

Main Identity

From: "The Natelsons" <natelson@montana.com>
To: "Koopman" <koopman@imt.net>
Sent: Thursday, February 03, 2005 3:23 PM
Subject: Re: HB 495

EXHIBIT 5
DATE 2.4.09
HB 495

Roger:

Eric has been claiming for years that tax credits are unconstitutional, and for years he's been shown to be wrong. One example is the 2002 U.S. Supreme Court case of *Zelman v. Simmons-Harris*, which upheld vouchers against a U.S. constitutional challenge. Eric and his allies had long claimed that vouchers were unconstitutional, but they were wrong again.

Vouchers, as you know, are a much more extensive program than tax credits. As for the state constitutional issues, the matter was pretty well decided back in 1971 when the Montana Supreme Court, construing a provision under the 1889 constitution that is virtually identical to the one under the current constitution, held that it was constitutional for the state to reimburse the clients of adoption agencies that were run by particular religious sects. The court further said that it would violate equal protection not to do so. That case is the *Lutheran Social Services* case.

If the current supreme court reversed *Lutheran Social Services*, it could do so only under Art. X, Section 6, the "Blaine Amendment," which forbids "direct" or "indirect" aid to "sectarian" schools. State Blaine Amendments are under a federal constitutional cloud because if followed strictly, they cause the state to discriminate against religion or against some religions and in favor of others (i.e., in favor of non-sectarian or independent religions and against "sects". The recent Supreme Court case of *Locke v. Davey* upheld a Washington state denial of educational religious benefits, but expressly stated that the Washington constitutional provision at issue was not a "Blaine Amendment" such as we have in Montana.

To be constitutional, all that is required is that the tax credits be available to any parent who pays tuition -- whether at a public school or non-religious private school, or non-sectarian (non-denominational) religious private school, or at a sectarian private school. If it's the parents' choice, that's all that's necessary. Of course, it is possible for the Montana supreme court to reverse its own precedent, but if the legislature never passed a bill for fear that our state supreme court might act unexpectedly, then our legislature would never pass a bill.

A glossary: A "sectarian" school as used in the Blaine Amendment is one controlled by a particular sect -- Catholicism was what was meant. Schools like Valley Christian are non-sectarian and not under the Blaine ban.

"Direct" aid -- forbidden by the U.S. and MT constitutions means direct grants to a school.

"Indirect" aid -- permitted under the U.S. Constitution but not under the Blaine Amendment (as to "sectarian" schools) means vouchers.

"Incidental" aid means aid to the customers of the institution -- such as tax credits, reimbursements, etc. It is permitted under current law under both constitutions.

One last point: The Montana Constitution contains mandates both for equal educational opportunity for all and for realizing full educational potential. Because people are inherently unequal in educational ability, this is an inherently inconsistent mandate for traditional public schools. The only way to meet both mandates, is to allow the tailoring of education for the individual child that is possible only in system of school choice. Viewed from that perspective, school choice is not merely an option; it is a state constitutional *requirement*.

- Rob