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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

RUBY DUNCAN an individual; RABBI MEL HECHT, an individual; HOWARD WATTS III, an individual; LEORA OLIVAS, an individual; ADAM BERGER, an individual,

Plaintiffs,

vs.

STATE OF NEVADA, ex rel. the Office of the State Treasurer of Nevada and the Nevada Department of Education; DAN SCHWARTZ, Nevada State Treasurer, in his official capacity; STEVE CANAVERO, Interim Superintendent of Public Instruction, in his official capacity,

Defendants.

Case No. A-15-723703-C

Dept. No. XX



**ORDER ON DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM**

This matter concerning Defendant STATE OF NEVADA's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim, filed October 19, 2015, joined by Parent-Intervenors on October 26, 2015, came on for hearing December 10, 2015 and February 11 and March 2, 2016, before Department XX of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE ERIC JOHNSON presiding: Plaintiffs RUBY DUNCAN, RABBI MEL HECHT, HOWARD WATTS, III, LOERA OLIVAS and ADAM BERGER appeared by and through their attorneys, AMY M. ROSE, ESQ. of the AMERICAN CIVIL LIBERTIES UNION OF NEVADA, NITIN SUBHEDAR, ESQ. and SAMUEL EDWARDS, ESQ. of the law firm, COVINGTON & BURLING, and GREGORY M. LIPPER, ESQ., Senior Litigation Counsel for AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; Defendant STATE

OF NEVADA appeared by and through its attorney, LAWRENCE VANDYKE, ESQ, Deputy Attorney General; and Parent-Intervenors AIMEE HAIRR, AURORA ESPINOZA, ELIZABETH ROBBINS, LARA ALLEN, JEFFREY SMITH and TRINA SMITH appeared by and through their attorneys, TIMOTHY D. KELLER, ESQ. and KEITH E. DIGGS, ESQ. of the INSTITUTE FOR JUSTICE. Having reviewed the papers and pleadings on file herein, including but not limited to the parties' supplemental briefs filed March 11 and 18, 2016, respectively, and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law.

## I. Introduction

THIS MATTER involves a challenge to Nevada's new education savings account ("ESA") program. Plaintiffs Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, Leora Olivas, and Adam Berger (collectively, "Plaintiffs") claim the ESA program violates the Nevada Constitution, specifically Article XI, section 2, requiring the Legislature to provide for a uniform public school system, and Article XI, section 10, prohibiting use of public funds for sectarian purposes. This matter currently comes before this Court on Defendants' Motion to Dismiss Plaintiffs' Complaint. After accepting as true the factual allegations of the Complaint for which Plaintiffs have standing to assert, and determining the scope of Article XI, sections 2 and 10, this Court finds Plaintiffs have not pled facts to demonstrate the ESA program is unconstitutional and to entitle them to declaratory relief. Therefore, this Court dismisses Plaintiff's Complaint challenging Senate Bill 302 ("SB 302") on constitutional grounds.

As a preliminary matter, the issues before this Court do not include the public policy merits of the ESA program. Whether Nevada's ESA program is wise educational or public policy is not a consideration germane to the narrow issues of Nevada constitutional law that are before this Court. In the absence of a constitutional violation, the desirability and efficacy of the

ESA program are matters to be resolved through the political/legislative process.

## II. Standard for Determining a Motion to Dismiss a Complaint

The Court has considered Defendant State of Nevada's Motion to Dismiss, joined by Parent-Intervenors. The Court is "bound to accept all the factual allegations in the complaint as true," *Marcoz v. Summa Corp.*, 106 Nev. 737, 739 (1990), and must "construe[] the pleading liberally, drawing every inference in favor of the nonmoving party." *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 629 (2009). However, in determining the factual allegations of the complaint on which a plaintiff relies to bring his or her causes of action, the Court is not bound to accept factual allegations for which the plaintiff does not have standing to assert to establish a cause of action. *See Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986); *Blanding v. City of Las Vegas*, 52 Nev. 52, 280 P. 644, 650 (1929). Once the plaintiff's pled facts are assumed true, the Court must then "determine whether or not the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief." *Edgar v. Wagner*, 101 Nev. 226, 227 (1985). In making this determination, this Court must decide what the law requires to be made out to establish Plaintiffs' causes of action. If disputed by the parties, what the law means is not a factual question but a legal one the Court must determine. In making this decision, the Court does not need to presume Plaintiffs' interpretation of the law is correct for purposes of determining the Motion to Dismiss. In the instant case, in deciding Defendants' motion, this Court must assume Plaintiffs' factual allegations in their Complaint are true, and then resolve legal issues of statutory and constitutional construction to determine if the facts as alleged make out Plaintiffs' causes of action in their Complaint. "A claim should not be dismissed . . . unless it appears to a certainty that the plaintiff is not entitled to relief under any set of facts which could be proved in support of the claim." *Hale v. Burkhardt*, 104 Nev. 632, 636 (1988). However, "[t]o survive dismissal, a complaint must contain some set of facts,

which, if true, would entitle [the plaintiff] to relief," *In re Amerco Derivative Litig.*, 127 Nev. Adv. Op. 17, 252 P.3d 681, 692 (2011) (quotation marks omitted).

## III. Factual Summary of Plaintiff's Complaint and Nevada ESA Program

This Court invited the parties to submit proposed statements of facts to the Court for its consideration in entering any order on Defendants' Motion to Dismiss or Plaintiffs' Motion for Preliminary Injunction. All parties provided proposed statements of facts. The Court has reviewed the proposed statements, Plaintiffs' Complaint and the statute and legislative history of the ESA program. Based on this review, the Court finds the following facts to have been alleged by the Plaintiffs or established by the record for purposes of deciding Defendants' Motion to Dismiss.[1]

### A. Nevada's Education Savings Account Program

Senate Bill 302, adopted and approved by the Nevada Legislature and Governor Brian Sandoval in 2015, created Nevada's ESA program. In passing SB 302, the Legislature sought to exercise its constitutional authority under Article XI, section 1 to encourage education by "all suitable means." The purpose of the ESA program is to advance the education of all students throughout the State by offering Nevadans a broader array of educational opportunities. Under SB 302, Nevada parents may enter into agreements with the State Treasurer to open ESAs for their children. SB 302 §§ 7.1, 7.2. Any school age child who has attended a Nevada public or charter school for at least 100 consecutive school days is eligible to participate in the program. SB 302 § 7.1. The ESA program is far more extensive and will be far more encompassing than any other ESA or voucher program in the country. A parent who wishes to choose an alternative to a public school can apply for an ESA and a percentage of what the State funds for his or her child's public education will be deposited into an account for that child. Once the ESA is

[1] In view of this Court's decision to grant Defendants' Motion to Dismiss, the Court makes no ruling on Plaintiffs' Motion for Preliminary Injunction.

opened, "[t]he child will receive a grant, in the form of money deposited" into the account. SB 302 § 7.1(b).

The money deposited into each student's account is drawn from public funds, specifically the State of Nevada's Distributive School Account (DSA), which is "financed by legislative appropriations from the State General Fund, a tax on out-of-state sales, a slot machine tax, mineral land lease income, and interest from investments of the State Permanent School Fund." These funds may appropriately be categorized as public funds. Pls.' Compl. ¶ 16, 18–19. Children from families with a household income less than 185% of the federal poverty level are eligible to receive 100% of the statewide average basic per-pupil support rate. All other children participating in the ESA program will receive 90% of the statewide average basic per-pupil support rate.

All funds deposited into ESAs established on behalf of children who reside in a given county must be deducted from the State's DSA apportionment that would ordinarily be disbursed to that county. There is no limit on how many students may participate in the ESA program. Theoretically, there is no limit on the total amount of public funds that can be diverted from public to private schools and other educational providers under the ESA program.

Parents may only use the money deposited in ESA accounts for educational purposes and those purposes alone. SB 302 § 9. SB 302 enumerates eleven specific educational purposes on which ESA grants may be spent. These purposes include tuition, textbooks, tutoring, and special education. SB 302, § 9.1(a)-(k). Regulatory safeguards exist to ensure that ESA money is not used by parents or schools in ways inconsistent with SB 302's educational purpose. For instance, the Treasurer has power to freeze or dissolve an account if he determines there has been "substantial misuse" of the account. SB 302, § 10.3. Each participating entity accepting payments from an ESA must provide receipts for those payments to the parents. *Id.* at § 11(4).

The Treasurer can also terminate participation by an entity that, for any reason, has "failed to provide any educational services required by law to a child receiving instruction from the entity." *Id.* at § 11.5(b).

### B. Non-Religious and Religious Education Services are Eligible to Participate in the ESA Program

ESA grants may only be used at participating entities or eligible institutions, including private schools, colleges or universities within the Nevada System of Higher Education. SB 302 § 3.5. The ESA program allows both religious and non-religious private schools to apply to serve as participating entities. Pls.' Compl. ¶ 16. The majority of private schools that have applied to participate in the program are religious. In some counties, the only private schools eligible to participate are religious. As a result, there is no question ESA funds will be used to pay tuition at private religious schools. Parents' use of ESA money for educational purposes must be documented. *Id.* at § 11(4).

