INTRODUCTION

The notion of school choice is over 200 years old. In 1776, Adam Smith first published *The Wealth of Nations* and suggested that “schools could reach a higher quality of education by allowing students to choose their own teachers and schools …[asserting] that if a school's enrollment began to diminish drastically, the school would be forced to emulate the popular schools and offer high quality education” (Smith, 1999). In recent history, Nobel laureate Milton Friedman helped to renew popular interest in school choice through the publication of the article, “The Role of Government in Education,” and subsequent founding of the Friedman Foundation for Educational Choice (Smith, 1999). Friedman suggested that by granting families choices in education, both schools and education would improve.

This year Indiana joined over a dozen other states in adopting Friedman’s principles by passing what many believe to be the most comprehensive school choice program in the country. With the enactment of three key bills (HEA 1001, HEA 1003, and HEA 1004), Indiana parents may now take advantage of a school expenditure tax deduction, school scholarships granted from private Scholarship Granting Organizations (SGOs) which are incentivized with a tax credit, and Choice Scholarships (generally referred to as vouchers) granted to low-income parents and funded by the state of Indiana. This Education Policy Brief will examine the legal, fiscal, and policy ramifications of Indiana’s school choice offerings, particularly the new Choice Scholarship program.

SCHOOL EXPENDITURE DEDUCTION

Although Choice Scholarships are only granted to low-income families, all taxpayers with dependent children can benefit from the new School Expenditure Deduction. The School Expenditure Deduction allows a taxpayer who has an eligible dependent child to take a tax deduction against her adjusted gross income for unreimbursed education expenditures made in connection with enrollment, attendance, or participation of the child in a private school education program or for expenses accrued in home schooling the child (IND CODE § 6-3-2-22). A child is “eligible” if he or she is eligible for a free elementary or high school education in an Indiana school corporation (IND CODE § 6-3-2-22(a)). The term “education expenditures” includes items such as tuition at a private school, computer software, textbooks, workbooks, curricula, and school supplies (IND CODE § 6-3-2-22(2)). The deduction is limited to $1,000 multiplied by the number of dependent children for whom the taxpayer made education expenditures (IND CODE § 6-3-2-22(3)(d)). The Indiana Legislative Service Agency estimates that the revenue loss to the state from this deduction could potentially range from $3.3 M to $3.7 M annually (Legislative Service Agency, 2011).

SCHOOL SCHOLARSHIP TAX CREDIT

Indiana School Scholarship Tax Credits, first passed in 2009, provide a mechanism for students to acquire privately funded scholarships to attend private schools through the assistance of Scholarship Granting Organizations (SGOs). SGOs are
non-profit organizations authorized by the state of Indiana to receive donations from any individual or entity (IND CODE § 6-3.1-30.5-12). Individuals and entities who donate to SGOs can claim a credit against state tax liability equal to 50 percent of their contribution to the SGO. The donations received by SGOs are used to grant scholarships to legal residents of Indiana who are between the ages of 5 and 22 during the year in which the scholarship is utilized (IND CODE § 20-51-1-4.5(1)-(2)). SGOs are allowed to set their own requirements and application processes, but they may not limit the availability of scholarships to students of only one participating school (IND CODE § 20-51-1-7(2)). The application process must be fair and neutral, and children who are members of families which have incomes of more than 150 percent of the free or reduced lunch levels as established by the federal government are not eligible (IND CODE § 20-51-1-4.5(4)).

Students seeking scholarships must have been or plan to be enrolled in an accredited school (IND CODE § 20-51-1-4.5(3)). The scholarships may only be used at schools that are located in Indiana; require an eligible individual to pay tuition or transfer tuition to attend; voluntarily agree to enroll an eligible individual; are accredited by a state, regional, or federal agency recognized by the Indiana State Board of Education; administer the ISTEP+; and are not a charter school or the school corporation in which an eligible individual is a legal resident (IND CODE § 20-51-1-4.7). In addition to better defining the eligibility requirements for schools and students seeking school choice funds, the 2011 legislative session also increased the annual limit on the amount of tax credits allowed each year from $2.5 million to $5 million during (IND CODE § 6-3.1-30.5-13). Although the annual limit on the amount of tax credits allowed has been increased, it is notable that the Department of Revenue only granted approximately $340,000 of the available $2.5 million in credits for fiscal year 2011 (Legislative Service Agency, 2011).

No public money ever directly flows to families or schools when a scholarship is granted by a SGO. The donor’s funds are given to the SGO before the funds ever become part of the state treasury (see Koterman v. Killian). Tax credits given by the state of Indiana for donation to SGOs are similar to tax credits granted by the state of Indiana for a number of other programs (see Table 1 for a sampling of current Indiana tax credit programs). In fact, in 2007, the state of Indiana allowed $2,232,136 in Neighborhood Assistance Credits (a program which funds both secular and sectarian organizations in a neutral manner) and allowed over $26,000,000 in personal income tax credits for College Choice 529 Savings Plans (also a program where funds are diverted to both secular and sectarian postsecondary education organizations in a neutral manner). The use of tax credits to incentivize behavior is a relatively common and much debated practice utilized in both state and federal tax structures. For a detailed discussion on the policies behind the use of tax credits generally see The Dual Subsidy Theory of Charitable Deductions, 84 Ind. L.J. 1047, Fall 2009 (Benshalom, 2009).

### CHOICE SCHOLARSHIPS

Although School Scholarship Tax Credits existed prior to the 2011 legislative session, school vouchers, or Choice Scholarships, were a significant addition to Indiana school choice statutes. The Friedman Foundation for Educational Choice cites Indiana’s new voucher program as the largest in the nation due to its broad eligibility (Enlow, 2011).

The student eligibility for Choice Scholarships parallels the eligibility described above for Scholarship Tax Credits (IND CODE § 20-51-1-4.5(4)). After choosing a school for her child, a parent must endorse the Choice Scholarship distribution from the Indiana Department of Education (IDOE) before the funds may be used by the chosen school. Schools receiving Choice Scholarship funds must meet specific requirements and adhere to certain guidelines in order to be eligible to receive funds.

