



James E. Rogers
Chancellor

Nevada System of Higher Education

2601 Enterprise Rd.

Reno, NV 89512

Phone: (775) 784-4901

Fax: (775) 784-6520

5550 W. Flamingo Rd., Ste. C-1

Las Vegas, NV 89103

Phone: (702) 889-8426

Fax: (702) 889-8492

MEMORANDUM

DATE: July 15, 2008

TO: NSHE Board of Regents

FROM: James E. Rogers
Chancellor

RE: Budget Reduction Implications – School of Medicine

I am disturbed, but not intimidated or deterred by the efforts of Governor Gibbons, acting through one of his closest advisors, Monte Miller, to phone various Regents on several occasions to attempt to “muzzle” or control what I write with my weekly memos, some of which have directly or indirectly criticized the Governor for his total lack of support of Nevada education, not just the higher education system, but also K-12.

Fortunately none of the Regents has “taken the bait” and tried to similarly thwart my efforts. I am grateful for their support. I believe it is my obligation to the Regents, the Legislature, and the Governor to discuss the financial problems of K–16 education and to attempt to put forth possible solutions. I consider my first obligation to be to the people of the state, not any single group or governmental entity. It is a responsibility that is grounded in the Constitution of the State of Nevada which in Article 11, Sec. 4, requires the establishment of a State University and which in Sec. 6.1 requires the Legislature to provide funding, as follows:

Section 4. Establishment of state university; control by board of regents. **The Legislature shall provide for the establishment of a State University** which shall embrace departments for Agriculture, Mechanic Arts, and Mining to be controlled by a Board of Regents whose duties shall be prescribed by Law.

Section 6. Support of university and common schools by direct legislative appropriation; priority of appropriations.

1. In addition to other means provided for the support and maintenance of said university and common schools, **the legislature shall provide for their support and**

maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

(emphasis added).

My memoranda are simply trying to encourage the leaders of this State not only to do the wise and prudent thing but to discharge their constitutionally mandated duty before the matter is taken from their hands as is possible through litigation of the type that has already been commenced in 45 other states, successfully in 27. Ten cases are still pending. That serves no one's interests well (See, attached memorandum from Brooke Nielsen).

It is my plan to send one memo a week through the remainder of my term as Chancellor ending in June 2009. Initially, I have focused on the devastating impact that proposed budget cuts will have on higher education and the future of the State simply because the threat is so imminent and profound. I will not retreat an inch from that position. However, these memos are intended to serve a much broader purpose.

We are constantly listening for legitimate questions and constructive criticism about our System of Higher Education. We will actively solicit those questions from our leaders in State government, business, alumni groups, donor communities and citizens **and we will respond directly, openly and publicly to those questions and concerns.** This may not always be comfortable but we are committed to this transparent process.

In addition, we will use the vehicle of these memos to illustrate the value of higher education to this State by case studies jointly presented with our partners in the private sector and other government agencies. Those memos will consist of information directly from the eight institutions of the System in conjunction with information from persons and organizations outside NSHE, for example our partners in K-12 education in the seventeen school districts of Nevada. I will also send you the thoughts and suggestions of large and small business entities, other state agencies, like the prison and health care providers, unions and other small and large groups who have an interest in improving education in Nevada and who have profited by strategic alliances with education.

I believe that there is a vast and in many ways untapped reservoir of support for education in this State. Those of us in education do not do a satisfactory job of letting the citizens of Nevada know the many diverse and positive ways in which we touch their lives in so many ways every day. **I am committed to reversing that trend and demonstrating that value every single day that I am Chancellor.**

And in that regard, I attach a memorandum regarding our statewide School of Medicine.

Nevada System of Higher Education

System Administration

2601 Enterprise Road
Reno, NV 89512-1666
Phone: (775) 784-4901
Fax: (775) 784-1127



System Administration

5550 W. Flamingo Rd., Suite C-1
Las Vegas, NV 89103
Phone: (702) 889-8426
Fax: (702) 889-8492

TO: Chancellor James E. Rogers

FROM: Brooke A. Nielsen, Special Counsel

RE: Funding Adequacy Litigation

DATE: July 14, 2008

This Memorandum addresses whether funding adequacy for post-secondary education in Nevada may be challenged through litigation. The analysis contained herein is not an exhaustive study of the issue, but is intended to briefly examine the legal feasibility of such litigation.

