

1 Donald M. Peters 005929
2 Kristin M. Mackin 023985
3 LASOTA & PETERS, PLC
4 722 East Osborn Road, Suite 100
5 Phoenix, Arizona 85014
6 Telephone: (602) 248-2900
7 Facsimile: (602) 248-2999
8 dpeters@lasotapeters.com

9 Timothy M. Hogan, 004567
10 Arizona Center for Law
11 In the Public Interest
12 202 E. McDowell, Suite 153
13 Phoenix, Arizona 85004-4533
14 Telephone: (602) 258-8850
15 thogan@aclpi.org

16 Attorneys for Plaintiffs

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IN THE SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

SHARON NIEHAUS, ARIZONA
SCHOOL BOARDS ASSOCIATION,
ARIZONA EDUCATION
ASSOCIATION and ARIZONA
ASSOCIATION OF SCHOOL
BUSINESS OFFICIALS,

Plaintiffs,

vs.

JOHN HUPPENTHAL in his capacity
as Arizona Superintendent of Public
Instruction,

Defendant.

No. _____

**APPLICATION FOR
PRELIMINARY INJUNCTION**

This case is a sequel to the Arizona Supreme Court's decision in *Cain v. Horne*, 220 Ariz. 77, 202 P.3d 1178 (2009). In *Cain*, the Arizona Supreme Court

1 struck down a “scholarship” program that provided State funding for disabled
2 students who wanted to attend religious and other private schools.

3 In its 2011 session, the Legislature enacted S.B. 1553, which creates
4 another scholarship program for disabled students who attend private schools. The
5 new program is a slightly revised version of one of the programs that were held
6 unconstitutional in *Cain*.
7

8 During hearings on House version of the new program, the possibility of a
9 legal challenge was discussed. Senate Rules Counsel testified that whether the
10 measure was distinct enough from the program invalidated in *Cain* to be
11 constitutional was hard to say and a “close call.” House Committee on Rules mtg.
12 2/28/11 (video archives). Plaintiffs disagree. S.B. 1553 is plainly
13 unconstitutional.
14

15 16 17 I. AN OVERVIEW OF S.B. 1553

18 19 A. *Who May Receive a Scholarship*

20
21 A copy of S.B. 1553 is attached as exhibit A. To receive a scholarship
22 under S.B. 1553, a student must meet the definition of a “qualified student.” To be
23 a qualified student, a student must have a disability. The term qualified student is
24 defined by the enactment in part as follows:
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1 “Qualified student” means a resident of this state who is either identified as
2 having a disability under section 504 of the rehabilitation act (29 United
3 States Code section 794), identified by a school district as a child with a
4 disability as defined in § 15-761 or a child with a disability who is eligible
to receive services from a school district under § 15-763 and who did any of
the following....

5 A.R.S. § 15-2401(5). The cited provision of the United States Code does not
6 define or otherwise identify any category of disabled students. The reference
7 therefore appears to have been an error. The remainder of the definition
8 incorporates, directly and indirectly, the standard definition of “child with a
9 disability” found at A.R.S. § 15-761.
10

11 In addition to having a disability, a child must have done one of the
12 following to meet the definition of a qualified student:
13

14 (a) Attended a governmental primary or secondary school as a full-time
15 student as defined in § 15-901 for at least the first one hundred days of the
16 prior fiscal year and who transferred from a governmental primary or
secondary school to a qualified school.

17 (b) Participated in the empowerment scholarship account program in the
18 previous year and whose parent renews the agreement pursuant to § 15-
2402, subsection B.

19 (c) Received a scholarship under § 43-1505 and who continues to attend a
20 qualified school.

21 A.R.S. § 15-2401(5). To fall within subsection (a), a student must have attended a
22 public school during the preceding fiscal year and must also have transferred from
23 the public school to a qualified school. The term “qualified school” is defined by
24 the enactment as follows:
25

1 “Qualified school” means a *nongovernmental* primary or secondary school
2 or a preschool for handicapped students that is located in this state and that
3 does not discriminate on the basis of race, color or national origin.

4 A.R.S. § 15-2401(4)(emphasis added). It is clear that a primary or secondary
5 school must be “nongovernmental,” or private, to meet this definition. There is
6 some ambiguity as to whether the modifier “nongovernmental” also applies to a
7 preschool, but the ambiguity is moot. Arizona’s government does not offer
8 separate preschools for the disabled. Any such schools must therefore be private.
9

10 In short, a student must have transferred from a public school to a private
11 school to fall within subsection (a). Subsection (c) expressly applies only to
12 students who attend a qualified private school. Subsection (b) applies to students
13 who previously obtained a scholarship under the program. Such students could not
14 have obtained a scholarship without qualifying under either subsection (a) or (c),
15 so they must also be in private school. When one works through the definition
16 carefully, it becomes apparent that only students in private schools can meet the
17 definition of qualified student.
18

19 To obtain a scholarship, a student’s parent must also make certain promises
20 in an agreement with the Department of Education, including the following:
21

22 To enroll a qualified student for an empowerment scholarship account, the
23 parent of the qualified student must sign an agreement to do all of the
24 following:

- 25 1. Provide an education for the qualified student in at least the subjects of
26 reading, grammar, mathematics, social studies and science.
27

1 2. Not enroll the qualified student in a school district or charter school and
2 release the school district from all obligations to educate the qualified
3 student.

