

EDUCATION

Answering the legal questions on expanding education choice

By Chris Cargill
President

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MOUNTAIN STATES
POLICY CENTER





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Introduction

Education choice remains one of the most popular public policies throughout the United States today. Across political, ethnic and racial divides, overwhelming majorities of Americans support giving families more options.¹ The most recent polling shows more than 70% support.

The results of education choice, too, show overwhelming success. More than 180 empirical studies indicate positive effects on everything from fiscal impact to parental satisfaction, test scores, civic values and more.²

Roughly 60% of states now offer some form of an Education Savings Account (ESA), an education choice tax credit, or a tax credit scholarship.³ Each year, the list of participating states gets longer, as more policymakers come to the realization that a one-size-fits-all solution doesn't work for all students.

Unfortunately for students in the Mountain States, lawmakers have been reluctant to add more options. The arguments against choice here vary, but opponents – most often state teacher unions – launch legal roadblocks in every state. In Montana, for example, the teacher's union has sued to block implementation of an ESA for special needs children.⁴ It has also attempted to block the creation of charter schools in the Treasure State.

Fearing expensive legal battles, policymakers who may be on the fence often err on the side of caution and vote against measures to expand choice, even though fewer and fewer legal battles are proving successful. Lawmakers must understand and expect any new program to face legal questions, especially when it is perceived to threaten special interest groups including unions.

¹ New Poll: School choice support soars from 2020, Real Clear Opinion, June 2023, available at <https://www.federationforchildren.org/new-poll-school-choice-support-soars-from-2020/>

² There are 187 studies on impact of education choice, and the results are overwhelming, by Chris Cargill, Mountain States Policy Center, January 24, 2024, available at <https://www.mountainstatespolicy.org/there-are-187-studies-on-impact-of-education-choice-and-the-results-are-overwhelming>

³ 29 states now have some form of ESA, education choice tax credit, or education tax scholarship, by Jason Mercier, Mountain States Policy Center, April 17, 2024, available at <https://www.mountainstatespolicy.org/29-states-now-have-some-form-of-esa-education-choice-tax-credit-or-education-tax-scholarship>

⁴ New special education accounts draw legal challenge, Montana Free Press, January 23, 2024, available at <https://montanafreepress.org/2024/01/23/montana-special-education-savings-account-lawsuit-filed/>

KEY INFORMATION COLUMN

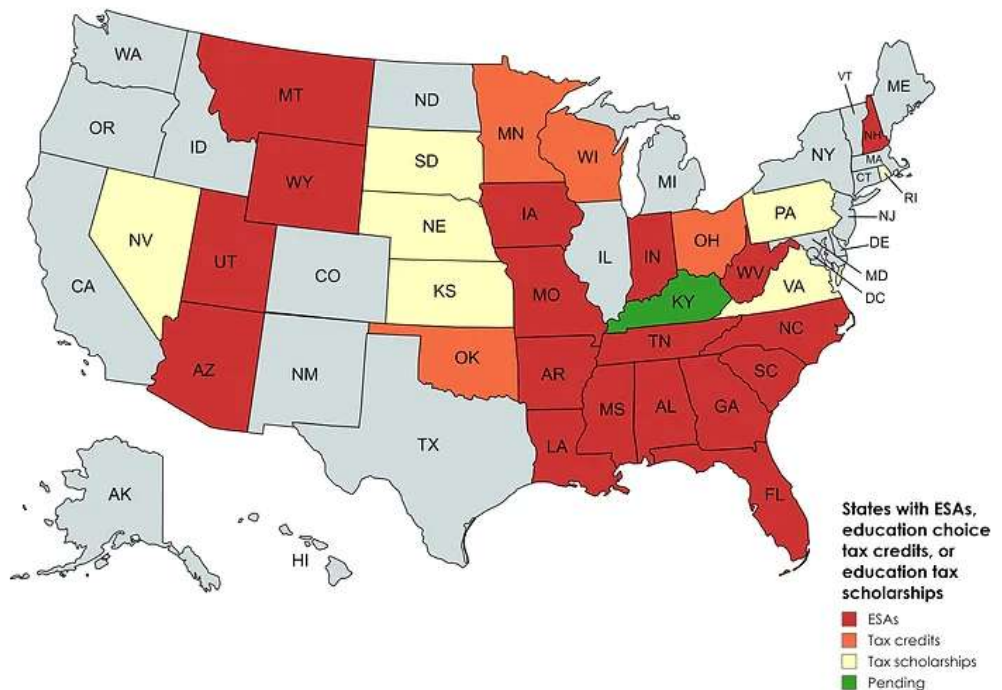
Twenty-nine states offer an Education Savings Account, an education choice tax credit, or a tax credit scholarship.