Many religious private schools have religious mission statements and instruction, and promote particular religious beliefs. As long as participating private schools do not transgress other state or federal anti-discrimination laws that may be applicable, participating private religious schools may take religion and other characteristics into account in their admissions process and hiring practices. Pls.' Compl. ¶ 6, 28, 69-79; *see also* SB 302 § 14. While those facilities applying for an exemption under NRS § 389.211 must attest they "provide[] equivalent instruction of the kind and amount approved by the State Board of Education," private religious schools that will receive ESA funds are not required to follow the cubiculum guidelines required in public schools as the State accepts as "equivalent" curricula which includes religious doctrine. There are no prohibitions on how private religious schools may use ESA program funds; SB 302 states "nothing in the provisions of [this Act] shall be deemed to limit the independence or

autonomy of a participating entity." SB 302 § 14, Pls.' Compl. ¶ 27. Once parents use their participating students' ESA funds to pay for an approved educational expense, such as tuition or textbooks, there is no prohibition on how participating entities may use those funds—so long as the participating entity provides the educational product or service for which it was paid. Pls.' Compl. ¶ 27, 38, 80; *see also* SB 302 § 1 1(5)(b). Private religious schools may comingle, and, consequently, spend ESA funds on religious activities entirely unrelated to students' education. Compl. ¶91 27, 38, 84. Private religious schools that receive ESA funds will not be required to meet the same educational standards as public schools and are not subject to the same oversight by the State.

### C. Plaintiffs' Factual Allegations for Which They Do Not Have Standing to Assert

The above-stated facts are those allegations from the Complaint which the Court has determined Plaintiffs' have standing to assert in making out causes of action challenging the constitutionality of the ESA program. Plaintiffs have alleged additional facts of which they have no personal involvement and interest, and are conjectural at this point in time at best. Consequently, these allegations do not establish actual controversies involving the Plaintiffs, and involve allegations, which, if proved true, should be brought by individuals who have actually suffered the alleged injuries. This Court finds Plaintiffs do not have standing to challenge the ESA program's constitutionality on these facts. Specifically, Plaintiffs allege private schools receiving ESA funds will illegally discriminate in both admissions and hiring on the basis of religion and other circumstances and the State has no rule, regulation, or procedure in place to prevent such discrimination by private religious schools participating in the ESA program. Plaintiffs further assert some religious private schools will require students and/or their parents to sign statements of faith and comply with religious codes of conduct and will exclude students

and/or charge more for tuition based on the students' faith, or even the faith of their parents. Plaintiffs further allege private schools receiving ESA funds will not be required to comply with Nevada's Public Accommodations Law.[2] *See* NRS § 651 et seq.

In addition, Plaintiffs contend, because there is no limit on how many students may participate in the ESA program and on the total amount of public funds that can be diverted from public to private schools, the ESA program will irreparably harm the public schools by diverting funds from them and bolstering a system of competing private and religious schools. Plaintiffs contend there will be a drastic curtailment of funding to the public schools that is greater than the otherwise-occurring year-to-year variation in State funding. Plaintiffs' argue the loss of funding to the public school system as a result of the ESA program will negatively impact public school education, opportunities, and services, including the forced lay off of teachers at public schools. Plaintiffs predict the students who remain in the public schools will be disproportionally students of lower income, students with disabilities, and students who speak English as a second language, all of whom are more expensive to educate than the average pupil.

## IV. Procedural History of Lawsuit

On August 27, 2015, Plaintiffs filed their Complaint against the State of Nevada requesting injunctive relief and declaratory relief. On September 17, 2015, Aimee Hairr, Aurora Espinoza, Elizabeth Robbins, Lara Allen, and Jeffery and Trina Smith ("Parent-Intervenors") filed a Motion to Intervene as Defendants, which this Court granted. On October 19, 2015, the

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[2] Parent-Intervenors dispute Plaintiffs' contention Nevada's Public Accommodation Law will not apply to religion affiliated schools in the ESA program, arguing in Nevada, "[a]ny nursery, private school or university or other place of education" is considered a "[p]lace of public accommodation." NRS 651.050(3)(k). Additionally, Nevada law states "[a]ll persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation, without discrimination or segregation on the ground of race, color, religion, national origin, disability, sexual orientation, sex, gender identity or expression." NRS 651.070. Nevada law also lays out the penalties, both civil and criminal, for violating the right to equal enjoyment of places of public accommodation. Because this Court finds Plaintiffs do not have standing to challenge the ESA program on these specific applied factual allegations, the Court does not reach the scope of the Public Accommodation Law under the ESA statute in any of the conjectural situations Plaintiffs suggest.

State of Nevada filed a Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim. On October 26, 2015, Parent-Intervenors filed a joinder to Defendants' Motion to Dismiss. Plaintiffs filed their Opposition to Defendants' Motion to Dismiss on November 10, 2015. Defendant and Parent-Intervenors' Replies followed on December 3, 2015.

During the course of this litigation concerning Defendants' Motion to Dismiss, numerous *amici curiae* briefs were received in support of both sides, including the Foundation for Excellence in Education,[3] the Friedman Foundation for Educational Choice, Inc.,[4] and the Nevada State Education Association and the National Education Association.[5] Shortly after filing of Defendants' Motion to Dismiss, the State of Nevada also filed a Motion for an Expedited Decision Argument and Decision, requesting a hearing on the Motion to Dismiss for November 25, 2015. This Court set oral argument for the day requested, but later received a request from Plaintiffs' Counsel (and later a Stipulation from all parties) to continue the hearing for approximately a month, or until December 10, 2015. This Court heard oral argument on Defendants' Motion to Dismiss on December 10, 2015.

In the interim of the briefing for the Motion to Dismiss, Plaintiffs filed a Motion for Preliminary Injunction, seeking to enjoin disbursement of the ESA funds, as well as a Motion for Expedited Discovery in support of the Motion for Preliminary Injunction. The State filed an *ex parte* Motion to Extend Time to Respond to Plaintiffs' Motion for Preliminary Injunction and Motion for Expedited Discovery. Discovery Commissioner Bonnie Bulla ultimately held a hearing regarding Plaintiffs' Motion for Expedited Discovery on December 18, 2015 and made various discovery rulings surrounding the Motion for Preliminary Injunction, which she recommended this Court adopt. Both the State of Nevada and Parent-Intervenors filed their

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[3] Filed on October 26, 2015 in support of Defendants' Motion to Dismiss.
[4] Filed on October 26, 2015 in support of Defendants' Motion to Dismiss.
[5] Filed on December 22, 2015, in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss.

Oppositions to Plaintiffs' Motion for Preliminary Injunction on December 31, 2016.

Plaintiffs partially objected to Commissioner Bulla's Report and Recommendations on January 12, 2016, seeking additional interrogatories and other discovery against the Parent-Intervenors and third-parties, and challenging Commissioner Bulla's denial of all but one of Plaintiffs' Requests for Production. Both the State of Nevada and Parent-Intervenors opposed Plaintiffs' additional discovery requests.

These discovery disputes led this Court to set a status check for February 11, 2016. At that hearing, the Court ordered the parties to submit an outline of factual and discovery issues regarding the status of the case in light of the First Judicial District Court decision granting a preliminary injunction in a separate lawsuit challenging the constitutionally of the ESA statute.[6] After review of the supplemental briefings, the parties returned for a status check hearing on March 2, 2016, where the Court attempted to flush out the remaining issues necessary to make a final decision as to Plaintiffs' causes of action. After concluding the parties could not reach an agreement on the essential facts of the case to allow a final decision, this Court ordered the parties to provide proposed statements of facts for it to consider adopting for either an order on Defendant's Motion to Dismiss or Plaintiffs' Motion for Preliminary Injunction. The Court also requested additional briefing as to any jurisdiction issues concerning Plaintiffs' Motion for Preliminary Injunction in view of the First Judicial District Court's preliminary injunction. Final briefings from the parties were filed by March 18, 2016, at which time this Court took the matter under advisement.

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[6] The First Judicial District Court granted the injunction finding the Plaintiffs were likely to prevail in establishing the ESA statute as unconstitutional under Article XI, section 6 of the Nevada Constitution. The Court found Article XI, section 6 requires the Legislature to appropriate funds which must only be used for the operation of the public schools, but the ESA program would divert "some amount of general funds appropriated to fund...the public schools . . . to fund" the ESA program, including private school tuition and other uses. Plaintiffs in their instant complaint made no claim under Article XI, section 6. This Court invited Plaintiffs to amend their complaint to include such a claim. Plaintiffs did not amend their complaint and this Court makes no findings as to the constitutionality of the ESA program under Article XI, section 6.

## V. Plaintiffs' Standing to Challenge the ESA Statute Under Article XI, Sections 2 and 10

Plaintiffs Ruby Duncan, Rabbi Mel Hecht, Howard Watts III, and Leora Olivas all reside in Southern Nevada and pay taxes in Nevada. Plaintiff Adam Berger is also a resident and taxpayer in Southern Nevada as well as a special-education teacher at a public school and the parent of a public-school student. Pls.' Compl. ¶ 12. Plaintiffs assert they have standing to challenge SB 302 because they object to the use of their tax dollars being disbursed through the ESA program to private schools, including religious ones, to pay for the enrollment of students in those academic facilities. Compl. ¶ 8--12. The Nevada Supreme Court has yet to rule whether taxpayer standing is available in Nevada. *See Pojunis v. Denis*, 2014 WL 7188221, at *1 (Nev. Dec. 16, 2014) (unpublished opinion finding plaintiff lacked standing "even assuming that taxpayer standing is available in Nevada"). Plaintiff Berger also contends he has standing because the ESA program "would divert massive sums from the State's Distributive School Account, depriving school districts of a key source of funding, and thereby depleting the resources at the school that Plaintiff Berger' s son attends and the one where he teaches."

Defendant State of Nevada, joined by Parent/Interveners, challenges the Court's jurisdiction to hear the instant matter, contending Plaintiffs lack standing to bring this action. Defendants argue Nevada law does not recognize taxpayer standing, citing primarily *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) and *Blanding v. City of Las Vegas*, 52 Nev. 52, 280 P. 644, 650 (1929); *cf. Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 630, 218 P.3d 847, 850 (2009) (finding statutory standing). Additionally, Defendants argue in cases where plaintiffs seek declaratory relief or raise constitutional issues, the Nevada Supreme Court requires them "to meet increased jurisdictional standing requirements." *Stockmeier v. Nevada Dep't of Corr. Psych. Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225-26 (2006).

