schools, they avoided drawing 12 a line between secular and sectarian education. In addition, they were not willing to 13 limit the funds that would be restricted from use for private schools—they went well 14 beyond “proceeds arising from the sale or disposal of any lands granted” under 15 Section 8 of the Enabling Act and chose to restrict the use of “any other funds 16 appropriated, levied or collected for educational purposes.” N.M.

Const. art. XII, § 17 3. 18 {28} The MLLA appropriates funds to New Mexico “to be used by such State and 18 1 its subdivisions, as the legislature of the State may direct..., for (i) planning, (ii) 2 construction and maintenance of public facilities, and (iii) provision of public 3 service.” 30 U.S.C. § 191(a). MLLA funds are not specifically allocated for schools 4 or school books.

The Legislature, which has the constitutional responsibility to 5 appropriate funds, see New Mexico Constitution Article IV, Section 30, has 6 discretion to appropriate MLLA funds for any purpose consistent with the broad 7 purposes described in the MLLA. Intervenor contend that the provision of school 8 books for children attending both public and private schools constitutes a “public 9 service.” Although we agree with this broad philosophical statement, the provision 10 of school books is an educational purpose.

Article XII, Section 3 controls the 11 Legislature’s discretion when money is appropriated for educational purposes by 12 prohibiting the appropriation of educational funds to private schools. 13 {29} Intervenor contend that the MLLA preempts any state constitutional 14 restriction on the Legislature’s discretion with respect to MLLA funds as long as the 15 Legislature appropriates the funds consistent with the broad purposes of the MLLA.

16 In support of their argument, Intervenor's cite to *State ex rel. Sego v. Kirkpatrick*, 17 1974-NMSC-059, 86 N.M. 359, 524 P.2d 975 and *Lawrence County v. Lead- 18 Deadwood School District No. 40-1*, 469 U.S. 256 (1985). These cases are 19 1 inapposite.

The Sego Court held that the Legislature does not have the power to 2 control the manner and extent of the use or expenditure of funds received by 3 institutions of higher learning from Congress or from private donations. 1974- 4 NMSC-059, ¶¶ 48-51.

In *Lawrence*, the United States Supreme Court held that a 5 federal statute specifically providing local governments with discretion in distributing 6 federal funds preempted a state statute attempting to control how local governments 7 allocated such funds. 469 U.S. at 261-68. Stated simply, Congress appropriated the 8 funds to local governments, not to the State; therefore, the State did not have 9 authority to dictate how local governments spent the money directly allocated to them 10 by Congress.

Similarly, when Congress appropriates money to New Mexico 11 institutions of higher learning, under this Court's holding in *Sego*, the Legislature 12 lacks authority to direct the use of such funds. The MLLA does not specifically 13 appropriate funds to or for school purposes. Simply because the MLLA gives 14 discretion to our Legislature does not mean that the Legislature is at liberty to ignore 15 state constitutional limitations on its discretion.

The MLLA has neither expressly nor 16 impliedly preempted the application of Article XII, Section 3 because restricting 17 funds appropriated for educational purposes to public schools is not incompatible 18 with the purposes announced in the MLLA.

Thus, Intervenor's argument that funds 20 1 from the MLLA that are used for the Instructional Material Fund are federal funds 2 which are "not subject to state constitutional limitations" is without merit. 3 {30} The Court of Appeals held that the direct recipients of the IML financial 4 program are the parents of the children, and therefore the benefit to private schools 5 is not direct enough to violate Article XII, Section 3.

Moses, 2015-NMCA-036, ¶ 40. 6 We can not agree that Article XII, Section 3 only prohibits direct support to private 7 schools. The broad language of this provision and the history of its adoption and the 8 efforts to amend it evince a clear intent to restrict both direct and indirect support to 9 sectarian, denominational, or private schools, colleges, or universities.

Our 10 interpretation is supported by the failed attempt in 1969 of the delegates to the New 11 Mexico Constitutional Convention to amend the precursor of Article XII, Section 3. 12 Report of the Constitutional Revision Commission 158 (1967). Using the Alaska 13 Constitution as a template, the Constitutional Revision Commission proposed 14 revising the precursor of Article XII, Section 3 to read "[t]he public schools and 15 institutions of the state shall be free from sectarian control.

No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.” New Mexico Legislative Council Service, Workbook of Selected Constitutions Prepared For Delegates to the New Mexico Constitutional Convention 1969 (July 15, 1969) (emphasis added). This proposed revision would not have been necessary if a reasonable interpretation of Article XII, Section 3 as written only precluded direct support of sectarian and private schools.

However, the proposed revision was never submitted to the voters for ratification in December 1969. See generally Proposed New Mexico Constitution (as adopted by the New Mexico Constitutional Convention of 1969) (October 20, 1969). Instead, the Constitutional Convention proposed a constitutional amendment that would address the crux of the question: may public funds be used to provide free textbooks to all students, including those who attend private schools?

