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Education Savings Accounts: Advancing Choice in States with Blaine Amendments

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In September 2016, the Nevada Supreme Court upheld education savings accounts (ESAs) as constitutional in the Silver State. ESAs are distinct from other parental choice mechanisms in education, especially K–12 private-school vouchers. Other options only enable parents to choose the school for their children—something which, in the case of vouchers, opponents have argued constitutes state aid to religious institutions because some children attend religious schools. Teachers unions and other associations have used this argument in court, citing so-called Blaine amendments in state constitutions to block vouchers. Blaine amendments are state constitutional provisions that prohibit public funds from flowing to private religious institutions.

Both research and legal precedent demonstrate that the ability to direct ESA funds to multiple education services and products separates ESAs from school vouchers. This is a critical distinction for states to recognize when considering parental choice options. Blaine amendments to state constitutions, such as the provisions in the Arizona and Nevada constitutions, have an ignoble history and should be repealed. Moreover, the distinctive policy design of ESAs makes the accounts well-positioned to withstand legal challenges based on Blaine amendments.

This paper, in its entirety, can be found at
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Diversity and Customization in ESA Use Among Arizona Families

In 2011, Arizona lawmakers enacted the nation's first law establishing ESAs. The state deposits a portion of a child's allotted funds from the state education formula into a restricted-use bank account that parents use to buy educational products and services for their children. Parents and students can use the accounts for online classes, private school tuition, personal tutors, saving for college, and financing a variety of other learning experiences. Every child is different, and with an account, students and their parents can design an education as unique as they are.

After lawmakers enacted ESAs, teachers unions and other special interests challenged their legality in court. Arizona unions based their suit on the state's Blaine amendment, which prohibits public funds from flowing to religious institutions. In 2014, Arizona courts ruled in *Niehaus v. Huppenthal* that ESAs do not violate the state constitution.

Arizona families have used these accounts to pay for a wide variety of education-related services, products, and providers. In 2013, the Friedman Foundation for Educational Choice (now EdChoice) conducted the first study of Arizona families' purchases with the accounts.[1] Among those students, the study found that approximately 34 percent of account recipients used their funds for multiple learning experiences.[2]

Between 2012 and 2014, lawmakers expanded ESA eligibility to include children from active duty military families, children who had been adopted through Arizona's foster care system, preschoolers with special needs, siblings of account holders, and students in public schools rated "D" or "F" on the

state report card system. An updated analysis using ESA data from the Arizona Department of Education from the end of the 2013–2014 school year and the complete 2014–2015 school year, and including these new populations of eligible students, found relative stability in the proportion of families using their accounts to customize their children's learning experience. Research from this time period found 28 percent of families using their ESAs to pay for multiple education services, products, and providers.

Although there was a modest decrease in the percentage of families using their ESAs for multiple services over the course of the two evaluations—from 34 percent to 28 percent—these results demonstrate that with a larger and different cohort of students over a different time period, a similar percentage of students still customized their learning experience with an account. In the analysis of families participating in the 2011–2012 school year, all participating students were children with special needs. These latest data include students made eligible through changes in the law since the first report. New eligibility criteria and the passage of time did *not* change how families value the accounts' flexibility. Parents continue to access a diverse menu of products and services to meet their children's learning needs.

Legal Challenge to ESA in Nevada

The American Civil Liberties Union (ACLU) brought a lawsuit similar to that in Arizona against a recently established ESA program in Nevada. In September 2016, the Nevada Supreme Court upheld the accounts as constitutional as far as the state's own Blaine amendment provisions are concerned. The program remains suspended, however, because the court ruled that lawmakers must revise the statute's funding provisions—statutes specific to Nevada law that do not have national implications.

The research findings from Arizona are relevant for Nevada families waiting to use ESAs. In 2015, Nevada lawmakers made history by making every child attending a public school in the state eligible for an ESA. Before any children were able to take advantage of the new option, the ACLU filed suit to block the program. In *Duncan v. State of Nevada,* the ACLU made claims similar to claims made by teachers unions in *Niehaus v. Huppenthal*. Citing the Nevada constitution's Blaine amendment, the ACLU attempted to block the Silver State's ESA program by arguing that it constitutes state aid to religious institutions.