4 A.R.S. § 15-2402(B).

5 In summary, to qualify for a scholarship, a student must have a disability
6 and must be enrolled in a private school. The student's parent must agree to
7 provide a basic education to the student and not to enroll the student in a public
8 school.

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11 *B. The Amount of the Scholarship*

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13 If a student qualifies and if the parent enters into the required agreement:

14 [T] he department shall transfer from the special education fund pursuant to
15 § 15-1182 to the treasurer for deposit into an Arizona empowerment
16 scholarship account an amount that is equivalent to ninety per cent of the
17 base support level prescribed in § 15-943 for that particular student.

18 A.R.S. § 15-2402(C). The base support level forms part of the amount of money
19 that is paid each year by the State to its school districts to fund the maintenance
20 and operations of those districts. See A.R.S. § 15-943. The figure is calculated
21 mathematically by multiplying a dollar figure called the base level by a formula
22 specified in statute. *Id.*; see also A.R.S. § 15-901(B)(2) (defining base level). The
23 formula takes into account the number of students in a school district and some of
24 their characteristics, including whether they are disabled. S.B. 1553 therefore
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1 provides that a qualifying student will receive, as a scholarship, 90 percent of what
2 the State would otherwise disburse to a school district to support the education of
3 that student.

4 *C. Permissible Uses of the Scholarship*

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6
7 The student's parent may use the money only for eleven purposes that are
8 specified in A.R.S. § 15-2402(B)(4):

- 9 (a) Tuition or fees at a qualified school.
10 (b) Textbooks required by a qualified school.
11 (c) Educational therapies or services for the qualified student from a
12 licensed or accredited practitioner or provider.
13 (d) Tutoring services provided by a tutor accredited by a state, regional or
14 national accrediting organization.
15 (e) Curriculum.
16 (f) Tuition or fees for a nonpublic online learning program.
17 (g) Fees for a nationally standardized norm-referenced achievement test,
18 advanced placement examinations or any exams related to college or
19 university admission.
20 (h) Contributions to a qualified tuition program established pursuant to 11
21 United States Code § 529.
22 (i) Tuition or fees at an eligible postsecondary institution.
23 (j) Textbooks required by an eligible postsecondary institution.
24 (k) Fees for management of the empowerment scholarship account by firms
25 selected by the department.
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28 Subsection (h) appears to contain an error, as there is no discussion of a qualified
29 tuition program at 11 U.S.C. § 529.

30 Subsections (a), (b) and (c) expressly permit scholarship funds to be used
31 for tuition, fees and books at a private school. It is unclear what kinds of
32 expenditures are authorized by Subsection (e), "Curriculum," since there is

1 ordinarily no separate charge for curriculum in schools. Because qualified
2 students must attend a private school, however, the curriculum for such students
3 will presumably be that of a private school.

4 In places, S.B. 1553 appears to contemplate that a qualified student can
5 receive a scholarship for private post-secondary education as well as for K-12
6 education. See A.R.S. § 15-2402(B)(4)(i), (j); A.R.S. § 15-2402(G). However,
7 only a “qualified student” may receive a scholarship. That term is defined in such
8 a way that a student at a post-secondary institution would not appear to qualify.
9 A.R.S. § 15-2401(5). Moreover, as discussed above, the amount of the scholarship
10 available under S.B. 1553 is 90 percent of what the State would disburse to a K-12
11 school district for the student in question. A.R.S. § 15-2402(C). The State does
12 not provide any funding to school districts to educate post-secondary students.
13 The “base support level” for such a student would very clearly be zero. That
14 would appear to be the amount of the available scholarship. Whether S.B. 1553
15 actually authorizes any financial support for students who attend private colleges,
16 or merely creates the illusion that it does, is therefore unclear. The fact that the
17 constitutional deficiencies in other parts of the enactment are not severable,
18 however, as discussed hereafter, probably makes it unnecessary to decipher the
19 puzzling provisions regarding post-secondary education.
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24 The statute also permits scholarship proceeds to be used for other
25 purposes—mostly inexpensive ones—including educational therapies or services;
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1 tutoring services; testing fees; and fees charged by the Department of Education to
2 administer the scholarship program. Since a student must attend a private school
3 to qualify for a scholarship, however, it is inevitable that most scholarship
4 proceeds would be used to pay the tuition at such schools.
5

6 7 II. S.B. 1553 VIOLATES THE AID CLAUSE

8 9 *A. By Authorizing the Use of Public Funds to Pay Private School 10 Tuition and Fees, S.B. 1553 Violates the Aid Clause*

11 In Article 11, Section 1 of the Arizona Constitution, the framers directed
12 the Legislature to “enact such laws as shall provide for the establishment and
13 maintenance of a general and uniform public school system.” The Legislature was
14 also directed to make such appropriations as might be required for the maintenance
15 and improvement of the public schools. Article 11, Section 10.
16

17 In furtherance of these goals, the framers enacted what has come to be
18 called the Aid Clause, found at Article 9, Section 10:
19

20 No tax shall be laid or appropriation of public money made in aid of any
21 church, or private or sectarian school, or any public service corporation.