See *id.* at 45. The constitutional amendment submitted to the voters for adoption read: “The legislature shall provide for a system of free textbooks for use by school children of this state. The system shall be administered by the state board of education.” *Id.* The Legislative Council Service warned the Constitutional Convention that “[t]his [provision] violates the Enabling Act and conflicts with other provisions of the proposed constitution.” New Mexico Legislative Council Service, *A New Constitution for New Mexico?*

An Analysis of Major Changes and Arguments For and Against (October 31, 1969). Specifically, the Legislative Council Service was concerned that “[t]his provision requires the state to indirectly aid and support sectarian and denominational schools.” *Id.* Notwithstanding the Legislative Council Service’s concerns, the Constitutional Convention submitted this constitutional amendment to the voters for ratification, which the voters rejected.

See Proposed New Mexico Constitution at 45; N.M. Const. art. XII, § 3. The history of Congressman Blaine’s attempt to amend the United States Constitution coupled with the New Mexico Enabling Act demonstrates why Article XII, Section 3 cannot be interpreted under jurisprudence analyzing the Establishment Clause. Article XII, Section 3 must be interpreted consistent with cases analyzing similar Blaine amendments under state constitutions.

For example, in *California Teachers Ass’n v. Riles*, the California Supreme Court addressed a challenge to a California law authorizing the Superintendent of Public Instruction to lend to students attending non-profit, non-public schools textbooks used in the public schools without charge. See generally 632 P.2d 953 (Cal. 1981). Article IX, Section 8 of the California Constitution provided that “[n]o public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools....” Similar to Article XII, Section 3 of the New Mexico

Constitution, this constitutional provision incorporated 18 a Blaine-like amendment for sectarian and denominational schools, but it also 23 1 extended the restriction to non-public schools.

Additionally, Article XVI, Section 5 2 of the California Constitution provided: 3 Neither the Legislature, nor any county, city and county, township, 4 school district, or other municipal corporation, shall ever make an 5 appropriation, or pay from any public fund whatever, or grant anything 6 to or in aid of any religious sect, church, creed, or sectarian purpose, or 7 help to support or sustain any school, college, university, hospital, or 8 other institution controlled by any religious creed, church, or sectarian 9 denomination whatever....

10 {33} In California Teachers Ass’n, the California Supreme Court was critical of the 11 “child benefit theory” in light of its state constitutional provision because the 12 “doctrine may be used to justify any type of aid to sectarian schools[;]... practically 13 every proper expenditure for school purposes aids the child.” 632 P.2d at 957, 960 14 (internal quotation marks and citation omitted).

The California Supreme Court 15 reasoned that “the application of the ‘child benefit’ theory in this circumstance 16 ‘ignores substance for form, reality for rhetoric, and would lead to total 17 circumvention of the principles of our Constitution.’ ” Id. at 963 (emphasis added) 18 (citation omitted).

The California Supreme Court noted that the broad language of 19 Article IX, Section 8 and Article XVI, Section 5 of the California Constitution “do 20 not confine their prohibition against financing sectarian schools in whole or in part 21 to support for their religious teaching function, as distinguished from secular 24 1 instruction.” California Teachers Ass’n, 632 P.2d at 964 (emphasis added).

As a 2 result, a full majority of the California Supreme Court concluded that the textbook 3 program could not survive state constitutional scrutiny, even if the benefit to the 4 schools was only incidental. See id. at 961-62 n.12. 5 {34} In Gaffney v. State Department of Education, the Nebraska Supreme Court 6 addressed the constitutionality of a textbook lending program under Article VII, 7 Section 11 of the Nebraska Constitution: 8 Neither the state Legislature nor any county, city or other public 9 corporation, shall ever make any appropriation from any public fund, 10 or grant any public land in aid of any sectarian or denominational 11 school or college, or any educational institution which is not exclusively 12 owned and controlled by the state or a governmental subdivision 13 thereof.

14 220 N.W.2d 550, 553 (Neb. 1974) (quoting Neb. Const. art. VII, § 11 (emphasis in 15 original) (internal quotation marks omitted)). The Nebraska Supreme Court relied on 16 the broad language of Article VII, Section 11 of the Nebraska Constitution to hold 17 that the textbook loan program unconstitutionally furnished aid to private sectarian 18 schools. Gaffney, 220 N.W.2d at 557.

The Nebraska Supreme Court concluded that the fact that the loan of textbooks was to the parents and students was not determinative because the program “lends strength and support to the school and, although indirectly, lends strength and support to the sponsoring sectarian institution.” *Id.* 2 {35} The Supreme Courts of Oregon, Massachusetts, and Missouri interpreted 3 similar Blaine-like state constitutional provisions and determined that even indirect 4 aid to the sectarian, denominational, or private schools violates the constitutional 5 provision.

See *Dickman v. Sch. Dist. No. 62C, Or. City, of Clackamas Cty.*, 366 P.2d 6 533, 543 (Or. 1961) (en banc) (holding that “the aid is extended to the pupil only as 7 a member of the school” the pupil attends, and although the pupil may share in the 8 indirect benefit, “such aid is an asset to” the sectarian or private school); see also 9 *Bloom v. Sch. Comm. of Springfield*, 379 N.E.2d 578, 580 (Mass.