Indiana Code § 20-51-4-1(a) dictates curricular standards for schools receiving Choice Scholarship funds while also explicitly prohibiting expanded regulation of private schools. The provision expressly seeks to protect the autonomy of the private schools, but provides a list of 15 documents such as the Constitution of the United States, the Pledge of Allegiance, and the Constitution of the State of Indiana (IND CODE § 20-51-4-1(b)) that eligible schools are barred from censoring and required to make available in school libraries (IND CODE § 20-51-4-1(d-e)). Eligible schools must allow students to freely

### TABLE 1. Indiana Tax Credits.

<table>
<thead>
<tr>
<th>Credit Description</th>
<th>Dynamic State Tax Reduction in 2007</th>
<th>Amount of Tax Credit</th>
<th>Cap</th>
<th>Misc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Neighborhood Assistance Credit; IND CODE §6-3.1-9</td>
<td>$2,232,136</td>
<td>50% of Donation</td>
<td>$2,500,000</td>
<td>Funds can be used by religious organizations</td>
</tr>
<tr>
<td>Unified Tax Credit for the Elderly; IND Code § 6-3-3-9</td>
<td>$6,907,760</td>
<td>$40 to $100 per taxpayer depending on income</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>Lake Country Residential Income Tax Credit; IND CODE §6-3.1-20-4</td>
<td>$6,888,233</td>
<td>The lesser of $300 or total amount of property tax liability</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>IN College Choice 529 Savings Plan Credit; IND CODE § 6-3-3-12</td>
<td>$26,001,627</td>
<td>20% of contribution to savings plan</td>
<td>None</td>
<td>Funds can be used on religious organizations</td>
</tr>
</tbody>
</table>

reference these documents, allow an opportunity to recite the Pledge of Allegiance, and display the United States flag in each classroom (IND CODE § 20-51-4-1(f)).

For students in middle and high schools, eligible schools must, within two weeks before a general election, provide five class periods of discussion on the systems of government of Indiana and the United States, methods of voting, election laws, party structures, and the responsibilities of citizen participation in elections (IND CODE § 20-51-4-1(f)(6)). Eligible schools are also required to provide instruction on honesty, morality, courtesy, obedience to law, respect for the flags and constitutions of Indiana and the United States, respect for parents, the dignity of honest labor, and other lessons that develop an “upright and desirable citizenry,” respecting other’s property, and respecting the rights of others to hold their own views and religious beliefs (IND CODE § 20-51-4-1(f)(7-8)). More broadly, eligible schools are held to a basic curricular standard which includes instruction in English, world languages, mathematics, social studies, sciences, fine arts, and health education (IND CODE § 20-51-4-1(f)(9)). Lastly, eligible schools are prohibited from teaching about the violent overthrow of the United States government (IND CODE § 20-51-4-1(g)). The IDEOE will be required to visit at least five percent of eligible schools through random selection to check for compliance (Legislative Services Agency, 2011).

Indiana will phase in the distribution of Choice Scholarships among eligible students. In the 2011-12 school year, the IDEOE may award only 7,500 Choice Scholarships among eligible students, and in the 2012-13 school year, only 15,000 Choice Scholarships may be awarded. Choice Scholarships are not limited in subsequent school years (IND CODE § 20-51-4-2(b)).

The IDEOE must establish procedures for awarding funds to eligible students, but the amount of the Choice Scholarship for each student must be less than the state tuition support amount per student received by each school corporation. Choice Scholarships are capped at the lesser of three amounts 1) the sum of tuition, transfer tuition, and fees an eligible student would be required to pay to attend an eligible school (IND CODE § 20-51-4-4(1)); 2) $4,500 for students in grades 1-8; or 3) 90 percent of the state tuition support amount if the eligible student is in a household with an annual income equal to the requirement for the federal free and reduced lunch program, or 50 percent of the state tuition support amount for a student in a household with an income no more than 150 percent of the qualification for the free and reduced lunch program (IND CODE § 20-51-4-4(2)). If an eligible student enrolls in an eligible school for only part of the school year, the Choice Scholarship will be reduced on a prorated basis. An eligible student is entitled to only one Choice Scholarship per school year (IND CODE § 20-51-4-6). The amount of the Choice Scholarship is not considered income for the purposes of other federal or state grants or programs (IND CODE § 20-51-4-11).

All schools participating in the Choice Scholarship program must submit data for category placement under Indiana’s accountability system.

Eligible schools are broadly prohibited from discriminating based on race, color, or national origin, and eligible schools must especially abide by their individual admission policies without discrimination when considering students who apply for and are awarded Choice Scholarships (IND CODE § 20-51-4-3(a-b)). If an eligible school receives more applications than Choice Scholarships available to the school, then the school must draw eligible students at random from the pool of applicants at a public meeting (IND CODE § 20-51-4-3(c)).

In order to be eligible for a Choice Scholarship, a student must also have either been enrolled in a school corporation that did not charge the individual transfer tuition for at least two semesters immediately preceding the first semester for which the individual receives a choice scholarship, or must have received a scholarship from a scholarship granting organization under IC 20-51-3 or a Choice Scholarship under IC 20-51-4 in a preceding school year (IND CODE § 20-51-1-4.5(5)(A)-(B)).

All schools participating in the Choice Scholarship program must submit data for category placement under Indiana’s accountability system. If an eligible school is placed in one of the two lowest categories for two consecutive years, the IDEOE will suspend Choice Scholarships to new students for the struggling school for a period of one year. If an eligible school is placed in either of the two lowest categories for three consecutive years, the IDEOE will suspend Choice Scholarships to new students until the school is placed in the middle or higher categories for two consecutive years, and if the eligible school is placed in the lowest category for three consecutive years, the IDEOE will suspend Choice Scholarships until the school is placed in the middle or higher categories for three consecutive years. Eligible students already attending the school may continue to receive Choice Scholarships (IND CODE § 20-51-4-9(a)).

Voucher Funding

The fiscal impact statement for the Choice Scholarship legislation (HEA 1003-2011) states that the impact on state tuition support expenses from the Choice Scholarship program are indeterminable (Legislative Services Agency, 2011); however, due to the language of HEA 1003, it is possible to estimate the funding levels of the Choice Scholarships compared to public schools funding.

