

# THE STATE OF EDUCATION SAVINGS ACCOUNT PROGRAMS IN THE UNITED STATES



Oscar Jimenez-Castellanos  
Arizona State University

William J. Mathis and Kevin G. Welner  
University of Colorado Boulder

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**National Education Policy Center**

School of Education, University of Colorado Boulder  
Boulder, CO 80309-0249  
(802) 383-0058  
[nepc.colorado.edu](http://nepc.colorado.edu)



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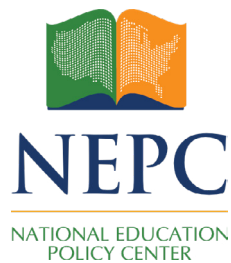
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## Executive Summary

Education Savings Accounts are a new form of private school choice and are arguably the most strongly promoted approach by voucher advocates. This policy brief examines the emerging policy, considering how it mirrors and differs from conventional voucher approaches and examining the legal issues that it raises.

Education Savings Accounts (ESAs) were first adopted in Arizona in 2011. The policy was designed to, among other things, work around state constitutional prohibitions preventing using public money to fund private schools, particularly religious schools. Parents are provided a set sum, often in the form of a debit account, which they can use for a variety of educational services including private school tuition and fees, online courses, extracurricular activities and private tutoring. Students enrolled in an ESA program are not allowed to concurrently attend a public school.

During the 2017 legislative session, 13 states introduced ESA bills, although only one bill ultimately became law (in North Carolina). Through December 2017, however, ESA laws had been enacted in six states (Arizona, Florida, Tennessee, Mississippi, Nevada and North Carolina).

The constitutionality of ESAs has been challenged in three state courts: Arizona, Florida, and Nevada. The challenge to Arizona's bill was unsuccessful; it was found to be constitutional. The challenge in Florida was dismissed because the plaintiffs lacked legal standing. The court never considered the merits of the constitutional arguments. The Nevada lawsuit was successful, but the plaintiffs lost on the key constitutional argument of whether using taxpayer money for private education was constitutional. Instead, the plaintiffs won because money designated for public education could not be used to fund the ESA program.

ESA programs use one of two approaches. The *targeted* approach limits eligibility to a specific group of students, most often those with disabilities (Arizona, Florida, Tennessee, Mississippi, and North Carolina). The *universal* model allows all school-aged students to enroll (Nevada). States that began with a targeted model have seen efforts to expand eligibility criteria through either incremental or radical legislative expansion. In 2017, Arizona did in fact expand its ESA program, to make every Arizona student eligible by 2020, but a referendum to reverse this decision appears headed for the November 2018 ballot.

Major concerns raised about ESA programs include their lack of accountability, their potential effects on social and economic stratification in schools and society, and their fiscal impact on school districts and states. But research, and even non-empirical analyses, regarding ESA policies has been very limited. In fact, the majority of currently available ESA literature has been provided by conservative think tanks, whose explicit goal is to advance free-market school choice reform. It is this think-tank advocacy that has driven the adoption and expansion of ESAs thus far.

While research and evaluation efforts should be stepped up, such efforts will face considerable obstacles. ESA programs embrace privatization and non-transparency by design. Accountability systems are absent, and data are limited; the lack of data and reporting will impede research on how these policies affect students, schools, and states.

The best evidence available about the efficacy of state-subsidized private education is probably the research on conventional voucher programs. Overall, this voucher literature raises serious questions about the quality of the private-school education, with the most recent research suggesting that students using vouchers do worse than they would have done had they remained in their public schools. Voucher research also points to problems with accountability, access, and segregation.

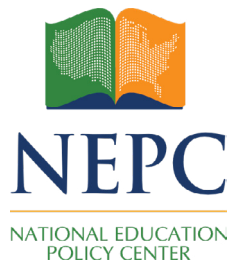
When considering ESAs, policymakers from all perspectives must carefully weigh the evidence on their impact on key elements of U.S. education. Questions they should ask include:

- Will the program increase or decrease democratic participation and equality?
- Will the program increase or decrease segregation by race, income, disability, or otherwise affect specific groups of students?
- Will the rights of children with special needs be protected?
- Will the outcome entangle church and state as a policy matter, even beyond legal concerns?
- Will the program result in the state funding two parallel systems, raising efficiency concerns? Will those systems be separate and unequal, sparking new legal challenges?
- How will accountability be ensured? How will malfeasance be monitored and controlled?

