



## Education Choice: The Next Legal Frontier

**Thomas M. Fisher**  
Vice President and Director of Litigation

# TMF Background



Indiana SG 2005-2023



Successfully Defended  
Indiana's Choice Scholarship  
Program



Thwarted public-school  
adequacy challenge

# GOALS



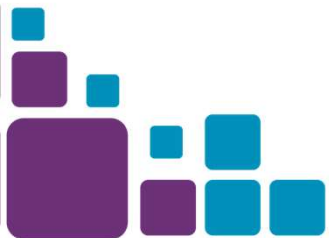
Understand  
EdChoice legal  
services



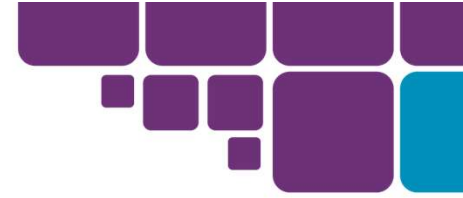
Review  
federal legal  
landscape



Learn key  
aspects of  
state litigation



# EdChoice Legal Services



# LPEC

*Legal Policy  
& Education Center*

*By EdChoice*



**Leslie Hiner**  
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## 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.



## EdLA launched in 2023 to litigate in defense of education freedom

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

Team: Tom Fisher (VP, Dir. of Litigation)

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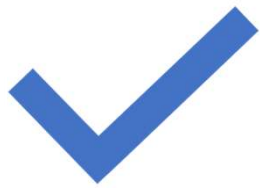
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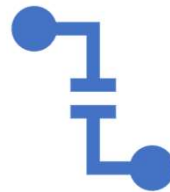




# Partnership for Educational Choice



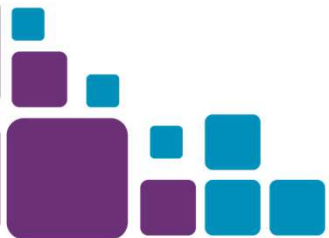
IJ and EdChoice



Co-counseling:  
AK, AR, OH, TN, UT



2025 Hand-Off



# 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

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Religion-neutral  
Blaines

Equal Treatment

Racial Segregation

Civil  
Rights/Discrimination


Exclusivity/Adequacy/  
Diversion

Appropriation





















Delegation


Supervision



 What potential legal challenge to education choice concerns you the most?

Open text poll 23 responses 23 participants

-  Anonymous  
That the establishment asserts its preferred, secular religion
-  Anonymous  
Special needs students being overly integrated into class room disrupting class balance
-  Anonymous  
Discrimination
-  Anonymous  
More money diverted away from education
-  Anonymous  
Political issues
-  Anonymous  
New state laws intended to prohibit public money to go to private schools
-  Anonymous  
Full funding, money follows student.
-  Anonymous  
Mini-Blaine sentiment
-  Anonymous  
Imposition of curriculum mandates from the judiciary or legislature.
-  Anonymous  
Appropriation
-  Anonymous  
Adequate/Equal Services to Schools
-  Anonymous  
None.
-  Anonymous  
Government over reach in homeschooling education
-  Anonymous  
Discrimination
-  Anonymous  
Blaine amendment
-  Anonymous  
Appropriation
-  Anonymous  
No funds for private
-  Anonymous  
Adequacy challenge
-  Anonymous  
Poorly written legislation opening us up to legal issues
-  Anonymous  
Diversion

 What potential legal challenge to education choice concerns you the most?

Open text poll 23 responses 23 participants

-  Anonymous  
Politics
-  Anonymous  
Separation of church and state
-  Anonymous  
Blaine

# 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



# Tennessee

## *McEwen v. Bill Lee, Governor* (Chancery 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.
- **Dismissed, but court of appeals reinstated. No injunction.**





# Montana

## *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, 2024; case remains pending.**



# Ohio

## *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**



# 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 within public education system yet not free and open to all. Objection to “outsourcing.”
  2. **Use of income tax revenues:** Intangible property taxes and income taxes must support public education or individuals with disabilities.
  3. **Delegation of Authority:** UFA run by program manager and education run by private entities unsupervised by government.
- **MTD/MSJ Pending**

