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THE IMPACT OF ESPINOZA V. MONTANA DEPARTMENT OF REVENUE ON EDUCATION CHOICE OPPORTUNITIES IN IDAHO

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The impact of *Espinoza v. Montana Department of Revenue* on education choice opportunities in Idaho

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Though 2020 might go down in history as the year in which fear of a virus shut down schools across the country, the greatest long-term impact of 2020 on education will likely have little to do with COVID-19. The U.S. Supreme Court’s *Espinoza v. Montana Department of Revenue* decision has the potential to restructure the American education system if education choice advocates are willing to make full use of their restored liberties.

To understand the *Espinoza* decision’s impact, we must go back to the “Blaine Amendment,” which was a proposed amendment to the U.S. Constitution supported by James G. Blaine, a Republican congressman (and future senator and secretary of state) from Maine. This amendment would have prohibited using government money to fund educational institutions that are religious in nature. Though the proposal passed the U.S. House 180-7 in 1875, it fell short of the two-thirds vote required for passage in the U.S. Senate and never moved forward to ratification.

Despite its failure at the federal level, variations of the Blaine Amendment are now found in 37 state constitutions.¹ (Of note, this is one fewer than the 38 states required to



adopt a constitutional amendment, should it pass both chambers of Congress.)

The various state Blaine amendments OFTEN refer generically to “religious sects” or “sectarian” institutions. However, it has long been recognized that anti-Catholic sentiment drove the adoption of the amendments.²

Idaho’s version of the Blaine Amendment is found in Article IX, Section 5 of the state constitution and reads as follows:

SECTARIAN APPROPRIATIONS PROHIBITED. *Neither the legislature 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 or religious society, or for any sectarian or religious purpose, or to help support or*



*sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious 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 or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions.*³

It was Montana’s Blaine Amendment, however, that led to the U.S. Supreme Court’s Espinoza decision, which effectively nullified the 37 Blaine Amendments across the country. At issue was Montana’s tax credit scholarship program and its availability to students of both religious and secular private schools. The Montana State Supreme Court found the program to be in conflict with the state’s Blaine Amendment and therefore ruled the entire program to be unconstitutional.

Kendra Espinoza, a single mother whose daughters attended a private religious school in Montana, challenged the state court’s ruling on First Amendment grounds and became the lead plaintiff in the case. What followed is a 5-4 U.S. Supreme Court decision that could change the course of American education.

Writing for the majority, U.S. Supreme Court Chief Justice John Roberts clarified that the underlying issue was not the existence of education choice programs but the exclusion of religious schools from such programs. “A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious,” he wrote.⁴

The Espinoza decision does not require Idaho to implement education choice opportunities, but it clears away the constitutional obstacles that have long stymied such efforts.

In this report, we will examine a variety of education choice options that Idaho could adopt now that the broadly exclusionary language relating to sectarian or religious schools found in Article IX, Section 5 has been invalidated.

It should be noted, Espinoza does not overturn *Locke v. Davey*, 540 U. S. 712 (2004)⁵ and therefore does potentially leave room for excluding from state funding an “essentially religious” course of instruction at a religious school.

While some states have successfully implemented various education choice programs prior to Espinoza that did not exclude students at sectarian or religious schools, the high court’s decision should quell any remaining constitutional objections that Idahoans might once have raised against such practices.

VOUCHERS

Vouchers are often regarded as the quintessential example of education choice, but they may not be the best option in Idaho for several important reasons. The concept is fairly simple. A voucher is essentially a government-issued coupon that can be used to pay for the tuition fees at a private school. In some cases, a voucher could be capped and any additional tuition beyond the cap would have to be paid by the family or through some other means.

Frequently credited to economist Milton Friedman in his 1962 book, *Capitalism and Freedom*, the idea of vouchers actually dates back to at least the late 18th century, when it was proposed by Thomas Paine, albeit not using the word “voucher.”⁶ John Stuart Mill also offered a similar proposal more than a century before Friedman coined the term.

It is worth noting, though, that Mill’s proposal was not intended to coincide with government-run schools but to replace them. While the idea of education being (at least partially) publicly funded and privately administered may seem heretical in the 21st century, it is far from unprecedented. Consider the SNAP (aka food stamp) program. Participants receive a voucher redeemable for food, yet there are no corresponding government grocery stores from which the public is permitted to receive basic foodstuffs at no charge.

Much like with food assistance, it would

theoretically be possible for the state or the country to move to an educational model that was entirely privately administered while still being funded—either in whole or in part—with tax dollars.

This concept is not the aim of vouchers, however, and such a system would likely conflict with Idaho’s constitutional requirement that “it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.”⁷

Instead, a voucher program would give some Idahoans (typically defined and capped by statute) the option to use vouchers at private schools rather than to attend the “public, free common schools” in their area.

There are two major conservative objections to a voucher system. The first is the general objection that such a system continues to be funded through redistribution. In a free society based on strict respect for property rights, no one’s consumption would be subsidized through involuntary redistribution. Each person or family would fund their own consumption and would not be taxed to fund the consumption of others.