22 The Aid Clause furthered the framers’ intent that Arizona have a strong public
23 school system “by prohibiting appropriations of funds from the public treasury to
24 private schools.” *Cain v. Horne*, 220 Ariz. at 82, 202 P.3d at 1183. The Aid
25 Clause was “primarily designed to protect the public fisc and to protect public
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1 schools.” *Id.* In combination, these clauses establish that the Legislature is
2 supposed to provide education solely through the public-school system, and that it
3 is prohibited from diverting funds to private schools.

4 The *Cain* court observed that the Aid Clause undoubtedly prevented direct
5 appropriations of money for private schools. 220 Ariz. at 83, 202 P.3d at 1184.
6
7 The statutes at issue in *Cain*, however, did not make direct appropriations for
8 private schools. Instead, they made public money available to parents, subject to a
9 requirement that the money be used to pay a private school. The court concluded
10 that this indirection made no difference. “For all intents and purposes,” it
11 concluded, “the voucher programs do precisely what the Aid Clause prohibits.” *Id.*
12 It is clear from *Cain* that public funds may not be used directly *or* indirectly to pay
13 for private education.
14

15 The program established by S.B. 1553 differs from the programs struck
16 down in *Cain* primarily in that, while it allows parents to use the state funds to pay
17 private school tuition, it also permits the money to be used for a few other
18 specified expenses, some of which would not offend the Aid Clause. To the extent
19 that S.B. 1553 permits parents to use state funds to pay private-school tuition and
20 fees, however, its effect is the same as that of the programs that were invalidated in
21 *Cain v. Horne*. It is invalid for the same reasons.
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1 *B. The Portions of S.B. 1533 That Violate the Aid Clause Are Not*
2 *Severable*

3 If the only defect in S.B. 1553 was that it violated the Aid Clause—which is
4 not the case, as Plaintiffs will show hereafter—the Court would have to decide
5 whether the provisions that permits public funds to be used for private education
6 could be severed from the remaining provisions. The answer is that they cannot
7 be.
8

9 Severability is inappropriate where the valid and invalid portions of a
10 statute are so intimately connected as to raise the presumption the Legislature
11 would not have enacted one without the other. *State ex rel. Napolitano v. Brown*,
12 194 Ariz. 340, 344, 982 P.2d 815, 819 (1999); *State Compensation Fund v.*
13 *Symington*, 174 Ariz. 188, 195, 848 P.2d 273, 280 (1993). Would the Legislature
14 have passed S.B. 1553 without the provisions that permit scholarship proceeds to
15 be used to pay private-school tuition? It seems highly unlikely. As discussed
16 above, scholarship recipients must attend private school and must promise not to
17 enroll in public school. Private schools obviously charge tuition. Tuition will
18 ordinarily be far and away the largest expense for those who choose to attend a
19 private school. Given that scholarship proceeds cannot be used to pay tuition, a
20 scholarship recipient would receive a large sum of money that could be spent only
21 on peripheral services, such as test fees and tutoring fees. The recipient would
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1 have to pay the primary cost of private education unassisted, even though he or she
2 will have surrendered the right to attend the free public schools.

3 As a whole, S.B. 1553 makes a sort of sense, even though the sense it
4 makes violates our most fundamental law. If the provisions that permit payment of
5 tuition and fees to a private school are excised, however, the enactment makes no
6 sense. To leave parts of the measure in effect would be to risk creating a law
7 judicially that the Legislature would never have chosen to enact.
8

9
10 III. S.B. 1553 UNCONSTITUTIONALLY CONDITIONS A BENEFIT ON A
11 WAIVER OF A CONSTITUTIONAL RIGHT

12
13 As mentioned above, S.B. 1553 requires that the parent of a qualified
14 student to promise not to enroll the student in public school. If a parent were to
15 enroll a child in private school and discover that the private school was not
16 meeting the child's needs, the parent would apparently be barred from
17 withdrawing the child from private school and enrolling him or her in a public
18 school. For reasons of public policy, the State cannot constitutionally condition a
19 benefit on such a promise.
20

21 The Arizona Constitution establishes a public education as a fundamental
22 right of Arizona pupils between the ages of six and twenty-one years. *Shofstall v.*
23 *Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973); *see also* Ariz. Op. Att'y Gen. No. I79-
24

1 103 (“Every child in Arizona is entitled to attend the public schools on a full time
2 basis”).