In *Stockmeier*, the Nevada Supreme Court stated it has a "long history of requiring an actual justiciable controversy as a predicate to judicial relief." 122 Nev. at 393, 135 P.3d at 225. The high court explained further that in matters such as the instant case, where plaintiffs seek a statute to be declared unconstitutional, it has "required plaintiffs to meet increased jurisdictional standing requirements." *Id.* at 393, 135 P.3d at 225–26. Presumably, in making these statements, the Nevada Supreme Court was referencing the federal judiciary's "case or controversy" requirement for standing. *Id.* at 392, 135 P.3d at 225. Under this standard, "the federal judiciary cannot declare the rights of individuals or 'determine the constitutionality of legislative or executive acts' without an 'actual controversy' between the parties." *Id.* at 392–93, 135 P.3d at 225 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992). However, the Nevada Supreme Court specifically rejected that state's courts are bound by the federal "case or controversy" requirements, noting standing is "'a self-imposed rule of restraint.'" *Id.* at 393, 135 P.3d at 225. The high court approved language allowing state courts to implement standing requirements in "'favor of just and expeditious determination on the ultimate merits.'" *Id.* (quoting 59 Am.Jur.2d *Parties* § 36, at 441–42 (2002)). The Nevada Supreme Court ultimately found the plaintiff had standing to bring an action seeking declaratory and injunctive relief concerning the "open meetings" law because the statute specifically provided for any person deprived a right under the statute to bring an action. *Id.* at 394-95, 135 P.3d at 226-27.

In *Doe v. Bryan*, the Nevada Supreme Court referenced the federal standing requirement of an actual controversy and again noted our State's "long history of requiring an actual justiciable controversy as a predicate to judicial relief." 102 Nev. 523, 525,728 P.2d 443, 444 (1986). Moreover, the high Court stated "litigated matters must present an existing controversy, not merely the prospect of a future problem." *Id.* To define a justiciable controversy, the Nevada Supreme Court in *Doe v. Bryan* relied on *Kress v. Corey,* quoting: "(1) there must exist a

justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination." *Id.* (quoting *Kress v. Corey,* 65 Nev. 1, 26, 189 P.2d 352, 364 (1948)). The Nevada Supreme Court also noted a party could not bring an action when the damage is merely apprehended or feared. *Id.* (citing *Kress,* 65 Nev. at 28-29, 189 P.2d at 365).

In saying it generally requires an "actual justiciable controversy" for standing in particular in cases with a constitutional law dimension, the Nevada Supreme Court has indicated it generally looks to requirements of injury, causation, and redressability. *See Lujan v. Defenders of Wildlife, 504 U.S. at 560–61.* In *Lujan v. Defenders of Wildlife* the United States Supreme Court stated it has generally refrained from finding standing to challenge the constitutionality of legislation without an "actual controversy" between the parties. *Id.* The Court has generally refrained from finding standing to determine the constitutionality of legislation without an "actual controversy" between the parties. In *Blanding*, which both parties cite in support of their positions, the Nevada Supreme Court declined to find standing for taxpayers to maintain a suit to enjoin the municipality from closing a public road. 52 Nev. 52, 280 P. at 651. There, the plaintiffs alleged they would be harmed in various ways by the diversion of traffic the closure would cause. The high Court found a plaintiff did not have standing to challenge a municipality's act "where he has not sustained or is not threatened with any injury peculiar to himself as distinguished from the public generally." *Id.* at 651. Further, it concluded that to "'entitle a property owner to injunctive relief against the vacation of a street or highway he must show that he will suffer a special or peculiar injury, and not merely such inconvenience as is cast

upon all other persons of that neighborhood.'" *Id.* at 651 (quoting 13 R. C. L. at 75-76).

In discussing plaintiffs' assertion of taxpayer standing, the Nevada Supreme Court in *Blanding* quoted 28 Cyc. pp. 1736, 1737, which provided a resident or taxpayer may sue to enjoin an unauthorized or illegal act of a municipality if the plaintiff has sustained a special injury different from that of the public. *Id.* at 650. Additionally, the Court quoted with approval:

> And where it (the act of the municipality) is prejudicial to the rights of taxpayers, as such, as involving the levy of tax, creation of a municipal debt, or appropriation or expenditure of public funds, or in any way tending to increase the burden of taxation, the great weight of authority is that if such action be illegal or unauthorized, taxpayers may sue to restrain it, without showing any special injury different from that sustained by other taxpayers.

*Id.*

The high court found plaintiffs in their complaint failed to allege anything sufficient to suggest the municipality misused its power in vacating the street, engaged in fraud or abused its discretionary powers. Consequently, the Nevada Supreme Court held plaintiffs lacked standing as "the appellants are not specially injured in regard to their special vocations as alleged, and it does not otherwise appear that the act of the municipality vacating the present street and establishing the proposed street is unlawful or beyond its chartered powers." *Id.*

The Nevada Supreme Court has rarely allowed parties to pursue litigation on behalf of the public's interest as taxpayers and to preserve public funds. In *State Bar of Nev. v. List,* 97 Nev. 367, 368, 632 P.2d 341, 342 (1981), the high Court held a private citizen could seek a writ of mandamus to compel a public officer to perform an act in view of statutory language authorizing the writ where "the law especially enjoins as a duty resulting from an office." NRS 34.160. The Court found "[m]andamus will therefore lie to compel the [public officer] to perform [a] duty at the suit of any citizen instituted to enforce compliance with the law." *Id.* Likewise, in *Citizens for Cold Springs v. City of Reno,* the Court found standing existed for citizens to challenge a land annexation under NRS 268.668. 125 Nev. at 629-32, 218 P.3d 849-

52. There, like in *Stockmeier*, the Nevada Supreme Court noted the statute provided that "any person ... claiming to be adversely affected" by an annexation can challenge it. *Id.*

In *City of Las Vegas v. Cragin Indus. Inc.,* 86 Nev. 933, 935–37, 939–40, 478 P.2d 585, 587–88, 589 (1970), the Nevada Supreme Court found standing for taxpayers to challenge the placement of above-ground power lines within their municipal taxing district. The high court declined to consider defendant's position that plaintiffs had to show special irreparable injury different in kind from that sustained by the general public to maintain an action challenging a particular use of a public street. Instead, the Supreme Court found the municipality's own ordinance required underground circuits, and, consequently, the power company and the city had entered into an agreement authorizing them to jointly violate the ordinance. The Nevada Supreme Court concluded this agreement was null, void, and against public policy. Under these facts, it found the ordinance was clear as to its limitations and could be changed only by a new enactment. The high court held any citizen of the municipality would have had standing to seek "injunctive relief, inasmuch as the relief sought is the abatement of unauthorized conduct. It was the only just, speedy and effective remedy available to the respondent." 86 Nev. at 939–40, 478 P.2d at 589.

What *Blanding* and these cases suggest is to meet the standing requirement, a plaintiff generally must present an actual case or controversy to the court demonstrating a sustained or threatened injury peculiar to himself as distinguished from the public generally. Only in rare instances, such as when a taxpayer has a particularly close interest in a matter involving illegal conduct of a municipality, or when a statute specifically creates standing, has the Nevada Supreme Court granted standing for a party to maintain an action as a taxpayer or citizen. Additionally, in discussing standing due to the illegal conduct of a municipality, the high court also indicated allowing standing was appropriate even if the plaintiff did not suffer a particular

injury because there was no one else who could present an actual case or controversy. *See City of Las Vegas v. Cragin Indus. ., Inc.,* 86 Nev. 933, 935–37, 939–40, 478 P.2d 585, 587–88, 589 (1970).

Defendant contends the decisions where the Nevada Supreme Court has allowed taxpayer standing to challenge illegal conduct of municipalities are limited to municipalities. Defendant argues allowing taxpayer standing in such instances may be appropriate because of the close interest a taxpayer has to the expenditure of funds where he or she lives. Defendant suggests the holdings of *Doe* and *Stockmeier* indicate such standing is not appropriate when considering a challenge at the state level to a legislative statute and its constitutionality. Defendant asserts the close interest that may exist between a taxpayer and the municipality does not exist when considering the taxpayer's status on the state level. This Court is not persuaded the principles which allow taxpayers to bring an action against a municipality never have any application at the state level. While the immediate impact of a city's illegal decision may justify a taxpayer bringing suit in certain circumstances, the immediate impact of a Legislature's alleged illegal action in certain circumstances may also justify taxpayer standing. With some municipalities involving hundreds of thousands of residents, limiting taxpayer standing to illegal actions of municipalities and not to those of the State Legislature cannot be justified or distinguished.

The question to this Court then is whether Plaintiffs, in challenging the State's transfer of public funds into parents' ESAs under Article XI, sections 2 and 10, have a sufficiently close interest in a matter possibly involving illegal conduct of the Nevada Legislature, and whether there is anyone else better suited than Plaintiffs who could demonstrate an actual case and controversy through injury peculiar to themselves to challenge the ESA program. This approach allows the Court to permit taxpayer standing in "'favor of a just and expeditious determination on the ultimate merits'" in very limited instances where the taxpayer has a close interest in the

alleged illegal conduct of the governmental body. *See Stockmeier*, 122 Nev. at 393, 135 P.3d at 225. However, in those instances where a plaintiff has a sufficiently close interest, but lacks a particular injury presenting a case or controversy, standing will be denied if another individual could suffer actual injury from the complained-of illegal conduct and bring an action. Limiting standing in such instances to those who can present an actual case and controversy challenging the illegal State conduct prevents the courts from being involved in entering advisory opinions and ensures the consideration of the legal issues under real life application of the State action, rather than in the context of hypotheticals.

