



December 9, 2019

Superintendent Kathy Hoffman
Arizona Department of Education
1535 W. Jefferson St.
Phoenix, AZ 85007

Re: Numerous violations of law by the Arizona Department of Education
concerning Empowerment Scholarship Accounts

Dear Superintendent Hoffman:

The Goldwater Institute has been contacted by several families participating in the Empowerment Scholarship Account (“ESA”) program regarding numerous issues they have encountered recently while navigating through the system on behalf of their children. These families rely on ESA funds to provide the best available education for their children, the majority of whom have limitations that prevent them from succeeding in a typical learning environment. ESAs are a lifeline for these families because they allow parents to craft a unique education that caters to the individual and special needs of their children.

After evaluating the various claims that have been brought to our attention, we have concluded that the Arizona Department of Education (“ADE” or the “Department”) is in violation of several laws, including the Arizona ESA statutes (A.R.S. §§ 15-2401-2405) and the Arizona Administrative Procedure Act (A.R.S. §§ 41-1001-1093.05).

Although we are aware of several claims, the most egregious ones involve (1) ADE’s recent failure to release ESA funds in a timely manner, (2) its regular practice of demanding the return of so-called “misspent” funds many *months* after the purported misspending, and sometimes even *years* afterward, and (3) its reliance on the *ESA Handbook*.

Because of these issues, the most vulnerable among Arizona’s children are not timely receiving the education services and therapies to which they are entitled. Additionally, ESA parents are living in fear that ADE will demand “repayment” to the Department for expenses that they believed had been approved long ago and for which they have no way of repaying. This adds considerably to the stress and hardships these families already endure.

ADE’s failure to release ESA funds in a timely manner appears to be a new rule that ADE has suddenly decided to enforce. The new rule conditions the release of ESA funds on parents’ error-free

submission of expense reports for prior funding quarters.¹ Because ADE does not provide a way for parents to correct any purported errors prior to the funding deadline, parents are no longer able to receive ESA funds on time if their reports happen to contain an error. This new rule is not only onerous for parents and unfair to ESA students (who have no control over the process), but it is also illegal.

First, A.R.S. § 15-2402(C) requires ADE to release ESA funds in exchange for a parent's agreement to abide by the ESA statutes. This means ADE *must* release these funds regardless of whether parents have submitted expense reports. While it is true that ADE may remove a parent from the program under A.R.S. § 15-2403(C), that grant of authority does not allow ADE to *withhold* funds unless a parent has already been removed from the program. And while A.R.S. § 15-2403(B)² empowers ADE to *audit* ESA accounts, no law allows ADE to condition future ESA funds upon the submission and/or approval of expense reports. Moreover, ADE can perform an audit by simply requesting bank statements.

Second, as a non-exempt agency under A.R.S. §§ 41-1001 and 41-1005, ADE is required to adhere to the rulemaking standards of the Arizona Administrative Procedure Act ("APA"), A.R.S. §§ 41-1021 to 41-1038. To the extent that ADE has created a rule requiring submission of expense reports, such a rule is *not* exempt from the APA. Section 41-1005(A)(4) exempts rules "concerning only the internal management of an agency that does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public." But ADE's rule requiring approval of prior expense reports *does* substantially and detrimentally affect ESA parents and their children. That rule is beyond the parameters of ADE's statutory grant of authority. It is therefore unlawful.

ADE's practice of demanding that parents "repay" what ADE considers to be "misspent" funds is also beyond the Department's statutory authority. The ESA statutes say that ADE "*may* refer cases of *substantial misuse* of monies to the attorney general for the purpose of collection or for the purpose of a criminal investigation if the department obtains evidence of fraudulent use of an account." A.R.S. § 15-2403(E) (emphasis added). But in many cases, ADE is itself demanding that parents "repay" funds to the state after they have purchased services or products that are plainly educational in nature. Any purchases that are educational in nature and that conform to the spirit of the ESA statutes are *not* "substantial misuse." And even if they were, that is a matter for the Attorney General, not the Department.

Moreover, because ADE has created a variety of complicated and ever-evolving rules and procedures, as outlined in the many versions of its *ESA Handbook*, parents often misunderstand what ADE has deemed to be an allowed or disallowed expense. This results in expenditures that comply with

¹ Quarter 2 of the 2019–2020 school year is the first time ADE has ever conditioned the release of funds in this manner.

² A.R.S. § 15-2403(B) provides: "The department shall conduct or contract for annual audits of empowerment scholarship accounts to ensure compliance with § 15-2402, subsection B, paragraph 4. The department shall also conduct or contract for random, quarterly and annual audits of empowerment scholarship accounts as needed to ensure compliance with § 15-2402, subsection B, paragraph 4."

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the spirit of the ESA statutes if not the technical letter of the rules ADE has created. Under the ESA statutes, ADE has *no authority* to demand “repayment” under such circumstances. Rather than demand “repayment” months or even years after students have already benefitted from an expenditure, ADE should establish rules in accordance with the legally mandated APA procedures and then educate parents about allowed and disallowed expenses. In fact, this is one reason why the APA’s public rule-making requirements are so important; they give parents the opportunity to participate in the establishment of rules that will affect them and to offer input regarding unreasonable rules and procedures. But rather than following the APA, the Department has created new rules regarding disallowed expenditures that are beyond the scope of its legal authority.

Additional claims that have come to our attention include ADE’s enforcement of many other invalid rules against ESA families. To the extent that ADE enforces the substantive requirements stated in the *ESA Handbook* against parents, it is violating Arizona law. Any rules ADE wishes to enforce must be established through the rulemaking process of the APA.

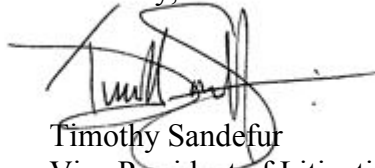
Examples that have been brought to our attention include but are not limited to the following: ADE’s practice of forcing parents to “repay” the state for misspent funds; ADE’s practice of placing such “repaid” funds into its general fund rather than returning them to that specific family’s ESA account; requiring parents to purchase pre-packaged curricula rather than allowing them to create their own curricula and determine which materials are required by that curricula; failing to provide a system by which parents may designate a portion of ESA funds for deposit into a Coverdell education savings account; prohibiting Venmo and other forms of payment to educational providers; and permanently removing ESA funds that have not been used when a parent voluntarily withdraws from the program.

These rules are not only invalid and beyond ADE’s statutory authority, but in many cases they are also arbitrary and capricious and therefore an abuse of ADE’s discretion. Additionally, ADE’s approval and disapproval of expenses is inconsistent. Often, parents will receive approval for an expense in one quarter only to have the very same expense disallowed in a different quarter. Thus, ADE’s approval process is also arbitrary and capricious and therefore an abuse of its discretion.

Due to the serious nature of these issues, we ask that ADE come into compliance with the ESA statutes and the APA by December 15 or face legal action. As always, the Goldwater Institute would be happy to discuss these and other concerns with you and your staff at any time. Please contact us with any questions or if you desire our help with compliance.

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Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy Sandefur', written over a horizontal line.

Timothy Sandefur
Vice President of Litigation
Scharf-Norton Center for Constitutional Litigation
at the Goldwater Institute

cc: Karla Escobar, ESA Director
cc: Hon. Mark Brnovich, Arizona Attorney General