

# CENTER FOR ARIZONA POLICY

# POLICY

# PAGES

## Empowerment Scholarship Accounts

February, 2023

### OVERVIEW

Parents have the fundamental right, as well as the responsibility, to direct the education of their children. As the U.S. Supreme Court has recognized, a “child is not a mere creature of the State;” rather, parents have the fundamental right to “direct the upbringing and education” of their children and as those “who nurture [their children] and direct [their] destiny have the right, coupled with the high duty, to recognize and prepare [them] for additional obligations.” [\*Pierce v. Soc’y of Sisters\*, 268 U.S. 510, 535 \(1925\)](#). Arizona law recognizes this “fundamental right”— the right of parents to direct the upbringing of their children, including their education ([A.R.S. § 1-601\(A\)](#)).

Center for Arizona Policy (CAP) supports a parent’s right to choose from a wide variety of school options, including district, charter, online, private, or homeschool. Parents are in the best position to make these choices, as they are most familiar with the educational needs, personalities, learning styles, and interests of their children.

In keeping with Arizona’s position as a national leader in educational freedom, Arizona established the CAP-supported Empowerment Scholarship Account (ESA) program in 2011, giving parents additional educational options for their children. In 2022, Arizona became the first state in the union to provide universal access to its ESA program.

### ANALYSIS

To find the educational environment that best meets the needs of their children, parents need educational options to choose from, *and* actual access to those options. Arizona has been a national leader in providing parents with a wide variety of educational options, as well as access to them through a variety of scholarship programs, including the Empowerment Scholarship Account program.

### BACKGROUND

In 2009, the Arizona Supreme Court struck down a voucher program for students with special needs. [\*Cain v. Horne\*, 220 Ariz. 77 \(2009\)](#). Immediately after the decision, Governor Jan Brewer



*This publication includes summaries of many complex areas of law and is not specific legal advice to any person. Consult an attorney if you have questions about your specific situation or believe your legal rights have been infringed. This publication is educational in nature and should not be construed as an effort to aid or hinder any legislation. This Policy Page may be reproduced without change and in its entirety for non-commercial purposes without prior permission from Center for Arizona Policy, Inc. © August 2019 Center for Arizona Policy, Inc. All rights reserved.*

convened a special session calling for the enactment of a tax-credit-funded scholarship program to help these students (Lexie’s Law)([A.R.S. § 20-224.07](#); [A.R.S. § 43-1184](#)). Unfortunately, the tax credit did not generate enough funds— certainly not enough to help all of the students who were depending on the program and the many more who had hoped to use the program. In 2021, twelve years after its enactment, state funding was finally increased for this program, expanding the number of special needs students who can qualify to receive the education that best suits their needs. ([EdChoice here](#).)

At the program’s inception however, the Court left the door open for a new program when it wrote, “[t]here may well be ways of providing aid to these student populations without violating the constitution.” [Cain, 220 Ariz. at ¶29](#). Taking them at their word, a new idea came about— education savings accounts, or Arizona Empowerment Scholarship Accounts (ESAs), where parents can direct the money in the account toward a host of educational expenses beyond just tuition at private schools. CAP and its attorneys were heavily involved in drafting and developing this program.

## THE ORIGINAL ESA PROGRAM

The original ESA program, passed in 2011, allows parents to withdraw their children from their district or charter school and receive ninety percent of state funds allocated for their child for a variety of educational expenses, including therapy, tutors, textbooks, curriculum, tuition at private schools, and even fees for standardized tests ([A.R.S. § 15-2402\(B\)\(4\), -\(B\)\(6\)](#)). Any funding that remains following the completion of school can be used on similar costs in a postsecondary institution. However, ESA contract students may not receive School Tuition Organization ([STO](#)) scholarships while enrolled in the ESA program.

the original ESA program was only available to students with disabilities. Over time, Arizona expanded those qualified for the program to include students in foster care, living on Indian reservations, attending failing or underperforming public schools, or with parents who are on active military duty, were killed in the line of duty, or legally blind, deaf, or hard of hearing ([A.R.S. § 15-2401\(7\)](#)).

With the exception of military families and students in preschool or entering kindergarten, the original ESA program required that students meet certain public school attendance requirements. [Id.](#)

**Litigation.** Upon the creation of the original ESA program, several groups, including the Arizona Education Association (AEA) and the Arizona School Board Association (ASBA), filed a lawsuit to challenge the program and sought an injunction to freeze the funds awarded to the students.

A judge in the Superior Court upheld the program in late 2011, and then on October 1, 2013, a three-judge panel of the Arizona Court of Appeals unanimously upheld the program as constitutional. [Niehaus v. Huppenthal, 233 Ariz. 195 \(App. 2013\)](#). On March 21, 2014, the Arizona Supreme Court declined to hear the case, ending the litigation over the ESA program and in effect upholding its constitutionality.