In answering the question of whether Plaintiffs have a sufficient close interest as taxpayers to the challenged illegal State action in the instant case, this Court notes federal courts have accepted, in limited circumstances, a plaintiff's status as a taxpayer to find standing to enjoin unlawful appropriations. *Flast v. Cohen,* 392 U.S. 83 (1968). In its decision in *Flast*, the United States Supreme Court held, to have standing, a taxpayer must first demonstrate a "logical link" between his taxpayer status "and the type of legislative enactment attacked," and then "a nexus" between such taxpayer status and "the precise nature of the constitutional infringement alleged." 392 U.S., at 102, 88 S.Ct. 1942. In considering these two requirements together, the United States Supreme Court in *Flast* explained "individuals suffer a particular injury for standing purposes when, in violation of the Establishment Clause and by means of 'the taxing and spending power,' their property is transferred through the Government's Treasury to a sectarian entity." 392 U.S., at 105–106. "Such an injury," the Court found, is unlike "generalized grievances about the conduct of government" and so is "appropriate for judicial redress." *Id.,* at 106. "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power." *Id.*

This Court finds Plaintiffs have standing as taxpayers to facially challenge the ESA statute as violating Article XI, Section 10's prohibition on the use of public funds for sectarian purposes. Similar to what was presented in *Flast*, if Plaintiffs are correct in their assertions the ESA statute is unconstitutional, then they would suffer an injury by the transfer of their property through the State treasury to sectarian entities. Plaintiffs cannot demonstrate any peculiar injury to themselves from that suffered by any other taxpayer. However, at this time, no other taxpayer or potential claimant is in a better position than Plaintiffs to assert a case or controversy. Consequently, unless Plaintiffs are allowed to bring the facial challenge to the ESA statute, no one will be in a position to bring a challenge other than State executives charged with carrying out the program. Since the State executives are proponents of the ESA program, finding only the executives are in a position to bring an action would effectively mean no action would be brought.

The Court also finds the Plaintiffs have standing as taxpayers to facially challenge the ESA statute as violating Article XI, section 2's provisions concerning the Legislature's responsibility to provide a uniform system of public schools. In looking at federal precedent, the United States Supreme Court has never found taxpayer standing except in considering challenges under the Establishment Clause. *See Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 139 (2011)(declining to lower the taxpayer standing bar in any other constitutional challenge apart from the Establishment Clause). However, providing education to Nevada citizens is a paramount responsibility of the Legislature. Nevada's Constitution requires the Legislature to budget and fund education before making any other appropriations. Nev. Const. Art XI, § 6. If Plaintiffs are correct in their assertion the ESA program exceeds the constitutional scope of section 2's required uniform public school system, then they would suffer an injury by the transfer of their property out of the uniform school system in "violation of specific

constitutional protections against such abuses of legislative power." *Cf. Flast v. Cohen,* 392 U.S. at 106. Likewise, no other taxpayer or potential claimant is in a better position to assert a case or controversy, and thus, Plaintiffs should be allowed to bring the facial challenge to the statute.

This Court emphasizes that it finds the Plaintiffs as taxpayers only have standing to bring facial challenges to the ESA statute. Plaintiffs allege many of the schools that will receive disbursements from parents through their ESA accounts may engage in various forms of discrimination in hiring of staff and admitting of students. Likewise, Plaintiffs make assertions as to potential consequences to some schools from the possible loss of certain funding due to ESA accounts. Plaintiffs do not have standing to assert these potential specific applied injuries as challenges to the ESA program as they have not personally suffered any harm. There may be individuals who could assert the challenges on a specific case basis should injury actually occur. This will allow the Court to avoid providing advisory opinions and to consider such challenges under real life circumstances and better understand the nature and impact of the challenged conduct. Additionally, as most of these challenges would be unique to individual schools, the remedy for any particular challenged conduct would be against the school and its participation in the ESA program, and not the striking of the ESA program in its entirety.

## VI. ESA Program Does Not Violate Article XI, Section 2's Uniform Public School System Provision

Generally, for a complaint to "survive dismissal, a complaint must contain some set of facts, which, if true, would entitle [the plaintiff] to relief" *In re Amerco Derivative Litig.*, 127 Nev. Adv. Op. 17, 252 P.3d 681, 692 (2011) (quotation marks omitted). This Court is mindful legislative acts are entitled to a "strong presumption" that "they are constitutional." *Sheriff Washoe Cnty. v. Smith*, 91 Nev. 729, 731, 542 P.2d 440, 442 (1975). "'Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In

order to meet that burden, the challenger must make a clear showing of invalidity.'" *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 80, 358 P.3d 234, 237-38 (2015) (quoting *Silvar v. Eighth Judicial Dist. Court,* 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)). "The Court will construe statutes, 'if reasonably possible, so as to be in harmony with the constitution.'" *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 521 (2014) (*quoting State v. Glusman,* 98 Nev. 412, 419, 651 P.2d 639, 644 (1982)). Because this Court looks at the Complaint as a facial challenge to the ESA statute, Plaintiffs must "demonstrat[e] that there is no set of circumstances under which the statute would be valid." *Deja Vu Showgirls v. Nevada Dep't of Tax.*, 130 Nev. Adv. Op. 73, 334 P.3d 392, 398 (2014). Under Nevada Revised Statutes, section 0.020, "[i]f any provision of the Nevada Revised Statutes, or the application thereof to any person, thing or circumstance is held invalid, such invalidity shall not affect the provisions or application of NRS which can be given effect without the invalid provision or application, and to this end the provisions of NRS are declared to be severable." Consequently, if a law can be constitutionally applied, but is unconstitutional as to some of its provisions or applications, the statute's lawful applications or provisions will be sustained if it appears the Legislature would have enacted the constitutional aspects of statute independently of the unconstitutional provisions or applications. *See Binegar v. Eighth Judicial Dist. Court In and For County of Clark*, 112 Nev. 544, 551–552, 915 P.2d 889, 894 (1996).

This Court first considers Plaintiffs' claim that Article XI, section 2 limits the Legislature in encouraging education in Nevada to the only means of a uniform public school system and precludes it from adopting the ESA program. The Court looks at this issue first because if section 2 does not preclude the Legislature from creating the ESA program, and the program may be constitutionally established, then this Court can turn to the question whether the Legislature may permit schools with religious affiliations to participate. If the Legislature can

create an ESA program as a suitable means under Article XI, sections 1 and 2, then, at a minimum, non-religious schools and educational services can properly participate in the program and parents can set up ESA accounts and direct funds to such schools, home schooling or other education options. Consequently, the first issue is whether the Legislature may create the ESA program for anyone.

Plaintiffs contend Article XI, section 2, by directing the Legislature "shall provide for a uniform system of common schools," prohibits the Nevada Legislature from providing for the education of Nevada school children by any other means. In this respect, Plaintiffs argue, that while Article XI, section 1 provides the Legislature shall encourage education "by all suitable means," Article XI, section 2, and the subsequent sections of the article, define what are the "suitable means." Consequently, Plaintiffs argue the specific directive of section 2 for a system of uniform public schools limits the Legislature from adopting the ESA program.

The Nevada Constitution articulates in two separate sections the duties of the Assembly in providing education opportunities in Nevada to school children. In Article XI, the framers set out in the first section that "[t]he legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements... ." This language was used in the original constitution of 1864 and has remained unchanged through the last 150 years. In section 2, the framers further provided "[t]he legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the Legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools." Again, this language has remained unchanged since the enactment of the 1864

constitution.

In determining whether Article XI, section 1, permits the Legislature to create the ESA program as part of its duty to "encourage by all suitable means" education, and whether that duty is subsequently limited by the command of Article XI, section 2 that the "legislature shall provide for a uniform system of common schools," this Court is mindful of the basic interpretive principal that the Nevada Constitution should be construed in its ordinary sense unless some apparent absurdity or unmistakable interest of its framers forbids such construction. *State ex rel. Lewis v. Doron*, 5 Nev. 399, 411 (1870). Consequently, where the language in the Nevada Constitution is plain and not ambiguous, it should be read in those plain and unambiguous terms. *State ex rel. Summerfield v. Clarke*, 21 Nev. 333, 31 P. 545, 546 (1982). These principles were recently reaffirmed by the Nevada Supreme Court in the context of interpreting Article II, section 9, explaining "we, like the United States Supreme Court, 'are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."' *Strickland v. Waymire*, 126 Nev. 230, 233, 235 P.3d 605, 608 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (internal quotations omitted). Additionally, a constitutional provision should be construed to give meaning to its entirety. Generally, the Nevada Constitution should be read to give all provisions meaning and avoid any language being treated as superfluous. *See Harris Associates v. Clark County School Dist.,* 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). This principle requires this Court whenever possible to interpret different provisions of the constitution in harmony with each other. *See Bowyer v. Taack*, 107 Nev. 625, 627, 817 P.2d 1176, 1178 (1991). Consequently, the Court must first consider whether the language of Article XI, section 1, providing the "legislature shall encourage [education] by all suitable means," in the normal and ordinary sense of its terms permits the Legislature to create the ESA program to

allow parents financial resources to educate their children outside the uniform public school system. The Court then must determine if this interpretation is inconsistent with any other provision of the constitution and can be read in harmony with other provisions, giving meaning to all.