Tax credits allow parents to deduct the cost of educational expenses from their yearly tax liability.

Defining terms

For the purposes of this study, it is important to clearly define terms. Education choice is simply any policy that enables parents and families to choose the best educational program for their child's needs. This can include public school transfers, charter schools, magnet schools, homeschooling, scholarships, tax credits, tax deductions and more.

Public schools, of course, exist in all 50 states. Charter schools exist in all but four states. Twenty-nine other states offer an Education Savings Account, an education choice tax credit, or a tax credit scholarship.



Vouchers are typically state payments directly to a private institution to cover a child's educational costs. Education Savings Accounts, in contrast, are dollars available to families, typically held by a state, that can only be accessed to pay for school tuition and fees, textbooks, tutoring and more.

Tax credits allow parents to deduct the cost of educational expenses from their yearly tax liability. And tax credit scholarships allow corporations and individuals make private donations to nonprofit organizations that provide scholarships to eligible children. In return, the corporations and individuals receive a state income tax credit.

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Dozens of lawsuits have produced both legal victories and defeats for education choice programs.

Uniformity Clauses were never intended to be a ceiling or limitation on creativity. Instead, they were simply meant to ensure there was a floor.

Constitutional questions

Dozens of lawsuits have produced both legal victories and defeats for education choice programs. The overarching question, however, is whether education choice is constitutional? In most states, the answer is yes. In others, it will depend on how the program is structured.

In 2002, the U.S. Supreme Court eliminated the federal Establishment Clause as a barrier to education choice. *Zelman v. Simmons-Harris* allows the government to fund any school on a neutral basis, so long as the choice of a religious school is left voluntary.⁵

This has left opponents at the state level with just two potential courses to pursue roadblocks: the religious and education provisions recorded in state constitutions.

A “compelled support” clause exists in 29 state constitutions. It was originally intended to prevent an official state religion. Anti-Catholic Blaine Amendments can also be found in dozens of state constitutions – provisions the U.S. Supreme Court has labeled “shameful” and a “clear manifestation of religious bigotry.”

Every state constitution also has an education provision, with some containing language that calls for a “uniform system of free public education,” or something similar. Education choice opponents have argued that such language not only requires the government to establish traditional public schools, but also prevents the government from doing anything else.

Uniformity Clauses, however, were never intended to be a ceiling or limitation on creativity. Instead, they were simply meant to ensure there was a floor.

For example, Idaho’s constitution says:⁶

“The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.”

Montana’s constitution reads:⁷

⁵ The Establishment Clause, National Constitution Center, available at <https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/264#:~:text=By%202002%2C%20in%20Zelman%20v.%20left%20to%20voluntary%20choice>

⁶ Idaho Constitution, Article IX, Section 1, available at https://sos.idaho.gov/elect/stcon/article_IX.html

⁷ Montana Constitution, Article X, Section 3, available at <https://www.umt.edu/montana-constitution/articles/article-x/x-1.php>

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The U.S. Supreme Court has issued several recent rulings that are instructive for lawmakers wishing to understand what is and is not possible in their states.

The U.S. Supreme Court ruled 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.”

“The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.”

In Washington state, the constitution proscribes:⁸

“The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established.”

Recent U.S. Supreme Court rulings

The United States Supreme Court has issued several recent rulings that are instructive for lawmakers wishing to understand what is and is not possible in their states. In ***Carson v. Makin***⁹, the court ruled on the constitutionality of the oldest school choice program in the United States. Town tuition programs in Maine and Vermont allowed towns that don't have public schools to pay for a student's tuition at an approved public or private school – including religious schools. When Maine moved to ban religious schools from participating, the case went national and the Supreme Court overturned the ban, concluding it violated a parent's First Amendment religious rights.

