

BUT IT MUST BE UNCONSTITUTIONAL *IN OUR STATE...*

Understanding the school choice legal landscape,
including how to respond to the uninformed



GOALS

- Understand the legal landscape post *Espinoza & Carson*
- Learn key legal arguments at federal and state levels
- Develop strategies to engage in conversations about the law & school choice

Federal Arguments – What We Hear

School choice violates the First Amendment:

1. School choice violates the separation of church and state

2. School choice violates the free exercise clause

Legal Basics – First Amendment

Congress shall make no law respecting an establishment of religion,

["Establishment Clause"]

or prohibiting the free exercise thereof;

["Free Exercise Clause"]

or abridging the freedom of speech,

["Free Speech Clause"]

or of the press;

or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Parental Authority

- Parents have the primary authority to decide how and where a child is educated.
- “The child is not the mere creature of the state.”
- *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*





Kendra Espinoza v. Montana Dept of Revenue

“A State need not subsidize private education, [b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”






David & Amy Carson v. Makin

“[T]he prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.”

Talking the Talk

When you hear...

- School choice violates the First Amendment. 
- School choice violates the separation of church and state. 
- School choice violates the free exercise clause. 

You can say...

- Since 1925 the Supreme Court has recognized **parents' right to decide** how a child is educated.
- **Parents, not the state, direct** how and where dollars are spent.
- School choice programs are open to **all types of religious schools** that meet required state criteria.

State Arguments – What We Hear

1. School choice defunds public schools; unconstitutional.

1a. Public funds for education can only be used for public schools.

2. Tax Credit Scholarships reduce tax collections intended for public schools.

2a. Tax credits are appropriations, just like vouchers.

Argument #1:

School choice; unconstitutional because it defunds public schools

Definition of Defund. Does school choice,

- Stop providing funds for public schools? No.
- Withdraw financial support from public schools? No.
- Prevent public schools from continuing to receive funds. No.
- Remove or deplete funds from public schools? No... but

State funding may end when a public school no longer provides educational services for a child whose parents withdraw the student from the school – for any reason.

Argument #1a:

Public funds collected for public schools cannot be used for another purpose.

Examples:

- Common, or Perpetual School Fund
- Sixteenth Acre
- Various lands, minerals, set-aside funds

State Obligations to Fund Public Schools

DELAWARE, the First State. Article X, Section 1. Establishment and maintenance of free public schools; attendance.

Section 1. The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means.

HAWAII, the 50th State. Article X, Section 1. The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control

EDUCATIONAL CHOICE: 32 STATES, plus D.C. & Puerto Rico; 80 PROGRAMS

TYPES OF SCHOOL CHOICE	80 STATE ENACTMENTS																						
Refundable Tax Credit	AL	OK	SC																				3
ESA	AZ	AR	FL 2	IN	IA	MS	MT	NH	NC	SC	TN 2	UT	WV										15
Voucher	AR	DC	GA	IN	LA 2	ME	MD	MS 2	NH	NC	OH 5	OK	PR	UT	VT	WI 4							25
Tax Credit ESA	FL	MO																					2
Tax Credit Scholarship	AL	AZ 4	AR	FL	GA	IL	IN	IA	KS	LA	MT	NE	NV	NH	OH	OK	PA 2	RI	SC	SD	UT	VA	26
Individual Tax Credit / Deduction	IL	IN	IA	LA	MN 2	OH 2	WI																9

Litigation DOES NOT INTIMIDATE Those Who Need Choice

“Voucher” includes Town Tuitioning.

Talking the Talk

When you hear...

- School choice is illegal because it defunds the public school system.



- Public funds collected for public schools cannot be used for another purpose.



You can say...

- Public schools' state funding ends when a student leaves for any reason - except with school choice, public schools keep federal and local tax dollars and part of state funds allocated for each child.
- This may or may not be true; each state constitution has its own language for funding education that may have been interpreted by the Courts. This simply requires careful bill drafting.

Argument #2:

Tax Credit Scholarships reduce tax collections and therefore, reduce public school funding.

- Tax credits reduce tax collections, but the state's obligation to fund public schools is not altered in any way.
- The claim that all revenue generated by tax collections funds public education exclusively is false. Some states require legislatures to fund public education before funding other obligations, but this does not mean that public schools have a claim to all tax revenue.

Argument #2a:

Tax Credit Scholarships are funded with public dollars and therefore, reduce public school funding.

- Tax credits reduce a taxpayer's state tax liability in return for the taxpayer's financial support of a particular public policy.
- TAX CREDITS ARE NOT APPROPRIATIONS OF THE STATE LEGISLATURE. Money earned by the taxpayer, for which a tax credit is given, is never taken into government coffers. Therefore, it is not money available for appropriation; it is not "public funds."

Tax Credits Scholarships - Basics

Private Donors

- Tax Credits are a reduction of tax liability
- Personal decisions made by private donors or corporations

Scholarship Granting Orgs

- Private charitable organization awards scholarships

Scholarship to Students

- Students receive scholarships to customize their education

Talking the Talk

When you hear...

- Tax Credit Scholarships are funded with public dollars and reduce funding available for public schools.

You can say...

- Tax Credit Scholarships are funded by voluntary donations by individuals or corporations.
- Tax Credit Scholarship donations are private funds given to private scholarship organizations.
- At no time does the government control or possess the donations that fund the private school scholarships.

Strategy for Discussing Constitutionality of School Choice



- Ask probing questions – when someone says school choice is illegal or unconstitutional, require that they give specific details. Never accept generalities (hollow words w/no meaning).
- Narrow the universe – address specific details of the statement or question, one at a time (or find someone who can).

Strategy for Discussing Constitutionality of School Choice

- Use data. We can provide information about your constitution and prior caselaw.
- Debate with confidence.
You're on the side of the angels.
- Ask an expert to address the statement or question. We can help!



Their Future Depends on Educational Freedom

