January 30, 2004: School Districts' Cash Balances

Brian K. Moore

Representative, District 67

New Mexico House of Representatives

Room 203G (CN), State Capitol

Santa Fe, NM 87501

RE: Opinion Request on Cash Balances

Dear Representative Moore:

You requested our advice on whether the revised statutory provision covering school districts' cash balances, NMSA 1978, § 22-8-41 (2003), is lawful. In particular, you asked whether the 2003 revision would survive a constitutional equal protection challenge given that, according to your letter, the revision (i) redirects funds from students in one district to students in another and (ii) uses cash balances from one district to pay for salaries in another.

Your question requires us to consider the 2003 revision to § 22-8-41 in light of equal protection and substantive due process law. As discussed below, we believe the revised § 22-8-41 presents neither an equal protection nor a substantive due process violation.

For many years, the cash balances provision of the Public School Finance Act has allowed school districts to carry forward cash balances. Even before the 2003 amendment, that statute provided that "[a] school district may budget out of cash balances carried forward from the previous fiscal year an amount . . . as an emergency account. . . . [S]chool districts may also budget operational fund cash balances carried forward from the previous fiscal year for operational expenditures, exclusive of salaries and payroll. . . ." NMSA 1978, § 22-8-41 (1967, as amended through 1988). This has allowed school districts to carry forward operational funds unspent in one year to the subsequent year – either in the form of an emergency fund, an unused cash balance or both.

The 2003 revision retains this option. It places a limit, however, on the *amount* that a district may carry forward. § 22-8-41(E). That limit (a percentage of the total operating budget) is phased in beginning in 2006, § 22-8-41(D), and varies with the district's budget (the larger the budget the smaller the percentage). § 22-8-41(E). Should a district exceed the limit, the State will deduct a portion of the excess from the district's operational funding for the upcoming year (the State Equalization Guarantee Distribution, or "SEGD"). § 22-8-41(F). In other words, whatever amount a district retains in State operational funding in excess of the limit one year it will forfeit the

succeeding year. Properly understood, the excess amount is not *taken from* the district; rather, it simply is never *awarded to* the district in the first place. Nor is it given to other districts; instead, it is used to increase the unit value of the total SEGD for *all* districts, including the one in question.

As we understand your question, it is whether this limitation would survive an equal protection challenge, considering its differing effect on a district exceeding the limit and one observing the limit. Answering this question requires that we consider the statute in light of the law of equal protection and substantive due process.

Before doing so, two preliminary points should be mentioned. First, the 14th Amendment to the U.S. Constitution, from which the equal protection and substantive due process protections arise, applies to persons, not to governmental entities such as school districts. U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). Thus, a school district would not have standing to challenge § 22-8-1 or any other law on those bases. However, a plaintiff might be able to circumvent this obstacle by filing suit on behalf of children in a district – and we assume that approach for the purpose of this analysis. Second, courts generally assume laws to be valid. "[L]egislative acts are presumptively valid and normally are subjected to the rational basis test; it is well-settled that they will not be declared invalid unless the court is clearly satisfied that the legislature went outside the constitution in enacting them." Richardson v. Carnegie Library Restaurant, Inc., 107 N.M. 688, 693, 763 P.2d 1153, 1158(1988). "When dealing with a facial constitutional challenge of a statute, the legislation 'enjoys a presumption of constitutionality.'" Marrujo v. New Mexico State Highway Transp. Dept., 118 N.M. 753, 757-758, 887 P.2d 747,751-752 (1994) (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

Equal protection and substantive due process (often called "fundamental rights") are closely related. Equal protection applies when a statute or regulation appears to treat a certain class of people differently from other classes. A fundamental rights analysis applies when the statute or regulation limits all persons equally but burdens a right that courts have determined to be "fundamental." 118 N.M. at 757, 887 P.2d at 751 ("Due process . . . focuses on the validity of legislation as it equally burdens all persons in the exercise of a specific right. Equal protection . . . focuses on the validity of legislation that permits some individuals to exercise a specific right while denying it to others."). In an equal protection challenge, a court initially considers whether the statute at issue creates a "suspect" classification (assuming it creates a classification at all). A classification is suspect only if it is based on race or ethnicity, religion or alienage (the requirement of U.S. citizenship). Garcia v. Albuquerque Pub. Schs. Bd. of Educ., 95 N.M. 391, 393, 622 P.2d 699, 701 (Ct.App.1980) (citing City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)), writ quashed, 95 N.M. 426, 622 P.2d 1046 (1981). In a fundamental rights challenge, on the other hand, a court first considers whether the right in question is indeed fundamental. "Fundamental" in this context means only those rights determined to be fundamental by the Supreme Court, "such as first amendment rights, freedom of association, voting, interstate travel, privacy, and fairness in the

deprivation of life, liberty or property – which the Constitution explicitly or implicitly guarantees." Marrujo, 118 N.M. at 757, 887 P.2d at 751.

Apart from these distinctions, equal protection and fundamental rights are analyzed in basically the same way. Id. ("The same standards of review are used in analyzing both due process and equal protection guarantees."). In both, the most salient consideration is the level of judicial review, or "scrutiny," a court will apply. "In evaluating a due process or equal protection claim under the Federal or State constitutions, the Court will apply one of three standards of review: strict scrutiny; intermediate scrutiny (also known as substantial, heightened, or high review); and minimal scrutiny (also known as the rational basis test)." Id.