Espinoza v. Montana Department of Revenue¹⁰ from 2022 dealt with restrictions to Montana's tax credit scholarship program. The Montana Department of Revenue prohibited recipients from using their scholarships at religious schools. But the U.S. Supreme Court ruled 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.”

In 2011, the Supreme Court issued an opinion in ***Arizona Christian School Tuition Organization v. Winn***¹¹. That case involving Arizona's scholarship tax credit. The court ruled the plaintiffs had no standing to sue because tax credits involve personal income, not government money – a critical distinction that serves as an example for other states considering tax credit programs.

⁸ Washington Constitution, Article IX, available at <https://law.justia.com/constitution/washington/constitution-9.html>

⁹ Carson v. Makin, 596 U.S. ____ (2022), Supreme Court of the United States, https://www.supremecourt.gov/opinions/21pdf/20-1088_dbfi.pdf

¹⁰ Espinoza v. Montana Department of Revenue, 591 U.S. ____ (2020), Supreme Court of the United States, available at https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf

¹¹ Arizona Christian School Tuition Organization v. Winn, 563 U.S. 125 (2011), Supreme Court of the United States, available at <https://supreme.justia.com/cases/federal/us/563/125/#tab-opinion-1963544>

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It is important to note West Virginia's Hope Scholarship is funded by a separate, annual appropriation by the legislature.

In ***Zelman v. Simmons-Harris***¹² – a 1995 case – the court allowed eligible students to receive a tuition voucher that could be used at participating public or private schools. The program was challenged by a group of Ohio taxpayers for violating separation of church and state. The Supreme Court upheld the program, with Chief Justice Rehnquist writing that it “is entirely neutral with respect to religion.”

And 1983's ***Mueller v. Allen***¹³ case involved a Minnesota tax deduction for education expenses. Some Minnesota taxpayers sued over the program, claiming it violated the Establishment Clause by providing financial assistance to “sectarian” institutions. The court ruled that the deduction did not violate the First Amendment since it was based on the free choice of parents and was broadly available.

Recent state cases

Throughout the nation, many state cases have determined the constitutionality of education choice expansion.¹⁴

In March 2021, West Virginia launched its Hope Scholarship program, offering Education Savings Accounts to students. Predictably, public school advocates sued to block implementation. But in ***Beaver, et al. v. Moore et al.***¹⁵, the West Virginia Supreme Court ruled in favor of the ESA's and said there was no conflict: “We find that the West Virginia Constitution does not prohibit the Legislature from enacting the Hope Scholarship Act in addition to providing for a thorough and efficient system of free schools. The Constitution allows the Legislature to do **both** of these things.” It is important to note West Virginia's Hope Scholarship is funded by a separate, annual appropriation by the legislature.

In Puerto Rico, ***Asociación de Maestros de Puerto Rico v. Departamento de Educación***¹⁶ dealt with a program called the Free School Selection Program. This initiative, passed by the Puerto Rico legislature, provided needy families scholarships so they could send children to the school of their choice – whether private or public. It prioritized students who were low income, disabled, adopted or in foster care. Predictably, one of the Island's teachers' unions sued to stop the scholarships, claiming it violated Puerto Rico's prohibition against using public money for private schools. But the Puerto Rico Supreme Court

¹² *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), Supreme Court of the United States, available at <https://supreme.justia.com/cases/federal/us/536/639/>

¹³ *Mueller v. Allen*, 463 U.S. 388 (1983), Supreme Court of the United States, available at <https://supreme.justia.com/cases/federal/us/463/388/>

¹⁴ Institute for Justice, School Choice and State Constitutions, 2016, available at <https://ij.org/wp-content/uploads/2016/09/50-state-SC-report-2016-web.pdf>

¹⁵ *Beaver, et al. v. Moore et al.*, West Virginia, 2023, available at <https://harvardlawreview.org/print/vol-136/state-v-beaver/>

¹⁶ *Asociación de Maestros de Puerto Rico v. Departamento de Educación*, Supreme Court of Puerto Rico, available at <https://www.lexjuris.com/lexjuris/tspr2018/lexj2018150b.htm>

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The Nevada Supreme Court ruled its state program was not in violation of Nevada's constitution, as it did not prohibit the state from encouraging and creating alternative forms of education.

