Addressing the Constitutional Challenge to ESAs

By Robert Wright

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Critics of Educational Savings Accounts often raise the issue of the constitutional challenges of using taxpayer funds to purchase private education.

Recently, Jason Bedrick of the CATO Institute and Lindsey Burke of the Heritage Foundation highlighted this issue in their article published in National Affairs, writing, "While the United States Supreme Court has ruled that publicly funded school vouchers are constitutional under the First Amendment's Establishment Clause, most state constitutions contain a version of the so-called 'Blaine Amendment,' which bars state aid to parochial schools."[1]

The Blaine Amendments owe their name to James G. Blaine, Speaker of the U.S. House of Representatives, who proposed a U.S. constitutional amendment in 1875 prohibiting states from funding religious education. The amendment's original intent was to prevent Catholics from acquiring taxpayer support for their schools. While his proposed amendment failed to become part of the U.S. Constitution, more than two-thirds of the 50 states adopted their own constitutional amendments barring state funding of religious organizations that include schools, which have come to be known as the Blaine Amendments.

To understand how the Blaine Amendments affect ESAs in Georgia, a recent report written by GCO Scholar Dr. Eric Wearne and the Georgia Public Policy Foundation provides important insight on this issue:[2]

> In recent decades, these [Blaine] amendments have been interpreted by some to be prohibitions against any use of state funds for any schools other than public schools, and to prevent public funding of other faith-based initiatives, of any kind. Georgia's Blaine Amendment reads:
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> > …[n]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution. Ga. Const. art. I, § II, ¶ VII.

However, Title 20 of the Georgia Constitution also states that,

> Educational assistance programs authorized. (a) Pursuant to laws now or hereafter enacted by the General Assembly, public funds may be expended for any of the following purposes:
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> (1) To provide grants, scholarships, loans, or other assistance to students and to parents of students for educational purposes.[3]

ESAs avoid many of the legal issues that may arise through other programs, such as vouchers and tuition tax credits… Matthew Ladner argues that “It is unlikely that ESAs would ever be less constitutionally robust than vouchers. … Designing programs so that the aid has multiple uses and is clearly under the complete control of parents can only help or be neutral in a constitutional challenge.”[4] Though vouchers have been held to be constitutional under certain conditions by the U.S. Supreme Court,[5] ESAs may avoid even these challenges.”[6]

Bedrick and Burke argue this point even further:

> “The example of Arizona is encouraging on this point for advocates of ESAs. Despite having previously struck down vouchers, in March 2014 the Arizona Supreme Court declined to review an appeals-court decision upholding the state’s ESA law. The court distinguished the ESAs from vouchers because the latter “set aside state money to allow students to attend private schools” whereas under the ESA law, “the state deposits funds into an account from which parents may draw to purchase a wide range of services” and “none of the ESA funds are pre-ordained for a particular destination.”

Given the precedent set by the Arizona Supreme Court and the authority granted by Title 20 of the Georgia Constitution, supporters of ESAs should not allow themselves to worry too much concerning the constitutionality of this innovative program.