In light of the nearly complete lack of information on what effects existing ESA programs are

having, it is recommended that:

- Policymakers should be wary of adopting or expanding an ESA program in light of the lack of any empirical evidence to support them and in light of their potential adverse effects.
- Legislatures in states with existing ESA programs should mandate and fund comprehensive program evaluation systems to determine their programs' impact on students, families, schools, districts and states.
- Legislatures designing new programs should routinely include mandated and funded comprehensive evaluation systems.



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## Introduction

Ever since the introduction of the first modern school voucher programs in Milwaukee (1990) and Cleveland (1995), public subsidies of private school tuition have expanded and diversified. According to the National Conference of State Legislators, 15 states (including the District of Columbia) have adopted conventional voucher policies.<sup>1</sup> But a total of 30 states have adopted voucher-like policies, in one form or another.<sup>2</sup> The newest approach is called Education Savings Accounts (ESAs)—also called, in Arizona— “Empowerment Scholarship Accounts.” Parents willing to eschew public school enrollment are provided a set sum, often in the form of a debit account, which they can use to purchase a variety of educational services in the private marketplace. Voucher advocates trumpet these policies as “*The New Frontier in School Choice*.”<sup>3</sup> As Adam Peshek and Gerard Robinson explain:

[F]or more than two decades, school choice had been just that—*school* choice. In a potentially profound development, ESAs focus on *educational* choice and upend many assumptions that have framed education policy issues. Instead of limiting parents’ educational choices to schools, ESAs give families almost unfettered control over the public funds allocated for their child’s education. With an ESA, parents are able to customize their child’s education by combining traditional schools, homeschooling, and different education providers, including tutors, therapists, online and blended models. The ability to direct education funds to the schools and services of parents’ choice gives them an unrepresented amount of discretion over their child’s education.<sup>4</sup>

The unifying theme of private-school voucher policies is that they leverage public funding to subsidize the payment of private school tuition.<sup>5</sup> Another consistency across voucher pol-

icies is that the primary end-recipients of voucher funding are religious schools.<sup>6</sup> ESAs fall comfortably within these voucher rules, but—as Peshek and Robinson enthusiastically point out—they also are unique for the level of parental discretion in how the public funding will ultimately be spent.

Most of the growth in voucher policies occurred after the U.S. Supreme Court cleared the way in 2002, largely removing the federal Establishment Clause as a legal obstacle.<sup>7</sup> However, as the Arizona Supreme Court showed in a 2009 decision called *Cain v. Horne*, a conventional voucher policy can still violate provisions in state constitutions.<sup>8</sup> Key to this ruling was the fact that these conventional voucher policies involve an appropriation of state money that is ultimately cashed in by the religious school.

What potentially separates ESAs from conventional vouchers in this regard is that they are designed as a work-around of such state constitutional prohibitions against using public funds to support religious activities. Instead of providing public money directly to religious schools, ESA programs allocate funds to parents, who are then free to use the funds for tuition or fees in a religious or non-religious private school or to pay for such educational services as private tutoring, online programs, and extracurricular activities. While program eligibility requirements, the amount of public funds provided, and other features vary across states (see Table I), one uniformity is that students taking advantage of an ESA program may not concurrently enroll in a public school.<sup>9</sup>

