

## Why Homeschool Families Should Support (or at Least Not Oppose) ESAs

Recent educational disruptions due to COVID-19 have prompted state legislatures throughout the country to consider creating or expanding their Education Savings Accounts (“ESAs”) programs. These ESA programs typically enable parents to receive a portion of state per pupil funding for educational services and products for their children. In Arizona’s Empowerment Scholarship Account program, in which my children participate, students may use scholarship funds for a variety of educational purposes, including private school tuition, textbooks, curriculum, private tutors, therapists, online programs, and other educational goods and services.<sup>1</sup> Participants in the ESA program generally fall into two categories: those who attend private school and those who are home-educated ESA students.

Although ESAs have provided meaningful educational freedom for thousands of families across the country, some in the homeschool community have raised concerns and are actively opposing ESA legislative proposals. As a parent of five who homeschooled his children for several years and now home-educates three of his children on the ESA program, I thought it would be helpful to describe my experience with the Arizona ESA program and respond to homeschool objections to ESAs.

My wife and I began homeschooling our children as part of a Classical Conversations community, and after a few years we started a homeschool co-op out of our home with other homeschooling families. However, after our eldest boys were diagnosed with a learning disability, we decided to home-educate them as ESA students to access private tutors, therapists, and educational programs that we would not otherwise have access to. Being on the ESA program has allowed us to tailor an education to meet the unique needs of our children, without giving up *any* control on the curriculum, textbooks, or other educational resources we use.

Our experience is not unique. I know many other homeschooling families that have decided to home-educate their children on the ESA program for a variety of reasons. I know the ESA program is not for everyone; each family must evaluate their educational options based on their own needs and circumstances. That is the beauty of school choice.

Unfortunately, as I’ve surveyed homeschool opposition to ESA programs, a recurring argument appears repeatedly. The argument begins as follows: “I don’t want to exchange my homeschool freedoms for state funds with strings attached.” That is a legitimate position; however, the problem arises with the conclusion that is reached: “I don’t think ESAs are worth it because they increase government control; therefore, homeschool families should oppose any ESA legislative proposal.” This conclusion simply does not follow. Just because ESAs might not be appealing to some homeschool families, it does not mean that all other families should be denied the opportunity to decide for themselves.

In what follows, I hope to lay out some reasons why homeschool families should support (or at least not oppose) ESA legislative proposals. I will draw from my experience with Arizona’s ESA program as an example of a well-structured program that provides meaningful

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<sup>1</sup> [Arizona Revised Statute \(“A.R.S.”\) §15-2402\(B\)\(4\).](#)

educational freedom while at the same time protecting the freedom of parents to direct the education of their children.

## **Reasons why homeschool families should support (or at least not oppose) ESAs:**

### **1. ESAs have not encroached on homeschool freedoms.**

The Arizona Empowerment Scholarship Account program (“ESA program”) has existed in Arizona since 2011, and homeschool families have not lost any freedom to direct the education of their children.<sup>2</sup> First, the creation of the ESA program has not encroached on the freedoms of homeschool families because Arizona law distinguishes homeschool students from home-educated ESA students. They are two separate legal categories. Therefore, the law provides two different definitions, one for students educated in a “homeschool”<sup>3</sup> and one for students “educated pursuant to an empowerment scholarship account.”<sup>4</sup>

Under Arizona law,<sup>5</sup> homeschool families have the freedom to direct the education of their children so long as they teach “reading, grammar, mathematics, social studies and science”<sup>6</sup> and they file an affidavit of intent to homeschool with the county school superintendent.<sup>7</sup> In contrast, Arizona’s ESA law requires the parent of a student entering the ESA program to sign an agreement *not* to file an affidavit of intent to homeschool.<sup>8</sup> In practice, homeschooling families choosing to switch to the ESA program revoke their affidavit of intent to homeschool. This requirement makes it evident the ESA program does not include homeschool students under Arizona law, and likewise, home-educated ESA students are not homeschool students. Therefore, any requirements applicable only to ESA students do not apply to homeschool students.