The Legislative Services Agency (LSA) estimated the tuition support amount that would be used to pay for Choice Scholarships based on a student cohort sample of 1,000. Table 2 summarizes LSA’s calculations. Since a maximum of 7,500 students may be awarded a Choice Scholarship during the 2011-12 school year by taking LSA’s cohort sample of 1,000 and multiplying it by 7.5, a maximum of $21,936,240 could be spent on Choice Scholarships in the 2011-12 school year (approximately 0.35 percent of the total estimated appropriation for tuition support in the 2012 calendar year). Likewise, since a maximum of 15,000 Choice Scholarships can be awarded in the 2012-13 school year by tak-
TABLE 2. Costs of Choice Scholarships as Estimated by the Legislative Services Agency

<table>
<thead>
<tr>
<th>Household Income</th>
<th>Scholarship Level</th>
<th>Scholarship Amount (assuming a $5,515 tuition support amount)</th>
<th>Students in Income Range out of 1,000 Student Samplea</th>
<th>Tuition Support Used for Scholarships</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grades 1-8</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Max. 100% free/reduced</td>
<td>90% of tuition support</td>
<td>$4,500</td>
<td>341</td>
<td>$1,534,500</td>
</tr>
<tr>
<td>lunch income level</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Max. 150% free/reduced</td>
<td>50% of tuition support</td>
<td>$2,758</td>
<td>141</td>
<td>$388,808</td>
</tr>
<tr>
<td>lunch income level</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Grades 9-12s</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Max. 100% free/reduced</td>
<td>90% of tuition support</td>
<td>$4,964</td>
<td>164</td>
<td>$814,014</td>
</tr>
<tr>
<td>lunch income level</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Max. 150% free/reduced</td>
<td>50% of tuition support</td>
<td>$2,758</td>
<td>68</td>
<td>$187,510</td>
</tr>
<tr>
<td>lunch income level</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td></td>
<td></td>
<td>$2,924,832</td>
</tr>
</tbody>
</table>

a The remaining 286 of the 1,000 in the cohort sample are not eligible for Choice Scholarships.

Source: Legislative Services Agency, 2011.
of Milwaukee benefit as their per-pupil spending increases. Per-pupil spending increases outside of Milwaukee because the state spends less on a voucher for a Milwaukee student than it would have spent on educating that child in MPS and those savings are distributed throughout the state rather than kept in MPS (Costrell, 2009).

As is the case in Washington, D.C., because Milwaukee is allowed to increase property taxes to mitigate the loss in revenue from exiting students, the effects of competition and incentives to make MPS more efficient and effective are hindered.

Indiana’s school choice statutes’ funding structure is similar to Wisconsin’s in that it allows state dollars to “follow students.” In other words, when a student chooses to use one of Indiana’s school choice options, the school from which the student came loses per-pupil funding for that student. Because the amount of money the state spends on Choice Scholarships is less than the amount of money the state would spend to educate that child in the public school, the result is a net savings for the state. However, unlike Milwaukee, some local Indiana school corporations will see a loss of revenue as students choose private schools.

Indiana’s private schools are not evenly distributed throughout the state; therefore, funding shifts will not be distributed evenly throughout the state. A review of the IDOE’s listing of private schools in Indiana reveals approximately 242 private schools, concentrated mostly around urban areas such as Indianapolis, northwest Indiana, Ft. Wayne, and Evansville (Indiana Department of Education, 2011b). School corporations in these areas will more likely see decreased total revenues as students leave the public schools for private schools, as opposed to rural school corporations where access to private schools is more limited. These schools should, however, also see decreased expenses as they are responsible for the education of fewer students. It is important to note that under Indiana’s program, although a school corporation’s total revenue may decrease due to vouchers, the per-pupil state tuition support would not decrease.

Indiana presents a particularly unique fiscal situation because its school choice statutes aspire to execute both school vouchers (Choice Scholarships) and school tax credits. The Cato Institute has expressed concern that vouchers combined with the tuition tax credit would erase any budgetary savings of one program or the other executed in solitude: “As written, the [Indiana] program could have a significant negative impact on state finances if families claim both the vouchers and funds from the state’s existing education tax credits…” Critics of expanding educational freedom always claim, incorrectly, that school choice programs are a drain on public resources. But the double-dipping that is allowed under this program could inadvertently prove them right” (Schaeffer, 2011). As the IDOE moves forward with implementation of the Indiana’s comprehensive plan, it is necessary to keep a watchful eye on the prevalence of “double-dipping.”

### LEGAL ISSUES

“In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process. This program may be wise or unwise, provident or improvident from an educational or public policy viewpoint. Our individual preferences, however, are not the constitutional standard.”

The Wisconsin Supreme Court

Jackson v. Benson

578 N.E.2d 602, 610 (Wisc. 1998)

Historically, constitutional challenges to school choice focused on application of the United States Constitution’s First Amendment Establishment Clause (otherwise known as the Federal Establishment Clause) and state establishment clauses. Although some state establishment clauses remain a viable option for constitutional challenge, federal jurisprudence to date has dismissed the Federal Establishment Clause as a viable basis for invalidating carefully written school choice statutes. (Green & Moran, 2010). The Indiana Constitution’s Religious Clauses are more detailed and stringent than the Federal Establishment Clause and therefore require a slightly different legal analysis. We will address both federal and state establishment clauses; explore less-publicized federal Constitutional provisions relevant to school choice in Indiana; and, where applicable, address the recent lawsuit filed by the Indiana State Teacher’s Association (ISTA) which challenges the constitutionality of the Choice Scholarship program.

### Establishment Clause of the First Amendment to the United States Constitution

The First Amendment to the United States Constitution provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” This clause, as applied through the Fourteenth Amendment, prohibits any state government from passing laws which have the purpose or effect of advancing religion. The Federal Establishment Clause is not, however, violated every time money in the possession of the state ends up in the possession of a religious institution. Rather, challenged programs are evaluated under a three-part test expounded by the U.S. Supreme Court over the last 60 years. Under the U.S. Supreme Court’s test, a statute complies with the Federal Establishment Clause if (a) it has a secular legislative purpose, (b) its primary effect neither advances nor inhibits religion, and (c) it does not create excessive entanglement between government and religion. If written and administered carefully, state voucher and education tax credit programs generally satisfy all three prongs of the U.S. Supreme Court’s test.

State voucher and education tax credit programs are generally found to have the secular legislative purpose of advancing education. The court in Mueller v. Allen, for example, held that “An educated populace is essential to the political and economic health of any community, and a State’s effort to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State’s citizenry is well-educated.” Programs that are designed to

benefit a broad spectrum of groups by allocating aid on the basis of neutral, secular criteria that neither favor nor disfavor religion and are especially likely to meet the “secular legislative purpose” prong of the U.S. Supreme Court’s Establishment Clause test. Indiana’s school choice statutes meet these criteria.

