EdChoice Legal Basics

A guide to landmark litigation and the foundation for school choice constitutionality

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Legal Defense
& Education Center
By EdChoice

INTRODUCTION

When we introduce new audiences to the concept of school choice, one of the most frequent responses we get is, "Sure, that sounds great, but is it legal?"

Yes, school choice is legal when programs are designed to respect both state and federal constitutions. Paying attention to legal details must be a priority. That's why we put together this short guide for policymakers, parents, and partners, explaining why state appellate and supreme courts—and the U.S. Supreme Court—continue to rule that school choice is constitutional.

Parents and families are children's first teachers. Homeschooling families choose to continue as their children's teachers well into grades K–12. And private school education, which began with Manhattan's Collegiate School in 1628, remains a popular choice for families. Yet, historically, private school education has been an option only for families who could afford the cost or received financial help. We know from years of research that many families would choose private schools and other educational resources for their children if they did not face insurmountable financial or geographical limitations.

Private educational choice programs in various forms—such as refundable tax credits, micro schooling, education savings accounts (ESAs), school vouchers and tax-credit scholarships—have been making educational freedom attainable for families since Vermont enacted the nation's first town tuitioning vouchers in 1869. Learn more about America's school choice programs and what the research says about them at edchoice.org or request our *EdChoice 101* booklet and *EdChoice Study Guide*.

ARE SCHOOL CHOICE PROGRAMS LEGAL?

The short answer: School choice is constitutional under the federal and most state constitutions when policies and programs are designed properly. Remember that school choice is a method of funding education that provides expanded educational opportunities for children by directing control of a child's education funds to the hands of parents.

The U.S. Supreme Court has made it clear that in states with school choice programs, public funding can be allocated to a family to spend on a child's K–12 schooling, including at faith-based schools. Some states have constitutional language prohibiting the use of public funds to support faith-based schools, but school choice programs do not fund private schools. Courts have been clear that school choice funds education for children by relinquishing government control over expenditure of those funds to parents, who make

private and independent choices of schools and educational resources that best fit their children. Government retains limited regulatory control over administration and oversight of the program, but parents choose how and where their children are educated.

More than 32 states plus Washington, D.C., and Puerto Rico have a variety of school choice programs on the books. Legal challenges to programs in 22 states, plus Puerto Rico, failed to cancel school choice in those states, with one exception. Kentucky is working on new school choice strategies after losing their program in 2022 based on a provision in their constitution that is unique to Kentucky and has no applicability to other states. Despite prior court rulings upholding school choice in New Hampshire (2014) and Ohio (2002), new legal challenges to programs are pending in those states. Additional legal challenges are pending in Maine, South Carolina, and Tennessee. Alaska's choice-friendly correspondence study program is also in litigation.

EdChoice Legal Basics will help you learn about landmark legal cases affecting school choice. Our experts recommend that all educational choice advocates understand and follow the rulings in these cases when considering school choice policies for their states.

As Milton Friedman indicated when introducing the modern voucher concept in 1955, a school choice program must meet the following minimum standards (according to a plethora of recent cases):

- **a.** Must be a sum appropriated for a child's education,
- **b.** received by the child's parent or individual with legal authority for the child's education,
- **c.** who will control expenditure of that specific sum,
- **d.** to be used solely in providing for the child's general education.

After the parent receives control of funds appropriated for the child's education, the educational choices made by the parent for the child are attributable solely to the parent, not the government. The parent has the freedom and responsibility to choose the school or educational resource best suited to meet the child's needs.

School choice programs must be inclusive of all schools and educational resources, without limitations as to religious affiliation, location, or teaching methodology. These are the basic rules for building school choice programs that will withstand state and federal constitutional scrutiny. Start here—then call EdChoice for further assistance!

LANDMARK CASES

Setting guidelines for school choice programs across the country

1923

Meyer v. Nebraska (262 U.S. 390)

"IT IS THE NATURAL DUTY OF THE PARENT TO GIVE HIS CHILDREN EDUCATION"

A law forbidding the teaching of German in any school was challenged by parents who sent their children to a private religious school where German was offered as an additional language class.