A more specific objection to vouchers is their use is limited only to such facilities and forms of education as are explicitly allowed by the government. Families that opt for homeschooling in Idaho are not required to submit their curriculum for evaluation or



approval and are thus likely to be excluded from traditional voucher programs. Some forms of homeschooling (such as child-led learning or unschooling) explicitly eschew traditional curriculum and embrace nonstructured methods of learning that avoid the rigid timetables and categorizations found in most schools.

Because vouchers are intended to pay for the tuition fees at a recognized private school, they are inherently exclusionary and serve to disincentivize nontraditional forms of education.

A related objection to vouchers is that their use can require a level of government oversight and tracking many families prefer to avoid.

While vouchers represent a form of education choice, that choice is still quite limited and focused on an arguably outdated model of education. As Idaho evaluates its education choice options in the post-Espinoza world, it should seek to find options that are more harmonious with free markets and free individuals.

EDUCATION SAVINGS ACCOUNTS

The term Education savings accounts (ESAs) can refer to several different ideas, many of which relate to tax shelters for savings earmarked for higher education. In terms of education choice, ESAs refer to restricted-use accounts in which public funds (typically) are

deposited so they can be used by families for certain approved educational expenses.

ESAs were originally designed, at least in part, to circumvent Blaine Amendments by changing how public money was distributed. Rather than being paid directly to private schools, it was provided to parents, who could then pay the private schools. By making the process more indirect, it was intended to withstand a constitutional challenge.

There are potential advantages to ESAs compared to vouchers, namely that they could potentially be used by parents to build a customized education that combines elements of public schooling, private schooling, homeschooling, virtual learning, or even unschooling, depending on how the system is constructed.

Another possible advantage of the ESA model compared to vouchers is that it could be funded by sources other than tax dollars. Employers could be offered tax incentives to contribute to their employees' ESAs. Individuals could also be offered tax deductions or tax credits for contributions made to their own ESAs or to others' ESA accounts as a charitable endeavor.

ESAs and vouchers share similar downsides. Such programs are still typically funded by wealth redistribution and they still have government-defined limits on how the funds can be used.

In their best form, however, ESAs could be (at least partially) privately funded and parents could have full control over how funds are spent and thus how their children are educated. It is unlikely that tax funding could be avoided entirely, however, which leaves the definition of allowable education expenses as the primary issue of debate.

Parents should be given as much freedom as possible to determine what constitutes an education expense. The more freedom, the more valuable such a policy will be to expanding education choice to all Idaho students — including those who are receiving non-traditional forms of education.

EDUCATION TAX CREDITS

Compared to vouchers and ESAs, education tax credits have perhaps the greatest potential to maximize the liberty and choice of families regarding their education.

As with other education choice funding forms, there are various versions of education tax credits that have been introduced or adopted over the years. At its core, the concept is that a parent can receive an income tax credit (refundable in some cases) for expenses related to their children's education.

In its most market-centric form, an education tax credit would simply be a capped credit available to any parent, who has the right to use the public school system but who opts for some other form of education instead.

For example, if an average student in a public school has \$10,000 of taxpayer funding allocated to his education, a refundable tax credit capped at \$6,500 would still allow the public schools to recoup some of their fixed costs while allowing the bulk of the funding to follow the student to his alternative education.

In its purest form, such a tax credit would be available to any family with school-age children and would impose no obligations on its use, leaving families with the maximum possible liberty to be innovative in their education choices.

CHARTER SCHOOLS

Though they are often referred to as a form of school choice, charter schools are actually public schools, albeit with some enhanced latitude when it comes to their operating procedures. It is worth acknowledging that “education choice” is a far broader concept than “school choice.” It is one thing to be able to choose a charter school rather than the local public school, but true education choice must include options beyond government schools.

CHARTER TEACHERS

Charter teachers are teachers who would “receive charters to run classrooms independently of schools.” This new concept was proposed by American Enterprise Institute in a recent report.⁸ The proposal goes on to offer some additional selling points of the idea.



“In addition to providing teachers with more autonomy, charter teachers would give families the opportunity to select not the school their child attends but the individual who guides their child’s learning and development.”

“Charter teacher policies could elevate the teaching profession, help retain talented educators by giving them control and agency over their own classrooms and careers, and attract a new generation of educators previously disenchanted by the idea of working in a large bureaucracy.”

This concept is still largely theoretical, but it could include teachers opening private practices or working in micro-schools or cooperatives. The funding could flow directly to the teachers or it might flow through the parents. The concept could potentially be combined with funding options such as vouchers or ESAs.

MICRO-SCHOOLS

Also known as “pods,”⁹ micro-schools combine the one-room schoolhouse of yesteryear with the technology and innovation of the 21st century. While the size of these entities can vary widely (from 5-6 students to 150 or more) and can include one or multiple teachers, some common features include children of different ages and grade levels learning together and teachers acting primarily as guides rather than lecturers.

Though they have taken on new relevance as a response to concerns about the declared pandemic, micro-schools have been gaining traction for at least a decade. In many ways, they represent a fusion of the benefits of homeschooling and private schools along with a forward-thinking focus on technology and the economy of tomorrow.