Table I  
Education Savings Accounts

STATE	TITLE	DATE	LITIGATION	ELIGIBILITY	NUMBER OF STUDENTS	FUNDING	ACCOUNTABILITY
Arizona	Empowerment Scholarship	2011	Court of appeals found no violation of the state constitution	(1) Special Ed, (2) Attend a "D" or "F" letter-grade school or school district, (3) Been adopted from the state's foster care system, (4) Child lives on a Native American reservation. (Referendum in Nov. 2018 will likely decide if scaled up.)	4,525 (2017-18)	100% of base funding for students earning up to 250% of poverty; 90% of base funding for all others.	None
Florida	Gardiner	2014	Dismissed because plaintiffs lacked legal standing	Special Education	7,463 (2016)	The General Appropriations Act specifies the annual amount. The amount varies according to grade, county of residence, and public school spending for students with disabilities. The Florida legislature appropriated \$107.4 million to the ESA program for 2017–18.	Recipient students must take a norm referenced test; limited state audit
Mississippi	EEO Special Needs	2015	none	Special Education	425 (2016-17)	The annual award amount is \$6,637, subject to increase or decrease by the same proportion as the Mississippi Adequate Education Program base student cost.	Norm ref test; audit
North Carolina	Personal ESA	2017	none	Special Education	Will begin in 2018-19	The maximum value for an ESA is \$9,000 per student per year. \$3.4 million was appropriated to the state's ESAs for the 2018–19 school year.	None
Nevada	ESA	2015	ESA did not violate "no aid" provision, but funding source not constitutional	Unrestricted	Non-operational (unfunded)	100% of base funding for students with special needs or those that live in families with incomes up to 100 percent of the free and reduced-price lunch program; 90% of base funding for all others.	Norm ref test
Tennessee	Individualized EAP	2015	none	Special Education	87 (2017-18)	100% of base IEA funding.	Norm ref test

Sources: Niehaus v. Huppenthal, 310 P.3d 983 (Ariz. Ct. App. 2013); Schwartz v. Lopez, 382 P.3d 886 (Nev. 2016); Faasse v. Scott (Florida 2nd Judicial Circuit, 2014); <https://www.edchoice.org>; <https://www.azcentral.com/story/news/local/arizona-education/2017/06/22/oversight-arizona-esa-school-voucher-program-almost-sham/407961001/>

The most vocal advocates of ESAs include conservative and libertarian organizations such as the Cato Institute, the American Federation for Children, the American Legislative Exchange Council, and EdChoice (formerly the Friedman Foundation for Educational Choice). Such advocates contend that ESA programs provide parents with increased choice, flexibility, and the freedom to design innovative educational experiences for their children, especially when a public school is seen as not meeting a child's needs.<sup>10</sup> Critics of ESA programs include organizations such as school board associations, teacher unions, the ACLU, and Americans United for Separation of Church and State. Such critics contend that ESAs run counter to the purposes of education in a democracy, are not educationally accountable, are susceptible to fraud and improper practices, and divert limited public funding away from local public schools into private schools.<sup>11</sup> They also point to research (discussed below) suggesting that voucher programs are not associated with positive test score effects.<sup>12</sup> Finally, notwithstanding a recent track record of generally unsuccessful litigation against voucher laws, critics argue that ESAs are unconstitutional because they run counter to state and federal principles of separation of church and state.<sup>13</sup>

## ESA Legislative Developments

As of December 2017, a total of six states have passed ESA legislation. The first program was adopted in Arizona in 2011. Florida followed in 2014, and then three states—Mississippi, Tennessee, and Nevada—passed legislation in 2015. The newest ESA program was adopted by North Carolina in 2017.<sup>14</sup>

Efforts to expand ESAs continue.<sup>15</sup> In addition to North Carolina, 13 states introduced legislation proposing ESA programs within the past two years (2016 and 2017): Arkansas, Illinois, Indiana, Kentucky, Minnesota, Missouri, New Hampshire, New Jersey, Oregon, Rhode Island, South Carolina, Virginia and Texas.<sup>16</sup>

States that have passed ESA legislation have adopted one of two approaches: targeted or universal. The *targeted* approach limits eligibility to a specific group of students, generally students with disabilities. Of the six existing ESA states, Florida, Mississippi, Tennessee, and North Carolina all adopted a targeted model.<sup>17</sup> In contrast, the *universal* model allows all school-aged students to enroll in an ESA program. Nevada adopted a universal model, although the Nevada program has not yet been implemented due to a court decision prohibiting the legislature from funding ESAs with monies allocated for public schools. The Nevada legislature must create an alternative funding stream before implementation, which has not happened because in 2016 Nevada Democrats successfully flipped control of both chambers in the state legislature.