Question Presented to the U.S. Supreme Court: Does a local statute forbidding the teaching of any subject in a non-English language run contrary to the Due Process Clause of the Fourteenth Amendment?

Answer: Yes. The U.S. Supreme Court held that, while the state may have an interest in promoting a homogeneous citizenry, "the individual has certain fundamental rights which must be respected." When the state denied the right of parents to have their children take a language class other than English, the state interfered with the rights of parents to educate their children."

"A desirable end cannot be promoted by prohibited means."

1925

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary (268 U.S. 510)

"THE CHILD IS NOT THE MERE CREATURE OF THE STATE."

This case determined that parents, not the state, have primary authority to decide how and where a child will be educated. A child cannot be forced by the state to be educated in a public school.

Question Presented to the U.S. Supreme Court: Did the Compulsory Education Act violate the liberty of parents to direct the education of their children?

Answer: Yes. The U.S. Supreme Court voted 9-0 to overturn Oregon's Compulsory Education Act, which required all children to attend public schools only. The Court held that, "The fundamental liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

1973

San Antonio Independent School Dist. v. Rodriguez (411 U.S. 1)

EDUCATION, OF COURSE, IS NOT AMONG THE RIGHTS AFFORDED EXPLICIT PROTECTION UNDER OUR FEDERAL CONSTITUTION.

This case established that there is no federal constitutional right to education—that using local property tax in addition to state minimum education funding is rational and permissible, and that the Equal Protection Clause of the 14th Amendment does not give a right to absolute equality.

Question Presented to the U.S. Supreme Court: Does Texas' public education finance system violate the Fourteenth Amendment's Equal Protection Clause by failing to distribute funding equally among its school districts?

Answer: No. The Court held that there is no constitutional right to education found in the federal constitution. "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." Furthermore, the Court held that the Equal Protection Clause of the 14th Amendment does not require absolute funding equality. Whereas it was argued that children living in districts with lower property wealth received a "poorer quality education," the Court said the question whether money determines the quality of education was an "unsettled and disputed question." The Court held that the Equal Protection Clause does not require "absolute equality or precisely equal advantages." Also, since many other states had adopted similar funding methods, mixing state and local funds to pay for education was not irrational. The state's guarantee to provide an adequate education, fulfilled by its minimum base funding, was enough to pass constitutional scrutiny.

1983

Mueller v. Allen (463 U.S. 388)

A TAX DEDUCTION FOR EDUCATIONAL EXPENSES DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING THE SECTARIAN AIMS OF THE NONPUBLIC SCHOOLS.

This case established that education funding given to a parent on behalf of a child has material constitutional significance that satisfies the Establishment Clause of the First Amendment to the Constitution.

Question Presented to the U.S. Supreme Court: Does a Minnesota statute that provides deductions of up to $500 and $700 per child for tuition, textbook and transportation payments made by parents of children attending elementary and secondary schools violate the Establishment Clause?

Answer: No. The U.S. Supreme Court determined that the tax deduction had a secular purpose, did not advance, or inhibit, religion and did not create excessive entanglement of the state with religion.

2002

Zelman v. Simmons-Harris (536 U.S. 639)

THE INCIDENTAL ADVANCEMENT OF A RELIGIOUS MISSION, OR THE PERCEIVED ENDORSEMENT OF A RELIGIOUS MESSAGE, IS REASONABLY ATTRIBUTABLE TO THE INDIVIDUAL RECIPIENT, NOT THE GOVERNMENT WHOSE ROLE ENDS WITH THE DISBURSEMENT OF BENEFITS.

This case determined that in a true private choice voucher program, at the moment when a parent receives public funding directly for the benefit of a child, the "circuit between government and religion" is broken and the parent's choice of school is attributable solely to the parent, not the state.

