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Understanding the legal landscape

Thomas M. Fisher

Vice President and Director of Litigation



TMF Background

- Indiana Deputy AG 2001-2023
- Indiana SG 2005-2023
- Successfully Defended Indiana's Choice Scholarship Program
- Successfully thwarted public-school adequacy challenge

GOALS

- Understand EdChoice legal services
- Review federal legal landscape
- Learn key aspects of state litigation

EdChoice Legal Services



Legal Policy and Education Center (LPEC)

➤ Legal expertise for policy makers, media, and legal community

- ***Legal Reviews:*** Provide constitutional guidance regarding bill drafts and questions at the state, federal and international levels.
- ***Legal Assistance:*** Provide research and legal policy guidance on various issues related to school choice.
- ***Legal Education:*** Speak at events across the country and abroad about the importance and constitutionality of school choice.

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EdChoice Legal Advocates (EdLA)

➤ Launched in 2023 to litigate in defense of education freedom

- Principally represent parents plus the occasional legislator
- File amicus curiae briefs to assist others in defending education freedom

Team: Tom Fisher (VP, Dir. of Litigation)
Bryan Cleveland (Attorney)
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The Partnership for Educational Choice

- A joint project of the Institute for Justice and EdChoice to advocate and defend educational choice nationwide
- Co-counseling cases in AK, AR, OH, TN, UT
- Intensive collaboration through 2025, when EdChoice takes full responsibility for defending school choice programs.

Federal Law





Establishment Clause

Zelman v. Simmons-Harris (2002)

- Upheld Ohio Pilot Project Scholarship Program
- Parent's choice of school is attributable solely to the parent, not the state.



Free Exercise Clause

Kendra Espinoza v. Montana Dept of Revenue (2020)

“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.”



Free Exercise Clause

David & Amy Carson v. Makin (2022)

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

STATE LITIGATION



Key State Litigation Challenges

- Religion-neutral Blaines
- Equal Treatment
- Racial Segregation
- Civil Rights/Discrimination
- Exclusivity/Adequacy/Diversion
- Appropriation
- Delegation
- Supervision

Alaska

➤ *Alexander v. Teshner (AK Superior Court, Anchorage)*

- Correspondence program use at non-public schools.
- Theory: Violates religion-neutral Blaine Amendment
- Trial Court enjoined, but SCOAK reversed and remanded



➤ *Montana Quality Education Coalition v. Montana* (District Court, Lewis and Clark County)

- ESA for students with disabilities
- Theories:
 - 1. Appropriates state money to private corporations for educational purposes.**
 - 2. Uses restricted tax or other revenue sources improperly.**
 - 3. Violates appropriation clause and non-delegation doctrine.**
 - 4. Cash payments violate education equal opportunity guarantee.**
- PI denied July 9, 2024; case remains pending.



➤ *Columbus School District (and 73 other school districts) v. State* (Franklin Court of Common Pleas)

- EdChoice Scholarship Program
- Theories
 1. Depletes Ohio public school funding
 2. Subsidizes private school students more than public school per pupil.
 3. Leads to more segregated schools
 4. Fails to support a uniform system of common schools
 5. Gives sectarian institutions control over public funds
- Cross MSJ Pending

Tennessee

➤ *McEwen v. Bill Lee, Governor* (Chancery Court of Davidson County)

- **ESA Pilot Program**
- **Theories**
 1. Diverts public education funds to private schools,
 2. Provides different public-private school treatment
 3. No anti-discrimination and civil rights protections.
- **Trial court dismissed, but court of appeals reinstated. No injunction.**

Utah

➤ *Labresh v. Cox, Governor of Utah (District Court Salt Lake City)*

- Utah Fits All Scholarship program, ESAs up to \$8K
- **Theories:**
 1. **Free and Open Schools**—UFA is a program within the public education system not free and open to all children in Utah. Objection to “outsourcing.”
 2. **Use of income tax revenues:** all intangible property taxes and income taxes must be used to support public education or programs for children or individuals with disabilities.
 3. **Delegation of State Board’s Authority:** UFA authorizes a private program manager to run it.
 4. **Delegation of Constitutional Functions to Private Entities:** Specifically education to private entities unsupervised by government.

■ **MTD Pending**