



# The New Hampshire Education Tax Credit Lawsuit Simplified

By Jason Bedrick

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When educational choice wins in the halls of state legislatures and the court of public opinion, opponents often turn to the courts of law. On April 16, the New Hampshire Supreme Court heard [oral arguments](#) in *Duncan v. State of New Hampshire*, a lawsuit brought by the American Civil Liberties Union (ACLU) and Americans United Against Separation of Church and State (AU) against New Hampshire's trailblazing choice program.

## BACKGROUND

In 2012, the New Hampshire legislature overwhelmingly passed the [Opportunity Scholarship Act](#), overriding the governor's veto in the process. The law grants tax credits to corporations worth 85 percent of their donations to nonprofit scholarship organizations that provide financial assistance to low- and middle-income parents so they can choose the education that works best for their children.

Scholarship recipients must have a family income that is no more than 300 percent of the federal poverty line (\$70,650 for a family of four in 2013-14), and 40 percent of scholarships are reserved for students qualifying for the federal free and reduced-price lunch program (\$43,568 for a family of four in 2013-14). Recipients can use the scholarship funds to pay tuition at private schools, out-of-district public schools, and to cover approved homeschooling expenses such as textbooks, tutoring, homeschool curricula, and online courses.

However, before a single scholarship was granted, [the ACLU and AU filed a lawsuit](#) claiming that the scholarship program violated New Hampshire's historically [anti-Catholic](#) Blaine Amendment, which [states](#):

[No] money raised by taxation shall ever be granted or applied for the use of the schools of institutions of any religious sect or denomination. (New Hampshire Constitution, Part II, Article 83)

Plaintiffs also argue that the program violates New Hampshire's ["compelled support" clause](#):

[No] person shall ever be compelled to pay towards the support of the schools of any sect or denomination. (New Hampshire Constitution, Part I, Article 6)

On June 17, 2013, the Strafford County Superior Court [ruled](#) that using tax-credit scholarships at religious schools would violate the state constitution's Blaine Amendment. The trial court accepted the plaintiff's argument that restricting the scholarships to secular subjects at religiously-affiliated schools would not suffice because religion can pervade all subjects at such schools. However, recognizing that the law included a severability clause, which preserves the rest of the law if any part of it is declared unconstitutional, the judge allowed the scholarship program to continue to serve students choosing secular private schools, out-of-district public schools, or homeschool environments.

The decision was appealed to the state supreme court by the New Hampshire state attorney general's office and the [Institute for Justice](#), which is representing several scholarship families and the Network for Educational Opportunity (NEO), the state's only active scholarship organization.

While the lawsuit was pending before the state supreme court, NEO awarded more than 100 scholarships to New Hampshire families, 91 percent of whom had incomes low enough to qualify for the federal free or reduced-price lunch program. [A survey](#) of parents of scholarship recipients found high levels of satisfaction:

- 97 percent stated they are satisfied with their private or home school
- 100 percent of parents whose child previously attended a public school reported they were more satisfied with their current choice of school.
- 68 percent reported they saw measurable academic improvement in their child since receiving a scholarship.
- 74 percent reported they could not afford private school without a scholarship.

## LEGAL ISSUES

The issues raised in this case are numerous and complex, addressed over the course of hundreds of pages of legal briefs, responses, and amici curiae. Below are summaries of the three main issues before the New Hampshire Supreme Court. For the sake of brevity and clarity, these summaries will eschew references to case law and omit many of the nuanced technical arguments, providing instead a broad overview of the primary issues raised.

*Standing: Who Can Sue?*

Before addressing the substantive questions, the New Hampshire Supreme Court faces a procedural question: Do any of the plaintiffs actually have the standing to bring the lawsuit?

The U.S. Supreme Court had previously ruled in [ACSTO v. Winn](#) that taxpayers lack the standing to challenge a tax-credit scholarship program under the First Amendment of the U.S. Constitution. A private individual or corporation's money does not become "public money" so long as it "has not come into the tax collector's hands," and there are no constitutional grounds to challenge how private individuals or corporations choose to lawfully spend or donate their money.

However, states may adopt different standards for standing, and New Hampshire's recently adopted standards are relatively broad. Under the existing statutes, it is clear that at least some of the plaintiffs have the standing to sue. However, the Institute for Justice argues that the New Hampshire legislature's amendment to the standing statute in 2013 is itself unconstitutional under several provisions of the state constitution because it dispenses with the requirement to show personal injury, violates the separation of powers, and vests authority in taxpayers that is constitutionally reserved for the governor.