The Alabama Supreme Court upheld the state's two tax credit programs, ruling the tax credit programs do not violate Alabama's Blaine Amendments, as the credits are given to parents or taxpayers, not religious institutions, and do not constitute government appropriations.

ruled against the suit, upholding the scholarship as it went to families, and not directly schools.

The Georgia Supreme Court has also dismissed a case challenging the state's popular tax credit scholarship program. In ***Gaddy v. Georgia Department of Revenue***¹⁷, plaintiffs took aim at the program that provided scholarships for children to attend private schools, funded by voluntary donations from individuals and corporations. The court ruled those who brought the case had no standing because neither they, nor the state, were hurt by the tax credit. Justices wrote, "a tax credit that funds a program that encourages attendance at private schools might, in fact, create a tax savings by relieving public schools of the burden of educating the students who chose to attend private school."

In Nevada's ***Schwartz v. Lopez***¹⁸ in 2016, plaintiffs challenged the state's Education Savings Account program, contending it was a violation of Nevada's Blaine Amendment and the "uniform system of common schools" requirement in the state constitution. The Nevada Supreme Court ruled the program was not in violation of the either, as it did not prohibit the state from encouraging and creating alternative forms of education. The court did conclude, however, that the state did not properly fund the ESA's by using funds originally designated for K-12 public education.

State case history

Additional state cases have also framed the debate regarding education choice. While each state legislature may approach the topic differently, there are themes that define what gains constitutional muster.

- ***Magee v. Boyd, Alabama – 2015***¹⁹
The Alabama Supreme Court upheld the state's two tax credit programs, rejecting several claims made by the plaintiffs under the Alabama Constitution. The court ruled that the tax credit programs do not violate Alabama's Blaine Amendments, as the credits are given to parents or taxpayers, not religious institutions, and do not constitute government appropriations. Additionally, the court found the programs to be neutral toward religion, with any benefits to religious institutions resulting from individual choices, not government action.
- ***Niehaus v. Huppenthal, Arizona - 2013***²⁰
In its ruling, the Arizona Court of Appeals determined that the Empowerment Scholarship Account program was in compliance with

¹⁷ Gaddy v. Georgia Department of Revenue, Georgia Supreme Court, 2017, available at <https://law.justia.com/cases/georgia/supreme-court/2017/s17a0177.html>

¹⁸ Schwartz v. Lopez, Nevada, 2016, available at <https://law.justia.com/cases/nevada/supreme-court/2016/70648.html>

¹⁹ Magee v. Boyd, Alabama, 2015, available at <https://law.justia.com/cases/alabama/supreme-court/2015/1130987.html>

²⁰ Niehaus v. Huppenthal, Arizona, 2013, available at <https://casetext.com/case/niehaus-v-huppenthal>

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Arizona’s Supreme Court held that the education article in the state’s constitution for a “general and uniform” public school system applies only to the obligation to fund a public school system that is adequate and defining adequacy is a legislative task.

the Arizona Religion Clause as it maintained a neutral stance towards religion. Furthermore, it was concluded that the program did not contravene the state’s Aid Clause as the funds in the account were eligible for a wide array of educational services.

- **Green v. Garriott, Arizona – 2009²¹**
The Arizona Court of Appeals held that the Corporate Tax Credit Scholarships program did not violate the federal Establishment Clause. The court's decision was based on three key factors: (1) The program had a valid, secular purpose and maintained neutrality toward religion, (2) it allowed parents and students to freely choose from a range of secular and religious educational options and (3) the program did not result in excessive government entanglement with religion.
- **Cain v. Horne, Arizona – 2009²²**
The Arizona Supreme Court addressed two state-funded programs - one for children with special needs and another for children in foster care. The Court found these programs to be constitutional under Arizona's Religion Clause, citing the clause's similarity to the federal Establishment Clause. However, the Court also ruled that the voucher programs violated the state's Aid Clause because they could only be used for private schools – and nothing else.
- **Kotterman v. Killian, Arizona – 1999²³**
The Arizona Supreme Court determined that tuition tax credits are in line with both the U.S. Constitution and the Arizona Constitution. The court said the credits form part of a government program that remains neutral with regard to religion and is accessible to a wide range of citizens. The primary effect of the program was not deemed to either advance or inhibit religion. The Court emphasized that the scholarships primarily benefit children rather than schools. In its refusal to broadly apply the state constitution’s Blaine Amendments, the Arizona Supreme Court acknowledged the prejudiced and bigoted origins of their implementation.
- **Hull v. Albrecht, Arizona – 1997²⁴**
Arizona’s Supreme Court held that the education article in the state’s constitution for a “general and uniform” public school system applies only to the obligation to fund a public school system that is adequate and defining adequacy is a legislative task. The ruling made clear that districts and/or the state can choose to go above, but not below, the minimum standards and in doing so do not run counter to the general and uniform requirement.

