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Nevada Supreme Court: Education Savings Accounts Are Constitutional, Funding Mechanism Isn't

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In a landmark decision, the **Supreme Court of Nevada** yesterday upheld the constitutionality of the nation's most expansive educational choice law. However, the court ruled that the funding mechanism the legislature adopted is unconstitutional. If the legislature creates a new funding mechanism–as it could and should in a special session–then the ESA program could be implemented right away.

Enacted in 2015, Nevada's **education savings account** (ESA) policy was originally scheduled to launch at the beginning of this year, but it immediately drew **two separate legal challenges** from the government schooling establishment and the ACLU and its allies. Nevada's ESA provides students with $5,100 per year (plus an additional $600 for low-income students or students with special needs) to use for a wide variety of approved educational expenditures, including private school tuition, tutoring, text books, online courses, homeschool curricula, and more. Families can also roll over unspent funds from year to year. As the Heritage Foundation's Lindsey Burke and I have **explained**, the ability to customize a child's education and save funds for later are significant improvements over school vouchers:

ESAs offer several key advantages over traditional school-choice programs. Because families can spend ESA funds at multiple providers and can save unspent funds for later, ESAs incentivize families to economize and maximize the value of each dollar spent, in a manner similar to the way they would spend their own money. ESAs also create incentives for education providers to unbundle services and products to better meet students' individual learning needs.

Of the five existing ESA programs, Nevada's is the most expansive. Florida, Mississippi, and Tennessee restrict their ESAs to students with special needs. Arizona originally restricted ESA eligibility to students with special needs, but has since included foster children, children of active-duty military personnel, students assigned to district schools rated D or F, and children living in Native American reservations. In Nevada, all students who attended a public school for at least 100 days in the previous academic year are eligible.

In two separate lawsuits, opponents of educational choice alleged that Nevada's ESA violated the state constitution's mandate that the state provide a "uniform system of common schools" (Article 11, Section 2), its prohibition against using public funds for sectarian purposes (Article 11, Section 6), and a clause requiring the state to appropriate funds to operate the district schools

before any other appropriation is enacted for the biennium (Article 11, Section 10). The court found that the ESA was constitutional under the first two constitutional provisions, but the way it was funded violated the third.

"Uniform" Does Not Mean "Exclusive"

The anti-choice plaintiffs alleged that the state constitution's mandate that the state provide a "uniform system of common schools" means that the state may *only* fund that system, and not an "alternative" system that includes "non-common, non-uniform private schools and home-based schooling." Essentially, they argued that "uniform" meant "exclusive." The court disagreed. The plain language of the term "uniform" refers to uniformity *within the system of common schools*. Such schools must be free-of-charge, free of sectarian instruction, open at least six months a year, and so on. The ESA program does not change that.

The plaintiffs took great pains to explain away the previous provision of the state constitution, which explicitly authorized the legislature to "encourage" education "by all suitable means." Although the plaintiffs argued that the term "all suitable means" is somehow limited by the "uniformity" clause, the court ruled that the two clauses operate independently. Furthermore, the court held that the expression "by all suitable means" clearly "reflects the framers' intent to confer broad discretion on the Legislature in fulfilling its duty" to promote education. The creation of an ESA program falls within this discretion.

ESA Funds Belong to Parents, Not the State

The plaintiffs further alleged that the ESA violated the state constitution's Blaine Amendment, which states: "No public funds of any kind of character whatever […] shall be used for sectarian purpose." Although even the plaintiffs conceded that the ESA has a secular purpose and that parents may expend all of their ESA funds on secular education, they contended that the potential that parents might use ESA funds to pay tuition at a religious school or purchase religious homeschool materials was a violation of the Blaine Amendment. The court disagreed:

Once the public funds are deposited into an education savings account, the funds are no longer "public funds" but are instead the private funds of the individual parent who established the account. The parent decides where to spend that money for the child's education and may choose from a variety of participating entities, including religious and non-religious schools. Any decision by the parent to use the funds in his or her account to pay tuition at a religious school does not involve the use of "public funds" and thus does not implicate Section 10.

This is consistent with how the courts treat other transfers of public funds to individual citizens. A person using food stamps for a religious feast, hosting regular Bible studies at a subsidized apartment, or spending Medicaid funds at a Catholic hospital with a crucifix in every room and priests on the staff likewise do not violate the U.S. or state constitutions. The mere fact that the state places some restrictions on how those funds may be spent does not, as the plaintiffs alleged, mean that they are still "public funds." As the court ruled, "That the funds may be used by the parents only for authorized educational expenses does not alter the fact that the funds belong to the parents."

Finding a New Funding Mechanism

Education savings accounts are constitutional. Nevertheless, the court ruled that the way the legislature funded them is not. In its current form, there is no limit to the number of ESAs that the state might issue because it depends on the number of eligible students who apply for an account.

The legislature did not explicitly create a separate appropriation for the ESAs, but rather diverted the funding that the state would otherwise have spent on those students had they enrolled in a district school. This creates a Catch-22. If the court were to find that the ESA funds do constitute a separate appropriation, then it runs afoul of the constitutional mandate that the legislature fund the district school system first because the legislature passed the ESA bill before the district school funding bill. However, if it is not a separate appropriation (as the court eventually held), then the legislature did not actually appropriate funds for the ESA because the district school funding bill makes no mention of them. The state treasury therefore has no authority to use the funds appropriated in the district school funding bill to fund the ESAs.

Although the Nevada Supreme Court issued an injunction against implementing the ESA, this decision gives supporters of educational choice more reason to celebrate than not. If funded properly, ESAs are constitutional in Nevada. Now all the legislature needs to do is hold a special session to make that happen.

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