3 It is well settled that neither the State nor federal governments may
4 condition a privilege or a benefit on a citizen’s agreement to waive a constitutional
5 right. “When statutory or constitutional rights are granted to private parties as a
6 matter of public policy, a governmental entity may not insist on waiver of those
7 rights.” *Havasu Heights Ranch and Development Corp. v. State Land Dept. of*
8 *State of Ariz.*, 158 Ariz. 552, 558, 764 P.2d 37, 43 (App. 1988) (citing *City of*
9 *Glendale v. Coquat*, 46 Ariz. 478, 480, 52 P.2d 1178, 1179 (1935)); *accord*,
10 *Employers' Liability Assur. Corp. v. Frost*, 48 Ariz. 402, 407-408, 62 P.2d 320,
11 323 (1936) (although state could prohibit entry of foreign insurance companies, it
12 could not condition their entry on a waiver of constitutional rights); *State v. Quinn*,
13 218 Ariz. 66, 73, 178 P.3d 1190, 1197 (App. 2008) (“states may not condition the
14 grant of a privilege on the forfeiture of a constitutional right”).
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18 The U.S. Supreme Court has explained the rationale for this established rule
19 as follows:

20 [A] s a general rule, the state, having power to deny a privilege altogether,
21 may grant it upon such conditions as it sees fit to impose. But the power of
22 the state in that respect is not unlimited, and one of the limitations is that it
23 may not impose conditions which require the relinquishment of
24 constitutional rights. If the state may compel the surrender of one
25 constitutional right as a condition of its favor, it may, in like manner,
26 compel a surrender of all. It is inconceivable that guaranties embedded in
27 the Constitution of the United States may thus be manipulated out of
existence.

1 *Frost v. R.R. Comm'n of California*, 271 U.S. 583, 593-94, 46 S.Ct. 605, 70 L.Ed.
2 1101 (1926). Because S.B. 1553 conditions receipt of a scholarship on a parent's
3 waiver of a fundamental constitutional right, it is invalid in its entirety.
4

5
6 IV. S.B. 1533 VIOLATES THE RELIGION CLAUSE
7

8 Article 2, Section 12 of the Arizona Constitution, which is known as the
9 Religion Clause, provides in pertinent part that “[n]o public money...shall be
10 appropriated for or applied to any religious worship, exercise, or instruction....”
11 S.B. 1533 authorizes the use of public funds to pay tuition and fees at religious
12 schools, and those schools need not alter their practices in any way because they
13 are being paid with public funds. See A.R.S. § 15-2404(C). Part of what
14 scholarship funds would inevitably pay for in a religious school, and part of what
15 public funds would be “applied to,” is religious instruction. S.B. 1553 therefore
16 violates the Religion Clause.
17
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19 In *Cain v. Horne*, the court's finding that the voucher programs violated the
20 Aid Clause made it unnecessary to decide whether they also violated the Religion
21 Clause. 220 Ariz. at 84 n.4, 202 P.3d at 1185. That may be the case here as well.
22 If for any reason this Court finds that S.B. 1553 does not violate the Aid Clause,
23 however, it should find that the enactment violates the Religion Clause.
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1 V. DISBURSEMENT OF ANY FUNDS PURSUANT TO S.B. 1533
2 SHOULD BE ENJOINED

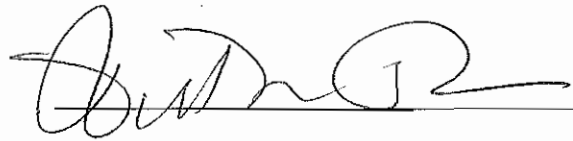
3 This action was brought pursuant to A.R.S. §§ 35-211 to 35-215, which
4 authorizes taxpayers to obtain injunctions to prevent the illegal payment of public
5 moneys. The statute applies when a litigant seeks to prevent disbursements
6 pursuant to an unconstitutional statute. *Cain v. Horne*, 220 Ariz. at 84, 202 P.3d at
7 1185. Plaintiff was required to make a demand that the Attorney General seek
8 relief as a prerequisite to filing suit. A.R.S. § 35-213(A). Plaintiff did so. See
9 exhibit B. The Attorney General declined to take action. See exhibit C.
10

11 The presumptive remedy under A.R.S. §§ 35-212 and 35-213 is an
12 injunction to prevent the illegal disbursement. The Arizona Department of
13 Education is charged with disbursing funds pursuant to S.B. 1553. See A.R.S. §§
14 15-2402(C), 15-2401(1). Defendant Huppenthal is vested with all executive and
15 administrative functions of the Arizona Department of Education. A.R.S. § 15-
16 231(B)(2); see also Ariz. Const. art. 11, § 2. He also has the power to direct the
17 performance of executive and administrative functions of the Department. A.R.S.
18 § 15-251(6). He therefore has the legal authority to prevent disbursements
19 pursuant to the statutes in question. Defendant Huppenthal should therefore be
20 enjoined from permitting any disbursements of public funds pursuant to the
21 authority of S.B. 1533.
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CONCLUSION