In 45 states, education finance litigation has been brought on behalf of K-12 against states, public officials, and state legislatures. Plaintiffs have prevailed in 27 cases, 20 of which have been funding adequacy cases.¹ Ten cases are still in process.² The cases are based on a variety of legal theories, including the claim that the state constitution requires the state legislature to provide sufficient funding to allow an adequate educational opportunity for all students. See *Abbeville County School District v. State*, 515 S.E.2d 535 (S.C. 1999) (“adequacy” claim based on South Carolina Constitution education clause upheld)(hereinafter referred to as “*Abbeville County School District*”).

In *Abbeville County School District*, forty of South Carolina’s poorer school districts, and their public students and taxpayers brought an action for declaratory relief against the state of South Carolina and various public officials including representatives of both houses of the state legislature. The South Carolina Supreme Court upheld the dismissal of the plaintiffs’ claims that were based on the state and federal equal protection clauses, and state the Education Finance Act (EFA), South Carolina Code Ann. §§ 59-20-10 to -80 (1990 & Supp.1998), but reversed the lower court’s dismissal of the claim based on the state constitutional education clause. *Abbeville County School District*, 515 S.E.2d at 538. Rejecting the Defendants’ argument that the constitution did not impose qualitative standards, the South Carolina court held:

The novel issue in this case involves the education clause of the state constitution. S.C. Const. art. XI, § 3 is entitled “System of free public schools and other public institutions” and provides:

¹ Access, “Education Adequacy Liability Decisions since 1989”, “www.schoolfunding.info”

² Access, “Litigations Challenging Constitutionality of K-12 Funding in the 50 States,” www.schoolfunding.info

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The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public institutions of learning as may be desirable.

At the heart of this controversy is the question of the duty imposed upon the General Assembly by this constitutional provision. The trial court held this section imposes no qualitative standards, and that absent an allegation that there was no system of free public schools open to all children in the state, no claim was stated under the education clause. The trial court also found the complaint's "bald legal conclusion" that the education furnished is inadequate did not state a clear and *67 convincing constitutional claim, and concluded that judicial restraint, separation of powers, and/or the political question doctrine prevented it from considering this education clause claim. Appellants challenge all these rulings.

It is the duty of this Court to interpret and declare the meaning of the Constitution. *State ex rel. Rawlinson v. Ansel*, 76 S.C. 395, 57 S.E. 185 (1907). Accordingly, the circuit court erred in using judicial restraint, separation of powers, and the political question doctrine as the bases for declining to decide the meaning of the education clause.

In determining the meaning of the education clause's language, "The General Assembly shall provide for the maintenance and support of a system of free public education....," the Court must be guided not only by the "ordinary and popular meaning of the words used," ^{FN1} but also by S.C. Const. art. I, § 23: "The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or promissory by its own terms." Since the education clause uses the term "shall", it is mandatory. *See also Washington v. Salisbury*, 279 S.C. 306, 306 S.E.2d 600 (1983) ("The plain language of [the educational clause] places the responsibility for free public education with the General Assembly....").

FN1. *State v. Broad River Power Co.*, 177 S.C. 240, 181 S.E. 41 (1935).

The circuit court held the phrase "maintenance and support of a system of free public schools" means simply that there be such a system, and that the clause contains no qualitative component. The court held the clause does not require the schools be adequate or equal. The State does not defend the circuit court's conclusion that our Constitution's education clause does not impose a qualitative standard, but rather argues that the appellants have not properly defined it. According to the State, since the complaint does not contain the correct definition, it does not state a proper claim, and therefore we should affirm the circuit court, without interpreting the clause. We will not accept this invitation to circumvent our duty to interpret and declare the meaning of this clause. *State ex rel. Rawlinson v. Ansel*, *supra*.