Arizona initially adopted a targeted model, but the legislature in 2017 expanded the model to create a universal ESA program by 2020, although enrollment is initially capped at about 30,000. This “foot in the door” expansion approach is common with voucher legislation, which tends to start off with enrollment caps and with benefits directed toward a sympathetic subgroup of students. Florida, for example, incrementally increased eligibility for its ESA program, which now includes more types of disabilities than when initially adopted. Arizona, prior to this most recent expansion, increased its original eligibility criteria in 2013 and



2014 to include students in failing schools, low-income students, and Native American students living on a reservation. The 2017 expansion into a universal program, however, faced immediate and significant public resistance. The Save Our Schools grassroots campaign has apparently collected enough signatures to put the issue on the November 2018 ballot.<sup>18</sup> In turn, expansion proponents have filed suit to have the petition and its signatures invalidated (see below discussion of this litigation).<sup>19</sup>

## Litigation

State constitutions, as noted above, can pose a legal impediment for voucher laws. Different states have different provisions, ranging from the type of “no aid” clause that was applied in striking down the Arizona voucher law mentioned earlier,<sup>20</sup> to “compelled support” provisions that exist in 29 state constitutions, to so-called Blaine amendment language that exists in 36 state constitutions.<sup>21</sup> In addition, state constitutions sometimes include provisions concerning local control of schooling<sup>22</sup> or language specifying the type of schooling system to exist in the state,<sup>23</sup> either of which can limit voucher legality. Provisions specifying sources of funding, such as the one at issue in the Nevada case mentioned above and discussed below, can also come into play.<sup>24</sup>

### Federal Courts

The 2002 *Zelman* decision largely ended federal challenges to voucher laws. In a nutshell, the U.S. Supreme Court found that Cleveland’s conventional voucher policy did not run afoul of the Establishment Clause, because the policy allowed parents to make genuine, independent choices among a variety of options, only some of which were religious schools.<sup>25</sup> Because of this decision, plaintiffs in subsequent litigation have primarily focused on state constitutions.

But federal courts may still become important. Over the past half-century, the U.S. Supreme Court has shifted from first striking down voucher-like laws,<sup>26</sup> to then allowing them,<sup>27</sup> to now signaling that they may be constitutionally favored. In 2017, the U.S. Supreme Court’s ruling in *Trinity Lutheran v. Comer* found that Missouri’s policy of denying playground-resurfacing grants to religious institutions violated the First Amendment’s Free Exercise Clause because it discriminated against organizations based on their religious character.<sup>28</sup> While this decision was limited to funding for a secular purpose, not for religious teaching, the Court may extend the *Trinity Lutheran* reasoning in a later case—essentially finding state constitutional provisions to be discriminatory if they prohibit funding for private/religious school vouchers.

### State Courts

ESA programs have been challenged on state constitutional grounds in three states: Arizona

(2011), Florida (2014) and Nevada (2015). Each of these is discussed below.

### *Arizona*

The first ESA lawsuit, *Niehaus v. Huppenthal*, was filed in Arizona in 2011 by Sharon Niehaus, a parent of a student with disabilities.<sup>29</sup> The plaintiff argued that ESA programs violated Article 9, Section 10 of the Arizona Constitution (the “no aid” clause)—just as the state’s supreme court had found in *Cain v. Horne* in 2009, regarding the state’s earlier conventional voucher policy. However, the Arizona court of appeals decided in 2013 that the state’s ESA program was meaningfully different and therefore constitutional. The key distinction, the court reasoned, was that the ESA policy turns to parents to independently make decisions as to how ESA funds are to be used. That is, the law was found by this court to not involve any appropriation of public money made in aid of any religious institution.

