



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



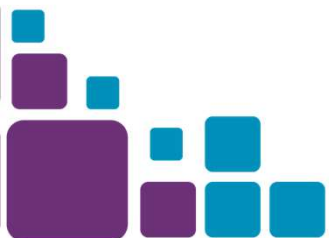
Understand
EdChoice legal
services



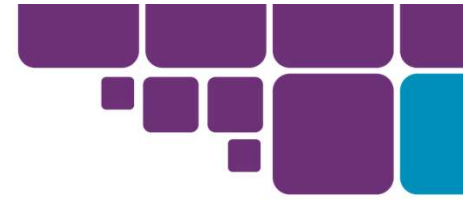
Review federal
legal landscape



Learn key aspects
of state litigation



EdChoice Legal Services



LPEC

*Legal Policy
& Education Center*

By EdChoice



Leslie Hiner
Leslie@edchoice.org

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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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

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?

Wordcloud Poll 24 responses 21 participants



Alaska

Program

- Correspondence program use at non-public schools

Alexander v. Teshner (AK Superior Court, Anchorage)

- Theory: Violates religion-neutral Blaine Amendment



Tennessee

Program

- ESA Pilot Program

McEwen v. Bill Lee, Governor (Chancery Davidson County)

- Diverts public education funds to private schools
- Provides different public-private school treatment
- No anti-discrimination and civil rights protection



Montana

Program

- **ESA For Students with Disabilities**

Montana Quality Education Coalition v. Montana (District Court, Lewis and Clark County)
[PI Denied; Case Pending]

- **Appropriates state money to private corporations for educational purposes**
- **Uses restricted tax or other revenue sources improperly**
- **Violates appropriation clause and non-delegation doctrine**
- **Cash payments violate education equal opportunity guarantee**



Ohio

Program

- ESA Program

Columbus School District v. State (Franklin Court of Common Pleas)
[Cross MSJ Pending]

- Depletes Ohio public school funding
- Subsidizes private school students more than public school per pupil.
- Leads to more segregated schools
- Fails to support a uniform system of common schools
- Gives sectarian institutions control over public funds



Utah

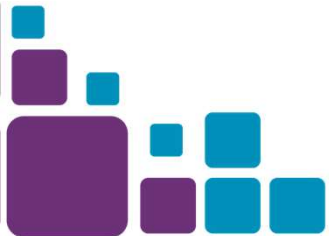
Program

- Utah Fits All, ESA up to \$8K

Labresh v. Cox, Governor (District Court Salt Lake City)

[MTD/MSJ Pending]

- Free and Open Schools
- Use of income tax revenues
- Delegation of Authority



Idaho

Current Programs

- **Public School Open Enrollment**
- **Empowering Parents Program:** \$1-3K for learning-loss recovery (\$50M max)
- **Advanced Opportunities Program:** \$4K for public school students; <\$1K for private school students—for advanced coursework “in excess” of regular school day

Blaine Amendment Dispute

- **Do Espinoza and Carson “Apply”?** Yes
- **2020 AG Advisory Letter to Sen. Lori Den Hartog:** No insight re school choice

