



BACKGROUND

DEFENDING THE SCHOOL CHOICE RIGHTS OF ARIZONA'S PARENTS AND KIDS *Byrd et al. v. Arizona Department of Education*

Arizona's Empowerment Scholarship Account (ESA) program was designed to give parents choices for educating their children. The program allows participating families—including those with special needs kids and parents living on Indian reservations—to send their kids to a school that best fits their children's needs, using the money the government would have spent on their education at a government-run school. This allows parents to ensure that their kids receive the specially tailored services they need.

Unfortunately, the Arizona Department of Education's (ADE) management of the program poses a severe obstacle to families who seek to participate. On behalf of several Arizona families, the Goldwater Institute has filed suit against the Department seeking a court order barring the Department from continuing its unlawful and obstructionist actions.

The Arizona ESA Program

Established in 2011, Arizona's ESA program provides eligible families with greater freedom of choice when it comes to education. Parents who participate receive funding that would otherwise have been spent at a government-run school, in the form of an account which they can spend in certain specified ways: for tutors, educational equipment, books, and so forth.

The program is overseen by the Department of Education. Yet the Department's administration of the ESA program has reached a crisis point. Countless Arizona families have suffered delays, arbitrary decisions, lack of communication, and the withholding of funds to which they are legally entitled. As a consequence, many families have been unable to pay their bills and have even been forced to withdraw their kids from tutoring services. These problems stem from the Department's failure to follow state law.

ADE's Illegal Administration

The Department's illegal practices begin with its adoption of the *ESA Handbook*, a nearly 50-page set of rules and restrictions that limit how parents may participate in the program. Among the rules included in the *Handbook* is a requirement that parents submit "quarterly expense reports" throughout the year, detailing how they spent their ESA funds. These reports must be

highly detailed, and according to the *Handbook*, failure to submit such a report can result in termination from the ESA program. What's more, the Department insists that it approve all previous expense reports "prior to disbursement of the next quarter's funding"—meaning that parents must wait for the Department to sign off on their paperwork from last season before they can receive this season's funding.

The problem with that is that the Department is so slow in approving past expense reports that parents often do not receive their promised funds on time—with the result that they're forced to pay for educational services out of other accounts, or even withdraw their kids from tutoring. If they pay out of their own pockets, they cannot be reimbursed. As a result, parents often find themselves unable to pay bills due to the Department's withholding. Yet participation in the ESA program is governed by contract law—and failure to pay funds on a date required by a contract is an illegal breach of contract, *regardless* of whether the Department has reviewed past reports.

More significantly, the Department has no legal authority to adopt the *Handbook*—or the rules included in it—in the first place.

The ESA Handbook

Whenever a state agency adopts rules, it's required to comply with Arizona's Administrative Procedure Act—a law that requires the agency to allow public comment on a proposed rule and follow certain deadlines before issuing the rule. Yet while the *Handbook* consists of dozens, if not hundreds, of rules, the Department of Education never complied with the Administrative Procedure Act when creating it.

Nor does any other Arizona law authorize the Department to create the *Handbook*. A law passed in 2018 would have permitted this—but that law was repealed by a referendum campaign shortly afterwards, meaning that the Department still has no authority to issue the *Handbook* or to require families to follow its mandates. In 2017, Goldwater Institute lawyers contacted the state's Attorney General about the unlawful nature of the *Handbook*. The state's reply was that the *Handbook* isn't mandatory—just a "guide"—but also that the Department would go ahead and withdraw several provisions in the *Handbook* that, in fact, were not mere "guides" but rules.

In fact, the *Handbook* does consist of illegally adopted "rules." Arizona law defines a "rule" as "an agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency."¹ The *Handbook*'s many mandates and restrictions easily meet that standard—meaning that it should have been created in compliance with the Administrative Procedure Act.

The reason this is important is that the Act's public-input requirement ensures that parents and community members have an opportunity to participate in the creation of rules—rather than allowing an agency to fashion rules on its own, without oversight. When the latter happens, the result is arbitrary and unlawful expansions of government authority, which leads almost inevitably to the violation of individual rights.

¹ A.R.S. § 41-1001(19).

Preapproval and “Repayment”

One of the most restrictive requirements imposed by the *Handbook* is the rule that forces parents to submit quarterly expense reports and await the Department’s approval of previous reports before they receive the next quarter’s funding. Not only does this result in arbitrary and harmful delays, but this requirement has no legal basis whatsoever.

