

Council for American Private Education

# CAPE outlook

Voice of America's private schools

## School Choice Success in Supreme Court

In a landmark decision likely to spur the school choice movement across the country, the U.S. Supreme Court dismissed a challenge to the constitutionality of the Arizona statute that provides state residents with tax credits for contributions they make to school tuition organizations (STOs). The 5-4 decision regarding the nation's first scholarship tax credit program clears the way for other states to enact similar legislation.

Issued April 4, the ruling's immediate practical effect is that it allows citizens in Arizona to continue to take a dollar-for-dollar

tax credit for contributions to STOs up to \$500 for individual taxpayers and up to \$1,000 for taxpayers filing jointly. Such contributions are then used by the STOs to award scholarships to help students attend religious and independent schools.

The ruling also serves to safeguard similar programs in six other states (Florida, Georgia, Indiana, Iowa, Pennsylvania, and Rhode Island) and could very well propel efforts to establish comparable initiatives elsewhere.

The case, known as *Arizona Christian School Tuition Organization v. Winn et al.*, is the first major K-12 school choice ruling by the high court since *Zelman v. Simmons-Harris*, a decision in 2002 upholding a voucher program in Ohio.

### Pivotal Question

A pivotal question before the court was whether money that the state does not collect in taxes is actually the government's money. During oral arguments back in

November, Justice Anthony Kennedy didn't think it was. He offered the analogy of a restaurant giving a senior citizen a 10 percent discount and then instructing the patron how to spend the savings, as if it were still the restaurant's money. Writing

the opinion for the majority in April, Kennedy continued the same line of reasoning: "When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the state has collected from respondents or from other taxpayers."

Reasoning that contributions to school tuition organizations are the decisions of private citizens to support private organizations, the majority determined that the program's challengers, who based the complaint on their status as taxpayers, lacked standing because the program does not extract money from taxpayers for government expenditures. They may be taxpayers, but the government is not using taxpayer funds to finance the STOs; other citizens are using their own funds for that purpose. "Objecting taxpayers know that their fellow citizens, not the state, decide to contribute and in fact make the contribution," said the court.

### Standing and Substance

When the court heard the case back in November, arguments were divided along two tracks: one dealing with standing and the other with substance. But the final decision actually never reached the substance side of the issue. Substance became somewhat irrelevant once the court decided that the parties bringing the case

were not legally allowed to do so in that they had not suffered any actual injury. The court cautioned that were it to confer upon itself "the power to invalidate laws at the behest of anyone who disagrees with them," it would likely "undermine public confidence in the neutrality and integrity of the Judiciary."

### Amicus Brief

Last summer CAPE joined an amicus brief in the case, developed by the Cato Institute, urging the court to uphold the program. The brief argued that "a taxpayer's choice of which STO to donate to—and whether to donate at all—is wholly within the discretion of that taxpayer." Accordingly, "Any benefit to religious institutions is merely incidental to that choice."

The brief also argued that the Arizona statute provides the authentic and autonomous choice that Supreme Court precedent requires of such programs. Whether it's the private choice of individuals who create the STO, or taxpayers who contribute to the STO, or parents who apply for the scholarship, there are several layers of "genuine and independent private choice insulating the program from any Establishment Clause challenge."

### Swift Reaction

Reaction to the decision was swift. U.S. House Committee on Education and the Workforce Chairman John Kline (R-MN) commended the court "for rejecting an attempt to deny parents the opportunity to choose a quality education for their child." He added, "State and local school leaders are implementing a number of solutions to enhance parental involvement, and our efforts to fix education in the nation must encourage this kind of creative reform."

Richard D. Komer, senior attorney with the Institute for Justice, said the deci-



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**CAPE member organizations:**

- Agudath Israel of America
- American Montessori Society
- Association Montessori International—USA
- Association of Christian Schools International
- Association of Christian Teachers and Schools
- Association of Waldorf Schools of N.A.
- Christian Schools International
- Evangelical Lutheran Church in America
- Friends Council on Education
- Lutheran Church—Missouri Synod
- National Association of Episcopal Schools
- National Association of Independent Schools
- National Catholic Educational Association
- National Christian School Association
- Oral Roberts University Educational Fellowship
- Seventh-day Adventist Board of Education
- United States Conference of Catholic Bishops
- Wisconsin Evangelical Lutheran Synod Schools
- 33 Affiliated State Organizations

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## DC Opportunity Scholarships Reauthorized

In a significant victory for families, the fiscal year 2011 spending bill that President Obama signed into law April 15 reauthorized the program that allows low-income students in the District of Columbia to use federally funded scholarships to attend religious and independent schools.