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3 S.B. 1553 authorizes the use of public funds to pay tuition and fees at
4 religious and other private schools. Such expenditures are prohibited by the Aid
5 and Religion clauses. The enactment also conditions the availability of a
6 scholarship on the waiver of a fundamental constitutional right, which is
7 prohibited for reasons of public policy. Defendant Huppenthal should be enjoined
8 from disbursing any funds pursuant to the authority of S.B. 1553.
9

10 September 26, 2011.
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15 Donald M. Peters
16 Kristin Mackin
17 LaSota & Peters, PLC
18 722 E. Osborn, Suite 100
19 Phoenix, AZ 85014
20 Telephone: (602) 248-2900

21 Timothy M. Hogan
22 Arizona Center for Law
23 In the Public Interest
24 202 E. McDowell, Suite 153
25 Phoenix, Arizona 85004-4533
26 Telephone: (602) 258-8850

27 Attorneys for Plaintiffs

EXHIBIT A

House Engrossed Senate Bill

State of Arizona
Senate
Fiftieth Legislature
First Regular Session
2011

SENATE BILL 1553

AN ACT

AMENDING SECTION 15-1182, ARIZONA REVISED STATUTES; AMENDING TITLE 15, ARIZONA REVISED STATUTES, BY ADDING CHAPTER 19; RELATING TO ARIZONA EMPOWERMENT SCHOLARSHIP ACCOUNTS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 15-1182, Arizona Revised Statutes, is amended to
3 read:

4 15-1182. Special education fund; administration

5 A. There is established a special education fund which shall consist
6 of legislative appropriations made to the fund for purposes of this section
7 and section 15-1202 AND CHAPTER 19, ARTICLE 1 OF THIS TITLE.

8 B. The fund shall be administered by the superintendent of public
9 instruction for the purposes provided in this article and article 7 of this
10 chapter AND CHAPTER 19, ARTICLE I OF THIS TITLE.

11 C. Each fiscal year the state board of education shall include in its
12 budget request for assistance to schools a separate line item for the fund.

13 D. The fund shall provide monies for the education of a child who has
14 been placed in a residential facility by a state placing agency or who
15 requires a residential special education placement as defined in section
16 15-761 OR FOR DEPOSIT INTO AN ARIZONA EMPOWERMENT SCHOLARSHIP ACCOUNT
17 PURSUANT TO SECTION 15-2402.

18 E. If a child has been placed in a residential facility by a state
19 placing agency, the fund shall provide monies for the following types of
20 vouchers:

21 1. Initial residential education vouchers to fund the educational
22 costs for any child, whether or not eligible for special education. This
23 paragraph applies to a child who has been placed in a residential facility
24 and who has either not received a comprehensive education evaluation as
25 provided in section 15-766, who has previously received such an evaluation
26 and was determined to be ineligible for special education services or who is
27 eligible for special education and for whom necessary procedures for changing
28 the child's educational placement must be completed. This voucher expires on
29 the expiration of sixty calendar days or completion of the educational
30 evaluation or review of special education placement, whichever occurs first.

31 2. Continuing residential education vouchers that fund the educational
32 costs for any child, whether or not eligible for special education, who
33 requires placement in a residential facility after the expiration of the
34 initial education voucher and who is not eligible for a residential special
35 education voucher.

36 F. When a school district makes a residential special education
37 placement, the fund shall provide monies to fund the residential special
38 education placement.

39 G. Monies in the fund are exempt from the provisions of section 35-190
40 relating to lapsing of appropriations. Any monies left unexpended may be
41 distributed to school districts by the department of education for the
42 following purposes:

43 1. To provide educational counseling, training and support services to
44 a child with a disability in order to maintain the child's educational
45 placement in the least restrictive environment.