1978) (same); 10 *Paster v. Tussey*, 512 S.W.2d 97, 104 (Mo. 1974) (en banc) (same). 11 {36} South Dakota and Hawaii have reached similar conclusions under their state 12 constitutions. This is important because like New Mexico, these states were required 13 to adopt Blaine-like amendments into their respective state constitutions for their 14 admission into the Union.

For example, in *In re Certification of a Question of Law* 15 from the United States District Court, District of South Dakota, Southern Division, 16 the South Dakota Supreme Court addressed a textbook lending program in which the 17 defendants raised arguments similar to those raised by Respondent and Intervenor 18 in this case. See generally 372 N.W.2d 113 (S.D.

1985). The South Dakota Supreme 26 1 Court noted that it was charged “with the responsibility of interpreting provisions of 2 [its] state constitution that are more restrictive than the Establishment Clause of the 3 United States Constitution.” *Id.* at 116, 118 (“[T]hose provisions of our constitution 4... are not mere reiterations of the Establishment Clause of the United States 5 Constitution but are more restrictive as prohibiting aid in every form.” (internal 6 quotation marks and citation omitted)).

In ultimately holding that the textbook loan 7 program was unconstitutional, the South Dakota Supreme Court specifically rejected 8 the defendants’ analogy between the textbook lending program “and the lending of 9 books by the public libraries in the state,” because any benefit to sectarian or private 10 schools violated its state constitutional provision.

Id. at 117. 11 {37} In addition, Hawaii, which was the last state admitted into the Union, has a 12 constitutional provision similar to New Mexico’s. Article X, Section 1 of the Hawaii 13 Constitution provides: “[N]or shall public funds be appropriated for the support or 14 benefit of any sectarian or nonsectarian private educational institution....” Like the 15 New Mexico Constitution, the Hawaii Constitution is more restrictive than the federal 16 Establishment Clause.

In *Spears v. Honda*, the Hawaii Supreme Court addressed the constitutionality of a statute requiring state-subsidized bus transportation for all school children, including sectarian and private school students. 449 P.2d 130, 132, 27 1 135, 135 n.5 (Haw. 1968).

The Court attributed great significance to the history of what was then Article IX, Section 1 of the Hawaii Constitution, now codified as Hawaii Constitution Article X, Section 1. *Spears*, 449 P.2d at 134-36. The Court's review of the constitutional history of Article IX, Section 1 revealed that the prohibition on using public funds to benefit private schools in Hawaii was intended to narrow the gap between the quality of education provided by private schools and public schools.

Spears, 449 P.2d at 132-33, 135 n.5. {38} The *Spears* Court concluded that it was important to understand that, unlike the Establishment Clause of the United States Constitution, what was then Article IX, Section 1 of the Hawaii Constitution was not exclusively about religion. 449 P.2d at 11 137-38.

The Court found that (1) the bus subsidy built up, strengthened and made successful the nonpublic schools; (2) the subsidy induced attendance at nonpublic schools, where the school children are exposed to a curriculum that, in many cases, if not generally, promotes the special interests and biases of the nonpublic group that controls the school; and (3) to the extent that the State paid out funds to carriers owned by the nonpublic schools or agents thereof, the State gave tangible support or benefit to such schools.

Id. (internal quotation marks omitted). The *Spears* Court ultimately held that the bus subsidy violated Article IX, Section 1, because it constituted an appropriation of public funds to non-public schools. *Id.* at 139. It is worth noting that the *Spears* Court suggested that the Legislature "return to the people to ask them to decide whether their State Constitution should be amended to grant the Legislature the power that it seeks, in this case, the power to provide 'support or benefit' to nonpublic schools." *Id.* {39} Article XII, Section 3 of the New Mexico Constitution prohibits the use of any part of the proceeds from the sale or disposal of any land granted to the state by Congress or any other funds appropriated, levied, or collected for educational purposes for sectarian, denominational schools.

The framers of our Constitution chose to further restrict the use of public funds by prohibiting their use for the support of private schools. As a result, a public school under the control of the State can directly receive funds, while a private school not under the exclusive control of the State can not receive either direct or indirect support.

{40} It is clear that private schools in New Mexico have control of what instructional materials will be purchased with their allocation of instructional material funds. The fact that students who attend private schools, just like students who attend public schools, are only loaned these instructional materials is not material to the analysis.

Private schools benefit because they do not have to buy instructional materials with money they obtain by tuition or donations and they can divert such money to other uses in their schools. Consistent with the rules of statutory construction and the majority of jurisdictions interpreting similar state constitutional provisions, the IML violates Article XII, Section 3 because it provides support to private schools.

IV. Conclusion {41} We reverse the Court of Appeals and the district court and determine that the IML violates New Mexico Constitution Article XII, Section 3. {42} IT IS SO ORDERED.

Sitting by designation 1 _____ 2 CHARLES W. DANIELS, Justice 31

10 EDWARD L. CHÁVEZ, Justice 11 WE CONCUR: 12
13 BARBARA J. VIGIL, Chief Justice 14
15 PETRA JIMENEZ MAES, Justice 16
17 RICHARD C. BOSSON, Justice, Retired 18