²¹ Green v. Garriott, Arizona, 2009 available at <https://casetext.com/case/green-v-garriott>

²² Cain v. Horne, Arizona, 2009, available at <https://law.justia.com/cases/arizona/supreme-court/2009/cainopinioncv080189pr-1.html>

²³ Kotterman v. Killian, Arizona, 1999, available at <https://casetext.com/case/kotterman-v-killian>

²⁴ Hull v. Albrecht, Arizona, 1997, available at <https://law.justia.com/cases/arizona/supreme-court/1997/cv-97-0369-sa-2.html>

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A trial court ruled that Florida's Corporate Tax Credit program did not negatively hurt public schools or state funding of K-12. Instead, the court credited the program as likely to improve the public school system as a whole.

Judges on the 5th Circuit Court of Appeals ruled that Louisiana's special education program did not violate the Establishment Clause because the opportunity was secular and provided no incentive for parents to pick a specific religious institution.

- **Colorado Christian University v. Weaver, Colorado – 2008**²⁵
The 10th U.S. Circuit Court of Appeals ruled that a scholarship program at the post-secondary level was in violation of the Free Exercise and Establishment Clauses of the First Amendment. This was due to the government's requirement to extensively examine the internal operations of private colleges to ascertain if they were too sectarian to participate in the program. However, the court did allow students from all religious colleges to be eligible for the scholarships.
- **Board of Education v. State Board of Education, Connecticut – 1998**²⁶
The Supreme Court of Connecticut upheld a law requiring transportation of private school students at public expense. The court said it did not violate the state's Compelled Support Clause, and had a secular purpose of ensuring child safety, benefiting students rather than the schools to which they were being transported.
- **Citizens for Strong Schools, Inc. v. Florida State Board of Education, Florida – 2016**²⁷
A trial court ruled that Florida's Corporate Tax Credit program did not negatively hurt public schools or state funding of K-12. Instead, the court credited the program as likely to improve the public school system as a whole.
- **Louisiana Federation of Teachers v. State, Louisiana - 2013**²⁸
The Louisiana Supreme Court struck down the state's scholarship program because of the way it was funded –through a budget mechanism designed exclusively for public schools. Instead, the state funded the program through general revenues.
- **Helms v. Picard, Louisiana – 1998**²⁹
Judges on the 5th Circuit Court of Appeals ruled that Louisiana's special education program did not violate the Establishment Clause because the opportunity was secular and provided no incentive for parents to pick a specific religious institution.
- **Minnesota Federation of Teachers v. Mammenga, Minnesota – 1993**³⁰
The state's Court of Appeals ruled a statute that allows high school students to enroll in classes at public or private colleges at state expense did not violate Minnesota's Compelled Support Clause or Blaine Amendments. Judges found that benefits were indirect – as

²⁵ Colorado Christian University v. Weaver, Colorado, 2008, available at <https://casetext.com/case/colorado-christian-univ-v-weaver>

²⁶ Board of Education v. State Board of Education, Connecticut, 1998, available at <https://portal.ct.gov/-/media/sde/legal/indexofschoolac.com.pdf>

²⁷ Citizens for Strong Schools, Inc. v. Florida State Board of Education, Florida, 2016, available at <https://caselaw.findlaw.com/court/fl-supreme-court/1973704.html>

²⁸ Louisiana Federation of Teachers v. State, Louisiana, 2013, available at <https://caselaw.findlaw.com/court/la-supreme-court/1630493.html>

²⁹ Helms v. Picard, Louisiana, 1998, available at <https://casetext.com/case/helms-v-picard-2>

³⁰ Minnesota Federation of Teachers v. Mammenga, Minnesota, 1993, available at <https://law.justia.com/cases/minnesota/court-of-appeals/1993/c8-92-2455.html>

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The North Carolina Supreme Court upheld the state's Opportunity Scholarships programs, ruling that public funds may be spent on all types of education, and the program did not create an alternate system of publicly funded private schools.

