STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

March 1, 2022

TRANSMITTED VIA EMAIL

The Honorable Sally J. Toone
Idaho House of Representatives
Idaho State Capitol
P.O. Box 83720
Boise, ID 83720-0081
stoone@house.idaho.gov

RE: Questions Regarding HB 669

Dear Representative Toone:

You presented three questions regarding House Bill 669, 66th Legislature, 2nd Regular Session (Idaho 2022) ("HB 669")[1]. The first is whether HB 669 is constitutional because the Hope and Opportunity Scholarship Fund program ("Scholarship Program") is limited to non-public school students. The second is whether HB 669 follows the accountability standards and testing requirements in IDAPA as required for public schools and whether such rules need to be followed for these public funds. The third is how much of the education code needs to be followed with the use of funds from HB 669. Each question will be answered in turn.

1. Is HB 669 constitutional?

Though HB 669 appears to run afoul the Idaho Constitution, it is still likely constitutional when considering the recent U.S. Supreme Court case, Espinoza v. Montana Department of Revenue, 591 U.S. ___, 140 S. Ct. 2246, 207 L. Ed. 679 (2020).

Article IX, section 5 of the Idaho Constitution ("Sectarian Appropriations Clause") prohibits public funds from being used to support any schools controlled by a church, sectarian or religious denomination. Specifically, it states:

[1] Citations to HB 669 in this response are to the first engrossed bill, available at https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2022/legislation/H0669.pdf.

> SECTARIAN APPROPRIATIONS PROHIBITED. Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions.

Idaho Const. art. IX, § 5. However, the U.S. Supreme Court recently struck down Montana's application of its similar provision requiring a scholarship program comply with its constitutional prohibition on aid for religious schools. See Espinoza, 140 S. Ct. 2246.[2] The constitutional provision scrutinized in Espinoza is similar to Idaho's Sectarian Appropriations Clause because it prohibits public funds from being used on religious and sectarian schools. Montana's provision ("no-aid provision") states:

> Aid prohibited to sectarian schools. (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

Mont. Const. art. X, § 6(1).

In Espinoza, Montana's no-aid provision was determined to be unconstitutional when applied to a state-funded scholarship program because the Court found that the no-aid provision barred religious schools from a government benefit (*i.e.*, the scholarship program) solely because they were religious schools. Espinoza, 140 S. Ct. at 2254-57. The Court found this discrimination to be a violation of the Free Exercise Clause of the U.S. Constitution which "'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'" Id. at 2249 (citations omitted). The Court further stated:

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[2] This office recognizes that Idaho's provision has not been struck down. But the State of Idaho is bound to follow decisions of the United States Supreme Court, thus this analysis attempts to reconcile Article IX, § 5, the *Espinoza* decision, and H. 669 in a manner that is consistent with this office's understanding of the current status of this area of the law.

> Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. This is apparent from the plain text. The provision bars aid to any school "controlled in whole or in part by any church, sect, or denomination." Mont. Const., Art. X, §6(1). The provision's title—"Aid prohibited to sectarian schools"—confirms that the provision singles out schools based on their religious character. Ibid. And the Montana Supreme Court explained that the provision forbids aid to any school that is "sectarian," "religiously affiliated," or "controlled in whole or in part by churches." [Espinoza v. Mont. Dep't of Revenue, 393 Mont. 446, 464-67, 435 P.3d 603, 612-13 (Mont. 2018)]. The provision plainly excludes schools from government aid solely because of religious status. See [Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. ___, ___, 137 S. Ct. 2012, 2019-21].

Id. at 2255. However, it is important to note that the Espinoza decision does not equate to general approval for spending of public funds for purely religious purposes. For instance, article IX, § 5 prohibition is still valid under Espinoza if a scholarship account were being used solely for religious purposes, such as the purchase of only religious texts. The application and interpretation of the Espinoza decision and article IX, § 5 under H.B. 669 will likely depend on the case-by-case nature of scholarship expenditures.

In short, the test in Espinoza is whether the funds are provided to aid or advance a primarily religious purpose or if the funds are provided to a religious entity but for non-religious means. H. 669 would make funds available for general education purposes; the type of school is incidental. Application of article IX, § 5 to prohibit the use of funds provided for primarily religious instruction, such as a seminary, may be permissible, but application to prohibit the availability of funding for general education purposes by a religious school may be difficult to defend. Since Idaho's Sectarian Appropriations Clause has very similar language to Montana's no-aid provision, it would likely be considered a violation of the Free Exercise Clause if challenged in court. Thus, even though the Scholarship Program outlined in H.B. 669 cuts against Idaho's Constitution—specifically the Sectarian Appropriations Clause—it is likely constitutional in light of the Espinoza decision.