Second, to make it abundantly clear, Arizona’s ESA statutes<sup>9</sup> expressly state the ESA program does not authorize state control of nonpublic schools. More specifically, the law states, “[t]his chapter [ESA chapter] does not permit any government agency to exercise control or supervision over any nonpublic school or homeschool.”<sup>10</sup> So, in addition to making a legal

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<sup>2</sup> [Senate Bill 1553](#) was signed into law in 2011, creating the Arizona Empowerment Scholarship Account program. The Arizona Education Association and the Arizona School Board Association filed a lawsuit seeking an injunction to freeze the funds awarded to students in the program, arguing the program violated the Arizona Constitution. The Maricopa County Superior Court denied their request for injunctive relief and the Arizona Court of Appeals affirmed the trial court’s denial. [Niehaus v. Huppenthal, 233 Ariz. 195 \(App. 2013\)](#). The Arizona Supreme Court denied review, in effect upholding the constitutionality of the ESA program.

<sup>3</sup> “‘Homeschool’ means a nonpublic school conducted primarily by the parent, guardian or other person who has custody of the child or nonpublic instruction provided in the child’s home.” [A.R.S. §15-802\(G\)\(2\)](#).

<sup>4</sup> “‘Educated pursuant to an empowerment scholarship account’ means a child whose parent has signed a contract pursuant to section 15-2402 to educate the child outside of any school district or charter school and in which the parent may but is not required to enroll the child in a private school or to educate the child through any of the methods specified in section 15-2402.” [A.R.S. §15-802\(G\)\(1\)](#).

<sup>5</sup> [A.R.S. §15-802](#).

<sup>6</sup> [A.R.S. §15-802\(A\)](#).

<sup>7</sup> [A.R.S. §§15-802\(B\), \(C\), and \(D\)](#).

<sup>8</sup> [A.R.S. §15-2402\(B\)\(5\)](#).

<sup>9</sup> [A.R.S. §§15-2401 through 2405](#).

<sup>10</sup> [A.R.S. §15-2404\(A\)](#).

distinction between homeschool students and home-educated ESA students, the law goes even further by stating the existence of the ESA program does not authorize state control of nonpublic schools (that is, any school that is not a district or charter school<sup>11</sup>).

Third, the existence of the ESA program for over eleven years has not resulted in any new restrictions on homeschool families. The fear that the ESA program will bring about unwanted attention from legislators resulting in restrictions for homeschool families has not played out in Arizona. Quite the opposite, during this time, new laws have expanded homeschooling freedoms. In 2017, House Bill 2389<sup>12</sup> was signed into law requiring all state governmental entities to recognize all diplomas and transcripts from school options available in Arizona, including homeschool diplomas and transcripts.<sup>13</sup> In 2018, House Bill 2536<sup>14</sup> was signed into law allowing homeschool students to fully participate in community college dual-enrollment programs.<sup>15</sup> In addition, the growth of the ESA program has created thousands<sup>16</sup> of new school choice advocates who contend parents have the right and responsibility to direct the education of their children. In advocating for the ESA program, these parents are in effect strengthening the argument for all school choice options, including the right of parents to homeschool.

In sum, the Arizona ESA program has been in effect for over eleven years, and there has been no encroachment on the freedom of homeschool families to educate their children. Under Arizona law, homeschool students and home-educated ESA students are in two distinct legal categories; therefore, ESA laws and requirements have no impact on homeschool students. During the last few years, homeschool freedoms have expanded in statute, and the ESA program has mobilized thousands of parents whose advocacy for parental rights in education benefits all school options.

## **2. ESAs have not encroached on the freedoms of private schools or ESA home educators.**

A properly structured ESA program will protect private schools and ESA home educators from state control and supervision. As a parent of children in the Arizona ESA program, both home-educated and in a private Christian school, I can confirm the Arizona ESA program does not regulate what curriculum or textbooks a private school or home educator uses. As with homeschool students, Arizona law requires ESA students to be educated in “at least the subjects

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<sup>11</sup> [A.R.S. §§15-101\(4\), \(22\)](#), stating district and charter schools are public schools.

<sup>12</sup> [HB 2389 \(2017\)](#).

<sup>13</sup> [A.R.S. §1-701](#), “This state, any political subdivision or agency of this state and any other governmental entity shall recognize and treat all diplomas and transcripts associated with schooling options as described in section 15-802 in the same manner. School districts may evaluate the transcripts of transfer students for the assignment of credit pursuant to section 15-701.01.”

<sup>14</sup> [HB 2536 \(2018\)](#).

<sup>15</sup> [A.R.S. §15-1821.01\(7\)](#).