1 6. "TREASURER" MEANS THE OFFICE OF THE STATE TREASURER.
2 15-2402. Arizona empowerment scholarship accounts
3 A. ARIZONA EMPOWERMENT SCHOLARSHIP ACCOUNTS ARE ESTABLISHED TO PROVIDE
4 OPTIONS FOR THE EDUCATION OF STUDENTS IN THIS STATE.
5 B. TO ENROLL A QUALIFIED STUDENT FOR AN EMPOWERMENT SCHOLARSHIP
6 ACCOUNT, THE PARENT OF THE QUALIFIED STUDENT MUST SIGN AN AGREEMENT TO DO ALL
7 OF THE FOLLOWING:
8 1. PROVIDE AN EDUCATION FOR THE QUALIFIED STUDENT IN AT LEAST THE
9 SUBJECTS OF READING, GRAMMAR, MATHEMATICS, SOCIAL STUDIES AND SCIENCE.
10 2. NOT ENROLL THE QUALIFIED STUDENT IN A SCHOOL DISTRICT OR CHARTER
11 SCHOOL AND RELEASE THE SCHOOL DISTRICT FROM ALL OBLIGATIONS TO EDUCATE THE
12 QUALIFIED STUDENT.
13 3. NOT ACCEPT A SCHOLARSHIP FROM A SCHOOL TUITION ORGANIZATION
14 PURSUANT TO TITLE 43 FOR THE QUALIFIED STUDENT IN THE SAME YEAR A PARENT
15 SIGNS THE AGREEMENT PURSUANT TO SUBSECTION B OF THIS SECTION.
16 4. USE THE MONEY DEPOSITED IN THE QUALIFIED STUDENT'S ARIZONA
17 EMPOWERMENT SCHOLARSHIP ACCOUNT ONLY FOR THE FOLLOWING EXPENSES OF THE
18 QUALIFIED STUDENT:
19 (a) TUITION OR FEES AT A QUALIFIED SCHOOL.
20 (b) TEXTBOOKS REQUIRED BY A QUALIFIED SCHOOL.
21 (c) EDUCATIONAL THERAPIES OR SERVICES FOR THE QUALIFIED STUDENT FROM A
22 LICENSED OR ACCREDITED PRACTITIONER OR PROVIDER.
23 (d) TUTORING SERVICES PROVIDED BY A TUTOR ACCREDITED BY A STATE,
24 REGIONAL OR NATIONAL ACCREDITING ORGANIZATION.
25 (e) CURRICULUM.
26 (f) TUITION OR FEES FOR A NONPUBLIC ONLINE LEARNING PROGRAM.
27 (g) FEES FOR A NATIONALLY STANDARDIZED NORM-REFERENCED ACHIEVEMENT
28 TEST, ADVANCED PLACEMENT EXAMINATIONS OR ANY EXAMS RELATED TO COLLEGE OR
29 UNIVERSITY ADMISSION.
30 (h) CONTRIBUTIONS TO A QUALIFIED TUITION PROGRAM ESTABLISHED PURSUANT
31 TO 11 UNITED STATES CODE SECTION 529.
32 (i) TUITION OR FEES AT AN ELIGIBLE POSTSECONDARY INSTITUTION.
33 (j) TEXTBOOKS REQUIRED BY AN ELIGIBLE POSTSECONDARY INSTITUTION.
34 (k) FEES FOR MANAGEMENT OF THE EMPOWERMENT SCHOLARSHIP ACCOUNT BY
35 FIRMS SELECTED BY THE DEPARTMENT.
36 C. IN EXCHANGE FOR THE PARENT'S AGREEMENT PURSUANT TO SUBSECTION B OF
37 THIS SECTION, THE DEPARTMENT SHALL TRANSFER FROM THE SPECIAL EDUCATION FUND
38 PURSUANT TO SECTION 15-1182 TO THE TREASURER FOR DEPOSIT INTO AN ARIZONA
39 EMPOWERMENT SCHOLARSHIP ACCOUNT AN AMOUNT THAT IS EQUIVALENT TO NINETY PER
40 CENT OF THE BASE SUPPORT LEVEL PRESCRIBED IN SECTION 15-943 FOR THAT
41 PARTICULAR STUDENT.
42 D. A PARENT MUST RENEW THE QUALIFIED STUDENT'S EMPOWERMENT SCHOLARSHIP
43 ACCOUNT ON AN ANNUAL BASIS.
44 E. A SIGNED AGREEMENT UNDER THIS SECTION CONSTITUTES SCHOOL ATTENDANCE
45 REQUIRED BY SECTION 15-802.

1 F. A QUALIFIED SCHOOL OR A PROVIDER OF SERVICES PURCHASED PURSUANT TO
2 SUBSECTION B, PARAGRAPH 4 OF THIS SECTION MAY NOT SHARE, REFUND OR REBATE ANY
3 ARIZONA EMPOWERMENT SCHOLARSHIP ACCOUNT MONIES WITH THE PARENT OR QUALIFIED
4 CHILD IN ANY MANNER.

5 G. ON THE QUALIFIED STUDENT'S GRADUATION FROM A POSTSECONDARY
6 INSTITUTION OR AFTER ANY PERIOD OF FOUR CONSECUTIVE YEARS AFTER HIGH SCHOOL
7 GRADUATION IN WHICH THE STUDENT IS NOT ENROLLED IN AN ELIGIBLE POSTSECONDARY
8 INSTITUTION, THE QUALIFIED STUDENT'S ARIZONA EMPOWERMENT SCHOLARSHIP ACCOUNT
9 SHALL BE CLOSED AND ANY REMAINING FUNDS SHALL BE RETURNED TO THE STATE.

10 H. MONIES RECEIVED PURSUANT TO THIS ARTICLE DOES NOT CONSTITUTE
11 TAXABLE INCOME TO THE PARENT OF THE QUALIFYING STUDENT.

12 15-2403. Empowerment scholarship accounts; administration;
13 audit; rules

14 A. THE TREASURER MAY CONTRACT WITH PRIVATE FINANCIAL MANAGEMENT FIRMS
15 TO MANAGE ARIZONA EMPOWERMENT SCHOLARSHIP ACCOUNTS WITH THE SUPERVISION OF
16 THE TREASURER.