2. **Are the services and expenditures under HB 669 subject to Idaho's assessment and accountability requirements?**

Idaho's comprehensive assessment program and accountability framework are both established by administrative rule of the Idaho State Board of Education ("SBOE"). IDAPA 08.02.03.111 and 112. SBOE's administrative rules are limited in scope to "***public school students*** in Idaho." IDAPA 08.02.03.001 (emphasis added). Thus, both Idaho's assessment program and accountability framework are limited to public schools. See IDAPA 08.02.03.111 (Assessment in the Public Schools); IDAPA 08.02.03.112 ("School district, charter district and public charter

school accountability…"). Scholarship Program recipients cannot be enrolled in public schools. HB 669, § 1, at 4:19-23. Therefore, it appears that the State's assessment program or accountability framework would not apply to services and expenditures of the Scholarship Program.

3. Are the services and expenditures under HB 669 subject to other provisions of Idaho's education law, such as age limits, special education, etc.?

With regard to age limits, HB 669's Statement of Purpose states "[t]his proposed legislation… would create Hope and Opportunity Scholarship (HOS) accounts for Idaho families with student(s) in Kindergarten through 12th grade." Statement of Purpose, H.B. 669, 66th Leg., 2nd Reg. Sess. (Idaho 2022). HB 669 defines an "eligible student" as:

> (d) "Eligible student" means a child who:
> (i) Is a resident of the state of Idaho;
> (ii) Has a household income level less than or equal to two hundred fifty percent (250%) of the income necessary to qualify for the Richard B. Russell national school lunch act, 42 U.S.C. 1751 et seq.; and
> (iii) Is:
> 1. Enrolled full-time and attending a public elementary or secondary school program in this state for at least forty-five (45) calendar days during an instructional term at the time of application or was enrolled full-time in a public elementary or secondary school program in this state for the entire instructional term the previous year;
> 2. The sibling of a student participating in the hope and opportunity scholarship program;
> 3. A child with a disability as defined in section 33-1001, Idaho Code; or
> 4. Eligible at the time of application to enroll in a kindergarten or first grade program in the state of Idaho.

HB 669, § 1, at 1:31-2:8. The above definition addresses, at least in part, age for purposes of program eligibility. However, despite the language in the Statement of Purposes that HOS accounts are limited to students in kindergarten through 12th grade, the definition of eligible student appears to allow for the possibility of younger or older students qualifying as eligible students on the basis of being a sibling of another participating student or due to the lack of an express cap on student age with respect to eligibility or qualifying services.

Ambiguities concerning age or the application of other state education laws could potentially be addressed through State Department of Education oversight of the program, either directly, through its contractor or through the parent review commission. However, it is important to note

the provisions in HB 669 emphasizing the independence of education service providers and the State's burden in any related legal proceedings, which state:

> (9) Independence of education service providers. Nothing in the provisions of this section shall be deemed to limit the independence or autonomy of an education service provider or to make the actions of an education service provider the actions of the state government.
>
> ***(a) Education service providers shall be given maximum freedom to provide for the educational needs of scholarship students without governmental control.***
>
> (b) Nothing in this section shall be construed to expand the regulatory authority of the state, its officers, or any school district to impose any additional regulation of education service providers beyond those necessary to enforce the requirements of the scholarship program.
>
> (c) An education service provider that accepts payment from an account pursuant to this section is not an agent of the state or federal government.
>
> ***(d) An education service provider shall not be required to alter its creed, practices, admissions policy, or curriculum to accept payments from a scholarship account.***

HB 669, § 1, at 9:7-23 (emphasis added). With respect to legal proceedings, HB 669 states:

> (11) Legal proceedings. In any legal proceeding challenging the application of this section to an education service provider, ***the state bears the burden of establishing that the law is necessary and does not impose any undue burden on the education service provider.***
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> (a) No liability shall arise on the part of the department or the state or of any public school or school district based on the award of or use of a scholarship account pursuant to this section.
>
> (b) If any part of this section is challenged in a state court for violating either the state or federal constitution, ***parents of eligible students and parents of students shall be permitted to intervene as of right in such lawsuit for the purposes of defending the scholarship program's constitutionality***. However, for the purposes of judicial administration, a court may require that all parents file a joint brief, as long as they are not required to join any brief filed on behalf of any named state defendant.
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> (c) If any provision of this section, or the application thereof to any person or circumstance, is held invalid, such invalidity shall not affect other provisions or applications of this section that can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.

HB 669, § 1, at 9:30-49 (emphasis added). Given the express freedom afforded to education service providers and the State's burden to establish that the application of other education laws to HOS accounts must be both "necessary" and "not impose any undue burden on the education service provider," the expenditures under HB 669 would not likely operate under the scrutiny of Idaho's education laws. However, due to the broad range of expenditures and services that can be provided under HB 669, a case-by-case analysis may be necessary to determine if certain Idaho education laws apply to a specific services or expenses.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Chief Deputy

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