By setting out in section 1, the Legislature shall encourage education by "all suitable means," with no specific reference to any other section, and then by setting out in a different section the Legislature's responsibility to create a uniform public school system, the framers indicated they intended to create two duties, a broad one to encourage education by "all suitable means," and a specific, but separate, one to create a uniform public school system. The framers' use of two different sections to set out the Legislature's responsibilities without reference in either section to the other plainly suggests the sections are separate and distinct. This distinction means the Legislature's duty "to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement" is to be carried out *in addition to* the provision for the common school system. In considering similar language, the Indiana Supreme Court noted that while such constitutional language creates a duty that is "'general and aspirational' and not well suited to judicial enforceability, . . . this by no means lessens the efficacy of the imperative." *Meredith v. Pence*, 984 N.E.2d 1213, 1222 (2013) (quoting *Bonner ex rel Bonner v. Daniels,* 907 N.E.2d 516, 520 (Ind.2009)). In 1864, with less than 40,000 people living in our State comprised of over 110,000 square miles and with an economy based largely on mining, which historically was a boom and bust industry, the framers of Nevada's constitution had no idea what the future would hold in regard to population, land, economic and educational development. Because of this reality in 1864, the drafters of the Nevada Constitution reasonably intended to provide the Legislature broad powers going forward into the future to take whatever actions it believed appropriate to encourage education and the improvement of a population to take on any potential

new opportunities. By including the phrase "by all suitable means" in defining the Legislature's responsibility to encourage education, the framers recognized the need for broad legislative discretion, and thus, left to the Nevada Legislature the sound discretion of determining the "method and means of fulfilling this duty." *Meredith v. Pence*, 984 N.E.2d at 1222.

This Court agrees with Plaintiffs that Article XI, section 1's use of the phrase "all suitable means" imposes limitations on the Legislature's authority. The Legislature must use means suited for encouraging education, and as long as a means is suited for encouraging education, it is available for the Legislature to consider and use. However, the fact the phrase implicitly grants broad authority to the Legislature in choosing the means to accomplish the goal of encouraging education is in no way inconsistent with or overriding the other sections of Article XI.

Plaintiffs are correct "[t]he maxim 'expressio Unius Est Exclusio Alterius', the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State," *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237 (1967), and applied to interpreting the Nevada constitution. *See State v. Arrington*, 18 Nev. 412, 4 P. 735, 737 (Nev. 1884). Plaintiffs are also correct the drafters when saying the Legislature may "use all suitable means," did not say the Legislature could use any means. However, the Court disagrees with Plaintiffs' position when they argue the Legislature is limited to the suitable means specifically required in section 2 and the subsequent sections of Article XI. Such a reading would ignore the framers' specific use of the word "all," granting the Legislature the authority to use "all suitable means," not just the ones stated in the subsequent sections of the article. If the framers wanted to limit the broad discretion they accorded the Legislature in Section 1, they could have easily and should have clearly stated it. Cf. *Strickland v. Waymire*, 126 Nev. 230, 235 P.3d 605, 611 (2010) (citing 3 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* 58:3, at 114-15

(7th ed. 2008) (discussing in the context of subsequent amendments to the constitution that if the Legislature and voters in passing an amendment intended to eliminate another right, the legislators and voters would have made "a direct statement and express language to that effect."). Sections 1 and 2 are not inconsistent with each other. The Legislature's broad authority under section 1 is not inconsistent with its baseline obligation to provide a uniform public school system in section 2. The Legislature can provide for a uniform system of common schools, free from religious instruction and open to general attendance by all Nevada children, and still adopt other suitable means to encourage education. To read section 2 and the other sections of Article XI as Plaintiffs seek to do, would make section 1 superfluous, without any meaning or purpose. In this Court's view, in drafting the first section of Article XI to grant the Legislature authority to use all suitable means to encourage education, the framers in 1864 actually intended to give the Legislature that authority and did not intend the section to have no meaning. If the framers had intended such an interpretation, they could have easily said the Legislature had the authority to encourage education through the means included in Article XI. They did not, and the ordinary and normal reading of the language of the section clearly allows the Legislature to use any means suitable for encouraging education, not just those outlined in the remaining sections of the Article.

*Bush v. Holmes,* 919 So.2d 392 (Fla. 2006), which Plaintiffs cite, is the only State case suggesting a uniform school clause in a State constitution limits the Legislature's authority to use other means to promote education. In *Bush*, the Florida Supreme Court found a Florida scholarship program violated section 1(a) of Article IX of the Florida constitution. Section 1(a) of Florida's constitution provides in pertinent part it is "a paramount duty of the State to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of

free public schools . . . ." Fla. Const. art. IX, § 1(a). The Court found the language making it a "paramount duty of the State to make adequate provision for the education of all children residing within its borders," as requiring the Legislature to provide education for Florida school children through "adequate provision." The Florida high Court then looked at the next sentence, which stated "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools," and concluded the sentence defined what the drafters meant by "adequate provision." The Court found this represented a restriction on the Legislature's authority to create a separate voucher program.

In the instant case, the Nevada Constitution sets out the authority of the Legislature in two different sections with no reference to the other. This Court does not agree with the Florida Court's *in pari materia* interpretation of its constitution. However, assuming the Florida Court's correct interpretation of its own State Constitution, the consistent use of the term "adequate provision" that existed between the sentences of the Florida constitution section does not exist in Article XI, sections 1 and 2 of our State's Constitution. This consistent use of terms between sentences was the basis the Florida Court used to limit the Legislature authority to make "adequate provision for education" to just "adequate provision for a uniform public school system." Unlike the Florida constitution, Article XI, section 1 uses broad language granting the Nevada Legislature the authority to encourage education by all suitable means, and section 2 makes no reference to suitable means or uses any other language suggesting a restriction of the Legislature's authority under section 1.

Plaintiffs' argue the ESA program runs afoul of section 2's uniformity and general attendance requirements because it allows for the education of Nevada students through public funding of private schools with divergent admissions criteria, curricula, educational programs, academic-performance standards, teacher qualifications and training. These arguments are only

valid if a uniform public school system is the only means the Legislature may use to encourage education. However, as discussed above, section 1 directs the Legislature generally to encourage education in Nevada through all suitable means and this imperative is broader than and in addition to the responsibility under section 2 to provide for a uniform public school system. The Legislature may act under section 1 without reference to section 2. The ESA program does not alter the existence or structure of Nevada's public school system.

The Plaintiffs contend the ESA program theoretically could divert to private schools all of Nevada's school children, and by consequence, all funding for the uniform public school system. However, while theoretically almost all school children *may* be eligible for the ESA program and a significant number may enroll in this option, this does not mean there is "no set of circumstances under which the statute can be constitutionally applied." *Deja Vu Showgirls v. Nevada Dep't of Tax.,* 130 Nev. Adv. Op. 73, 334 P.3d at 398. This Court has no reason to believe and Plaintiffs have not proffered any factual allegations to suggest all parents of Nevada school children will enroll in the ESA program. Even assuming large numbers of parents do enroll their children in the program, so long as there is a "uniform" public school system," open to the "general attendance" of all, the Legislature has fulfilled the duty imposed by Article XI, section 2. Plaintiffs assert a potential damage resulting from the application of the ESA program which is, at best, "merely apprehended or feared." *See Doe v. Bryan*, 102 Nev. at 525, 728 P.2d at 444 (citing *Kress v. Corey,* 65 Nev. 1, 28-29, 189 P.2d 352, 365 (1948). As discussed above, Plaintiffs lack standing to seek declarative relief for applied constitutional challenges. Plaintiffs do not have standing to assert these potential injuries as they have not personally suffered the harm and have no actual justiciable controversy. *See Doe v. Bryan*, 102 Nev. at 525, 728 P.2d at 444. Plaintiff Berger's position as school teacher and parent of a student at a public school and his contention the ESA program will deprive school districts of funding, and deplete the

"resources at the school his son attends and the one where he teaches" is no less merely apprehended or feared than Plaintiffs' wholesale contention all school children may enroll in the ESA program. The applied effect of the ESA program is yet to be determined and can ultimately be considered based on the impact it actually makes. If the impact causes an identifiable injury, individuals affected by such damages will have standing to bring an action. The ESA program provides parents with funding they may use to choose different educational opportunities for their children and does not replace the public school system. The Legislature has continued to meet its constitutional obligation of providing for public schools which are open to all Nevada school children as required by Article XI, section 2.

Plaintiffs argue the ESA program violates fundamental constitutional precepts of equality and fairness, and certain schools participating in the program will improperly discriminate in admissions, enrollment, and hiring based on religion and other protected characteristics under the United States and Nevada Constitutions and statutes. *Cf. e.g.*, NRS § 6 13.330; NRS § 651.070 (statutes prohibiting discrimination in employment and public accommodations, including schools, on basis of religion, sexual orientation and gender identity). As this Court discussed above in considering Plaintiffs' standing to bring this action, these contentions possibly may be relevant as to whether the funds the State provides parents may be used for certain schools which may act in violation of discrimination laws. However, these contentions are not determinative of whether the State has the authority to create the ESA program. While this Court has found Plaintiffs have standing to challenge the Legislature's authority to create the ESA program under Article XI, sections 1 and 2, they do not have standing to challenge anticipated illegal discrimination of some schools as they have not suffered such injury. Individuals who suffer discrimination may challenge the inclusion of certain schools in the ESA program under the law. Whether illegal discrimination occurs and a school may participate under the program can be

dealt with in the specific context of the facts of an actual controversy rather than in the hypothetical.

This Court concludes Plaintiffs have not alleged facts establishing their claim the Legislature's creation of the ESA program violates the uniform school system provisions of Article XI, section 2. Plaintiffs' claim is therefore dismissed.