17 B. THE DEPARTMENT SHALL CONDUCT OR CONTRACT FOR ANNUAL AUDITS OF A
18 RANDOM SAMPLE OF EMPOWERMENT SCHOLARSHIP ACCOUNTS TO ENSURE COMPLIANCE WITH
19 SECTION 15-2402, SUBSECTION B, PARAGRAPH 4. THE DEPARTMENT MAY ALSO CONDUCT
20 OR CONTRACT FOR AUDITS OF EMPOWERMENT SCHOLARSHIP ACCOUNTS AS NEEDED TO
21 ENSURE COMPLIANCE WITH SECTION 15-2402, SUBSECTION B, PARAGRAPH 4.

22 C. THE DEPARTMENT MAY REMOVE ANY PARENT OR QUALIFIED STUDENT FROM
23 ELIGIBILITY FOR AN ARIZONA EMPOWERMENT SCHOLARSHIP ACCOUNT AND SHALL NOTIFY
24 THE TREASURER. A PARENT MAY APPEAL THE DEPARTMENT'S DECISION PURSUANT TO
25 TITLE 41, CHAPTER 6, ARTICLE 10.

26 D. THE DEPARTMENT MAY REFER CASES OF SUBSTANTIAL MISUSE OF MONIES TO
27 THE ATTORNEY GENERAL FOR INVESTIGATION IF THE DEPARTMENT OBTAINS EVIDENCE OF
28 FRAUDULENT USE OF AN ACCOUNT.

29 E. THE TREASURER MAY DEDUCT UP TO THREE PER CENT OF THE AMOUNT OF
30 STUDENT STATE AID FROM EACH EMPOWERMENT SCHOLARSHIP ACCOUNT FOR THE COSTS OF
31 ADMINISTERING EMPOWERMENT SCHOLARSHIP ACCOUNTS UNDER THIS CHAPTER, INCLUDING
32 COSTS INCURRED BY THE DEPARTMENT.

33 F. THE DEPARTMENT SHALL MAKE QUARTERLY TRANSFERS OF THE AMOUNT
34 CALCULATED PURSUANT TO SECTION 15-2402, SUBSECTION C TO THE TREASURER FOR
35 DEPOSIT INTO THE EMPOWERMENT SCHOLARSHIP ACCOUNT OF EACH QUALIFIED STUDENT.

36 G. THE DEPARTMENT MAY ADOPT RULES NECESSARY FOR THE ADMINISTRATION OF
37 EMPOWERMENT SCHOLARSHIP ACCOUNTS.

38 15-2404. State control over nonpublic schools; prohibition;
39 application

40 A. THIS CHAPTER DOES NOT PERMIT ANY GOVERNMENT AGENCY TO EXERCISE
41 CONTROL OR SUPERVISION OVER ANY NONPUBLIC SCHOOL OR HOME SCHOOL.

42 B. A QUALIFIED SCHOOL THAT ACCEPTS A PAYMENT FROM A PARENT PURSUANT TO
43 THIS CHAPTER IS NOT AN AGENT OF THE STATE OR FEDERAL GOVERNMENT.

1 C. A QUALIFIED SCHOOL SHALL NOT BE REQUIRED TO ALTER ITS CREED,
2 PRACTICES, ADMISSIONS POLICY OR CURRICULUM IN ORDER TO ACCEPT STUDENTS WHOSE
3 PARENTS PAY TUITION OR FEES FROM AN EMPOWERMENT SCHOLARSHIP ACCOUNT PURSUANT
4 TO THIS CHAPTER IN ORDER TO PARTICIPATE AS A QUALIFIED SCHOOL.

5 D. IN ANY LEGAL PROCEEDING CHALLENGING THE APPLICATION OF THIS CHAPTER
6 TO A QUALIFIED SCHOOL, THE STATE BEARS THE BURDEN OF ESTABLISHING THAT THE
7 LAW IS NECESSARY AND DOES NOT IMPOSE ANY UNDUE BURDEN ON QUALIFIED SCHOOLS.

8 Sec. 3. Arizona empowerment scholarship accounts; agreements

9 For the 2011 fall semester, the deadline for parents to sign an
10 agreement with the department is August 1, 2011. For the 2012 spring
11 semester, the deadline is December 1, 2011. The department has up to thirty
12 days to process agreements and notify the treasurer of the total number of
13 qualified students who have properly filled out the agreements for
14 empowerment scholarship accounts.

EXHIBIT B

LASOTA & PETERS PLC

Tel 602 248 2900
Fax 602 248 2999
722 East Osborn Road, Suite 100
Phoenix, Arizona 85014

DONALD M. PETERS
dpeters@lasotapeters.com

June 28, 2011

Tom Horne
Arizona Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926

Re: Request for action to prevent illegal disbursements pursuant to Senate Bill 1553

Dear Attorney General Horne:

This law firm represents the Arizona School Boards Association, an Arizona taxpayer. This letter is a request pursuant to A.R.S. § 35-213 that you institute an action pursuant to A.R.S. § 35-212 to enjoin the illegal payment of public monies pursuant to Senate Bill 1553, which was enacted in the first regular session of this year's Legislature. A copy of the enactment is attached.