Question Presented to the U.S. Supreme Court: Does a program designed to rescue economically disadvantaged children from a "failing" public school system by providing scholarships that they may use in private, religious or suburban public schools that choose to participate in the program—and which operates in the context of a broad array of public school choices—violate the First Amendment because in the early stages of the program most

of the schools that have agreed to take on scholarship students are religiously affiliated?

Answer: No. Ohio's voucher program is part of the state's general obligation to provide educational opportunities to children. The purpose of the voucher is to fund a child's education and the primary recipient of educational aid is the child. No funding reaches any private school unless and until a parent voluntarily elects to participate in the voucher program then chooses the school as the best provider of education for the child. If the parent chooses a religious school, any appearance of religious endorsement is attributable to the parent. The state does not compel participation and does not choose the school; therefore no claim can be made that the state participated in the parent's independent decision. The parent may choose secular and religious options, and there is no advantage to choosing one or the other except in terms of which school will provide the best fit for the child's learning needs.

2011

Arizona Christian School Tuition Organization v. Winn 563 U.S. 125

PRIVATE BANK ACCOUNTS CANNOT BE EQUATED WITH THE ARIZONA STATE TREASURY.

The case established that tax-credit scholarship programs are private scholarship programs funded with private funds from private individuals who give money for scholarships voluntarily. Furthermore, state tax credits given to private scholarship funders represent a diminution of tax required to be paid by the funder; there is no state appropriation.

Questions Presented to the U.S. Supreme Court:

1. Do Respondents lack taxpayer standing because they do not allege, nor can they, that the Arizona Tuition Tax Credit involves the expenditure or appropriation of state funds?

2. Is the Respondents' alleged injury—which is solely based on the theory that Arizona's tax credit reduces the state's revenue—too speculative to confer taxpayer standing, especially when considering that the credit reduces the state's financial burden for providing public education and is likely the catalyst for new sources of state income?

3. Given that the Arizona Supreme Court has authoritatively determined, under state law, that the money donated to tuition-granting organizations under Arizona's tax credit is private, not state, money—can the Respondents establish taxpayer standing to challenge the decisions of private taxpayers as to where they donate their private money?

Answer: The plaintiffs, Arizona taxpayers, lacked standing to sue. They could present no injury in fact affecting them directly. They could show no misuse of tax dollars and no increase in costs to Arizona's budget that would necessarily require a tax increase. They also could not show that their tax dollars were being collected and then used for a purpose that is unconstitutional. Their main assertion, that tax credits are government expenditures, was soundly dismissed by the Court. Referencing scholarship tuition organizations, the Court said, "Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention."

2013 *Niehaus v. Huppenthal (310 P.3d 983 (Ariz.App. 2013))*

MONIES ARE EARMARKED FOR A STUDENT'S EDUCATIONAL NEEDS AS A PARENT MAY DEEM FIT. THE STATE IS NOT DIRECTING WHERE MONIES ARE TO GO.

This case established that education savings accounts are different than vouchers, in that funding may be used for a variety of educational resources. They do not offend the Arizona Constitution's limitations regarding indirect public funding of private religious schools.

Question Presented to the Arizona Judiciary: Does Arizona's education savings account (ESA) program violate the Aid and Religion Clauses of the Arizona Constitution, and unconstitutionally condition a benefit on the waiver of a constitutional right.

Answer: No. The Court stated, "The ESA does not result in an appropriation of public money to encourage the preference of one religion over another, or religion per se over no religion." Echoing

the U.S. Supreme Court's language in *Zelman v. Simmons-Harris*, the court said, "Any aid to religious schools would be a result of the genuine and independent private choices of the parents."

2013

Meredith v. Pence (984 N.E.2d 1213 (Ind. 2013))

ANY BENEFIT TO PROGRAM-ELIGIBLE SCHOOLS, RELIGIOUS OR NON-RELIGIOUS, DERIVES FROM THE PRIVATE, INDEPENDENT CHOICE OF THE PARENTS OF PROGRAM-ELIGIBLE STUDENTS, NOT THE DECREE OF THE STATE, AND IS THUS ANCILLARY AND INCIDENTAL TO THE BENEFIT CONFERRED ON THESE FAMILIES.