Indiana Code § 6-3-2-22 clearly designates a secular legislative purpose and casts a wide net by granting a tax deduction specifically for educational expenditures (up to $1,000) to any individuals who home-school their dependent children or send their dependent children to any private school. Indiana Code § 20-51-1-7 requires SGOs to make scholarships available for more than one participating school and creates various safeguards to encourage neutral disbursement of the scholarship funds. Likewise, Indiana Code § 20-51-4-1 illustrates the secular purpose of advancing education by listing an unprecedented number of documents that all participating schools must make available in order to maintain eligibility in the Choice Scholarship program. Indiana Code § 20-51-4-3(b),(c) promotes a neutral process of scholarship administration by prohibiting discrimination on the basis of race, color, or nation origin; requiring the admissions policy of each school to be fairly applied; and requiring a random drawing from eligible names when there are not enough open seats in a particular school to accommodate the number of applicants.

State voucher and education tax credit programs do not have the primary effect of advancing religion when they are designed in a way which (a) neither favors nor disfavors religion in defining the program’s beneficiaries, and (b) the state funds reach the religious institution through the clear private choices of citizens. Thus, the Wisconsin process could not be deemed to “advance religion” because it removed direct government involvement from (a) the choosing of a religious school, and (b) the funding of a religious school. Likewise, the U.S. Supreme Court approved government funding for a deaf child’s interpreter in a religious school even though the government employee would essentially be a “mouthpiece” for religious instruction because the choice to be in attendance at a private school was a decision wholly made by the parents, and, as such, the Court held there was no primary effect of the state advancing religion.

Likewise, in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, the court held that a university was required to fund a Christian campus newspaper in the same way in which it funded other student groups. The Court held that “as long as the benefit was neutral with respect to religion, what the student did with that benefit, even if it was to spend all of it on religion-related expenditures, was irrelevant for purposes of analyzing whether the law or policy violated the Establishment Clause.” It could be argued that Indiana’s school expenditure deduction and school tax credit do not violate this prong of the Federal Establishment Clause test because money is never given directly from the state treasury to religious institutions. The tax deduction and tax credit are purely a result of the private choices of parents and the private choices of other unrelated individuals and corporations who choose to donate money to SGOs.

Indiana’s Choice Scholarships are at higher risk for violating the “advancing religion” prong because the source of the funds is, in fact, the state treasury. However, Indiana’s process for the delivery of state funds to Choice Scholarship recipients mirrors Cleveland’s process for vouchers, which has already survived a Constitutional challenge. Before any funds are disbursed to a Choice Scholarship recipient, parents make a private choice as to which school the student should attend. After making the private choice, parents must co-endorse the voucher with the chosen school. Thus, it can be argued the state is merely advancing private parental choice and education rather than religion (IND CODE § 20-51-4-10).

State voucher and education tax credit programs do not lead to excessive entanglement between the state and participating sectarian schools when the program allows private schools to operate without excessive interference from the state government. The court has held that when the public school superintendent is called upon to monitor performance, reporting, auditing, nondiscrimination policies, and health and safety requirements in the sectarian schools receiving state funds, no excessive interference exists.

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Routine regulatory interaction which does not involve inquiries into religious doctrine or delegation of state power to a religious body does not create excessive entanglement.\textsuperscript{14} The provisions of Indiana’s school choice statutes which grant tax credits and tax deductions plainly avoid excessive government entanglement. Indiana Code § 20-51-4-1 (governing Choice Scholarships) intends the state to avoid entanglement with private schools: “... the department or any other state agency may not in any way regulate the educational program of a non-public eligible school...” However, the unprecedented list of requirements added to Indiana Code § 20-51-4-1 puts the Choice Scholarship at risk for excessive entanglement. The IDOE will need to carefully create a mechanism for ensuring compliance with the statute without entangling and interfering with the private schools. If the IDOE simply creates an annual survey and inspection of a private school, it is unlikely entanglement will be found. But if the Department institutes checks which require state employees to regularly enter and monitor private schools, the Choice Scholarship program could run afoul of the Federal Establishment Clause.

In short, School Choice programs will withstand scrutiny under the Establishment Clause of the U.S. Constitution if they (a) demonstrate a secular purpose such as promotion of the education opportunities of students, (b) are facially neutral, (c) do not create a preference for or against religion, (d) grant the benefit to a large class of beneficiaries without regard to religion, (e) grant the aid directly to the parents who must then independently choose where to direct the money, and (f) avoid government entanglement.

**Federal Free Exercise Clause**

The Federal Establishment Clause prohibits the government from promoting or excessively involving itself in religion, while the Free Exercise Clause prohibits the government from hindering an individual’s practice of religion, asserting that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (U.S. Const. Amend. I). Sometimes a state action is permitted by the Establishment Clause, but not required by the Free Exercise Clause.\textsuperscript{16} In applying the Free Exercise Clause in 1972, the U.S. Supreme Court found a compulsory education law which required Amish parents to send their children to school past eighth grade to be in conflict with the Free Exercise Clause because attending school after eighth grade was against Amish religious beliefs.\textsuperscript{17} The Court reasoned that “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. However strong the state’s interest in compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.”\textsuperscript{18}

It has been argued that parents who, due to lack of funds, are forced to send their children to public schools, are being hindered in their ability to practice religion as they see fit.\textsuperscript{19} In response, courts have moved away from the holding in Wisconsin v. Yoder and have granted latitude to states by holding that “valid and neutral laws of general applicability” do not need to be justified by a compelling governmental interest even if the law has the “incidental effect of burdening a particular religious practice.”\textsuperscript{20} Indiana’s school choice statutes are not in danger of violating the Federal Free Exercise Clause because the funding provided by the school choice statutes encourage the free choice of parents to enroll students in any private school, sectarian or secular.

**Other Federal Constitutional Law Provisions**

In addition to the enumerated rights granted by the United States Constitution, the U.S. Supreme Court has interpreted the Constitution to also protect certain unwritten (or “extra-textual”) rights as fundamental rights. Meyer v. Nebraska synthesized some of the ways the courts have expounded on the meaning of the Fourteenth Amendment.

Without doubt, [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.

262 U.S. 390, 399-400 (1923)

One aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment is “a right of personal privacy, or a guarantee of certain areas or zones of privacy.”\textsuperscript{21} The right of personal privacy includes “the interest in independence in making certain kinds of important decisions.”\textsuperscript{22} Among the decisions an individual may make without unjustified government interference are personal decisions “relating to marriage,”\textsuperscript{23} “procreation,”\textsuperscript{24} “contraception,”\textsuperscript{25} and “child rearing and education.”\textsuperscript{26}

\textsuperscript{14}See Jackson v. Benson.
\textsuperscript{15}Id.