Blaine Amendments' Ignoble Roots

During the latter half of the 19th century, Catholic families sought to establish Catholic schools as an alternative to the publicly funded common schools emerging in the United States at the time. Common schools sought to assimilate all students to a general sort of Protestantism, including use of the King James Bible and conducting devotional activities.[3] Maine Senator James G. Blaine sought to prohibit aid to "sectarian" schools. As the U.S. Supreme Court acknowledged in *Mitchell v. Helms*, the effort had "a shameful pedigree that we do not hesitate to disavow.... Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that *sectarian was code for Catholic*."[4]

Although the federal amendment failed, Congress subsequently required territories seeking admittance to the union to include similar prohibitions on public funds supporting religiously affiliated schools. That requirement, in conjunction with the 14 states that already had Blaine-type language prior to the federal effort, resulted in 29 states having such restrictions by 1890, and 38 states had adopted Blaine amendments by 1959.[5]

1. During fiscal year (FY) 2012 (the 2011–2012 school year), Arizona awarded accounts to 115 students with special needs. In FY 2013 (the 2012–2013 school year), 302 students used the accounts. In total, the analysis included the 316 students participating through the entirety of the 2011–2012 school year through the first quarter of the 2012–2013 school year.
2. Lindsey M. Burke, "The Education Debit Card: What Arizona Parents Purchase with Education Savings Accounts," Friedman Foundation for Educational Choice, August, 2013, http://www.edchoice.org/wp-content/uploads/2013/08/2013-8-Education-Debit-Card-WEB-NEW.pdf#page=20 (accessed September 30, 2016).
3. Mark Edward DeForrest, "Locke v. Davey: The Connection Between the Federal Blaine Amendment and Article I, 11 of the Washington State Constitution," *Tulsa Law Review*, Vol. 40, No. 2 (2004), pp. 295–320.
4. *Mitchell v. Helms*, 120 S. Ct. 2530, 2551 (2000). Emphasis added.
5. Ibid.

ESA Design: Helping to Withstand Blaine-Based Lawsuits

Nevada's Blaine amendment says that "no public funds of any kind or character whatever, State, county or Municipal, shall be used for sectarian purpose."[6] Thankfully for Nevada families, in September 2016, the state supreme court upheld ESAs as constitutional. The court held that ESAs provide money to families, who can use funds to pay for a variety of education-related products and services such as private tutors, private school tuition, and other expenses.[7] Families will be able to access ESAs pending identification of an appropriate funding source for the accounts.[8]

The defining feature of ESAs—that parents can make multiple choices for their children's education—helped them survive a Blaine-based legal challenge in Arizona where the state supreme court had deemed a voucher program unconstitutional. In the 2013 Arizona Court of Appeals' unanimous opinion, Judge Jon Thompson wrote that "[t]he 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. Any aid to religious schools would be a result of the genuine and independent private choices of the parents."[9] In 2014, the Arizona Supreme Court denied the union's appeal of the lower court's decision, allowing the court of appeals decision to stand.

Critically, ESA funds are not reserved for specific schools or education providers. Funds are deposited into parent-controlled accounts, and parents can use the funds for an education-related provider, product, or service of choice. The ESA option "does not require any student to be enrolled in a private school, much less a 'sectarian' private school."[10] The ability to direct dollars to multiple education services is a critical distinction between ESAs and other parental choices in education, including K–12 private school vouchers.

Customization Makes ESAs Unique Education Choice Mechanisms

The distinctive policy design of ESAs enables accountholders to finance multiple learning options beyond tuition at a private school. It also makes the accounts well-positioned to withstand Blaine amendment–based legal challenges. Such lawsuits against private school vouchers have alleged that these scholarships constitute state aid to religious institutions. Yet nearly 30 percent of Arizona ESA families are making multiple education decisions simultaneously in determining how and where their children learn. In this way, Arizona parents' customization demonstrates what the courts have reasoned: ESAs are functionally different from other parental choices in education. Nevada courts reached the same conclusion.

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6. Constitution of the State of Nevada, Article 11, Section 10, https://www.leg.state.nv.us/const/nvconst.html (accessed September 30, 2016).
7. The majority opinion authored by Justice James Hardesty held that "once the public funds are deposited into an education savings account, the funds are no longer 'public funds' but are instead private funds of the individual parent who established the account. The parent decides where to spend that money for the child's education and may choose from a variety of participating entities, including religious and non-religious schools." See Nevada Supreme Court, No. 69611, September 29, 2016, p. 24, https://www.redefinedonline.org/wp-content/uploads/2016/09/Nevada-Supreme-Court-ruling.pdf (accessed September 30, 2016)
8. On September 29, 2016, the Nevada Supreme Court heard the *Schwartz v. Lopez* and *Duncan v. State of Nevada* cases together, finding in a four-to-two ruling that ESAs are constitutional under the Nevada state constitution but holding that the legislature would need to find an alternative funding source for the accounts. Article 11, Section 2 of the Nevada state constitution requires the legislature to pay for public schools before any other appropriation. The court held that "the use of any money appropriated in SB 515 [establishing the accounts] for K–12 public education to instead fund the education savings accounts contravenes the requirements in Article 11, Section 2." The accounts remain enjoined until an alternative funding source can be identified. Ibid.
9. *Niehaus v. Huppenthal,* 233 Ariz. 195, 310 P.3d 983 (Ct. App. 2013).
10. Ibid.