The Oklahoma Supreme Court held that the Lindsey Nicole Henry Scholarships program did not violate the Blaine Amendment of the Oklahoma Constitution because the program is neutral with respect to religion.

students could choose a public or private, religious or non-religious school and course, and religious colleges separated funds to make sure they were used for non-religious purposes.

- ***Father Flanagan's Boys Home v. Department of Social Services, Nebraska – 1998***³¹
The Nebraska Supreme Court ruled that paying for private schools for educating special needs students are not the type of appropriations prohibited by the state's Blaine Amendment.
- ***Duncan v. State, New Hampshire – 2014***³²
New Hampshire's Supreme Court rejected a lawsuit over the state's school tax credit program, ruling that opponents could not show they had any personal injury.
- ***Hart v. State, North Carolina – 2015***³³
The North Carolina Supreme Court upheld the state's Opportunity Scholarships programs, ruling that public funds may be spent on all types of education, and the program did not create an alternate system of publicly funded private schools. Justices said the programs served a public purpose and that plaintiffs did not have standing because they could not show personal injury.
- ***Simmons-Harris v. Goff, Ohio – 1999***³⁴
Ohio's Supreme Court ruled the Cleveland Scholarship and Tutoring Program did not violate either the federal Establishment Clause or the state constitution's Compelled Support or education clauses. However, because the program violated the state single subject rule, it was struck down. The Legislature quickly re-authorized the program as stand-alone legislation.
- ***Oliver v. Hofmeister, Oklahoma – 2016***³⁵
The Oklahoma Supreme Court held that the Lindsey Nicole Henry Scholarships program did not violate the Blaine Amendment of the Oklahoma Constitution because the program is neutral with respect to religion. Because the parent—not the government—decides where the child goes to school and receives the aid in consideration for their not attending the public schools, the aid is for the student, not for the sectarian school.
- ***Christen G. v. Lower Merion School District, Pennsylvania – 1996***³⁶

³¹ Father Flanagan's Boys Home v. Department of Social Services, Nebraska, 1998, available at <https://law.justia.com/cases/nebraska/supreme-court/1998/1208.html>

³² Duncan v. State, New Hampshire, 2014, available at <https://law.justia.com/cases/new-hampshire/supreme-court/2014/2013-045.html>

³³ Hart v. State, North Carolina, 2015, available at <https://law.justia.com/cases/north-carolina/supreme-court/2015/372a14.html>

³⁴ Simmons-Harris v. Goff, Ohio, 1999, available at <https://supreme.justia.com/cases/federal/us/536/639/>

³⁵ Oliver v. Hofmeister, Oklahoma, 2016, available at <https://law.justia.com/cases/oklahoma/supreme-court/2016/113267.html>

³⁶ Christen G. v. Lower Merion School District, Pennsylvania, 1996, available at <https://law.justia.com/cases/federal/district-courts/FSupp/919/793/1580818/>

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The Wisconsin Supreme Court ruled the Milwaukee Parental Choice Program did not violate the states' Compelled Support Clause or its Blaine Amendment, because students were not required to attend religious schools and any benefits to those schools are incidental.

Perhaps the simplest education choice solution is a refundable tax credit.

A federal court held that, in accordance with the Individuals with Disabilities Act, a state was allowed to reimburse parents for private school tuition because the payments did not advance any specific religion.

□ ***Americans United for Separation of Church & State v. Blanton, Tennessee – 1977***³⁷

A federal court ruled Tennessee's Student Assistance Program was valid and constitutional because the money was paid directly to the student rather than the institution and did not reference whether the institution was required to be public or private.