As mentioned above, lawmakers in Arizona decided, after this court ruling, to expand the program—most recently, deciding in 2017 to make it universally available to families who eschew public schools. However, the state’s law may again change. Opponents filed signatures with the state to put a referendum on the November 2018 ballot, which (if passed) would reverse the expansion of the ESA program. Complicating the issue, voucher proponents have brought a lawsuit challenging the validity of the signatures.<sup>30</sup>

### *Florida*

Florida’s ESA was also challenged in court, with the plaintiffs alleging that the law was enacted in violation of Florida’s constitution’s “single subject matter” rule, which allows only one subject to be addressed in a single piece of legislation. However, the trial court never addressed the merits of the claim, instead dismissing the case because the plaintiff did not have “standing.”<sup>31</sup> A plaintiff in any lawsuit must show a special injury, beyond what any other resident of the state might suffer, in order to have legal standing to proceed.

### *Nevada*

The most recent, and arguably the most consequential, ESA lawsuits were both filed in Nevada in 2015. The ACLU filed the first, *Duncan v. Nevada*, on behalf of five citizens and Americans United for Separation of Church and State. The plaintiffs argued that the law violates Nevada’s constitution for three reasons: (a) allowing funding to potentially be used for a “sectarian purpose;” (b) creating a “competing system of private schools whose curricular, instruction, and educational standards diverge dramatically from those of public schools;” and (c) allowing participating private schools to potentially discriminate based on “religion, sexual orientation, and gender identity.”<sup>32</sup>

Soon after the ACLU suit, the Education Law Center of New Jersey and the organization Educate Nevada Now filed the second suit, *Lopez v Schwartz*. The plaintiffs argued that the program would (a) divert funds set aside for public schools to private, often religious,

schools; (b) reduce the funds deemed sufficient to operate Nevada public schools; and (c) create a system of schools that is not legislatively established and that are not free and open to all students.<sup>33</sup>

Ultimately, the two cases were consolidated into one, and they were heard together by the Nevada Supreme Court. Based on reasoning similar to that used in the Arizona *Niehaus* court, the Nevada Supreme Court found that using taxpayer money for private education was constitutional. The state constitution prohibited use of public funds for sectarian purposes. But the court reasoned as follows:

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 [the constitutional prohibition].<sup>34</sup>

However, the Nevada court also found the funding source to be inappropriate (see argument “(a)” made by the *Lopez* plaintiffs, as set forth above).<sup>35</sup> The court determined that since the legislature did not appropriate any funds for the education savings accounts, the funneling of money appropriated for K-12 public education to the education savings accounts is unconstitutional. In other words, the monies appropriated for public education cannot be used to fund the ESA program. As noted earlier, legislative control switched from Republican to Democratic the same year (2016) as the opinion was handed down, so no follow-up legislation has been passed that would provide the necessary funding. The ESA law remains on the books, but without the funding there is no active program.

## ESA Policy Issues

ESAs have not been the subject of peer-reviewed research examining, e.g., their impacts on students.<sup>36</sup> This dearth of scholarly publications can be attributed to four realities: (a) the fact that four of the six programs have only been in existence for two years, a short period for conducting research; (b) the lack of requirements in the laws for program evaluations or for states to collect the data needed for a serious study; (c) one program (Nevada’s) having never been implemented; and (d) the private, individualized ways that recipients are allowed to spend the ESA money.

In light of the lack of sound research about ESAs specifically, the most useful guidance is provided by research on conventional voucher programs. Voucher research can tell us about the likely efficacy of ESAs and can illuminate relevant policy issues.

## Effectiveness

In relation to the potential of vouchers to enhance academic outcomes, three major studies with rigorous methodology and large samples were recently released:<sup>37</sup>

- Louisiana—“When controlling for baseline achievement, we find [voucher] users are 18% of a standard deviation behind in [English Language Arts] and 34% of a standard deviation behind on mathematics compared with their control group peers after attending their most preferred private school for 2 years.”<sup>38</sup>
- Ohio— “The students who use vouchers to attend private schools have fared worse academically compared to their closely matched peers attending public schools. The study finds negative effects that are greater in math than in English language arts. Such impacts also appear to persist over time, suggesting that the results are not driven simply by the setbacks that typically accompany any change of school.”<sup>39</sup>
- Washington, DC—“After one year, the [voucher program] had a statistically significant negative impact on the mathematics achievement of students offered or using a scholarship.”<sup>40</sup>

These studies suggest that public subsidies such as ESAs, which are intended to encourage movement from public schools to private schools, are unlikely to result in higher test scores if used for that purpose. Mathematics performance, in particular, appears to decline. We note, however, that these studies don't tell us whether other uses of ESAs, to pay for private tutoring for example, would be more effective.

