

<b>LFC Requester:</b>	<b>Liu</b>
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**AGENCY BILL ANALYSIS  
2021 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

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**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:  
**Original**     **Amendment**      
**Correction**     **Substitute**   

**Date** 2/3/2021  
**Bill No:** HJR7

**Sponsor:** Reps. James R.J. Strickler,  
Rebecca Dow, and  
Rod Montoya  
**Short Title:** SCHOOL FUNDING FOR  
HOME OR PRIVATE SCHOOL,  
CA

**Agency Name and Code Number:** PED - 924  
**Person Writing:** John Sena  
**Phone:** 505-570-7816    **Email:** John.Sena@state.nm.us

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY21	FY22		
N/A	N/A	N/A	N/A

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY21	FY22	FY23		
N/A	N/A	N/A	N/A	N/A

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY21</b>	<b>FY22</b>	<b>FY23</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	Undetermined	Undetermined	Undetermined	Undetermined	Recurring	Undetermined

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HJR1, Permanent Fund for Early Childhood, CA; and SJR1, Funds for Teacher Salaries and Instruction

Duplicates/Relates to Appropriation in the General Appropriation Act: N/A

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis: House Joint Resolution 7 (HJR7) proposes to amend several sections of the New Mexico Constitution, including the anti-donation clause, to permit public school funds to be provided to private elementary and secondary schools or the parents of school-aged children who attend private or home elementary or secondary schools. HJR7 also proposes to permit public school funds be allocated directly to parents of school-aged children who are required to attend public elementary or secondary school via distance education during a pandemic.

HJR7 proposes to strike the requirement of Article 12, Section 1 of the state constitution that the sufficient educational system the state is responsible for establishing and maintaining for the benefit of all the state’s children be “uniform.”

As a proposed amendment to the state constitution, HJR7 must pass each chamber of the legislature with a simple majority in order to be referred to the voters for ratification at the next regular election, or special election held for the purpose of considering the amendment. The amendments proposed under HJR7 would also require consent of the United States Congress.

**FISCAL IMPLICATIONS**

HJR7 does not contain an appropriation.

The actual effect the proposed constitutional amendments would have upon public school funding would depend upon what legislation might be enacted under newly ratified constitutional provisions if HJR7 were passed by the legislature and ratified by the people. The proposed amendments, of themselves, would only set the stage for potential statutory changes that might redirect educational funding to the entities and individuals listed in the joint resolution.

**SIGNIFICANT ISSUES**

***School Funding Issues***

HJR7 proposes to amend Articles 4, 9, and 12 of the New Mexico Constitution to permit public school funds to be provided to:

- parents of school-age children whose children:
  - are home schooled at the elementary or secondary level by the child’s parent or guardian;
  - attend a private, nonsectarian, nondenominational elementary or secondary school; or
  - are required to attend public elementary or secondary school via distance learning during an epidemic; and
- private elementary or secondary schools.

Specifically, the joint resolution would amend Article 4, Section 31 of the constitution, which bars an appropriation to any person or institution not under the total control of the state, by specifically including language exempting entities provided for in Articles 9 and 12 of the constitution.

Article 9, Section 14 of the constitution – the “anti-donation clause” – generally prohibits states, counties, school districts, and municipalities from making any donation or financial provision for an person or private enterprise, but provides for certain exceptions. HJR7 proposes to add exemptions for parents of school children who attend home or private schools or are required to attend public school via distance learning during a pandemic.

Article 12, Section 3 of the constitution generally prohibits any funds appropriated or collected for educational purposes from being used for the support of any sectarian, denominational, or private elementary, secondary, or postsecondary school. HJR7 proposes to add language to that section that would permit those funds being used for the support of private elementary or secondary schools.

Section 6 of the joint resolution requires the consent of the United States Congress in order for the provisions of HJR7 to take effect. Congressional consent is required for the effectuation of these proposed amendments because it would amend Article 12, Section 3 of the New Mexico Constitution, which mirrors the language of Section 8 of the Enabling Act of 1910, prohibiting the state from using any moneys from the sale or disposition of lands granted for educational purposes for the benefit of any sectarian or denominational schools; Article 12, Section 3 also explicitly includes private schools in this prohibition. As noted by Attorney General Opinion No. 12-03, February 1, 2012, the Enabling Act set the terms by which New Mexico was admitted to the Union...terms to which New Mexico agreed, by the ratification of Article 21, Section 9 of the New Mexico Constitution (“This state and its people consent to all . . . the provisions of the said act of Congress. . .”) Article 21, Section 10 of the state constitution goes on to state, “[t]his ordinance is irrevocable without the consent of the United States and the people of this state, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of congress.” Further, the New Mexico Supreme Court has stated that Section 10 of the Enabling Act became a part of the state’s “fundamental law to the same extent as if it had been incorporated directly into the Constitution.” (See State ex rel. Interstate Stream Commission v. Reynolds, 71 N.M. 389, 396, 378 P.2d 622, 627 (1963).)