This case established that the Indiana Constitution's restrictions regarding public funds coming into the hands of religious entities do not apply to entities providing K–12 education.

Questions Presented to the Indiana Supreme Court: 1. Does the Indiana constitution prohibit the state legislature from providing education to Indiana school children by any means other than a uniform system of common (public) schools?; 2. Does the voucher program compel citizens to support places of worship without their consent?; 3. Is money supporting the voucher program drawn from the state treasury for the benefit of participating religious schools?

Answer: No. The Court, citing the plain language of the constitution, made clear that the legislature has two education duties: 1) "to encourage moral, intellectual, scientific, and agricultural improvement"; and 2) "to provide for a general and uniform system of open common schools without tuition." The legislature has authority to provide public schools and any other resource that aids intellectual improvement. Furthermore, the requirement of a uniform system applies to public schools, and vouchers do not disrupt that system. The voucher program does not require the state to compel individuals to attend or support places of worship. The voucher program funds education, not worship. Finally, the court held that there is no direct benefit to religious schools because the program is entirely voluntary; no funds whatsoever flow to a religious school unless chosen independently by a parent; and the direct benefit of voucher funding is to the children utilizing the program. Any benefit to a school chosen by a parent is strictly an ancillary benefit that does not run afoul of the constitution.

2020

Espinoza v. Montana Dept of Revenue (140 U.S. 2246)

THAT 'SUPREME LAW OF THE LAND' CONDEMNS DISCRIMINATION AGAINST RELIGIOUS SCHOOLS AND THE FAMILIES WHOSE CHILDREN ATTEND THEM. THEY ARE 'MEMBER[S] OF THE COMMUNITY TOO,' AND THEIR EXCLUSION FROM THE SCHOLARSHIP PROGRAM HERE IS 'ODIOUS TO OUR CONSTITUTION' AND 'CANNOT STAND.'

The case determined that the Free Exercise Clause of the First Amendment to the U.S. Constitution requires that if a state adopts an educational choice program, religious providers of education cannot be excluded as a viable option for parents choosing educational providers for their children.

Question Presented to the U.S. Supreme Court: Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?

Answer: Yes. If states enact school choice programs, they cannot disqualify some schools as choices for parents just because the schools are religious. Prohibiting parents from choosing schools that are religious would violate the Free Exercise rights of the parents under the First Amendment to the U.S. Constitution.

2022

Carson v. Makin (142 S.Ct 1987)

THE PROHIBITION ON STATUS-BASED DISCRIMINATION UNDER THE FREE EXERCISE CLAUSE IS NOT A PERMISSION TO ENGAGE IN USED-BASED DISCRIMINATION.

This case clarified that there is no distinction between discriminating against a school because of its status as a religious entity, and discriminating against a school because the school uses funds it receives from tuition to teach through the lens of faith. The Court opined, "Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism."

Question Presented to the U.S. Supreme Court: Does a state violate the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction?

Answer: Yes. The Supreme Court ruled that, in school choice programs, states may not discriminate against religious schools chosen by parents because the schools may use program funds received from parents to teach and conduct school business in a manner consistent with their faith.

CASE CITATIONS

Meyer v. State of Nebraska, 262 U.S. 390 (1923).

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

San Antonio Ind School Dist. v. Rodriguez, 411 US 1 (1973), reh'g denied 411 U.S. 959 (1973).

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Arizona Christian School Tuition Organization v. Winn, 563 U.S. 125 (2011).

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Espinoza v. Montana Dept of Revenue, 140 S.Ct. 2246 (2020).

Carson v. Makin, 142 S.Ct. 1987 (2022)

The EdChoice Legal Defense & Education Center (LDEC) provides legal review, assistance and education to policymakers, courts, press and advocates regarding educational choice program laws. Whether on the national- or state-level, our team of experts is ready and equipped to defend educational choice for American families.

Like to contact an LDEC expert?
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