

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-017911

01/25/2012

HONORABLE MARIA DEL MAR VERDIN

CLERK OF THE COURT
L. Firriello
Deputy

SHARON NIEHAUS, et al.

DONALD M PETERS

v.

JOHN HUPPENTHAL, et al.

KEVIN D RAY

CLINT BOLICK
TIMOTHY DAVID KELLER

MINUTE ENTRY

On November 28, 2011, this matter came before the Court for Evidentiary Hearing re Plaintiff's Application for Preliminary Injunction filed September 26, 2011. At the request of the parties, the Court consolidated the Motion with a hearing on the merits. The Court took the matter under advisement.

The Court has considered the matters presented including the Plaintiffs' Application for Preliminary Injunction filed September 26, 2011; Defendant's Response filed November 1, 2011; Intervenor-Defendant Goldwater Institute's Response filed October 28, 2011; Parent-Intervenors' Response filed October 28, 2011; Plaintiffs' Consolidated Reply filed November 17, 2011; the authorities cited; and the argument of counsel.

The Plaintiffs seek to enjoin the Arizona Department of Education from disbursing S.B. 1553 scholarships, alleging the disbursement of money violates Article 9, Section 10 of the Arizona Constitution (Aid clause) and Article 2, Section 12 of the Arizona Constitution (Religion clause).

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In early 2011, the Arizona Legislature passed S.B. 1553, a scholarship program now known as the “Arizona Empowerment Scholarship Accounts.” S.B. 1533 authorizes the Department of Education to disburse public funds as scholarships. These scholarships provide educational options for qualified students with a disability to pay tuition and fees at private schools. The parent of a scholarship student must agree to release the school district from all obligations to educate the student. The scholarships are 90% of what the Department of Education would pay a public school educating the student.

The Court first looks to whether S.B. 1533 is unconstitutional and likely to result in the injunctive relief requested. The Plaintiffs bear the burden of proof in showing beyond a reasonable doubt that S.B. 1533 is unconstitutional. The Plaintiffs point out that the Arizona Supreme Court already has struck down a “scholarship” program that provided State funding for disabled students who wanted to attend private schools in *Cain v Horne*, 220 Ariz. 77, 202 P3d 1178 (2009), and that any slight revisions that may exist in this legislation continue to be unconstitutional under *Cain*.

The Defendant and Intervenors argue that there are substantive differences between the voucher program in *Cain* and the scholarship program in S.B. 1533. Primarily, the voucher program in *Cain* required parents to turn over the entire voucher as a tuition payment to the private school; in contrast, scholarship funds under S.B. 1553 are held in an account which allows parents to make educational choices and draw from the account for various services and to different entities. The scholarships allow the parent to directly arrange for services needed for the student instead of relying on and/or appealing to the public school to address the need - a process which in the past has proven to be time consuming and expensive.

The Court does not find that disbursement of scholarships under S.B.1533 violates the “Aid clause”. Unlike the voucher program in *Cain*, under the S.B. 1533 program, an account is created for the student where the parent can choose to fund various educational services and programs from more than one entity. The exercise of parental choice among education options makes the program constitutional. The monies are earmarked for a student’s educational needs as a parent may deem fit - not endorsed directly to a private institution in an all or nothing fashion. The student does not have to be enrolled in a private or religious school to make use of the monies.

In *Kotterman v Killian*, 193 Ariz. 273, 972 P22d 606 (1999) the Arizona Supreme Court analyzed whether tax donors could receive a tax credit for contributions made to a private religious school. The Court concluded that the tax credit statute was constitutional because there was no appropriation by the state from general state fund for an identified purpose or destination. The range of choices and neutrality of the system made any benefit to a religious school “indirect and attenuated.” Similarly, there can be no finding that the “Religion clause” is violated because

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the State is not directing where monies are to go. Any benefit is indirect and not a result of State action. There is no purpose by the State to directly benefit any religious school. The monies flow from the State to the students' parents, and then to the entity of the parents' choice - which may or may not be a religious entity - for the benefit of the student.

THE COURT FINDS that the Plaintiffs fail to overcome the burden of showing beyond a reasonable doubt that S.B. 1533 is unconstitutional. There is a strong showing that S.B. 1533 is constitutional because it allows the parents of qualified students to choose how and when all, or a portion of, the scholarship monies are spent.

IT IS ORDERED denying Plaintiffs' request for injunctive relief.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.