## VII. ESA Program Does Not Violate Article XI, Section 10's Prohibition on Use of Public Funds for Sectarian Purposes

This Court next turns to Plaintiffs' claim the ESA program violates Article XI, section 10 of the Nevada constitution which provides "[n]o public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." Significantly, since this Court has found the Legislature had the constitutional authority to create the ESA program generally, Plaintiffs' constitutional challenge potentially affects only religious affiliated schools participation in the program. If any schools because of their religious affiliation constitutionally cannot participate in the program, they may be severed from participation and the ESA program can continue with the participation of other schools or education options in view of the Legislature's clear intent to provide Nevada parents with the broadest spectrum of educational options.

In determining the meaning of section 10 and its proscriptions on State action, this Court, as with the process of interpreting Article XI, sections 1 and 2, must first consider whether the language of Article XI, Section 10, providing "no public funds .. . shall be used for sectarian purpose," in the normal and ordinary sense of its terms, permits the Legislature to create ESAs which parents may use to educate their children through religion affiliated services. If the terms of section 10 on their face are not clear, this Court must consider the intent and goals of the Legislature and voters at the time of the section's adoption to construe it ""in line with what

reason and public policy would indicate the Legislature intended."'" *State ex rel. Harvey v. Second Judicial Dist. Court*, 117 Nev. 754, 770, 32 P.3d 1263, 1274 (2001)(quoting *McKay v. Bd. of Supervisors,* 102 Nev. 644, 649, 730 P.2d 438, 442 (1986) (quoting *Robert E. v. Justice Court,* 99 Nev. 443, 445, 664 P.2d 957, 959 (1983)).

In its simplest terms, section 10 says the Legislature cannot use any public funds for a sectarian purpose. The Nevada Supreme Court in *State v. Hallock*, 16 Nev. 373, 387 (1882), considering the meaning of the section only two years after its adoption, concluded that "sectarian" as used in section 10:

> was used in the popular sense. A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or people. In the sense intended in the constitution, every sect of that character is sectarian, and all members thereof are sectarians.

Consequently, "sectarian purpose" as used in section 10 would generally include any purpose in support of a specific religion or general groups holding similar religious tenets. The Nevada Supreme Court in *Hallock* probably expressed it best by stating the section was intended that public funds should not be used for the purpose of " building up of any sect." *Id.*

The purpose *Hallock* defines for section 10, avoiding State action to build up a sect, parallels largely the purpose of the federal Establishment Clause. In *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947), the United States Supreme Court stated the Establishment Clause was intended to accomplish, as Thomas Jefferson described, a "wall of separation between Church and State." The Court found the clause precluded State practices that "aid one religion . . . or prefer one religion over another," as well as practices that "aid all religions" and consequently endorse the idea of religion over nonreligion. *Everson*, 330 U.S. at 15. The Court has gone on to explain in a series of cases starting with *Flast v. Cohen,* 392 U.S. 83, (1968), that the Establishment Clause prevents governments from spending public money "in aid of

religion." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 348 (2006)). The Court in *Flast* traced the history of the Establishment Clause in part to James Madison's contention that "government should not '"force a citizen to contribute three pence only of his property for the support of any one establishment.'" *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011) (quoting *Flast, 392 U.S.* at 103)(quoting 2 Writings of James Madison 183, 186 (G. Hunt ed.1901)). The Court identified Madison's view as a "specific evil" the Establishment Clause was intended to protect against. *Id.*

Plaintiffs note the federal Establishment Clause uses language different from Article XI, section 10. Compare Nev. Const. art. XI, § 10 ("No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.") with U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion"). They contend that, on its face, Section 10 sets a higher bar than the Establishment Clause.

This Court does not concur with Plaintiffs' logic in interpreting whether Nevada's Legislature and voters in approving section 10 sought to set a higher bar to the use of public funds for aid of religions than the Establishment Clause. It is important to remember at the time section 10 was amended, Nevada's constitution had few provisions limiting the State government from passing any law respecting a particular religion. The Establishment Clause of the First Amendment had not yet been applied to the states through the Due Process clause of the Fourteenth Amendment. The First Amendment was not applied to the states until 1925 when the United States Supreme Court applied the freedoms of speech and press to the states through the Due Process Clause. *Gitlow v. New York*, 268 U.S. 652 (1925). The Establishment Clause was not applied to the states until 1947. *Everson v. Board of Education*, 220 U.S. 1 (1947). Article I, section 4 of the Nevada constitution provides for "[t]he free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this

State . . .," and Article XI, Sections 2 and 9 precluded sectarian education in public schools. Consequently, in 1879, before section 10 was ratified, few restrictions rested on the State Government in regard to legislation which might promote the establishment of religion. Because of this circumstance, when the Nevada Legislature and voters approved Section 10 in 1879, which provided "[n]o public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose," it is not clear the Legislature intended something more than the federal Establishment Clause which then precluded Congress from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof."

Defendants attack Section 10 as a "Blaine Amendment," which is a term used to denote a series of State constitutional amendments from approximately 1875 to 1900 which limited through various language State governments from providing funding to religious schools. Defendants suggest these amendments, including Nevada's, were the result of anti-Catholic bigotry arising at the time from the growth of parochial schools. However, as Justice William Brennan explained in his dissent in *Lemon v. Kurtzman*, the inclusion of limitations in State constitutions on public support of religious schools was an ongoing process beginning soon after the formation of the federal government and its inclusion of the Establishment Clause in the Bill of Rights. *See Lemon v. Kurtzman*, 403 U.S. 602, 645-50 (1971)(Brennan, J., dissenting).[7]

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[7] While undoubtedly dislike of another's religion as compared to one's own may encourage one to preclude public funds be given to a competing religion, it is this concern that no religion should be given governmental preference over another that led to the creation of the Establishment Clause in the first place and the subsequent state limitations on support of religions. In its history on the adoption of section 10, the Nevada Supreme Court in *Hallock* identified the State's appropriation of funds to the Catholic affiliated orphanage as the only appropriation prior to the adoption of the section to an arguably sectarian organization. The Court looked at the legislative history surrounding the appropriation for guidance as to the scope of the section and what the Legislature and voters considered to be a sectarian purpose. *Hallock*, 16 Nev. at 381. In looking at the first request for the appropriation in 1866, the Court noted that in addition to the request for an appropriation in support of the Catholic affiliated orphanage, there was also a request for an appropriation for the support of an Episcopal affiliated orphanage. Both appropriation requests failed to pass. The Court considered the report of the Senate Ways and Means Committee in the 1866 session, which reported against the passage of the two appropriation requests at that time. The Committee reported the appropriations sought were intended to:

> enable them to train up children in the tenets or religious belief of the respective churches, without

Section 10 does no more than preclude the Legislature from supporting specific religions or religion in general, the principle of which was enshrined in the Establishment Clause of the federal Bill of Rights. Nevada, as well as most other states over the course of United States history, separately acted in view of the void that existed in its own constitution to limit State support of religion. As the Nevada Supreme Court in *Hallock* explained: "People of nearly all nationalities and many religious beliefs established our State. They met on common ground, and

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> regard to the question of religious opinions of the relatives of such children, which is commendable zeal for the progress of those denominations, as the right training of the children is the best way to build up churches. But if the state contribute twenty thousand dollars towards building up and strengthening those churches, and making provision thus for future increase of Episcopal pastors and laymen and Catholic priests, nuns, and laymen, other denominations, such as Presbyterians, Methodists, Baptists, and Unitarians, will feel equally entitled to similar appropriations; and thus the revenues of the state might be absorbed to such an extent as to endanger its ability to pay its bonds, interest, and other obligations, for which its faith is already pledged, or which may be necessary for ordinary current expenses."

*Id.* at 381. The Court noted the appropriation request for the Catholic affiliated charity was made in subsequent sessions prior to 1879, with the appropriation being approved in some sessions. Based on this history, the Court concluded that the voters in adopting section 10 sought to prevent the "use of public funds for the benefit of petitioner and kindred institutions." *Id.* at 383. The Court concluded that sectarian as used in section 10:

> was used in the popular sense. A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or people. In the sense intended in the constitution, every sect of that character is sectarian, and all members thereof are sectarians. The framers of the constitution undoubtedly considered the Roman Catholic a sectarian church. (Const. Debates, 568 *et seq.*) The people understood it in the same sense when they ratified it.

*Id.* at 386-87. While defendants may be correct that the impetuous for the section was concern with providing public support to Catholic parochial schools, the section does no more than preclude the Legislature from supporting a specific religion, which principle was enshrined in the Establishment Clause of the federal Bill of Rights and separately acted upon by states in view of the void that existed in their own constitutions to limit state support of religions. The section does not prohibit any one or religious order from practicing their beliefs and is consequently unlike the municipal law struck down in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), which was clearly intended to proscribe a religion's particular rite. Neither the United States Supreme Court, nor any other court, has ever struck down a state constitutional provision which limits state support of sectarian interests and is neutral in its limitation. *See Locke v. Davey*, 540 U.S. 712 (2004). The history of section 10 as outlined by the Nevada Supreme Court in *Hallock* and its own terms, very different from the federally proposed Blaine Amendment and other state amendments focused on public support of sectarian schools and education, convinces this Court that section 10 is not unconstitutional under the First Amendment and is a proper exercise of Nevada citizens' right to limit support of specific religions or of religion generally. The issue is certainly not ripe at this point in view of the myriad of legislative histories, speeches and news articles all parties have provided for a determination on a motion to dismiss. This Court finds the best explanation of section 10 and the reasons for its adoption to be the one the Nevada Supreme Court in *Hallock* expressed: "People of nearly all nationalities and many religious beliefs established our state. They met on common ground, and in the most solemn manner agreed that no sect should be supported or built up by the use of public funds. It is a wise provision and must be upheld." *Hallock*, 16 Nev. at 387.

in the most solemn manner agreed that no sect should be supported or built up by the use of public funds. It is a wise provision and must be upheld." *Hallock*, 16 Nev. at 387.

