

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

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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** 2/25/2021  
**Bill No:** SJR19

**Sponsor:** Sen. Craig Brandt  
**Short Title:** STATE FUNDS FOR PRIVATE SCHOOLS

**Agency Name and Code**    PED - 924  
**Number:** \_\_\_\_\_  
**Person Writing:**    John Sena  
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**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	General Fund and others

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HJR1, Permanent Fund for Early Childhood, CA; HJR7, School Funding for Home or Private School, CA; SJR1, Funds for Teacher Salaries and Instruction

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

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis: Senate Joint Resolution 19 (SJR19) proposes to amend Article 12, Section 3 of the Constitution of New Mexico to permit public funds, specifically those “arising from the sale or disposal of any lands granted to the state by Congress,” (i.e. the land grant permanent fund) to be used to support sectarian and denominational schools. The bill would also permit public educational funds not arising from the land grant permanent fund be used to support private schools, in addition to sectarian and denominational schools.

As a proposed amendment to the state constitution, SJR19 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 to consider the amendment.

**FISCAL IMPLICATIONS**

SJR19 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 SJR19 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 permitted by the joint resolution. However, any legislation drafted to effect these proposed amendments would certainly divert possibly substantial moneys from our public schools – the intended beneficiaries of these funds since the inception of the state – to the support of religious and private institutions.

**SIGNIFICANT ISSUES**

It should be noted initially that the title of the joint resolution does not completely and accurately describe the proposed subject matter of SJR19. The short title reads: “PROPOSING TO AMEND ARTICLE 12, SECTION 3 OF THE CONSTITUTION OF NEW MEXICO TO ELIMINATE THE PROHIBITION ON STATE EDUCATIONAL FUNDS BEING USED FOR THE SUPPORT OF PRIVATE SCHOOLS, COLLEGES AND UNIVERSITIES.” Notably absent from the title is any language indicative of the proposed amendment that would permit

public moneys derived from the proceeds of the land grant permanent fund be used to support religious educational institutions.

SJR19 proposes two amendments to Article 12, Section 3 of the state constitution. The first strikes language referring to the use of public funds collected for educational purposes that not derived from the land grant permanent fund. The second strikes the language directly referring to sectarian and denominational schools, colleges or universities. The combined effect of these two amendments would:

1. permit moneys from the land grant permanent fund be used to support sectarian or denominational schools, colleges, and universities; and
2. permit public moneys raised for educational purposes *other* than those arising from the land grant permanent fund be used for the support of sectarian, denominational, *and* private schools, colleges, and universities.

The only prohibition on the disposal of public educational moneys currently enshrined in Article 12, Section 3 that would survive the passage and ratification of SJR19 would be the prohibition on moneys derived from the land grant permanent fund being used for the support of private schools, colleges, and universities – which directly, if partially, contradicts the title of the joint resolution.

There are a number of inherent problems with these proposed amendments, not the least of which is the likelihood that SJR19 violates the Establishment and Supremacy Clauses of the Constitution of the United States. The Establishment Clause of the First Amendment to the U.S. Constitution prohibits the passage of laws that aid one religion, all religions, or show preferential treatment to one religion over another. The Supremacy Clause – Article VI, Paragraph 2 of the U.S. Constitution – holds that the federal constitution takes precedence over state laws, and even state constitutions. Article 2, Section 1 of the Constitution of New Mexico likewise declares the United States Constitution the supreme law of the land.

While the Supreme Court of the United States arguably has recently emphasized the Free Exercise Clause – which prohibits government interference with religious belief and practice – over the Establishment Clause of the First Amendment to the United States Constitution, SJR19 proposes no amendments that would invoke the tension between those two clauses. For example, *Espinoza v. Montana Department of Revenue*, (591 U.S. \_\_\_\_ (2020)) held, essentially, that “[a] State need not subsidize private education. But once a state decides to do so, it cannot disqualify some private schools solely because they are religious.” SJR19, however, does not propose to support secular private schools over sectarian ones, but rather offers more support to religious schools than secular private schools. The joint resolution proposes to permit *all* categories of public funds for education be allocated to sectarian schools, but would only allow non-religious private schools access to those public educational funds *not* derived from the land grant permanent fund. Thus, SJR19 avoids this central issue of *Espinoza*.

Beyond the consideration of the U.S. Constitution, any amendment to Article 12, Section 3 of the state constitution also invokes the strictures of the Enabling Act of 1910. Article 12, Section 3 of the New Mexico Constitution mirrors the language of Section 8 of the Enabling Act, directly prohibiting the state from using any moneys from the disposition of lands granted for educational purposes for the benefit of any sectarian or denominational schools; Article 12, Section 3, however, also bars using those moneys to benefit private schools. 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 state 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).) Any attempt to amend Article 12, Section 3 of the state constitution to change constitutional provisions regarding the proper beneficiaries of moneys derived from the land grant permanent fund requires the consent of Congress. SJR19 includes no such contingency for Congressional approval, and, therefore, even if passed by the legislature and ratified by the people, it would remain invalid and ineffectual.

### **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 HJR7, proposing to amend Article 12, Section 3 of the state constitution to allow public educational moneys to be allocated for support of private elementary and secondary schools.

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