Strict scrutiny, the most exacting standard, applies only when a statute creates a suspect classification or burdens a fundamental right. Id. at 757-758, 887 P.2d at 751-752 ("Strict scrutiny applies when the violated interest is a fundamental personal right" or when "the statute focuses upon inherently suspect classifications. . . .") (internal citations omitted). To pass strict scrutiny, the government must show that the statute or regulation is necessary to fulfill a compelling government interest. Bernal v. Fainter, 467 U.S. 216, 219(1984) ("In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available."). As a practical matter, statutes are rarely sustained in the face of such scrutiny. Id. at 220, n.6.

The next highest level of review, intermediate or heightened review, "is triggered by . . . legislation which uses sensitive – rather than suspect – classifications." Marrujo, 118 N.M. at 757, 887 P.2d at 751. Called "quasi-suspect," these generally are classifications based on legitimacy or gender. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 441 (1985). Restrictions based on these quasi-suspect classifications "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." Id.

Classifications that are neither suspect nor quasi-suspect, and rights that have not been determined to be fundamental, require only the rational basis test. "The rational basis standard of review is triggered by 'all other' interests: those that are not fundamental rights, suspect classifications, important individual interests, and sensitive classifications. This level of scrutiny applies in economic and social legislation. . . ." Marrujo at 757-758, 887 P.2d at 751-752. "Under this test, the burden is on the opponent of the legislation to prove that the law lacks a reasonable relationship to a legitimate governmental purpose." Id., at 758, 887 P.2d at 752. Using this test,

> legislative acts . . . will not be declared invalid unless the court is clearly satisfied that the legislature went outside the constitution in enacting them. The burden of proof is on the plaintiff to demonstrate that the challenged legislation is clearly arbitrary and unreasonable, not just that it is possibly so. . . . Only when a statutory classification is so devoid of rational support or serves no valid governmental interest, so that it amounts to mere caprice, will it be struck down. . . .

Richardson 107 N.M. at 693, 763 P.2d at 1158 (internal citations omitted).

The salient question for your inquiry is which standard a court would apply if reviewing § 22-8-41. The section creates no suspect or quasi-suspect classification: Nothing therein creates a classification based on race or ethnicity, religion, alienage, gender or legitimacy. Thus, analyzed as an equal protection matter, the statute would warrant only rational basis review (as economic legislation normally does). A plaintiff almost certainly could not show that the revision lacked a rational relation to a legitimate government interest, given that the control of school districts' cash balances is rationally related to the State's interest in fiscal oversight. Therefore, in our judgment, § 22-8-41 would likely be validated if challenged on equal protection grounds.

Nor does § 22-8-41 burden a fundamental right: It does not affect voting, interstate travel or any of the other rights so protected. A plaintiff might argue that § 22-8-41 burdens education, but education has been held not to be a fundamental right – at least under the federal constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."). Rights may be fundamental under state constitutions even when they are not so under the federal; and this has happened in regard to education in some states. [1] But it has not happened in New Mexico; to our knowledge, the State's highest courts have not entertained the question. It is conceivable that an appellate court in New Mexico could determine education to be fundamental; what the outcome would be if the question were properly before such a court is not certain. But it seems likely that New Mexico would follow the lead of the U.S. Supreme Court and the states that have entertained the question and held education not to be a fundamental right.

The only other way in which § 22-8-41 could be subject to scrutiny above the rational basis test is if a court determined that education was close enough to a fundamental right that it should be accorded heightened scrutiny. Federal jurisprudence suggests that education might be accorded such scrutiny. Plyler v. Doe, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution. But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation.") (internal citations omitted). But the same case law suggests that such treatment would apply to education only in its most basic sense – i.e., provision of essential educational services – and thus probably would not extend to cash balance provisions. Id. at 223

Again, New Mexico courts might ultimately decide to apply a higher standard of review than the federal constitution does to a statute such as this, but we are aware of little authority to suggest that result would occur. Indeed, in a pre-Pyler case directly related to education, the New Mexico Court of Appeals stated that it would follow the Rodriguez court's lead, and concluded that education was not a fundamental right and required only the rational basis test. State v. Edgington, 99 N.M. 715, 718, 663 P.2d 374, 377 (Ct..App.,1983) (citing Garcia v. Albuquerque Public Schools Bd., 95 N.M. 391, 622 P.2d 699 (Ct.App.1980)). It should be noted, however, that the same court, in a case

unrelated to education, cited the Pyler court's holding with approval. Alvarez v. Chavez, 118 N.M. 732, 736, 886 P.2d 461, 465 (Ct.App.1994) (overruled on other grounds by Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721).

Little is guaranteed in the realm of equal protection and fundamental rights litigation. However, baring the unlikely result that a New Mexico court found that education was entitled to heightened scrutiny – or the more unlikely result that it was considered a fundamental right and entitled to strict scrutiny – the cash balances revision about which you inquired would be reviewed by a court as economic legislation requiring only the rational basis test. There does appear to be a rational relation between limiting cash balance carry-overs for certain school districts, and distributing funds equitably, as the Legislature has determined, so that all school districts in the State have fair access to such funds (including a district with an excess balance). For this reason, we believe this statute would be found not to violate equal protection or substantive due process, and, thus, to be constitutional. Moreover, even if this statute were to receive heightened scrutiny, we believe it would be judged "substantially related to a legitimate state interest," City of Cleburne at 441, given the State's keen interest in equitably distributing funds to its public schools, and, thus, upheld.

We hope this response is helpful. If we may be of further assistance, please let us know. You requested a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing our legal advice in the form of a letter instead of an Attorney General Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

David A. Stevens

Assistant Attorney General

DAS/gsm

cc: Stuart M. Bluestone, Chief Deputy Attorney General

[1] Approximately twenty states' highest courts have considered the question, and those courts are fairly evenly split between those finding and those not finding education to be a fundamental right. See William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation,* 79 Ed. Law Rep. 19.