The question remains, however, what is the scope of Section 10 and was it intended to exceed the limitations of the Establishment Clause to make no law in support of a religion. The proposed "Blaine Amendment" to the United States Constitution sought to impose an Establishment Clause upon the states which at that time were under no such restrictions. The language of the proposed amendment provided: "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation 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 or denominations" *See* https://ballotpedia.org/Blaine_Amendment. Significantly, the proposed amendment applied only to the states and did not impose any new limitations on the federal government. If the drafters of the amendment had perceived the federal Establishment Clause as permitting federal public expenditures in support of religious schools, they would have been expected to have specifically precluded the federal government along with the states from making such expenditures. Conversely, the inclusion of the additional language in the proposed amendment arguably suggests the drafters were adding further limitations beyond the scope of the Establishment Clause. However, in the context of the times, the drafters may have sought to insure clarity rather than the creation of a higher bar beyond the Establishment Clause. Education at the time the Blaine Amendment was proposed was a specific province of the states and local governments, and such governments had a history of providing public support to religious schools. *Lemon v. Kurtzman*, 403 U.S. at 645-50 (Brennan, J., dissenting). Consequently, the inclusion of the specific language in the proposed amendment prohibiting

funding of religious schools does not necessarily suggest the drafters sought to make limitations beyond what was required in the Establishment Clause as opposed to clarifying the scope of the limitations of the Establishment Clause in the context and history of State educational systems.

The plain terms of Section 10 also suggest it does not place greater limitations on the Legislature than the Establishment Clause. Section 10 prohibits the Legislature from using public funds for a "sectarian purpose." Unlike the proposed federal Blaine Amendment and many other State "no-aid" amendments enacted after it, which specifically precluded money from being appropriated to religious schools, section 10 simply precludes the Legislature from having a sectarian purpose in the appropriation of any money. Consequently, in this Court's view, the drafters contemplated the Legislature could make expenditures which might impact upon a religion as long as the Legislature's purpose in making the appropriation was not to build up any religion. Such an approach, if truly the intent of Nevada's drafters, would be a logical one in view of the impracticality of an expansive prohibition of "any and all government expenditures from which a religious or theological institution derives a benefit—for example, fire and police protection, municipal water and sewage service, sidewalks and streets, and the like. Certainly religious or theological institutions may derive relatively substantial benefits from such municipal services. But the primary beneficiary is the public, both the public affiliated with the religious or theological institution, and the general public." *Meredith v. Pence*, 984 N.E.2d 1213, 1227 (Ind. 2013). Other courts considering State provisions limiting public expenditures for sectarian purposes have regularly concluded that the provisions do not preclude appropriations for non-sectarian/secular purposes which have an incidental benefit to a church related institution. *See, e.g., Embry v. O'Bannon*, 798 N.E.2d 157 (Ind. 2003) (State Constitution prohibited drawing money "from the treasury, for the benefit of any religious or theological institution"; upholding dual-enrollment program providing public school corporations with

additional funds to provide secular educational services to parochial school students also enrolled in public school); *State ex rel. Warren v. Nusbaum,* 55 Wis.2d 316, 198 N.W.2d 650 (Wis.1972) (State Constitution prohibited use of public funds "for the benefit of religious societies, or religious or theological seminaries"; court approved State contract with a church-related university for dental education services as it did not have the primary effect of advancing religion); *State ex rel. Warren v. Nusbaum,* 64 Wis.2d 314, 219 N.W.2d 577 (Wis.1974)(approving school boards contracting education services for exceptional needs children in religious schools as a secular purpose); *Advisory Opinion re Constitutionality of P.A.1970, No. 100,* 384 Mich. 82, 180 N.W.2d 265 (Mich. 1970)(approving teachers paid with public funds teaching secular subjects in private schools as serving a public purpose). These cases and their conclusions support the view Nevada's Article XI, section 10 with its limitation on the use of public funds for sectarian purposes was not intended to preclude any expenditure that has an incidental benefit to religion, where such is made for a primary secular purpose. The drafters of the Nevada constitution and Section 10 seem to have allowed the Legislature flexibility in its actions so long as its purpose in its actions is not to build up a religious sect.

This Court believes this history of Section 10 and its language supports the consideration of the United States Supreme Court's interpretation of the Establishment Clause in considering the scope of section 10. These decisions concerning the Establishment Clause focus for the most part on the underlying purpose of the challenged State action, just as the language of Section 10 focuses on whether an expenditure of public funds is for a sectarian purpose. "The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) (quoting *Agostini v. Felton,* 521 U.S. 203, 222–223 (1997)).

The Supreme Court in *Agostini v. Felton,* 521 U.S. 203, 222–223, (1997), explain that in evaluating the constitutionality of a State action under the Establishment Clause, the question to be asked is "whether the government acted with the purpose of advancing or inhibiting religion [and] whether the aid has the 'effect' of advancing or inhibiting religion." *Id.* at 222-23 (citations omitted). This Court finds Plaintiffs have failed to allege any facts disputing the ESA program was enacted for the valid secular purpose of providing financial assistance to parents to take advantage of educational options available to Nevada children. The legislative history for the statute demonstrates the Legislature considered the implementation of the ESA program important in view of what it perceived was the limited achievement of the public school system. As in *Zellman* and *Agostini*, the question is whether the ESA program has "the forbidden 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. at 648-49.

The United States Supreme Court's "decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 649 (citations omitted). Where a school aid program, such as the ESA program, is neutral with respect to religion, and provides assistance available directly to a wide spectrum of citizens, or as in this case, essentially all parents of Nevada school children, who, in turn, direct the financial assistance to religion affiliated schools "wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Id.* This Court concludes the ESA program does not violate Article XI, section 10, as the State is not using public funds for a sectarian purpose, but for a non-sectarian/secular one, of providing parents a broad range of educational options for their children. The ESA program "permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual

recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." Zelman, 536 U.S. at 652.

As provided under the provisions of the ESA statute, the funds the State deposits in each student's savings account are reserved for educational purposes, and not for any sectarian purpose. The State has no influence or control over how any parent makes his or her genuine and independent choice to spend his or her ESA funds. Consequently, the State cannot be deemed to be using the funds for a sectarian purpose as the parents, and not the State, direct through their own independent decision the funds to religious education schools. Parents, if they choose to use the ESA program, must expend the ESA funds for secular education goods and services, even if they choose to obtain these services from religion affiliated schools. As discussed above, since the United States Supreme Court's 1993 decision in *Mueller v. Allen*, the federal courts interpreting the Establishment Clause, which, like Article 11, Section 10, prohibits government action for the purpose of supporting or building up of religion, have concluded student assistance programs allowing participants to use their benefits at religious schools further a secular, not sectarian purpose. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. at 648-49; *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983).

This Court agrees the ESA program as provided in the statute does not restrict any public funds for use at any religion affiliated school. The program provides funds through ESAs to parents to pay for education choices the parents may choose for their children. Indeed, the Legislature in creating the program provided a wide range of options to parents for use of ESA funds. Consequently, under the plain terms of section 10, the Legislature is not using public funds for a "sectarian purpose." Other courts considering their State constitutional provisions

restricting the use of public funds to sectarian schools or for sectarian purposes have found such provisions do not preclude the State from offering education financial aid to parents who, in turn, independently spend the aid with religious affiliated schools for education services. See, e.g., *Oliver v. Hofmeister*, 2016 WL 61400 (Okla. Feb. 16, 2016); *Niehaus v. Huppenthal*, 310 P.3d 983, 988, (Ariz. Ct. App. 2013); *Meredith v. Pence*, 984 N.E.2d 1213, 1229 (Md. 2013); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1998).

Plaintiffs contend the Nevada Supreme Court's decision in *State v. Hallock* precludes public funds from being passed through the ESA program to religion affiliated schools. In *Hallock*, the Nevada Supreme Court considered what was clearly a direct appropriation of public funds to an orphanage that provided religious instruction and was affiliated with a specific religion. The Court did not consider whether the State could provide money to the orphanage for the purely secular costs of care and feeding of the orphans. The Court noted this argument was made that the appropriation, if "paid, would not be used for sectarian purposes, but for the physical necessities of the orphans." However, the Court specifically found the appropriation was intended to be a "mere charity" and a "contribution only" to the orphanage. *State v. Hallock*, 16 Nev. at 388. Consequently, the *Hallock* Court was faced only with considering the constitutionality of a direct appropriation to a religion affiliated orphanage. While it expressed the intent of section 10 was "that public funds should not be used, directly or indirectly, for the building up of any sect," the Court provided no guidance as to what would be considered "indirect" support because it specifically found that it was dealing with a direct charitable contribution.[8]

[8] Plaintiffs contend various Attorney General Opinions support their view of section 10's prohibition on public funds for sectarian purposes. The Court has reviewed these opinions, which are not binding on the Court. Defendants also have cited Attorney General Opinions which they contend support the use of public funds as

In contrast, in *Murrow Indian Orphans Home v. Childers*, 171 P.2d 600, 603 (Okla. 1946), the State Board of Affairs, acting under legislative authority, made a contract with a Baptist affiliated orphanage to care for certain orphan and dependent children. Plaintiffs challenged this contract under the "no aid" clause of the Oklahoma Constitution, Article II, § 5, which provides: "No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit or support of any priest, minister or other religious teacher or dignitary, or sectarian institution as such." Considering the issue the Nevada Supreme Court left open in *Hallock,* whether the State could provide funds to a sectarian institution for a secular purpose, in this instance the contracting of care of State wards, the Oklahoma Supreme Court held the State, in making the contract, was "fulfilling a duty to needy children. The institution can render a service that goes far toward the fulfillment of this duty, and for compensation that is a matter of contract and public record. The matter of the wisdom of the