We hold today that the South Carolina Constitution's education clause requires the General Assembly to provide the opportunity for each child to receive a minimally

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adequate education. *Compare Opinion of the Justices*, 624 So.2d 107 (Ala.1993) (holding qualitative standard created by clause “The Legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof...”); *R.E.F.I.T. v. Cuomo*, 86 N.Y.2d 279, 631 N.Y.S.2d 551, 655 N.E.2d 647 (1995) (“The legislature shall provide for the maintenance and support of a system of free common schools” requires that each student receive a sound basic education); *Fair School Fin. Council of Oklahoma v. State*, 746 P.2d 1135 (Ok.1987) (constitutional provisions requiring the “establishment and maintenance of a system of free public schools” means a basic adequate education); *Tennessee Small School Sys. v. McWherter*, 851 S.W.2d 139 (1993) (holding constitutional clause “The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools” embraces a qualitative component); see also *Gould v. Orr*, 244 Neb. 163, 506 N.W.2d 349 (1993) (no violation of clause “The legislature shall provide for the free instruction on the common schools of this state” alleged where no claim of “inadequate schooling”). Further, the General Assembly itself has acknowledged the need to “To guarantee to each student in the public schools of South Carolina the availability of at least minimum educational programs and services....”^{FN2}

FN2. S.C.Code Ann. § 59-20-30 (1990).

Id., at 539-541. Although the arguments in support of a funding adequacy claim on behalf of higher education in Nevada will differ from the factual and legal bases discussed in *Abbeville County School District* and in other school finance litigation, by analogy strong arguments can be made that the Nevada Constitution imposes a mandatory obligation on the Legislature to fund the universities and colleges at a level that allows the opportunity for students to obtain some level of substantively adequate post-secondary education.

All states have created school systems in their state constitutions. The constitutional language varies and therefore each state may have somewhat unique arguments in support of state constitution funding claims. The Nevada Constitution can arguably be interpreted to require not only the opportunity for a “sound basic education,” but also the opportunity for a “sound higher education.” Several provisions of the Constitution address the establishment and funding of K-12 and the University. Nevada Constitution, Article 11, Sec. 4, requires the establishment of a State University and Sec. 6.1 requires the Legislature to provide funding, as follows:

Section 4. Establishment of state university; control by board of regents. **The Legislature shall provide for the establishment of a State University** which shall embrace departments for Agriculture, Mechanic Arts, and Mining to be controlled by a Board of Regents whose duties shall be prescribed by Law.

...

Section 6. Support of university and common schools by direct legislative appropriation; priority of appropriations.

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1. In addition to other means provided for the support and maintenance of said university and common schools, **the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.**

(emphasis added).

Just like the education clause at issue in *Abbeville County School District* and in other school funding cases, a qualitative component is implied in the Nevada Constitution, Article 11, Section 4. There is a specific mandate to the Legislature in the Constitution, Article 11, Section 1, to “. . . encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements. . . .” The mandatory promotion of such educational pursuits cannot be meaningfully achieved in the absence of at least minimally adequate standards. Comparison of Nevada’s higher education outcomes, including attendance and graduation rates, to those of other states demonstrates Nevada’s failure to present adequate opportunities for higher education to its citizens. As the Court in *Abbeville County School District* noted, the mere creation of an education system does not satisfy the constitutional education mandate. *Id.* Inadequate funding can be demonstrated to be a significant factor in Nevada’s failure to achieve even a minimally satisfactory level of student attendance and success at our universities and colleges.

The language of the Constitution, Article 11, Section 6.1 also provides compelling support for the argument that the Legislature must provide sufficient funding to allow the university system provide some substantively adequate level of educational opportunity. Unlike the education clause in South Carolina, the Nevada Legislature is given specific direction in Article 11, Section 6 as to the type and timing of funding for education. First, the Legislature is required to fund both the common schools and the University from “direct legislative appropriation from the general fund.” If other sources of funding for both the common schools and the University are inadequate, the Legislature *must* provide the necessary support from the general fund. Second, the Legislature *must* first receive budgets prepared by the common schools and the University before it can act. Clearly, the drafters of the Constitution could not have intended the submission of budgets prepared by the common schools and the University to have no impact on the amount to be appropriated by the Legislature. Also, of great significance is the requirement that Nevada residents be allowed to attend the university tuition free. NRS 396.540. This tuition free requirement accentuates the University’s need to receive sufficient funding from the general fund.

