

School Choice Lawsuits Update: Summer 2016 Edition

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As school choice wins in the court of public opinion, opponents have resorted to fighting it in the courts of law. Here are a few brief updates regarding pending lawsuits against school choice programs around the country.

Colorado: Douglas County's School Choice Grant Program

Last summer, the Colorado Supreme Court struck down Douglas County's school voucher program with a plurality ruling that it violates the state's historically anti-Catholic Blaine Amendment, which forbids public money from being used at religious schools. District officials responded to the ruling by creating a new voucher program that excludes religious schools, which drew lawsuits from both opponents and *supporters* of school choice.

The Institute for Justice, which had previously defended the school voucher program, sued the county for unconstitutionally discriminating against religious groups. According to IJ, the "exclusion of religious options from the program violates the Free Exercise, Establishment, Equal Protection, and Free Speech Clauses of the United States Constitution, as well as the Due Process Clause, which guarantees the fundamental right of parents to control and direct the education and upbringing of their children." IJ contends—correctly, in my view—that the First Amendment requires the government to be *neutral* both among religions and between religion and non-religion, but it may not actively favor nor discriminate against either religious or non-religious groups or institutions. This case is still pending.

In a separate lawsuit, opponents of school choice contended that the new voucher program was not materially different than the old one. Earlier this month, a district court agreed, striking down the program yet again. Although by excluding religious schools, the new program appears to be in compliance with the Colorado Supreme Court's ruling, the district court explained that the state supreme court did not rule on the merits of several other alleged violations of state constitutional provisions under which the district court had previously invalidated the program. This case is likely going to return to the state supreme court for resolution.

Florida: Tax-Credit Scholarships

There are currently two lawsuits pending against Florida's tax-credit scholarship program. As RedefinED reports, a judge recently denied an attempt to fast-track one of the two suits, which primarily concerns the adequacy of the state's funding of district schools. A judge dismissed the portion of the suit related to the tax-credit program but plaintiffs filed an appeal and asked for the case to skip the appellate court and go straight to the state supreme

court. That request has been denied, so the case will go before the appellate court first. That means the program is likely to serve more than 100,000 students by the time it comes before the state supreme court.

Nevada: Education Savings Account

As I noted a few weeks ago, the Nevada Supreme Court held oral arguments in two lawsuits against the state's education savings account (ESA) program. Redefined provides a nice summary of the arguments from each side.

Meanwhile, a new poll finds that nearly half of Nevada voters (48%) support the ESA program compared to 37% who oppose it. Some are making hay of the fact that wealthier families are more likely to support the program, but the law's legislative sponsor explains that the poor are likely to benefit the most in the long run:

Support rose to 69 percent for voters with an income above \$200,000, compared to just 40 percent for those earning less than \$30,000.

“That might be true right now,” [state senator Scott] Hammond said. “But like anything else, when new technologies and innovations come down, it does seem like the rich take advantage of those.”

He compared the favorability of ESAs to the adoption of smartphones and other electronics: Wealthy individuals can afford to pay for the cost of research and development for a new product before the price drops for everyone else.

If the Supreme Court rules in favor of ESAs, Hammond predicted the cost of private school tuition and other services will fall and build support for the program.

“The price point will decrease. The knowledge also will increase among groups of people who may not even know what an ESA is,” he said. “And then you'll start to see more participation.”

Exactly so. As I noted last year, the iPhone was initially something that only wealthier folks could afford, but now Walmart carries a smartphone that has better specs than the original iPhone that costs just \$10. Likewise, a market for education will require the participation of higher income families to bring needed capital, but over time the greatest benefit will redound to the poor. As we've seen in Arizona, it is the lowest-income families who were the *least satisfied* at their district schools and who were the *most satisfied* with the ESA.

New Hampshire: Croydon's Town Tuitioning Program

The village of Croydon, New Hampshire (population 651) is too small to run its own K-12 school system, so it has long contracted with a neighboring town to educate its students. However, a few years ago, village officials decided to cover the tuition costs of students attending any school their parents chose, up to the amount they had been paying in their previous agreements. Unfortunately, state officials didn't like the town bucking the government education monopoly:

Croydon had been spending about \$12,000 per pupil to place them in Newport's district school. The town would cover tuition at a family's chosen school up to the amount Newport charged,

and the parents would make up any difference. On the other hand, if a school charged less than that, then the town would reap the savings. This year, Croydon paid for four students to attend Newport Montessori School, a private school where tuition is \$8,200 a year.

Although the taxpayers save money and, most importantly, the students' parents believe that school is the best fit for their children, the New Hampshire Department of Education ordered Croydon to immediately cease paying for students attending private schools.

The DOE argues that Croydon does not have the statutory authority to pay for students to attend private schools. The Croydon School Board's attorney, former New Hampshire Supreme Court Justice Charles Douglas III, disagrees, pointing to a statute authorizing districts to contract with other public or non-public educational institutions, which, in fact, some other districts already do.

Sadly, a district court recently ruled against Croydon, which is now considering an appeal. Because the town is so small, raising the funds necessary to mount a successful legal appeal is challenging, so some village officials have created a GoFundMe page for a legal defense fund. (Yes, my libertarian friends, they *do* take Bitcoin!) For more information on the case, see the School Choice for New Hampshire blog.

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