Further, according to Attorney General Opinion No. 12-03, if the Enabling Act and state constitution were so amended to permit the state to finance a private entity under Article 12, Section 3, the anti-donation clause’s prohibition against grants of public money to private entities would not apply in these particular instances, as constitutional provisions should be read together and harmonized if possible, rather than as groupings of isolated and discordant rules. (See

Denish v. Johnson, 1996 NMSC 5, ¶ 32, 910 P.2d 914, 922.) Thus, should the amendment to Article 12, Section 3 of the state constitution be ratified by the people and permitted by the United States Congress, constitutional impediments in the anti-donation clause of Article 9, Section 14 to allocating public funds to parents of children who attend home or private schools, or public schools via distance learning during a pandemic, would be likewise be obviated. In effect, therefore, any previously constitutionally impermissible donations or allocations to those particular classes of individuals would be permitted, in perpetuity, via the regular legislative process.

### ***Uniformity of Education***

In addition to the proposed amendments that would permit public funds to be directed to private and home schools and parents of private and home school students, HJR7 would strike the word “uniform” from Article 12, Section 1 of the Constitution of the State of New Mexico. That section currently mandates a “*uniform* system of free public schools sufficient for the education of, and open to, all of the children of school age in the state shall be established and maintained.”

It is difficult to speculate the effects such an amendment might have upon the provision of education to the state’s children. Removing the requirement of uniformity in public education may have profound implications for equity and equality in education, which in turn have the potential to affect any number of aspects of quality of life for New Mexico’s citizens, going forward. It is axiomatic that education is necessary for children to grow into happy, successful, productive citizens. To simply strike the constitution’s requirement of uniformity in its provision is potentially to open the door to inequalities and inequities in the lives of the state’s children, particularly those deemed most at-risk.

In New Mexico, this issue was most recently addressed in the *Martinez* and *Yazzie* consolidated lawsuit, where it was found the state had failed in its obligation to provide our most at-risk children with that uniform and sufficient education that the constitution exhorts the state to ensure, a decision the Governor declined to appeal. In its Decision and Order, the Court noted that state constitutional provisions requiring uniformity in education had become another avenue, aside from state equal protection clauses, by which aggrieved parties might beg relief from the courts for inequalities in the provision of education, after the U.S. Supreme Court rejected claims that there was a *federally* protected fundamental right to education. The Court in *Martinez* and *Yazzie* indicated that, while most lawsuits addressing state-level equal education protections protested inequities in school funding among school districts, that avenue was inappropriate in New Mexico, where most of the funding for public schools is provided directly by the state. Instead, the Court noted the *Martinez* and *Yazzie* plaintiffs framed their case not around a comparison of school districts, but rather around a comparison of economically disadvantaged students and English learners with those who are neither. The Court agreed with this interpretation, and explicitly extended the protection of Article 12, Section 1 to those students, as well as to Native American and Hispanic students and students with disabilities. Deleting this constitutional requirement of uniformity may likewise have the effect of deleting those vital protections from our at-risk students, leaving them at even greater risk of falling behind not only in the achievement of a sufficient education, but of a secure and successful life after their educational career is completed.

### **PERFORMANCE IMPLICATIONS**

None at this time, pending any enacted legislation pursuant to the proposed constitutional

amendments.

#### **ADMINISTRATIVE IMPLICATIONS**

None at this time, pending any enacted legislation pursuant to the proposed constitutional amendments.

#### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Relates to HJR1, proposing to amend Article 12, Section 7 of the state constitution to provide for additional annual distributions from the Land Grant Permanent Fund for the benefit of early childhood educational services.

Relates to SJR1, proposing to amend Article 12, Section 7 of the state constitution to provide for a new annual distribution from the Land Grant Permanent Fund for instruction and teacher salaries.

#### **TECHNICAL ISSUES**

N/A

#### **OTHER SUBSTANTIVE ISSUES**

N/A

#### **ALTERNATIVES**

N/A

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

N/A

#### **AMENDMENTS**

N/A