\textsuperscript{17}Wisconsin v. Yoder, 406 U.S. 205 (1972).
\textsuperscript{18}Id.
\textsuperscript{20}Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531(1993) (holding unconstitutional a neutral law which, in reality, only negatively impacted the practice of Santeria religion).

\textsuperscript{22}Whalen v. Roe, 429 U.S. 589, 599-600 (1977).
\textsuperscript{23}Loving v. Virginia, 388 U.S. 1, 12 (1967).
\textsuperscript{24}Skinner v. Oklahoma, 316 U.S. 535 (1942).
Public school teachers themselves are no longer required to adhere to the strict moral codes required of teachers when compulsory education laws were imposed. Although the codes of teacher conduct in place in 1915 were extreme, they nonetheless evidenced the desire of those who wrote them to shelter children from negative influences during the course of the school day. In many respects, some schools are no longer able to accomplish this moral neutrality. Compulsory education laws often force parents to broach sensitive topics earlier than they might choose.

Of course most public schools are not “injurious” to a child, but compulsory education laws do not need to be “injurious” to a child to place a burden on parents’ fundamental right to parent their child as they desire. Since the creation of compulsory education laws, parenting styles and lifestyles have dramatically changed and some parenting choices simply cannot be accommodated by the public school system. Single-parent homes are especially more common in today’s society, and compulsory education laws all but prohibit the child of a single parent from seeing her parent during the week if that single parent is employed in a capacity which requires shift work. A single parent who works in the evenings may seek out a private school with afternoon or evening hours so that she may have the ability to exercise her fundamental right to parent her child in the mornings and meaningfully interact with her child each day. Other parents in today’s culture prefer all organic surroundings for their children. The local public school may not be willing or able to ensure all cleaning supplies, snacks, and meals are organic, but a small private school may choose to embrace such a parenting desire. Today’s parents may prefer specialized education for their children—a classical education, an artistic focus, or multi-age classrooms. Likewise, some modern parents are more global than parents from 100 years ago and may prefer that world language and multi-cultural instruction play a large role in their children’s rearing. The scriveners of compulsory school laws simply could not have begun to realize the magnitude of diverse parenting styles embraced in today’s society.

Opponents of school choice respond to such arguments by suggesting that a parent’s fundamental right to raise her child is, in fact, protected; after all, a parent may “choose” to send her child to any school of her desire and may even choose to homeschool her children. This “choice” is a fiction for single parents and lower-to-middle-class families who do not have the funds to pay for private tuition or the ability to stay home and teach their children (Smith, 1999). This “choice” is reminiscent of the fictional voting rights given to the poor and minorities in many states prior to the enforcement of the Voting Rights Act of 1965. Although a parent’s right to choose the manner of upbringing of her child is a federally protected right, compulsory education laws, although seemingly benign, currently have the effect of inhibiting those of lesser means from exercising that right in much the same way that many states inhibited the rights of those of lesser means from exercising their fundamental right to vote.

In contemporary society, however, the balance between the state’s interest in an educated populace and a parent’s fundamental right to choose the best upbringing for her child is a much different analysis than that completed by the scriveners of the compulsory education statutes. In modern society, few schools serve a small, uniform community. Despite the best efforts of school administrators and teachers, today’s schools can expose children to aspects of society which, in some cases, directly contradict their parent’s values. In some schools, it is not uncommon for a child to witness violence, gain unauthorized Internet access, observe drug use, and hear graphic details of peers’ sexual encounters in the process of a mandatory school day.

29. Rules of Conduct for Teachers in 1915: 1) You will not marry during the term of your contract; 2) You are not to keep company with men; 3) You must be home between the hours of 8 p.m. and 6 a.m. unless attending a school function; 4) You may not loiter downtown in ice cream stores; 5) You may not travel beyond the city limits unless you have the permission of the chairman of the board; 6) You may not ride in a carriage or automobile with any man unless he is your father or brother; 7) You may not smoke cigarettes; 8) You many not dress in bright colors; 9) You must wear at least two petticoats; 10) You must wear at least two petticoats; 11) You dresses must not be any shorter than two inches above the ankle. http://lang-witches.org/blog/2009/04/05/teacher-code-of-conduct-1915/


27. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (holding constitutional a state statute which prohibited children from selling literature on the streets despite parental permission).

28. “Knowledge and learning … being essential to the preservation of a free government …” Ind. Const. Art. 8. § 1
vote. Many, such as U.S. Supreme Court Justice Clarence Thomas in Zelman v. Simmons-Harris, suggest that in the post-Brown v. Board of Education era, school choice is the only means of emancipation for low-income students trapped in failing schools (Holme & Richards, 2009; Holme & Wells, 2008; Ryan & Heise, 2002).

Opponents of school choice correctly point out, however, that although states are prohibited from infringing on a fundamental right, they are not required to fund fundamental rights. Although it is true that the state is not required to fund a parent’s fundamental right to choose how best to raise her child, by imposing a significant, direct, and disproportionate burden on lower income individuals, compulsory education laws transcend the holding in Maher v. Roe. Maher affirms a state’s right to incentivize one behavior (i.e., attendance at public school through payment, healthcare for birthing a fetus rather than aborting it), but it fails to address the fact that compulsory attendance laws directly burden a parent’s fundamental right to raise a child. Parents must educate their children — there is no choice. Parents are required to allow the state to impact the development of their children and required to accept a burden on their fundamental right to raise their children. Citizens who do not have means to pay for a school that matches their parent-

### Indiana’s Religious Clauses

Indiana Constitution Article I provides:

Section 2: All people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences.

Section 4: No preference shall be given, by law to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent.

Section 6: No money shall be drawn from the treasury, for the benefit of any religious or theological institution.

Although much media attention has focused on the possibility that Indiana’s school choice statutes violate Article I of Indiana’s Constitution, it appears unlikely that the statutes will be struck down based on Article I of the Indiana Constitution. A comparison of 25 state constitutions (see Table 3) with a specific focus on Wisconsin’s and Indiana’s Constitutions, legislative history, analysis of the word “seminary,” and the fact that public dollars are already spent on sectarian organizations, all lend support to the constitutional validity of Indiana’s school choice statutes.