## Educational Accountability

The existing ESA laws include very few accountability measures.<sup>41</sup> For example, the laws contain no requirements regarding curriculum, teacher qualifications, or admission. Instead, parents are placed in the role of consumers who are authorized to purchase whatever educational programming they wish within broad parameters and with virtually no legislative restrictions to safeguard educational quality. They are also free to choose religious education at private sectarian institutions.<sup>42</sup> Moreover, ESA programs—and voucher programs more generally—typically do not contain the access and antidiscrimination protections that are mandated for public schools.<sup>43</sup>

Nor are ESA programs required to conduct a comprehensive evaluation of student learning. In some states, as shown on Table I, parents must submit data on the academic achievement or progress of their students through “alternate assessments,” such as an acceptable standardized test. However, the actual programs and assessments are so diverse and unsupervised that no common program evaluation system is realistic.<sup>44</sup>

This situation reflects proponents' arguments for a free-market definition of accountability. That is, parents can hold schools accountable by “voting with their feet”—by declining to work with poor-quality vendors; market forces will thereby ensure quality and eliminate

poor programs.<sup>45</sup> However, many assumptions that must be in place for an efficient market to function in this way (such as fully informed consumers making choices grounded in quality) are simply absent.<sup>46</sup> Also, if the parent exhausts the limited funds in the voucher (see the “Access” discussion below), and students cannot enroll in a public school concurrently with enrollment in an ESA program, then many parents will have no genuine ability to “vote with their feet.”

Skeptics of the free-market perspective argue that ESAs should be held accountable to taxpayers just as public schools are, through audits, transparency and public governance.<sup>47</sup> While some legislators have attempted to attach accountability requirements to ESA legislation, these efforts have generally been softened or rejected for voucher policies on the grounds that parents are in the best position to assess their child’s progress and needs.<sup>48</sup>

### **Misuse of Funds**

With so few restrictions on spending, it is perhaps not surprising that Arizona’s first audit uncovered examples of ESA funds being used to purchase big-screen televisions, snow globes and sock monkeys.<sup>49</sup> Parents also failed to turn in required accounting. Given parents’ broad latitudes and the lack of state oversight capabilities, much more stringent monitoring seems in order to safeguard the proper use of public funds for this particular educational reform. To their credit, some pro-ESA advocacy organizations have acknowledged the problem and called for stricter accountability.<sup>50</sup> Also, the laws in Florida and Mississippi do require random or regular account audits, but it is not yet clear how these will be implemented.<sup>51</sup>

### **Access, Segregation and Stratification**

Research on school vouchers indicates that they increase social, economic, and racial stratification, which have a variety of negative impacts.<sup>52</sup> Part of this stratification is by parental choice, seeking out schools that comport with religious beliefs and teachings. Part is also due to schools making choices, based on such beliefs and teachings as well as factors such as past academic and behavioral records. Each of these forms of selecting and stratification has its unique causes and implications.

Advocates of ESAs rarely address the issues of segregation and social stratification, in part because they generally believe that any social stratification that may occur results from individual parent choices that should be respected.<sup>53</sup> From this perspective, *de facto* segregation does not appear to be an inherent flaw in the ESA program structure.