The bipartisan budget plan included the *Scholarships for Opportunity and Results (SOAR) Act* that the House had approved as a stand-alone bill in March. Enactment of the legislation means that new students will be able to attend schools starting this fall using scholarships worth up to \$8,000 in grades K-8 and up to \$12,000 in grades 9-12. Priority will be given to students whose scholarships were rescinded when Congress closed the program to new students in 2009.

Inclusion of the SOAR Act in the compromise legislation came at the insistence of House Speaker John Boehner (R-OH), a passionate and steadfast supporter of the program from the start. Its enactment offers a future full of hope for disadvantaged students, and perhaps not only in the nation's capital. An article in *The New York Times* April 14 suggested that the legislation is helping to fuel the revival of school vouchers elsewhere. As the Times put it, "Mr. Boehner's beloved program is the latest example of how conservative Republicans across

the country are advancing school vouchers—including offering them for the first time to middle-class families—and reviving a cause that until recently seemed moribund."

Kevin Chavous, chair of the Black Alliance for Educational Options (BAEO), called reauthorization of the scholarship program "an awesome victory" that "gives hope to several thousands of children and families." Regarding President Obama's signing of the measure, Chavous said, "As a lifelong Democrat, I publicly issued several hard-hitting challenges to our president to help save this program, and today he listened to the voices of 2,000 kids and families."

The program is consistent with President Obama's goal of cutting the number of high school dropouts. A study published last June by the U.S. Department of Education found that students who attended private schools using opportunity scholarships had a 21 percent higher high-school graduation rate than a control group of comparable students. Dr. Patrick Wolf, who headed the study, told a Senate panel earlier this year, "We can be more than 99 percent confident that access to school choice through the Opportunity Scholarship Program, and not mere statistical noise, was the reason why OSP students graduated at these higher rates."



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sion "should embolden state legislators to move aggressively ahead with reforms that expand parental choice and empower parents to choose from among a wide array of public, private, and religious schools."

Betsy DeVos, chairman of the American Federation for Children, called the ruling "an important victory for school choice not just in Arizona, but around the country." She said attention and resources should now be focused on expanding school choice programs "so that families across America have the same choices as those in Arizona."

Eric Rassbach, national litigation director for the Becket Fund for Religious Liberty, called the decision "a real victory for religious liberty" in that it requires individuals "to show that they're actually being discriminated against before they

can sue over things like the charitable tax deduction."

Robert Enlow, president and CEO of the Foundation for Educational Choice, said the court affirmed that "individuals should have the right to contribute to any tax-free scholarship program just as they would contribute to the Red Cross, a homeless shelter, or any other charity." He predicted that in the wake of the ruling "we should see more of these tax credit programs emerge throughout the country."

Justice Anthony Kennedy, who wrote the opinion, was joined in the decision by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justices Kagan, Ginsburg, Breyer, and Sotomayor dissented. The opinion is available at <http://www.supremecourt.gov/opinions/10pdf/09-987.pdf>.

## Indiana Approves Sweeping School Choice Legislation

Indiana Governor Mitch Daniels will soon sign what is being widely described as the most far-reaching school choice legislation in the nation.

Approved in April by the state legislature, the measure creates a \$1,000 state tax deduction for parents who incur costs connected with private schools or home schooling. It also doubles the cap on the state's existing scholarship tax credit program, allowing \$5 million to be awarded in credits, up from the current \$2.5 million. But the bill's centerpiece is the creation of an expansive choice scholarship program that provides assistance to low- and middle-income families to help their children attend private schools.