Of the 26 states represented in Table 3 below, 13 have constitutional provisions that are much more rigid and specific in their aversion to state funding for private education than Indiana, and therefore caution should be used when directly comparing the school choice provisions and case law from these 13 states with Indiana’s school choice statutes and pending litigation. For example, two states repeatedly referred to by the ISTA suit were Virginia (Almond v. Day) and New Hampshire (Opinion of the Justices), but Virginia’s Constitution can be readily distinguished from Indiana’s: “No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State…” Likewise, New Hampshire’s Constitution provides, “…no person shall ever be compelled to pay towards the support of the schools of any sect or denomination.” It is also notable that, despite the more rigid and specific constitutional prohibitions on private school funding in these 13 states, 6 have some form of tax credit, deduction, or narrow voucher available for private schools.

Of the 12 states represented in Table 3 that have constitutional provisions that are, like Indiana’s, somewhat nebulous with respect to private school funding, 8 have some form of tax credit or tax deduction available, and 8 have some form of voucher program available. Wisconsin, although not mentioned by the ISTA suit, has constitutional provisions similar to Indiana’s. Specifically, Article I, Section 18 of Wisconsin’s Constitution closely mirrors Indiana’s Article I, Section 6: “…nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.” At first glance, some might suggest the difference between Indiana’s use of the word “institu-

### Table 3: Constitutional Provisions

<table>
<thead>
<tr>
<th>State</th>
<th>Type of Voucher</th>
<th>Constitutional Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Tax Credit</td>
<td>Article I provides: no money shall be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.</td>
</tr>
<tr>
<td>Alaska</td>
<td>Tax Credit</td>
<td>Article I provides: no money shall be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.</td>
</tr>
<tr>
<td>Colorado</td>
<td>Tax Credit</td>
<td>Article I provides: no money shall be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.</td>
</tr>
<tr>
<td>Idaho</td>
<td>Tax Credit</td>
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</tr>
<tr>
<td>Illinois</td>
<td>Tax Credit</td>
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</tr>
<tr>
<td>Massachusetts</td>
<td>Tax Credit</td>
<td>Article I provides: no money shall be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.</td>
</tr>
<tr>
<td>Minnesota</td>
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<tr>
<td>Mississippi</td>
<td>Tax Credit</td>
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</tr>
<tr>
<td>New Hampshire</td>
<td>Tax Credit</td>
<td>Article I provides: no money shall be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.</td>
</tr>
<tr>
<td>New York</td>
<td>Tax Credit</td>
<td>Article I provides: no money shall be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Tax Credit</td>
<td>Article I provides: no money shall be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.</td>
</tr>
<tr>
<td>Utah</td>
<td>Tax Credit</td>
<td>Article I provides: no money shall be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.</td>
</tr>
<tr>
<td>Virginia</td>
<td>Tax Credit</td>
<td>Article I provides: no money shall be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Tax Credit</td>
<td>Article I provides: no money shall be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.</td>
</tr>
</tbody>
</table>
“a place of education, a school, college, university, or the like; often explicitly (cf. 3a)33 seminary of learning, seminary of science, etc. Also in more specific sense (cf. 3b)34 an institution for the training of those destined for some particular profession.” Interpreted into modern language, Indiana’s constitution simply states that funds cannot be granted for the benefit of religious institutions, while Wisconsin’s constitution goes a step further and states that funds cannot be granted for the benefit of religious schools. Despite this hurdle, Wisconsin’s school choice program was found to be in compliance with its constitution. In Jackson v. Benson, the Wisconsin Supreme Court determined that money was drawn from the Wisconsin treasury for the “benefit” of education — not for the “benefit” of religion. As such, the Milwaukee Parental Choice Program did not violate the Wisconsin Constitution.35 Because Indiana Constitution Article I, Section 18 and arguably sets a lower standard than Wisconsin’s Article 18, it appears unlikely the Indiana school choice statutes will be found unconstitutional based on Indiana Constitution Article I, Section 6.

Wisconsin also has a “compelled support clause” similar to Indiana’s Article I, Section 4. The Wisconsin Supreme Court also interpreted Wisconsin’s “compelled support clause” in Jackson and indicated that as long as people were not being forced to participate in religious activities at secular schools or forced to attend the secular schools, the “compelled support clause” was not violated. Including Wisconsin and Indiana, there are at least eight states with “compelled support clauses” coupled with a history of school choice litigation or legislation. Table 3 below summarizes the legislation, case law, and applicable constitutional provisions of school choice states. Of the eight states listed below with “compelled support clauses,” only two have language which is comparable to Indiana and also agree with ISTA’s36 assertion that individuals are “compelled” to support religion simply by paying taxes which eventually end up in the possession of a secular school. The logic behind the ISTA position battles against the logic of Everson v. Board of Education: “… a policeman protects a Catholic … not because he is a Catholic, but because he… is a member of our society. The fireman protects the Church school — but not because it is a Church school; it is because it is property, part of the assets of our society.”357 An individual, through the simple act of paying taxes (which are then filtered through the private choices of other individuals) is not being “compelled” to support a religious institution for the purposes of Indiana’s Article I, Section 4 — the individual is merely being “compelled” to support education as chosen by the child’s parent. It is significant that the state of Indiana has been directly funding sectarian organizations for many years in the form of private secular universities, group homes for troubled youth, and family services providers (see Department of Child Services Provider directory located at http://www.in.gov/dcs/2608.htm). The support given to sectarian schools through the school choice statutes is actually less offensive to Article I, Section 4 than, for example, foster care per diems, which arrive at sectarian foster agencies38 purely through state-actors’ decisions. Unless opponents of school choice in Indiana also wish to dismantle private secular foster care funding, private secular health providers, funding, and state subsidies for private secular universities, Article I, Section 4 of the Indiana Constitution does not provide a strong basis for opposition.

### Equal Education Clause of Indiana’s Constitution

In addition to Indiana, the constitutions of at least 13 other states39 require a uniform system of public schools (Green & Moran, 2010). Opponents of school choice tend to cite a recent Florida Supreme Court decision, Bush v. Holmes, where a statewide voucher system was found unconstitutional due to the Florida Constitution’s Equal Education Clause. Aside from being a much-debated decision in its own right, the Bush decision is not applicable to Indiana’s constitutional analysis of the school choice statutes. Florida’s Constitution, although similar, utilizes much stronger language upon which the Bush court chose to base its decision: “…a paramount duty of the state [is] to make adequate provision for the education of all children residing within its borders…[the state is required to provide] a uniform, efficient, safe, secure and high quality system of free public schools.” (FLA. CONST. art. IX §(a)). The Bush court asserted that the word “paramount” indicated that the duty to create a uniform school system was not something that could be delegated in any way to any entity.40 Critics of the Bush decision (including the dissenting justice) argue that the Florida Supreme Court majority overextended the language of the Florida Constitution in its decision, believing instead that the Florida voucher program was constitutional because it did not prevent the legislature from creating the voucher system as a supplement to an already adequately functioning public school system.41

### References

36. The ISTA lawsuit references Indiana’s Embry v. O’Bannon, as well as cases from Vermont, Virginia, New Hampshire, and Iowa in support of its “compelled support” argument. See Table 3 below for a comparison between Indiana’s Constitution and the constitutions of the states referred to by ISTA.