#### *Whose Money? Private vs. Public Funding*

If the court finds that one or more plaintiffs have the standing to bring their case, the first substantive question that it confronts is whether tax credits constitute "money raised by taxation."

As noted above, the U.S. Supreme Court ruled that the money a taxpayer keeps because of tax credits remains private money. However, state courts are free to adopt a different understanding under their state constitutions and New Hampshire does not have precedent that clearly favors one interpretation over another.

Plaintiffs argue that the court should adopt "tax expenditure analysis," which holds that there is no substantive difference between a tax credit and a tax expenditure. They further argue that the scholarship funds constitute "money raised by taxation" because the program relies on the tax code to create an incentive for businesses to donate to scholarship organizations.

The program's defenders argue that "money raised by taxation" historically refers only to tax revenue that has been collected by the state and has entered the state treasury, not tax credits, deductions, or exemptions. In the tax-credit scholarship program, private businesses donate the money to private nonprofits, which then help private citizens afford homeschooling expenses or tuition at private (or out-of-district public) schools. At no point does the money enter the state treasury.

They also urge the court to reject tax expenditure analysis for constitutional purposes because the U.S. Supreme Court and other state supreme courts have rejected it and because it would have far-reaching consequences beyond this case. For example, tax expenditure analysis would

implicate longstanding charitable tax deductions and property tax exemptions that more directly benefit religious organizations than the tax-credit scholarship.

### *Is Public Money “Granted or Applied” to Religious Schools?*

If the court decides that tax credits do constitute “money raised by taxation,” it must then determine whether the constitution is violated when parents choose to use that money at religious schools.

In [Zelman v. Simmons-Harris](#), the U.S. Supreme Court ruled that the citizens may use public funds at religious schools so long as the program has a secular purpose and the funds reach the religious schools in a manner that is indirect and incidental to the choices of individual citizens. However, as noted above, a state may adopt a standard that differs from the U.S. Constitution so long as it does not violate it. New Hampshire’s legal precedent in this area is conflicting and consists mostly of non-binding advisory opinions.

Plaintiffs argue that two provisions of New Hampshire’s state constitution expressly forbid the use of public funds at religious schools. The defenders counter that what the constitutional provisions were intended to forbid was only direct public support of religious schools. By contrast, the tax-credit scholarship program empowers parents to choose among numerous educational options, some religious and others not. Because the program is neutral with regards to religion and, as the trial court found, has the secular purpose of expanding educational opportunity, there is no constitutional violation.

In response, plaintiffs [point](#) to advisory opinions holding that the state cannot constitutionally “do indirectly what it cannot do directly” and that the taxpayers’ interest is not “dependent on the number of hands it passes through.” The defenders in turn point to advisory opinions holding that “indirect and incidental” aid is permitted and that the constitutional provisions in question were not “intended that members of a denomination should be deprived of public benefits because of their beliefs.” (The defenders’ briefs are not available online but the Cato Institute offered a similar argument in its [amicus brief](#).)

## CONCLUSION

There are four possible scenarios for how the New Hampshire Supreme Court will rule in this case:

1. **The court rules that the plaintiffs lack standing.** In this case, the trial court’s opinion would be overturned and scholarship students would be able to attend the school of their choice, religious or secular.

2. **The court rules in favor of the program on the merits.** That would mean either the court holds that tax credits are private money or that public money may be spent at a religious school so long as it reaches the schools in a manner that is indirect and incidental to the choices of parents. As in the first scenario, scholarship students would be able to attend the school of their choice, religious or secular.
  
3. **The court upholds the trial court's decision.** In this case, the tax-credit scholarship program would continue as it has in the last year. The trial court forbid the use of scholarships at religious schools but allowed their use at secular private schools, out-of-district public schools, and homeschool environments. In this scenario, the Institute for Justice likely would challenge the decision in federal court for violating the Free Exercise clause of the First Amendment since such a decision would require legislative hostility toward religion rather than neutrality.
  
4. **The court rules against the program and rejects the severability clause.** The trial court found that the severability clause that the legislature had added was valid, therefore the program could continue for parents selecting secular schools or homeschooling. The state supreme court could reach the same conclusion on the merits, but reject the severability clause. This would be the most devastating outcome for educational choice in New Hampshire, as it would completely obliterate the tax-credit scholarship program.

As Yogi Berra once said, it's hard to make predictions, especially about the future. That said, based on the prior rulings of the U.S. Supreme Court and the Arizona Supreme Court as well as New Hampshire's own precedent, it is likely the New Hampshire Supreme Court will hold that the Granite State's tax-credit scholarship program is constitutional.

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