The Department does have legal authority to conduct “annual audits” of participating families, and can even do so more often if necessary,² but there’s a big difference between an audit and the Department’s quarterly report requirement. Most importantly, an audit does not include a funding-withholding rule like the one the Department implements. And the law only allows the Department to audit “as needed to ensure compliance” with the law—not to mandate submissions from every participant every three months without any reason to suspect they’ve done something wrong.

In addition to this preapproval requirement, however, the Department also forces parents to “repay” funds that it claims have been “misspent” in the past. This means that if a parent buys an educational tool which the Department doesn’t approve, the Department can demand that the parent pay out of her own pocket the amount spent on that tool—even months or years after the original expenditure. And those “repaid” funds go, not back into the parent’s ESA account, but into the Department’s own funds, to be spent however it chooses.

Nothing in the law allows the Department to do this. Instead, if the Department believes a parent is engaged in “substantial misuse” of ESA funds, it must refer the case to the state’s treasurer and Attorney General for investigation.³ The law also allows the Department to suspend participants who “knowingly misuse” ESA funds⁴—but the Department often demands “repayment” even of parents who have not “knowingly” misused funds, but who have instead bought things that the Department itself thinks unnecessary. For example, one family was ordered to “repay” almost \$3,000 after buying a year-long subscription to a language-skills computer program for their severely autistic son, because after making the purchase they chose to withdraw from the ESA program and instead sent their child to a charter school. The Department claimed that because they did not use the program for the full year, the expenditure was excessive—not that the family was “knowingly misusing” their funds. (Fortunately, that case ended in a settlement.)

In fact, “repayment” isn’t a proper term to begin with. ESA funds don’t belong to the Department of Education. They belong to families. When the Department orders them to “repay” expenditures for educational tools, it’s really forcing them to give the government money that the government has no right to claim. Even if the Department’s “repayment” demands were proper, that money should go back into a family’s designated ESA account, not into the government’s own pocket.

² A.R.S. § 15-2403(B).

³ A.R.S. § 15-2403(C), (E).

⁴ A.R.S. § 15-2403(C).

The Plaintiffs

The four families suing the Department represent only a few of the more than 100 that have contacted the Goldwater Institute over problems with its illegal and obstructionist administration of the ESA program. Each is different, yet each is representative of the families throughout Arizona who look to that program to help them obtain the educational services their children need.

The Byrd, Hallford, Svedin, and Walton families include children with special needs. They have all been forced to submit quarterly expense reports and await approval—and have suffered from late payments as a result. Some have been forced to pay for educational services out of their own pockets. Others have been ordered to “repay” funds that the Department failed to approve. And all have been forced to follow the rules listed in the *Handbook*, despite the lack of legal basis for those rules.

Each and every one of the parents believed that the ESA program would give them the help they sought for their child. They all believed this would be a program that would give them the tools to ensure that they could tailor an individualized education program to their child. Instead, it is a maze of ever shifting regulations and requirements that leave these parents confused and fearful that an inadvertent miscategorization will cut off funds to not only one of their children, but to all of them. All parents express concern that a scrivener’s error from years ago may stop their child from receiving the educational support that they need today.

Every one of the children at issue have special needs. Many of them suffer from severe delays and they desperately need consistency in their routines and ongoing academic support. All children, but in particular these children, lose newly acquired academic proficiency without reinforcement of the concepts and material. These families simply cannot afford the inconsistencies in timing and approval of accounts.

These children need the ongoing support of their parents, who have carefully researched the best academic options for their children. They have sometimes waited months for enrollments into programs that are highly effective in eliciting academic growth for their children. The families deliver the daily academic, vocational, and rehabilitative support for these children that would otherwise require a cadre of staff to provide. They should not be required to deal with inconsistent and punitive responses from the program which was created to empower their educational choice.

Case Logistics

The plaintiffs in the case are parents Maisha Byrd, Chauncey Hallford, Kayla Svedin, and Prisca Walton, and their children, all of whom participate in the ESA program. The defendants are the Arizona Department of Education and its officials.

The case was filed in the Superior Court of Arizona in Maricopa County on January 7, 2020.

The Legal Team

Timothy Sandefur is the Vice President for Litigation at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation and holds the Institute's Duncan Chair in Constitutional Government.

Veronica Thorson is a Staff Attorney at the Goldwater Institute. She litigates cases across Arizona involving the state constitution's prohibition on government subsidies to private businesses and in defense of the educational freedom of Arizona families.

Martha Astor is a Staff Attorney at the Goldwater Institute and an expert on educational reform who has taught at Northern Arizona University.