**Universal Expansion Attempted.** In 2017, the Arizona legislature further expanded the ESA program to include all district and charter school students by phasing in eligibility over four years with the number of students capped at approximately 30,000 ([SB 1431](#), 2017 Leg., 53rd

Leg., 1st Reg. Sess., (Ariz 2017)). However, the law was referred to the 2018 General Election as Proposition 305 and voters repealed it.

**Updates and Refinement.** In 2020, the Arizona legislature refined the ESA program to ensure greater transparency, education, and administration, and benefit to students, with the passage of CAP-supported SB 1224. In 2021, a CAP-supported measure easing the eligibility requirement that students qualifying for an ESA was enacted – they now only have to attend a public school for 45 days, instead of 100 days the prior year, to be qualified to apply. ([HB2829AmendExplanation.](#))

## **THE UNIVERSAL ESA PROGRAM**

In 2022, the legislature passed, and Governor Ducey signed, HB 2853 to establish a second ESA program providing universal access to the ESA program to every student in Arizona. Without limitation, parents who want to opt out of public school (and even those who already have opted out to homeschool or attend private schools) are allowed to take advantage of the ESA program to help fund the non-public education of their children.

The law provides access to the ESA program for any resident of the state who is eligible to attend school, from kindergarten through twelfth grade. Access to the program is open to all children regardless of the school they currently attend or their family's income level. Families who participate receive approximately \$6,500 to \$7,000 per year per child for private school, home education, 'learning pods,' tutoring, or any other kinds of educational service that would best fit their students' needs.

The program has only limited regulations. There is no testing requirement. Parents sign a contract with the state committing to use a portion of the funds allocated to their student to provide an education in at least the subjects of reading, grammar, mathematics, social studies, and science. They otherwise can spend funds on a litany of education expenses including:

- Tuition, fees, textbooks, and uniforms at a private school
- Tuition or fees for a nonpublic online learning program
- Tutoring or teaching services in core subjects provided by an accredited individual or facility
- Tutoring or teaching services in specific subjects (including music, art, dance, drama, driver's education, and foreign languages) provided by an accredited individual or facility
- Curricula of the parent's choice including religious-based curriculum
- Computer hardware and technology devices primarily used for education purposes including calculators, personal computers, microscopes, telescopes, and printers (but not including entertainment and noneducation devices like televisions, telephones, video game consoles and accessories, and home theater and audio equipment)
- Extracurricular activities such as chess, horseback riding lessons, home economics, cooking classes, sewing, personal finance, and woodworking classes from credentialed providers
- Consumable education supplies including paper, pens, and markers
- Sports and educational camps
- Tickets for zoos, science or art centers, museums, plays, ballet, orchestra, musicals, etc., for the individual ESA student

- Services provided by a public school, including individual classes and extracurricular programs.
- Fees for a nationally standardized norm-referenced achievement test, an advanced placement examination or any exams related to college or university admission
- Tuition, fees, and textbooks at an eligible postsecondary institution
- If the student has been determined to have a disability by a school district or by an independent third party, ESA funds can be used to pay for educational therapies, paraprofessional or education aide, and tuition for vocation and life skills education

ESA contract students may receive non-public instruction at home by their parents or tutors, just like traditional homeschool students. However, filing an affidavit to homeschool and signing an ESA contract are distinct legal options; parents must choose to do one or the other. See A.R.S. § 15-2402(5) (prohibiting parents participating in the ESA program from filing an affidavit of intent to homeschool).

For more information on the ESA program, see [azed.gov/esa/](https://azed.gov/esa/).

---

## TALKING POINTS

- **Education policy should put students first.** Empowerment Scholarship Accounts put students first by ensuring families are able to choose the best educational option for their child.
  - **ESAs save the state money.** Schools would face significantly higher costs if children—especially children with disabilities—were to be forced back into the public schools. The amount that can go into an ESA is limited to 90% of what the state would have spent on the student. Moreover, federal and local education funding stay with the district; they are not part of the ESA scholarship.
  - **When it comes to education, one size doesn't fit all.** Parents know what is best for their child. That's why it's important for them to have options when deciding how to educate their children.
  - **ESAs are wildly popular.** Tens of thousands of Arizona families applied for the assistance when lawmakers allowed parents access in 2022, and other states hailed the universal educational freedom program as a model to follow.
- 

## CONCLUSION

Parents have the fundamental right to direct the education of their children. Public policy should empower parents to not only choose, but also access the educational setting that best meets their child's needs. The innovative Empowerment Scholarship Account program provides parents with such opportunity.

## **EMPOWERMENT SCHOLARSHIP ACCOUNTS**

February 2023

---