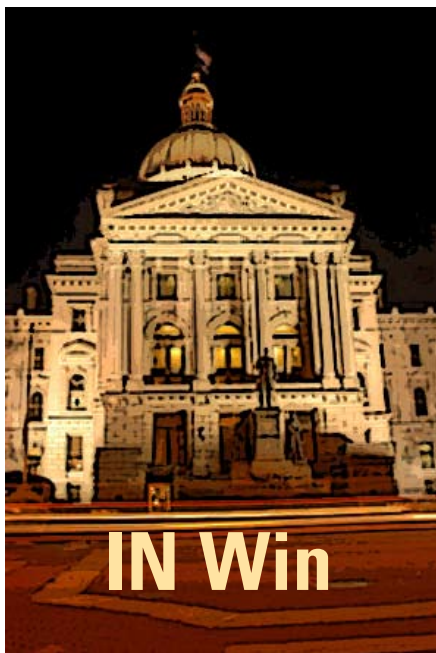
The new "Choice Scholarship" program will be available starting July 1, 2011, to children enrolled in grades 1 through 12 in one of the state's public schools, as well as to children who received either a choice scholarship or a scholarship under the state's "School Scholarship Tax Credit" program in an earlier school year.

Families with annual incomes of not more than 150 percent of the amount that qualifies them for the federal free or reduced-price lunch program will be eligible for the scholarships. For the 2011-12 school year, a family of four with an annual income just under \$62,025 would qualify for a scholarship equal to 50 percent of the state's per-pupil aid to the child's school district. A family earning up to 100 percent of the qualifying income for school lunch (\$41,348 for a family of four) would be eligible for a scholarship worth 90 percent of the per-pupil aid. Scholarships may not exceed the actual cost of tuition and fees at the private school, and for grades 1 through 8 only, may not exceed \$4,500.

The program would be phased in over three years, with no more than 7,500 scholarships awarded for the 2011-12 school year, 15,000 in 2012-13, and no limits thereafter.

The legislation includes an extensive set of programmatic and instructional requirements for participating schools, incorporating some provisions that already apply to state-accredited private schools. By way of example, eligible schools must administer the Indiana Statewide

Testing for Educational Progress (ISTEP) and submit data required for a designation under the state's school improvement program; they must also have a copy of specific historical documents (e.g., *The Mayflower Compact*) in the school



library and, in grades 6 through 12, provide five full periods of civics-related instruction within the two weeks preceding a general election. The list of requirements is long and detailed, and while generally not a new burden for state-accredited schools, will likely require adjustments for other accredited schools that want to take part in the program (accreditation by the state or an agency recognized by the state is a condition for participation).

The bill states that, except for the listed requirements, the intent is "to honor the autonomy of nonpublic schools that choose to become eligible schools." It also makes clear that the state "may not in any way regulate the educational program of a nonpublic eligible school that accepts a choice scholarship...including the regulation of curriculum content, religious instruction or activities, classroom teaching, teacher and staff hiring requirements, and other activities carried out by the eligible school."

John Elcesser, executive director of the Indiana Non-Public Education Association (INPEA), a CAPE affiliate, called the legislation "an opportunity for middle- and low-income families to access quality educational options for their children that they otherwise could not afford." He said the new law will allow parents "to find the right educational fit for their children" and provides a balance between offering families affordable options and protecting "the mission and operational independence" of private schools, especially those already accredited by the state.

A host of organizations were involved in the effort to secure enactment, including the Foundation for Educational Choice, the American Federation for Children, School Choice Indiana, the Indiana Catholic Conference, and INPEA. And, of course, numerous public officials played a critical role in steering the legislation toward final passage: Governor Mitch Daniels, State Education Superintendent Tony Bennett, House Speaker Brian Bosma, Senate President Pro Tempore David Long, and others.

## AZ Leads Again

Arizona Governor Jan Brewer last month signed breakthrough legislation that establishes the nation's first program of "Empowerment Scholarship Accounts."

Focused on helping students with disabilities, deposits to the accounts are made by the state and withdrawals are made by parents to educate a child in the setting of their choice.

Allowable expenditures of funds from the accounts include tuition and fees at a private school, textbooks, therapies, tutoring, online learning programs, and even eventual college costs.