In conclusion, in light of the successful education clause funding cases in other states, and in light of the unique mandates of the Nevada Constitution regarding the establishment and funding of higher education, there are reasonable and good faith arguments to support a funding adequacy claim on behalf of higher education in Nevada. Obviously, additional analysis and study of the issues is needed to further develop the factual and legal arguments in support of a funding adequacy claim.



University of Nevada, Reno

Milton D. Glick
President

To: Chancellor Jim Rogers

From: Milton D. Glick *Milt Glick*

Date: July 14, 2008

Per your request, the Vice-president for Health Sciences and his staff have provided a brief but clear picture of the University of Nevada School of Medicine, the state's need for it to grow and the implications of budget reductions on its ability to serve the state of Nevada and its residents.

Nevada is facing a health care crisis. Ranking 46th of 50 states in physicians per capita, Nevada has the lowest number of physicians in training of any state with a medical school, was the fastest growing state in the union 19 of the past 20 years, and has a burgeoning elderly population that drives health care needs far out of proportion to its population. Despite these challenges, the University of Nevada School of Medicine (UNSOM), founded in 1969, did not increase its enrollment until 2006, and then only from 52 to 62. Even with this modest increase, newly graduated physicians may not be able to remain in state. All physicians must complete between 3 and 8 years of additional training, or up to a decade post-baccalaureate before entering practice. A full complement of postgraduate training programs for residents (physicians pursuing training in a specialty, e.g. internal medicine) and fellows (additional training after residency in subspecialty medicine, e.g. cardiology) is absolutely critical to maintaining a healthy physician supply.

Bluntly speaking, every other surrounding western state that began medical schools during the same period – Arizona, New Mexico, Utah - responded to their health care needs by building complete medical schools that train physicians across the spectrum of medical specialties and subspecialties – Nevada did not. How did this happen? First, UNSOM was founded when Nevada's population was less than one-half million, while surrounding states were two to three times as large. Since then, Nevada's population passed NM, and is close to UTs; no one anticipated this rapid growth. Two additional decisions limited UNSOM's growth. Other peer states combined their public

medical schools with hospitals in an integrated health sciences center model. Nevada chose a community based model, using affiliated community physicians and hospitals to provide training and support. This was logical 40 years ago, when the mission of UNSOM was to train providers for rural areas. Now, extraordinary economic pressures on community hospitals and physicians make it impossible for them to allocate scarce resources to train physicians. Other states expanded their health science systems and medical schools to keep pace with their needs over the past four decades; Nevada did not.

For example, UNSOM offers only 14 distinct residencies and fellowship training programs. By contrast, Arizona, Utah and New Mexico each offer between 35 to 38 postgraduate training programs. The programs missing from Nevada are not obscure specialties. They include Cardiology, Gastroenterology, Neurology, Orthopedic Surgery, Oncology, Pulmonary and Critical Care medicine. Consequently, almost half of UNSOM students must leave the state after graduation to pursue residency training, and they are much less likely to return to practice after completing their residencies.

This is not a criticism of the quality of UNSOM. It is an excellent school of medicine; it's simply too small and incomplete. UNSOM graduates compete for the best residency training positions nationwide. Students are exposed to diverse learning situations, from busy urban county hospitals like University Medical Center in Las Vegas, to solo practitioners in rural and frontier Nevada. UNSOM graduates have gone on to become deans and vice presidents of health science centers (University of New Mexico), vice presidents of major biotech companies (Genentech), and distinguished careers in public service and patient care.