<sup>16</sup> As of September 30, 2022, the Arizona ESA program has 30,741 participating students. Arizona Department of Education, [Empowerment Scholarship Account \(ESA\) Quarterly Report to the Arizona State Board of Education Fiscal Year 2023: Quarter 1](#), 2.

of reading, grammar, mathematics, social studies and science.”<sup>17</sup> The Arizona Department of Education (“ADE”), which oversees the program, ensures at least some ESA funds are used for each of these subjects during a school year. This verification is not required for ESA students attending private school because the schools are already required by law to teach these subjects. Besides making sure I use funds for the five required subjects each year, my ability to select what curriculum and textbooks I use for the education of my children has not changed from when I was homeschooling them. This same freedom extends to private schools with ESA students.

As noted above, Arizona law prohibits state control of nonpublic schools. A.R.S. §15-161, a statute predating the ESA program, already prohibits the state from controlling or supervising private schools: “Nothing in this title [Title 15 Education] shall be construed to provide the state board of education or the governing boards of school districts control or supervision over private schools.”

Moreover, ESA statute A.R.S. §15-2404 includes four key provisions meant to protect the freedom of private schools to operate and teach according to their mission. As discussed previously, A.R.S. §15-2404(A)<sup>18</sup> does not allow government agencies to control or supervise a private school even though it receives ESA funds. A.R.S. §15-2404(B)<sup>19</sup> clarifies that private schools receiving ESA funds from students in the program are “not an agent of the state or federal government.” Therefore, they cannot be regulated as a public school nor are they functioning as a state actor, which would subject the schools to limitations imposed on government by the United States and Arizona constitutions.

In addition, A.R.S. §15-2404(C)<sup>20</sup> expressly prohibits private schools from having to “alter [their] creed, practices, admissions policy or curriculum” in order to accept students paying tuition with ESA funds. In the case of faith-based private schools, this provision protects their freedom to operate and teach according to their own religious beliefs without government intervention. Finally, in the case a private school believes the state is violating these provisions, A.R.S. §15-2404(D)<sup>21</sup> places the burden on the state to establish its regulation “is necessary and does not impose an undue burden” on the school. This provision imposes on the state a high legal burden difficult to overcome in court, especially in the case when a regulation interferes with a religious school’s freedom to operate and teach according to its sincerely held religious beliefs.

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<sup>17</sup> [A.R.S. §15-802\(A\)](#).

<sup>18</sup>“This chapter does not permit any government agency to exercise control or supervision over any nonpublic school or homeschool.”

<sup>19</sup> “A qualified school that accepts a payment from a parent pursuant to this chapter is not an agent of the state or federal government.”

<sup>20</sup>“A qualified school shall not be required to alter its creed, practices, admissions policy or curriculum in order to accept students whose parents pay tuition or fees from an empowerment scholarship account pursuant to this chapter in order to participate as a qualified school.”

<sup>21</sup>“In any legal proceeding challenging the application of this chapter to a qualified school, the state bears the burden of establishing that the law is necessary and does not impose any undue burden on qualified schools.”

In addition to these statutory protections, the U.S. Constitution’s Free Exercise Clause<sup>22</sup> which also applies to states,<sup>23</sup> would likely prohibit the state from imposing ESA regulations that would in effect require faith-based schools to violate their religious beliefs in order to accept students paying tuition with ESA funds. Such interference would violate not only a school’s religious freedom but also of families whose children attend or want to attend that school.

In recent years, the U.S. Supreme Court has taken a strong position protecting religious schools against government discrimination, even when public funds are involved. In *Trinity Lutheran* (2017),<sup>24</sup> the Court established that a state cannot deny a religious school an otherwise public benefit (like a playground resurfacing grant) just because of its religious status.<sup>25</sup> In *Espinoza v. Montana Department of Revenue* (2020),<sup>26</sup> the Court held that a state-based tax credit scholarship program for private school tuition violated the Free Exercise Clause when it excluded religious schools, thereby discriminating against religious schools and the families whose children attend or hope to attend them. Similarly, in *Carson v. Makin* (2022),<sup>27</sup> the Court held that a generally available tuition assistance program could not exclude sectarian (religious) schools, even though school districts were required to transmit tuition payments directly to the private schools.

With these three cases, the U.S. Supreme Court has firmly established when it comes to a generally available grant or scholarship, a state cannot discriminate against a religious school and its students (or students hoping to attend), especially when the public funds flow to the schools “through the independent choices of private benefit recipients”<sup>28</sup>-- like in *Espinoza* and *Carson* where the parents chose the school. To be sure, these cases do not directly involve state interference with private school or home education instruction; however, the principle that with a generally available scholarship—like the ESA program—the state cannot engage in religious discrimination is very much applicable. Any ESA restriction that discriminates against a religious school (and its students) by interfering with its ability to operate according to its religious beliefs will not likely survive a court challenge.