One other access issue is also important, since it gets to the heart of school choice advocacy. How much choice do these policies really give low-income families? In Arizona, a family would generally receive \$5,600 each year per child, deposited into the ESA.<sup>54</sup> The largest deposit is probably in North Carolina, for a student with more severe special needs: \$9,000 per student per year.<sup>55</sup> For a lower-income family with few additional resources to supplement this amount, choices will be limited—particularly once transportation issues are taken into account.<sup>56</sup> These concerns are supported by an analysis of Nevada applicant zip codes, aggre-

gated by school district and matched to median income, shows most students applying for ESAs are from more affluent families.<sup>57</sup> Applications from households with incomes above \$100,000 were far more likely to enroll in an ESA program than households with incomes below \$25,000.

Moreover, interplay between socioeconomic status and disability may exist in ESA enrollment patterns. Parents of more affluent children with special needs may use the ESAs to enroll their children in high-resourced private schools; lower-wealth parents of children with disabilities won't have those options.<sup>58</sup> Affluent parents can, and do, supplement their ESAs to pay for a high-quality and expensive private school that would likely be inaccessible to low-income families.<sup>59</sup> Logically, this is how special-needs-targeted ESAs without so-called means testing (that is, without tying eligibility to proof of low income) are likely to play out: wealthier families able to purchase a well-resourced private school will get a new subsidy from the state, while lower-wealth families will largely forego the subsidy and remain in public schools. If these lower-wealth families do leave the public schools and take the subsidy, they will generally face powerful financial impediments to securing the resources for an upgrade in services for their child with special needs.

## **The Purpose of Public Education**

In the nineteenth century, Horace Mann, father of the common schools movement, said “Education, then, beyond all other devices of human origin, is the great equalizer of the conditions of men—the balance-wheel of the social machinery.”<sup>60</sup> Through the twentieth century, the popular view—with all its flaws and hypocrisies—was that universal education would produce an equal and democratic society.<sup>61</sup> Written into state constitutions, public education was intended to consolidate a stew of different languages, religious affiliations, ethnic groups and economic status into a working body public.

The views given voice by Peshek and Robinson in the extended quote earlier in this brief, and represented by ESA programs, pushes back hard against this community ideal. It encourages and promotes a major shift in the purpose of public education. Under a universal ESA model, the state's role shifts from providing equitable public education to all students to funding parents who can seek out a range of alternative educational services using public monies.<sup>62</sup> Instead of providing a common public good for the benefit of society, such voucher programs substitute individual choices that may or may not be governed by democratic norms or accountable for democratic aims.

## **Financial Implications for Public Schools**

Depending on the funding mechanism in any given state, ESA funding can create financial shortfalls for public schools. During the 2015-16 school year, for example, the relatively small Arizona program drew \$20.6 million from the public schools.<sup>63</sup> Displacing revenue from already-struggling public school systems may have legal implications.<sup>64</sup> Julie Mead

asks, “...does a state’s funding private education subvert its constitutional obligation to provide adequately for public education, thereby converting a child’s right to an education to merely the right to shop for one?”<sup>65</sup>

The projected overall fiscal impact on the public school system depends on whether the law includes a hold-harmless provision (compensating schools for some of the funding lost when a student leaves) as well as assumptions about how many students are eligible to participate in the program and the size of the voucher. Revenue loss could have significant negative consequences for students in public schools, and dividing public resources into two separate systems may prove financially inefficient, with both systems becoming less adequate—except as a supplement for the affluent.

## **Flexibility**

ESA advocacy literature trumpets the greater flexibility given parents to customize educational programming to meet the needs of individual children.<sup>66</sup> As noted above, ESAs can be used in a variety of ways, including financing private education, online learning opportunities, private tutoring, and educational therapies. The laws generally also allow parents to roll over their unused funds on a quarterly basis. A two-year analysis<sup>67</sup> of expenditure patterns of 316 parents found that:

- 85.3% of all ESA funds were spent on private school tuition;
- 34% percent of families used funds for multiple educational options;
- 19.6% percent paid for education therapy and services;
- 14.8% percent used funds for private tutoring;
- 12.3% percent financed curriculum; and
- 2.2% percent paid for online learning options.