Recognizing that small size and incomplete training programs were not meeting state needs, UNSOM expanded its faculty over the past four years using clinical practice revenues. The UNSOM budget increased from \$106 million in FY 03 to \$146 million in FY07. Practice plan revenues increased from \$31 million to \$60 million in FY07. Thus, practice plan revenues were responsible for 72% of the increase in the UNSOM budget. Put another way, UNSOM has increased faculty and residency programs by depending largely on clinical practice revenues to hire new physician educators. This approach is not sustainable. UNSOM combined practice plan revenues finished fiscal year 2008 almost \$2 million in the red. Without vertical integration with one or more hospitals, growing education by depending on clinical revenue is not an option in today's highly competitive health care environment.

The most recent 4.5% state budget cut completely stopped UNSOM efforts to implement the long term growth plan endorsed by the Board of Regents. The consequences of cutting the UNSOM budget further will be immediate and severe. To understand this, the critical role of state dollars in supporting the teaching and service roles of UNSOM must be understood.

State budget cuts don't just displace academic employees who provide classroom education to physicians in training. UNSOM faculty and residents provide an extraordinary amount of care for medically underserved and vulnerable populations – a population guaranteed to increase dramatically in bad economic times. UNSOM physicians run the only level one trauma center in Nevada at University Medical Center in Las Vegas, the only burn unit in Nevada, and provide the majority of care for patients hospitalized at UMC. UNSOM physicians caring for hospitalized patients at UMC, achieved \$20 million in potential cost savings in 2007 based on reduced length of stay and cost. School physicians cared for more than 120,000 outpatients, 30,000 hospitalized patients, and delivered 5,000 babies in 2007. Mojave Mental Health kept over 3,000 of the most seriously mentally ill out of emergency rooms and state facilities in Clark County. UNSOM's Center for Education and Health Services Outreach (CEHSO) helped medically underserved populations throughout the state by providing training, outreach, hospital and provider technical assistance, EMS technical assistance, telehealth/telecommunications, policy development/analysis and health workforce activities, and placing more than 500 AED devices to reduce cardiac sudden death. The Nevada Health Service Corps placed 87 health care providers throughout frontier Nevada using educational loan debt repayment as an incentive.

School of Medicine research activities also serve as an economic engine for the state. Medical school basic scientists generate \$17 million of extramural funding for research annually, each dollar of which is accompanied by additional funding to the University in support of infrastructure such as buildings, library, maintenance, etc. Indeed, University-wide indirect support, which directly reflects research success, is helping to fund a new 100,000 square foot biomedical research building on the Reno campus. State funding is essential in continuing this growth, allowing us to recruit new faculty who can bring additional research funding.

Collectively, these activities underscore the highly positive economic impact of UNSOM on state economy. Only one dollar in five of the UNSOM budget comes directly from the state. The remainder comes from services provided to hospitals, federal and local hospital support for resident education, research, and clinical revenues – a 400% annual return on investment. Every dollar is reinvested into the local economy, employing highly skilled and highly remunerated employees and purchasing supplies. Cutting our state budget by 14% – over \$5 million – will result in severe cuts to existing programs.

The 4.5% budget cut in FY2008 has already halted further class growth and faculty recruitment. In order to meet the additional projected cuts, UNSOM must now contract further. We will have to close the Las Vegas dental residency program as of June 30, 2009 even though this program cares primarily for the underserved. Some programs must remain to ensure accreditation as a school of medicine, so we cannot simply cut across the board. This means that budgets for

units like CEHSO, that provide exemplary service and outreach, but that are not central to our educational mission may be disproportionately affected. Where there are duplicate programs, we will consider closing one of the two, leaving patients without care. For example, we currently have departments of internal medicine, family and community medicine, pediatrics, and psychiatry in both Reno and Las Vegas. Closing each one of these duplicate programs would save the \$5 million required from UNSOM but result in the loss of about 70 residency positions or a 27% annual reduction in Nevada-trained, licensable physicians!

UNSOM already operates with an extremely lean administrative infrastructure. It has the lowest number of faculty to resident physicians amongst our peers. The medical practice plan functions with overhead expenses half those of comparable private multispecialty group practices. Support services function at a level such that even minor reductions will endanger education, research and service. Rather, the number of academic programs at UNSOM will have to be reduced so that the core remaining units can survive.