To conclude, Arizona’s ESA laws expressly protect private schools and ESA home educators from state control and supervision. Besides the five-subjects requirement, the state does not impose any additional requirements regarding what curriculum or textbooks are used.

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<sup>22</sup>U.S. Const. Amend. I. “Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” (emphasis added).

<sup>23</sup>*Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding the Free Exercise Clause had been incorporated against the states through the Fourteenth Amendment).

<sup>24</sup>[\*Trinity Lutheran Church of Columbia, Inc. v. Comer\*, 582 U.S. \(2017\)](#).

<sup>25</sup>The Court held that Missouri Department of Natural Resources’ express policy of denying grants to any applicant owned or controlled by a church, sect or other religious entity violated the rights of Trinity Lutheran Church under the Free Exercise Clause of the First Amendment when the Department denied a playground resurfacing grant for the church-operated preschool and daycare.

<sup>26</sup>[\*Espinoza v. Montana Department of Revenue\*, 591 U.S. \(2020\)](#).

<sup>27</sup>[\*Carson v. Makin\*, 596 U.S. \(2022\)](#).

<sup>28</sup>[\*Carson\*](#), at 10 (citing *Zelman v. Simmons-Harris*, 536 U. S. 639, 652-53 (2002)).

Moreover, even without these numerous statutory protections, it is likely the Free Exercise Clause of the First Amendment would protect religious schools and home educators from ESA regulations that discriminate against them because of their religious status or beliefs.

### **3. ESAs have provided life-changing services and resources for children with learning and developmental disabilities.**

As we all know, loving parents want their children to thrive in their education and would do whatever it takes to help them access the educational resources they need. However, as we also know, this can be especially challenging for parents with children with learning and developmental disabilities. What are parents to do if the public school system is not providing the services their child needs and they do not have the resources to access specialized schools and therapies? For the past eleven years, Arizona parents in this predicament have been able to turn to the ESA program.

The ESA program has provided life-changing services and resources to thousands of children with learning and developmental disabilities. According to ADE's latest ESA quarterly report, there are 8,325 students in the program with "special needs."<sup>29</sup> These disabilities range from specific learning disabilities like dyslexia and dysgraphia to severe hearing and visual impairment to students with autism or multiple disabilities and severe sensory impairment. The ESA program has enabled parents of these children to access specialized private schools, therapies, and services that otherwise would be out of their financial reach.<sup>30</sup>

Over the years, my wife and I have met countless parents of children with disabilities who have expressed how grateful they are for the program and how much it has changed the lives of their children. As parents of children with disabilities, we are grateful every day for the needed therapies and resources the ESA program has made available for our children.

Without the ESA program, thousands of children with disabilities would likely have had no other viable option than to remain at the public school that was not meeting their educational needs. This situation would be a loss not only for parents and their children, but also for our community at large as thousands of children would be denied an education where they could reach their full potential. As I noted in my introduction, ESAs are not the right program for everyone, but this does not mean the opportunity should be denied to those who really need it.

### **4. ESAs have encouraged educational entrepreneurship, leading to new and more affordable educational opportunities for all students, including homeschool students.**

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<sup>29</sup> Arizona Department of Education, [Empowerment Scholarship Account \(ESA\) Quarterly Report to the Arizona State Board of Education Fiscal Year 2023: Quarter 1](#), 2.

<sup>30</sup> Scholarship amounts for students with disabilities are calculated by multiplying the basic per pupil funding amount by weighted multipliers for district school funding laid out in statute, [A.R.S. 15-943\(2\)\(b\)](#). The multipliers vary depending on a student's disability category. The amount of the scholarship is ninety percent of the funds for that particular student if that student were attending a charter school. [A.R.S. § 15-2402\(C\)](#).



As Arizona's ESA program has grown it has encouraged educational entrepreneurship, to the benefit of all students. The availability of ESA funds has increased the number and diversity of educational goods and services available, and the growing competition for ESA funds should have a downward pressure on the price for these goods and services. For example, the availability of ESA funds for tutoring has multiplied the number of tutoring companies and individuals offering their tutoring services. The same has been the case for innovative therapies, like executive functioning coaches, ADHD consultants, and spelling-to-communicate for non-speaking students. The Arizona ESA Networking Facebook group with nearly 9,000 members is a free-market solution that connects ESA families with these tutors, therapists, and other education vendors. These new service providers emerged in response to the ESA program, but their services are available to all students.