A flexible model, micro-schools can operate as for-profit corporations, parent-controlled cooperatives, or even teacher-owned sole proprietorships. As vehicles for accessible education choice, micro-schools could utilize funding options such as vouchers, ESAs, or education tax credits. While a voucher system would likely impose accreditation mandates and other regulations, a well-designed tax-credit or ESA policy could offer much greater flexibility and foster more entrepreneurship in the education market.

TAX POLICY

Basic changes in tax policy can increase education choice. The simplest, of course, is to reduce taxes, leaving families with more of their own money to spend on education or any other expenses they may have.

More targeted tax policies include education tax credits, discussed above, and tax deductions or tax credits for contributions made to an ESA. If these incentives were made available to both employers and individuals, the benefit to education choice would be increased.

Because public education is funded with tax dollars, any shift away from public education is either going to require a proportionate reallocation of those funds or, preferably, not collecting them in the first place.

Innovation is encouraged in this regard. K-12 education is the primary beneficiary of property tax revenue, so property tax reductions could also be made available to those who choose education options other than public schools.

OTHER POLICY OPTIONS

Another option exists that could provide expanded options even for high school students who remain in public schools: Allow business and community partners to verify and certify skills the students learn. Allowing high school students to earn transcript credit for skills learned outside customary school courses could help expand education options, especially during periods when traditional class attendance may not be a possibility.

Such a system would not only foster individual liberty for students, it would allow students to take responsibility for their own learning. As a result, participating students would be more prepared for the workforce, genuine citizenship, and life as responsible, productive adults.

EXPEDIENCY IS NECESSARY

In years past, any debate regarding education

choice policy would be seen as a multi-year discussion based on incrementalism and compromise. In 2020, something else is required. We are mere weeks away from the start of a school year in which the only thing we can reliably expect is uncertainty.

More than 300,000 school-aged Idahoans face an uncertain future as politicians, bureaucrats, and school boards debate how to maintain social distancing in facilities that some people already believe are at or over capacity in many cases. Ideas include half-time attendance, rotating or alternating schedules, shortened days, and implementing variations of virtual learning as a part- or full-time replacement for in-person instruction.

Regardless of what the officials may eventually decide, thousands of parents are unwilling to mask their children and send them to languish in plexiglass cubicles, cut off from their classmates in Idaho's brave new world.

This is the year in which education choice has moved from a policy debate to a practical necessity. Idaho needs to move quickly and decisively to implement education choice options — and the next regular Idaho legislative session will be too late. An entire semester will have been lost before legislators even convene. By the time they adjourn, a second semester will be nearing its end.

The state of South Carolina recently announced that it would distribute approximately 5,000 one-time, need-based



education grants of up to \$6,500. These grants can be used to pay 2020-21 school-year tuition for eligible students at participating private, parochial or independent schools in the state.¹⁰ These grants are funded through the federal coronavirus relief bill.

The state of Oklahoma created a grant program as well, but it is intended to fund curriculum content, tutoring services, and technology rather than tuition. Known as “Bridge the Gap Digital Wallet,” the \$8 million program will provide \$1,500 grants to more than 5,000 low-income Oklahoma families.¹¹

In both Oklahoma and South Carolina, the caps and means testing included in the programs prevent them from extending comprehensive education choice to all students. Instead the programs are limited to a small percentage of low-income families. Additionally, the limitations on how the grants may be spent curtail the freedom of parents to customize their children’s education.

Through either executive action or an extraordinary legislative session, Idaho needs to act with similar urgency. We have a number of viable options, but the worst option of all would be to do nothing and leave Idahoans with an uncertain future, lacking access to the education choice options students and families need.

CONCLUSION

The U.S. Supreme Court’s Espinoza decision

is the best thing to happen to education in a generation and Idaho is well-positioned to take advantage of the expanded education choice opportunities now available.

The widespread belief that social distancing must be maintained indefinitely by K-12 students creates an urgent need for significant innovation in education and a radical departure from the status quo.

The confluence of these factors creates both opportunity and obligation. Gem State students need education choice and they need it now. Options abound from vouchers, ESAs, and education savings accounts to charter teachers, micro-schools, and creative tax policy. The best solution may well incorporate elements from several of these ideas.

This is no time for timidity and restraint. This is the time to be bold and to move forward quickly and decisively. Idaho can be a leader and make sure that all Idaho students have the opportunity to receive a world-class education — not based on uniformity and standardization but based on the unlimited potential and power of the free market.

No matter how you may define the problems and challenges of education, education choice is the solution.

END NOTES

1. <https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments/>
2. <https://www.usccr.gov/pubs/docs/BlaineReport.pdf>
3. <https://legislature.idaho.gov/statutesrules/idconst/ArtIX/Sect5/>
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9. <https://www.heritage.org/education/commentary/pandemic-pods-are-fundamentally-reshaping-k-12-education>
10. <https://www.wyff4.com/article/sc-gov-mcmaster-makes-education-announcement-in-green-ville/33366326>
11. https://www.governor.ok.gov/articles/press_releases/governor-stitt-announces--30-million-education



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