38. For example, White’s Residential & Family Services is a residential treatment facility and foster care provider for the state of Indiana that directly receives state funds and openly professes on its website to be a “Christ-centered organization committed to enriching the lives of children and families…[and has a]…primary core value…to model God’s grace and love…” Children sent to White’s Residential & Family Services against their will by the state of Indiana are required to attend religious services during their stay regardless of personal beliefs. See www.whiteskids.org.


40. Bush v. Holmes, 919 So. 2d 392 (Fla 2006).

41. 120 Harv. L. Rev. 1097, 1100 (February, 2007).
The Indiana General Assembly’s mandate is to: (a) encourage by all suitable means moral, intellectual, scientific, and agricultural improvement, and (b) to provide, by law, for a general and uniform system of Common Schools. The ISTA lawsuit suggests that Common Schools are the only way the General Assembly may achieve the education of Indiana’s youth. This interpretation disregards the first part of the clause which gives the General Assembly the ability to achieve the education of Indiana students through “all suitable means.” (In fact, the authors of the ISTA Complaint delete the phrase “by all suitable means” when they quote Article 8, Section I of the Indiana Constitution in their Complaint and in their Brief.) Nothing in Article 8, Section I prevents the Indiana legislature from providing a general and uniform system of schools and providing other methods (such as school choice) for the education of Indiana’s children. Indiana’s school choice statutes will not likely violate this provision of Indiana’s constitution unless the Indiana Supreme Court determines school choice to be an “unsuitable means” to encourage the moral, intellectual, scientific, and agricultural improvement of Indiana’s citizens.

"unsuitable means" to encourage the moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

The Indiana General Assembly’s mandate is to: (a) encourage by all suitable means moral, intellectual, scientific, and agricultural improvement, and (b) to provide, by law, for a general and uniform system of Common Schools. The ISTA lawsuit suggests that Common Schools are the only way the General Assembly may achieve the education of Indiana’s youth. This interpretation disregards the first part of the clause which gives the General Assembly the ability to achieve the education of Indiana students through “all suitable means.” (In fact, the authors of the ISTA Complaint delete the phrase “by all suitable means” when they quote Article 8, Section I of the Indiana Constitution in their Complaint and in their Brief.) Nothing in Article 8, Section I prevents the Indiana legislature from providing a general and uniform system of schools and providing other methods (such as school choice) for the education of Indiana’s children. Indiana’s school choice statutes will not likely violate this provision of Indiana’s constitution unless the Indiana Supreme Court determines school choice to be an “unsuitable means” to encourage the moral, intellectual, scientific, and agricultural improvement of Indiana’s citizens.

**LOOKING FORWARD...WHAT CAN INDIANA LEARN FROM OTHERS?**

Indiana now joins the District of Columbia, Colorado (Douglas County), Maine, Louisiana, Wisconsin (Milwaukee), and Ohio (Cleveland) as having school choice programs which grant state-funded vouchers to individuals based on income or the failing status of their neighborhood schools. Vermont and Maine, largely rural states, only grant state-funded vouchers to individuals if there is not a public school in the immediate area. But, in Maine, the funds may only be used at secular schools. Arizona, Florida, Georgia, Louisiana, Ohio, Oklahoma, and Utah provide state-funded vouchers to students with disabilities. Florida’s original voucher program, which was overturned in *Bush v. Holmes*, supra, served a broader base of students. Colorado also initially passed a more comprehensive school voucher program which was overturned in *Owens v. Colorado Congress of Parents* in 2004. The Colorado litigation centered on a clause in the Colorado constitution which vests all “control of instruction in the public schools districts” in the individually elected board members of the districts. The Supreme Court of Colorado held that a statewide mandatory voucher program infringed on the “control” of the local districts. In response to this decision, the local Douglas County school district recently voted to create a voucher program within its own district.

Milwaukee, Wisconsin, was one of the first cities to implement a voucher program — the Milwaukee Parental Choice Program (MPCP) — which provides eligible students the chance to attend any school of their choice. State funds in the form of a voucher are given to an eligible student’s parents. The voucher is then endorsed at the school of the parents’ choosing. After being heavily litigated and upheld in Wisconsin courts, the U.S. Supreme Court declined to grant certiorari on the case. Like Milwaukee, Cleveland implemented a School Voucher Program (SVP) to grant financial assistance to children from low-income families. Unlike MPCP, when a parent chooses to send a student to a public school outside the district, the state sends those choice funds directly to the school without issuing a voucher per se, but when a parent chooses to send a student to a sectarian school, the state sends the funds to the parents in the form of a voucher to be endorsed over to the school of the parents’ choosing. The Ohio program was also heavily litigated in state courts, but, in the end, the program was held constitutional by the Ohio Supreme Court.