□ ***Jackson v. Benson, Wisconsin – 1998***³⁸

The Wisconsin Supreme Court ruled the Milwaukee Parental Choice Program did not violate the states' Compelled Support Clause or its Blaine Amendment, because students were not required to attend religious schools and any benefits to those schools are incidental.

□ ***Davis v. Grover, Wisconsin – 1992***³⁹

The Wisconsin Supreme Court upheld the Milwaukee Parental Choice Program from a legal challenge under Wisconsin's uniformity provision. The Court said the total amount of public funds appropriated for the program was "inconsequential" when compared with total expenditures for public education.

A path forward

The experience of other states gives lawmakers a roadmap for what is possible in the education choice arena. Likewise, these cases help separate fact from fiction (which is used to frighten elected officials and the general public).

The overwhelming consensus of cases at the federal and state level shows education choice programs *are* constitutional.

Still, as they would design any program, policymakers must be cautious. For example, it would be unconstitutional for a state to purchase textbooks or materials for a private, religious school. It would also likely be unconstitutional for a state to directly fund a religious or private school or require parents to pick a specific religious institution as a condition of any program.

But education choice is about much more than private, religious schooling. Courts have consistently ruled that programs that fund students and families are constitutional. The key is for policymakers to put the decisions in the hands

³⁷ Americans United for the Separation of Church and State v. Blanton, Tennessee, 1977, available at <https://casetext.com/case/am-united-for-sep-of-church-and-state-v-blanton>

³⁸ Jackson v. Benson, Wisconsin, 1998, available at <https://casetext.com/case/jackson-v-benson-1>

³⁹ Davis v. Grover, Wisconsin, 1992, available at <https://law.justia.com/cases/wisconsin/supreme-court/1992/90-1807-9.html>

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Policymakers committed to expanding education choice options should be prepared for numerous legal challenges, but if the program is built correctly, it is unlikely that any case would be successful.

Nothing in this publication shall be construed as an attempt to aid or hinder the passage of any legislation.

of parents. Any benefits to religious institutions, then, would be the result of individual choices – not government action. Parents may choose to use the assistance to fund a child’s schooling at a religious institution, but they are just as likely to choose a program that is secular.

Perhaps the simplest education choice solution is a refundable tax credit. Cases brought against tax credits have rarely had success because plaintiffs cannot show any personal injury, and they involve personal income – not government money. Furthermore, as the Supreme Court of Georgia ruled “a tax credit that funds a program that encourages attendance at private schools might, in fact, create a tax savings by relieving public schools of the burden of educating the students who chose to attend private school.”

If lawmakers choose to make an annual appropriation to fund any program, jurisprudence recommends an allocation separate from any K-12 budget.

Conclusion

Policymakers committed to expanding education choice options should be prepared for numerous legal challenges, but if the program is built correctly, it is unlikely that any case would be successful.

Article 9, §1 of the Idaho Constitution creates a duty to “establish and maintain a general, uniform and thorough system of public, free common schools.” But nothing in the state constitution prevents the legislature from supplementing that duty or requires parents to send their child to a government school. The constitution simply creates a baseline.

As the West Virginia Supreme Court recently ruled, the legislature can do “both of these things.”

ABOUT THE AUTHOR

For more than 20 years, Chris Cargill has worked in communications and public policy. Chris has deep roots in our region and is a graduate of Gonzaga University with a degree in broadcast communications and political science. His experience includes a decade in television news as well as 13 years for another state based think tank.



Chris' work has been published in the Idaho Statesman, The Coeur d'Alene Press, The Helena Independent Record, the Spokesman-Review, The Seattle Times, the Tri-City Herald and Real Clear Policy, as well as many other regional newspapers. He is also a familiar voice on radio stations throughout the region.

Chris is a member of the Heritage Foundation's Project 2025 Advisory Board, which is focused preparing comprehensive policy recommendations for the next conservative presidential administration. He is also an active participant in the American Enterprise Institute's Leadership Network.

Chris & his wife Lisa are the proud parents of two boys, including one who has special needs - one of the many reasons why he is so passionate about education choice options for families.

In his spare time, Chris spends time with family, serves on his local city council, and enjoys whatever down time he can in the great outdoors on his family property in North Idaho.