Parents win with unprecedented options, and taxpayers win in that the amount deposited in the accounts each year is 10 percent less than what the state would otherwise spend to educate the child in a public school.

Students are eligible for the program if they attended a government school during the previous school year or received a scholarship under the state's tuition tax scholarship program. Once they qualify for the accounts they can benefit from them year after year.

The Goldwater Institute, which developed the program, estimates that as many as 17,000 students will qualify for the accounts.

Nick Dranias, a legal scholar at Goldwater, said the law was designed to address concerns raised by the state's Supreme Court about an earlier program. "The court said school vouchers for special needs children had to be struck down because parents really could only use them at certain private schools." The new program gives families "real control of their education dollars to spend on a wide range of options."

Darcy Olsen, president and CEO of the Goldwater Institute, summed up the law's significance: "By adopting the first education savings account program in the country, Arizona again has moved into the national forefront of education reform."

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## CAPE notes

★ In 1975 CAPE filed an amicus brief with the U.S. Supreme Court in the milestone case *Meek v. Pittenger*, which dealt with various types of state assistance to students in religious and independent schools. CAPE's brief asked the court to clarify the constitutional boundaries of allowable assistance and to "bring them into harmony with the historical purpose of the First Amendment, the traditional practical implementation of that amendment, parental and student rights in education, and academic pluralism in American education."

How do we know all that? We read it in the January 1975 issue of *CAPE Outlook*. First published in May 1974, *Outlook* has been chronicling four decades of significant events in the history of America's religious and independent schools. Every issue is now available on the Web, allowing historians, researchers, and any interested individuals to review the history of public policy and private schools. Visit the *Outlook* archives at <[www.capanet.org/outlook.html](http://www.capanet.org/outlook.html)>.

★ Although private school graduates serve the public good in a variety of ways, *The New York Times* recently centered on a particular slice of public service rendered by private school graduates: the reformation of public education. In an article April 17, the paper noted that public school reformers "are a diverse group, men and women of every political stripe and of every race and ethnicity. But there is one

thing that characterizes a surprisingly large number of the people who are transforming public schools: they attended private schools."

As examples of persons who once worked, or are working, for school reform, the paper put forth the following impressive list: President Barack Obama (Punahou School, Honolulu, HI), President George W. Bush (Phillips Academy, Andover, MA), Education Secretary Arne Duncan (University of Chicago Laboratory School, Chicago, IL), Senators Judd Gregg (Phillips Exeter Academy, Exeter, NH) and Edward M. Kennedy (Milton Academy, Milton, MA), Rep. John A. Boehner (Archbishop Moeller High School, Cincinnati, OH), Michelle A. Rhee (Maumee Valley Country Day School, Toledo, OH), Mitt Romney (Cranbrook School, Bloomfield Hills, MI), Bill Gates (Lakeside School, Seattle, WA), Jeb Bush (Phillips Andover), Chester E. Finn, Jr. (Phillips Exeter), David Levin (Riverdale Country School, Bronx, NY), Cathleen P. Black (Aquinas Dominican High School, Chicago, IL), Merryll H. Tisch (Ramaz School, New York, NY), Steven Brill (Deerfield Academy, Deerfield, MA), Marc Sternberg (Episcopal School, Baton Rouge, LA), Davis Guggenheim (Sidwell Friends School, Washington, DC).

★ Regular readers of *Outlook* may recall an article in the **November 2010 issue** on what the election meant for the advancement of school choice at the state level.

While prospects looked good at the time, we hardly expected the pace of progress to be as rapid as it has been. Indiana (p. 3), Arizona (p. 3), and Florida (an expansion of vouchers for students with disabilities) have already crossed the finish line, and school choice measures are very much on the march in Pennsylvania, Ohio, Oklahoma, Tennessee, Wisconsin, and elsewhere.

★ Last month, the American Center for School Choice (ACSC) convened national education leaders at the University of California, Berkeley, for a conference around the provocative theme "May Superman Pray? The Role of Faith-Based Schools in School Choice." According to ACSC officials, participants agreed that "without more stable funding streams," such as vouchers or tax credits, the future of urban religious schools serving low-income families is "murky at best." Session videos are available at <[www.amcsc.org](http://www.amcsc.org)>.

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