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provided under the ESA program. In none of the cited opinions were the facts before the Attorney General similar to the circumstances before this Court and none of the Attorney General's opinions clearly support one side or the other. While in 65-276 Op. Nev. Att'y Gen. (Nov. 6, 1965), the Attorney General opined that school districts may receive federal funds and use the funds to assist both public and religious school students as required by federal law, he also stated the federal funds had to be kept separate from the state public school funds to avoid violating section 10. As defendants note, the Attorney General subsequently reversed his opinion in Opinion No. 65-278 (Nov. 15, 1965), and found children enrolled in parochial schools could enroll in in public school classes not offered in the parochial school. 74-158 Op. Nev. Att'y Gen. (Jan. 24, 1974). In 41-B-40 Op. Nev. Att'y Gen. (Feb. 11, 1941), the Attorney General was asked whether the state could provide funds to a sectarian hospital for the care of crippled children. The Attorney General concluded "[w]e do not believe that [section 10], strict as it seems, was intended to prevent necessary hospitalization in sectarian hospitals." However, in reaching his opinion, the attorney general goes on to emphasize "no sectarian instruction of any kind was imparted." In 63-67 Op. Nev. Att'y Gen. (Sept. 5, 1963), the Attorney General concluded the "holding of divine services at state [prison] institutions by the various preceptors of religious faiths, and where attendance is not compulsory, does not violate any constitutional prohibition, and that compliance . . . does not contravene the prohibition of Article XI, Section 10, of the Constitution of Nevada." However, the Attorney General in reaching the conclusion considered the inmates' rights under Article 1, section 4, allowing Nevada citizens to freely exercise their religions. He did not consider the issue of whether the state could support such religious services as part of an expenditure for secular purposes. In 70-688 Op. Nev. Att'y Gen. (June 16, 1970), the Attorney General did recognize that some courts had concluded that state "aid" to provide secular services to children in religious schools "accrues to the child and not to the religious order, and is so far removed from religious connotations that no problem is presented." However, while the Attorney General concluded the state could provide secular television programing to religious schools, the state was charging for the programing at the same rate it charged public schools and there was arguably no issue involving the use of public funds. Indeed, Article XI, section 10 is not even referenced in the opinion. Consequently, this Court has found the Attorney General Opinions referenced in the parties' filings to be of limited application in deciding the issue before it.

terms of these contracts is for the Legislature and the agency upon which it thrusts the performance of its commands, and so long as they involve the element of substantial return to the State and do not amount to a gift, donation, or appropriation to the institution having no relevancy to the affairs of the State, there is no constitutional provision offended." While there were a number of factual distinctions between the orphanage in *Hallock* and the one in *Childer*, this Court finds the Oklahoma decision persuasive in defining the scope of Section 10's limitations on the use of public funds for sectarian purposes. *See also* 41-B-40 Op. Nev. Att'y Gen. (Feb. 11, 1941) (State may contract and pay religion affiliated hospital for care of crippled children if religious indoctrination is not required of the patients). The Court concludes the Nevada Supreme Court's decision in *Hallock* precluding a direct payment of public funds as a charitable contribution to a religious affiliated orphanage does not preclude the Legislature from providing funds to ESA accounts for the secular purpose of education, even if the funds are used to contract the secular education through a religion affiliated school.

To the degree Article XI, Section 10, arguable precludes the State from making a direct payment to a religion affiliated school, under the ESA program, the State deposits funds into an account from which parents may draw to purchase services. While Plaintiffs argue the State's contention that ESA accounts are individual ones of the parents is more form than substance, with the State limiting the use of the accounts, continuing some oversight of the accounts and maintaining a right to unused funds, the accounts as provided by statute are accounts under the control of the parents who can use the funds to pay for a wide-range of education options. Consequently, this Court finds the form the State has chosen to provide parents with financial assistance, does not result in direct payments from the State to any preordained or particular destination.

This Court accepts the funds parents may direct from ESA accounts to religion affiliated

schools will be comingled with other tuitions and other funds. These comingled funds will be used to provide education to children and may be used to provide religious instruction or services. The Plaintiffs assert, absent any requirement that participating schools segregate the public funds for secular education, the funds will be used to further religious activities that take place in these schools. Plaintiffs argue this use of comingled funds, in part in furtherance of religious activities, amounts to a direct use of public funds for a sectarian purpose. Again, this Court disagrees as "the principal actors and direct beneficiaries under the voucher program are neither the State nor program-eligible schools," but Nevada families with school-age children. *See Meredith v. Pence*, 984 N.E.2d at 1228. As the Indiana Supreme Court found when faced with a similar argument, the "direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend. The voucher program does not directly fund religious activities because *no* funds may be dispersed to *any* program-eligible school without the *private, independent selection by the parents of a program-eligible student.* . . . Any benefit to program-eligible schools, religious or non-religious, derives from the private, independent choice of the parents of program-eligible students, not the decree of the State, and is thus ancillary and incidental to the benefit conferred on these families." *Id.* at 1228-29 (Emphasis in original).

Plaintiffs emphasize the likelihood that large amounts of aid will be diverted from the public schools to religion affiliated schools. However, the United States Supreme Court has emphasized the amount of government aid channeled to religious institutions by individual aid recipients is not relevant to the Establishment Clause inquiry, and this Court does not see it as relevant to the Article IX, section 10 inquiry. Either the ESA program's likely potential to divert public funds through parent choice to some religion-affiliated schools is constitutional or it is not. The amount of funds diverted does not affect the inquiry or the outcome. *Zelman v.*

*Simmons-Harris*, 536 U.S. 639, 648-49 (citing *Mueller v. Allen*, 474 U.S., at 490–491, (Powell, J., joined by Burger, C. J., and REHNQUIST, J., concurring) (citing *Mueller, supra,* at 398–399,); 474 U.S., at 493, 106 S.Ct. 748 (O'CONNOR, J., concurring in part and concurring in judgment); *id.,* at 490, (White, J., concurring)). This Court's decision rests not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing. *Id.*

The Plaintiffs contend the ESA program could theoretically divert to private schools all of Nevada's school children, and, by consequence, all funding for the uniform public school system. However, that almost all school children *may* be eligible for the ESA program and a significant number may enroll in this option does not mean there is "no set of circumstances under which the statute can be constitutionally applied." *Deja Vu Showgirls v. Nevada Dep't of Tax.,* 130 Nev. Adv. Op. 73, 334 P.3d at 398. As discussed before, this Court has no reason to believe and Plaintiffs have not proffered any factual allegations to suggest all parents of Nevada school children are going to enroll in the ESA program. As noted above, even if large numbers of parents enroll in the program, so long as there is a "uniform" public school system," open to the "general attendance" of all, the Legislature has fulfilled the duty imposed by Article XI, section 2. Plaintiffs assert a potential damage resulting from the application of the ESA program which is, at best, "merely apprehended or feared." *See Doe v. Bryan*, 102 Nev. at 525, 728 P.2d at 444 (citing *Kress v. Corey,* 65 Nev. 1, 28-29, 189 P.2d 352, 365 (1948). What the applied impact of the ESA program will be is yet to be determined and can be considered based on the impact it actually makes. If the impact causes an identifiable injury, individuals affected by such damages will have standing to bring an action. The ESA program provides parents with funding they may use to choose different educational opportunities for their children and does not replace

the public school system. The Legislature has continued to meet its constitutional obligation of providing for public schools which are open to all Nevada schoolchildren as required by Article XI, section 2.

As with its uniform public schools claim, Plaintiffs also argue the ESA program violates Article XI, Section 10's prohibition on the use of funds for sectarian purpose because certain schools participating in the program will improperly discriminate in admissions, enrollment, and hiring based on religion and other protected characteristics under the United States and Nevada constitutions and statutes. *Cf. e.g.*, NRS § 6 13.330; NRS § 651.070 (statutes prohibiting discrimination in employment and public accommodations, including schools, on basis of religion, sexual orientation and gender identity). Again as this Court has previously held, Plaintiffs' contentions may be possibly relevant as to whether the funds the State provides parents may be used for certain schools which may act in violation of discrimination laws. However, these contentions are not determinative of whether the State has the authority to create the ESA program or whether the program may be used by parents to direct funds to religion affiliated schools. While this Court has found Plaintiffs have standing to challenge the Legislature's authority to create the ESA program under Article XI, section 10, they do not have standing to challenge anticipated illegal discrimination of some schools as they have not suffered such injury. Again, as stated above, individuals who suffer discrimination may challenge the inclusion of certain schools in the ESA program under the law. Whether illegal discrimination occurs and a school may participate under the ESA program can be dealt with in the specific context of the facts of an actual controversy rather than in the hypothetical. *See Doe v. Bryan*, 102 Nev. at 525, 728 P.2d at 444.

This Court concludes Plaintiffs have not alleged facts establishing its claim that the Legislature's creation of the ESA program violates Article XI, section 10, prohibiting the use of

public funds for a sectarian purpose. Plaintiffs' claim is dismissed.

## VIII. Conclusion

This Court holds the Nevada program, the Choice Scholarship Program, is within the Legislature's power under Article XI, Sections 1 and 2, and the enacted program does not violate Section 10's prohibition on the use of funds for sectarian purposes. The Court finds Plaintiffs are not entitled to relief under any set of facts alleged in their complaint. The Court grants Defendants' Motion to Dismiss and dismisses Plaintiffs' Complaint pursuant to NRCP 12(b)(5).

DATED this 18th day of May, 2016.

ERIC JOHNSON
DISTRICT COURT JUDGE