Senate Bill 1553 allows the Arizona Department of Education to give scholarships to qualified pupils. A.R.S. § 15-2402(C). To be qualified, a pupil must be disabled and must attend a private school. A.R.S. § 15-2401(5). The pupil's parent must promise not to enroll the pupil in a public school. A.R.S. § 15-2402(B)(2). In return for that promise and other promises by the parent, the Department of Education is to transfer 90 percent of the base support level that would be paid to a public school, if the student were attending one, to a scholarship fund. A.R.S. § 15-2402(C). The parent may use the money from the scholarship fund to pay tuition and other specified expenses. A.R.S. § 15-2402(B)(4).

One difficulty with this enactment is that it requires that parents waive their children's fundamental right to attend public school as a condition of obtaining a scholarship. The State may not require a waiver of a constitutional right as a condition of obtaining a benefit. *See Employers' Liability Assur. Corp. v. Frost*, 48 Ariz. 402, 407-408, 62 P.2d 320, 323 (1936); *Havasu Heights Ranch and Development Corp. v. State Land Dept.*, 158 Ariz. 552, 558, 764 P.2d 37, 43 (App. 1988); *State v. Quinn*, 218 Ariz. 66, 73, 178 P.3d 1190, 1197 (App. 2008). For this reason alone, Senate Bill 1553 is unconstitutional.

A distinct difficulty is that Senate Bill 1553 violates Article 9, Section 10, of the Arizona Constitution, which has been referred to by the courts as the Aid Clause. As you know, in *Cain v. Horne*, 220 Ariz. 77, 202 P.3d 1178 (2009), the Arizona Supreme Court ruled that two school-

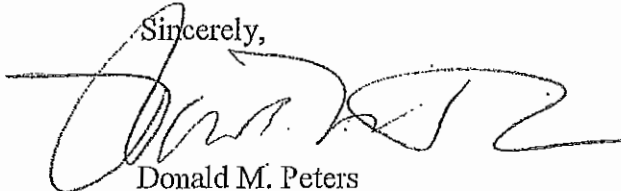
Tom Horne
June 28, 2011
Page Two

voucher statutes violated the Aid Clause. The statutes violated the clause because they authorized the indirect transfer of public funds to private schools. Senate Bill 1553 does the same thing. The enactment authorizes scholarships only for pupils who attend private schools. Although the enactment permits the scholarship funds to be used for purposes other than paying tuition at the pupil's private school, the funds may be used for that purpose. Payment of tuition is inevitably what the scholarship funds would primarily be used for. Senate Bill 1553 is therefore invalid in light of the decision in *Cain v. Horne*.

Senate Bill 1553 also violates Article 2, Section 12, of the Arizona Constitution. That provision states: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." The scholarship funds may be used to pay tuition at religious schools. Those schools need not alter their practices to receive the funds. A.R.S. § 15-2404(C). To the extent the funding inures to the benefit of religious schools, the money will be both appropriated for and applied to religious instruction in violation of the Arizona Constitution.

Because Senate Bill 1553 is unconstitutional, any disbursement of funds pursuant to its authority would be illegal. Such disbursements may be enjoined pursuant to A.R.S. § 35-212. *Cain v. Horne*, 220 Ariz. at 84, 202 P.3d at 1185. My client therefore asks that you bring an appropriate action to prevent any disbursements pursuant to Senate Bill 1553.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald M. Peters", written over a horizontal line.

Donald M. Peters

DMP/tv
attachment

EXHIBIT C



TOM HORNE
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
CIVIL DIVISION/EDUCATION AND HEALTH SECTION

ERIC J. BISTROW
CHIEF DEPUTY
DIRECT: (602) 542-8080
EMAIL: ERIC.BISTROW@AZAG.GOV

July 29, 2011

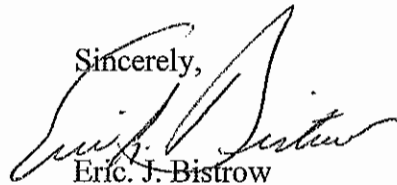
Donald M. Peters
LaSOTA & PETERS, PLC
722 East Osborn Rd, Suite 100
Phoenix, AZ. 85014

Re: Your Letter dated June 28, 2011 requesting the Attorney General file a lawsuit to prevent the alleged illegal disbursement of public monies under Senate Bill 1553

Dear Mr. Peters:

We are in receipt of your letter dated June 28, 2011 addressed to Attorney General Horne. Please be advised that the Attorney General has exercised the discretion provided him by statute (A.R.S. §35-212(A)) and will not be filing the requested lawsuit.

Sincerely,



Eric J. Bistrow
Deputy Chief

Doc: #2188358