ESAs have also led to the creation of new schooling options like micro schools and hybrid model schools. Micro schools, like Integrative Learning Academy in Peoria, and True North Academy in Cave Creek provide small class sizes and individualized learning for neuro-typical and neuro-diverse students. Hybrid model schools, like Highlands Latin Cottage School– Phoenix Valley, provide a two-day-a-week option for families that want structured schooling but with a flexible schedule. Many of these innovative school models are available largely because of the ESA program but have benefitted many non-ESA families, including homeschool families that want additional options for their children.

##### **5. ESAs encourage more public school accountability and provide a way out for those who feel stuck in public school.**

Most Arizona families have found public schools a good fit for their children;<sup>31</sup> however, many parents want their schools to be more accountable to them, while others want a different school setting for their children altogether. In recent years, parents have become far more active in expressing their concerns with their schools, whether regarding academic accountability, school safety concerns, or harmful ideologies being taught to their children. The availability of the ESA program should make schools more accountable to parents because if schools are unresponsive to parent concerns, they risk losing those families to the ESA program. Therefore, the ESA program could provide a great benefit to families who want to remain in their public school.

In addition to providing more accountability, the ESA program also provides a way out for families who feel stuck in their public school. Homeschool families—who have opted out of

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<sup>31</sup> According to 2022 [census data](#), there are around 1.23 million school-age children in Arizona. According to the Arizona Department of Education's "[AZ State Report Cards](#)" for 2021-2022, "Nearly 1,150,000 students attend publicly funded K-12 schools in Arizona. Approximately 910,000 of those students attend one of more than 2000 district public schools, and approximately 240,000 students attend one of more than 700 charter schools in the state." This means nearly 94% of K-12 students attend a public district or charter school.

the public school system—of all people should be able to empathize with families who want to find a different school that works better for their children. Parents may want to take their children out of public schools for a variety of reasons. They may disagree with the worldview or harmful ideologies being taught. They may be in an academically failing school or a school that does not meet their child's educational needs. They may disagree with how the school responded to COVID-19 and were unresponsive to their concerns. Or maybe their child is being bullied or was the victim of an assault in their school. Regardless of their reasons, parents who want a different educational setting for their children should have that opportunity.

Private school may be an option for some families, but for many families this is cost-prohibitive, especially if they have multiple children. Homeschooling might also be an option, but for many families it is not a viable option. Single-parent homes and households where both parents must work are most likely unable to homeschool. Even if a family could afford to have one parent stay home, that does not mean homeschooling would work for that family. As a homeschooling parent, I know firsthand the varied challenges and difficulties of homeschooling and I'm aware it does not work for many families. For parents that want to take their children out of public school but cannot afford private school and for whom homeschooling is not an option, the ESA program might be the only way for their children to access the right school for them.

## **Conclusion**

Homeschool families should support (or at least not oppose) Educational Savings Accounts programs. A properly structured ESA program, like Arizona's Empowerment Scholarship Account program, provides meaningful school choice for families, without encroaching on homeschool freedoms or on the freedom of private schools and ESA home educators. Various provisions in Arizona law make clear the ESA program does not include homeschool students and therefore the ESA program does not affect them. Arizona law also expressly prohibits state control or supervision of nonpublic schools, even if they receive ESA funds. Being on the ESA program has allowed my wife and I to tailor our children's education to meet their unique needs, without giving up *any* control on the curriculum, textbooks, or other educational resources we choose to use.

For the past eleven years, the Arizona ESA program has provided life-changing services and resources for children with learning and developmental disabilities. It has sparked educational entrepreneurship, leading to new and more affordable educational opportunities for all students. ESAs also encourage public schools to be more responsive to parent concerns or they risk losing those families to the ESA program. Finally, ESAs provide a way out for those who feel stuck in public school and for whom private school is cost-prohibitive and homeschooling is not a viable option.

Although ESAs have greatly benefited thousands of students across the country, ESAs do not appeal to every family, including many homeschool families. However, as I've stated before,



a dislike for ESAs by some families does not mean all other families should be denied the opportunity to decide for themselves. That is why homeschool families should support (or at least not oppose) properly structured ESA legislative proposals.

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