An earlier study also found that a significant portion of the ESA designated funds went unspent.<sup>68</sup>

For parents who are well positioned to take advantage of these choices, the ESAs can undoubtedly provide genuine benefits. Yet this increased ESA flexibility can come with significant tradeoffs, particularly for families with fewer resources. Keeping in mind that students with disabilities have been the focus of existing ESA laws, these students—when they leave public schools—are relinquishing procedural and substantive legal protections under the Individuals with Disabilities Education Act (IDEA).<sup>69</sup> Further, as noted above, the voucher amount by itself is unlikely to be sufficient to pay for high-cost special needs programs. Another concern is that not all students have the same amount of choice and flexibility due to exclusionary practices. For instance, privatized educational institutions may set stringent admissions requirements that some students will not be able to meet because of their disabilities, gender or sexual identity, background, heritage, behavior, beliefs or academic performance.<sup>70</sup>

## Satisfaction

The pro-ESA literature reports that ESAs result in high parent satisfaction. One frequently cited study was an open (non-random<sup>71</sup>) poll on a Yahoo! message board. The tallies showed 71 percent of parents reported being “very satisfied” with the accounts; nearly 20 percent reported being “satisfied,” and 10 percent said they were “somewhat satisfied.”<sup>72</sup> In a separate article, based on a telephone survey of female respondents, approximately 73 percent of Latino respondents were found to support a proposed ESA program, while approximately 22 percent said they oppose such school choice programs. And among African-American populations, the same study suggests that there is a strong level of support for ESAs, with 63 percent of respondents supporting the program.<sup>73</sup>

## Discussion and Recommendations

Voucher growth in the immediate future seems likely, especially in light of the U.S. Supreme Court’s *Trinity Lutheran vs. Comer* decision. And ESAs will likely continue to be advanced by pro-voucher advocates. For many state legislators, ESAs make a strong appeal to anti-government and anti-regulatory instincts. Research on outcomes—intended and otherwise—may have lesser importance. Still, policymakers should be aware that the latest group of major voucher studies indicates that ESAs and other voucher approaches are dubious policy tools if the goal is to improve educational outcomes or integrate society. That being the case, policymakers should be extremely wary of adopting or expanding an ESA program. When considering ESAs, policymakers from all perspectives must carefully weigh the evidence on their impact on key elements of U.S. education. Questions they should ask include:

- Will the program increase or decrease democratic participation and equality?
- Will the program increase or decrease segregation by race, income, disability, or otherwise affect specific groups of students?
- Will the rights of children with special needs be protected?
- Will the outcome entangle church and state as a policy matter, even beyond legal concerns?
- Will the program result in the state funding two parallel systems, raising efficiency concerns? Will those systems be separate and unequal, sparking new legal challenges?
- How will accountability be ensured? How will malfeasance be monitored and controlled?

In light of the nearly complete lack of information on what effects existing ESA programs are having, it is recommended that:

- Policymakers should be wary of adopting or expanding an ESA program in light



of the lack of any empirical evidence to support them and in light of their potential adverse effects.

- Legislatures in states with existing ESA programs should mandate and fund comprehensive program evaluation systems to determine their programs' impact on students, families, schools, districts and states.
- Legislatures designing new programs should routinely include mandated and funded comprehensive evaluation systems.

## Notes and Resources

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- 8 *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009), holding that the state’s voucher policies violated the Arizona constitution’s Article 9, Section 10: “[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.”
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- 21 Eighteen state constitutions include both types of provisions. See Welner, K.G. (2008). *NeoVouchers: The emergence of tuition tax credits for private schooling*. New York, NY: Rowman & Littlefield (pg. 67). Compelled-support language prohibits the state from forcing residents to support a ministry. Blaine language tends to forcefully prohibit the state from supporting religious institutions. For example, Colorado's constitution states, "Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose." Colorado Const. Art. IX, § 7.
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- 25 *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).
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  - 34 *Schwartz v. Lopez*, 382 P.3d 886 (2016). The case was consolidated with *Duncan v. Nevada*, with the Nevada Supreme Court decision available at <https://www.leg.state.nv.us/division/legal/weblawcd/SCop/132/132NevAdvOpNo73.html>
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