Arizona, the District of Columbia, Florida, Georgia, Indiana, Iowa, North Carolina, Oklahoma, Pennsylvania, and Rhode Island have all implemented tax credit programs. The Arizona tax credit statute was also heavily litigated at the state level. The United States Supreme Court did grant certiorari on the case, but the issue argued at the United States Supreme Court turned on whether or not taxpayers had “standing” to bring a challenge against the statute rather than focusing on the question of whether the statute itself was constitutional. See Table 3 below for a further breakdown of school choice programs throughout the country, their statutes, case law, and relevant constitutional provisions.
<table>
<thead>
<tr>
<th>Location; Type; Eligibility</th>
<th>Applicable Constitutional Provision</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Alaska</strong> - No school choice program, but cited by ISTA suit</td>
<td>Art. VII, § 1: No money shall be paid from public funds for the direct benefits of a religious or other private educational institution.</td>
<td><em>Sheldon Jackson College v. State</em>, 1979 - (Alaska Supreme Court held that tuition program for private college students was invalid due to Art. VII, §1)</td>
</tr>
<tr>
<td><strong>Arizona (2006)</strong> - Public Voucher (now unconstitutional); Foster kids and kids with disabilities</td>
<td>Art. II, § 12: No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.</td>
<td><em>Ariz. Rev. Stat. Ann. § 15-891 Cain v. Horne</em>, 2009 - (Arizona Supreme Court holding that the program was unconstitutional under the Aid Clause w/o discussing Religion Clause)</td>
</tr>
<tr>
<td><strong>Arizona (1997)</strong> - Private Tax Credit - 100% of donation, $500 max. for individuals, $1,000 max. for couples, no max. for corporations, $17.28 million cap; Low-income students, foster kids, kids with disabilities (2006) - Corporate Private Tax Credit</td>
<td>Art. II, § 12, supra. and Art. IX, § 10: No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.</td>
<td><em>A.R.S. 43-1184</em> (individuals); <em>A.R.S. 43-1183</em> (corporations); <em>Kottermann v. Killian</em>, 1999 (Arizona Supreme Court upheld tax credit under Federal Establishment Clause &amp; Arizona Aid Clause &amp; Arizona Gift Clause); <em>Hibbs v. Winn</em>, 2004 (U.S. Supreme Court holding Arizona tax credit program does not violate Federal Establishment Clause); <em>Arizona Christian School Tuition Org. v. Winn</em>, 2011 (U.S. Supreme Court holding that taxpayers lack standing to challenge tax credit program)</td>
</tr>
<tr>
<td><strong>Colorado (2011)</strong> - Public Voucher; Douglas County only</td>
<td>Art. IX, § 7: No school district...shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever, nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.</td>
<td></td>
</tr>
<tr>
<td><strong>Colorado (2003)</strong> - Public Voucher (now unconstitutional); Low-Income students in underperforming schools</td>
<td>Art. IX, § 15: The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.</td>
<td><em>Owens v. Colorado Congress of Parents</em> - 2004 (Colorado Supreme Court held program unconstitutional because it took control away from the local school districts)</td>
</tr>
<tr>
<td><strong>Florida (1999)</strong> - Public Voucher (now unconstitutional); students in underperforming schools</td>
<td>Art. IX, § 1: The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education...</td>
<td><em>Bush v. Holmes</em> - 2006 (Florida Supreme Court held unconstitutional because of Paramount Duty of Equal Education Clause)</td>
</tr>
<tr>
<td><strong>Florida (2001)</strong> - Corporate Private Tax Credit - 100% of donation, $140 million cap; Low-income students with priority given to students who received voucher prior to <em>Bush v. Holmes</em> decision</td>
<td></td>
<td><em>F.S. 220.187</em></td>
</tr>
<tr>
<td>State</td>
<td>Year</td>
<td>Description</td>
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</tr>
<tr>
<td>Florida</td>
<td>2001</td>
<td>Public Voucher; Kids with disabilities; Amount based on individual child's needs, but average amount per child is $7,144.00</td>
</tr>
<tr>
<td>Georgia</td>
<td>2007</td>
<td>Public Voucher; Kids with disabilities; Amount based on individual child's needs, but average amount is $8,000.00.</td>
</tr>
<tr>
<td>Georgia</td>
<td>2008</td>
<td>Private Tax Credit - 100% of donation, 75% of total tax liability limit for corporations, $1,000 limit for individuals, $2,500 limit for couples, $50 million cap; Open to all students</td>
</tr>
<tr>
<td>Idaho</td>
<td></td>
<td>No school choice program, but cited by ISTA suit</td>
</tr>
<tr>
<td>Illinois</td>
<td></td>
<td>No school choice program, but cited by ISTA suit</td>
</tr>
<tr>
<td>Indiana</td>
<td>2011</td>
<td>Education Expenditure Tax Deduction - $1,000 per child per year deduction allowed for unreimbursed education expenses at public, private, or home school</td>
</tr>
<tr>
<td>Indiana</td>
<td>2011</td>
<td>Public Voucher; families below the federal poverty level receive scholarship for 90% of their portion of the funding formula; families between 100% and 150% of federal poverty level receive scholarship for 50% of their portion of the funding formula; $4,500 annual max. for each student</td>
</tr>
<tr>
<td>Indiana</td>
<td>2009</td>
<td>Private Tax Credit for Corporations and Individuals; 50% of donation with $5 million cap</td>
</tr>
<tr>
<td>State</td>
<td>Program Description</td>
<td>Legal References</td>
</tr>
<tr>
<td>------------</td>
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<tr>
<td>Iowa (2006)</td>
<td>Private Tax Credit; 65% of donation; $7.5 million cap; family below 300% of federal poverty</td>
<td>Art. I, §3: …nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry</td>
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<td></td>
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<td>I.C. 422.11S, Knowlton v. Baumhover, 1918 - (Iowa Supreme Court held unconstitutional any taxation for ecclesiastical support)</td>
</tr>
<tr>
<td>Louisiana (2008)</td>
<td>Personal Tax Deduction for 50% of unreimbursed educational expenses with $5,000 cap per child</td>
<td>Art. I, § 8: No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof</td>
</tr>
<tr>
<td>Louisiana (2008)</td>
<td>Public Voucher; family below 250% of federal poverty in underperforming school</td>
<td>Art. VIII, § 1: The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.</td>
</tr>
<tr>
<td>Louisiana (2010)</td>
<td>Public Voucher - kids with disabilities; voucher with a value of up to 50% of what state would spend on child in the public school</td>
<td>LA. R.S. 17:4011</td>
</tr>
<tr>
<td>Maine (2005)</td>
<td>Public Voucher; if no public school exists in a rural area, the state will pay for a private secular school tuition</td>
<td>Art. I, § 3: …all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance.</td>
</tr>
<tr>
<td>Massachusetts - no school choice but cited by ISTA suit</td>
<td>Art. XVII, § 2: … no grant, appropriation or use of public money…shall be made or authorized by the commonwealth...for the purpose of…maintaining or aiding any...school...wherein any denominational doctrine is inculcated, or any other...school...which is not publicly owned and under the exclusive control, order, and superintendence of public officer or public agents...</td>
<td>Commonwealth v. School Committee of Springfield, 1981 (Massachusetts Supreme Court held use of state funds to educate special needs students in private schools to be constitutional) Opinion of the Justices to the Senate, 1987 (Massachusetts Supreme Court opined that bill providing for a tax deduction for public and non-public elementary and secondary school tuition, textbooks, and transportation expenses amounted to “use” of public money and violated XVII, § 2).</td>
</tr>
<tr>
<td>Minnesota (1997)</td>
<td>Education Tax Credits and Deduction; 75% of unreimbursed education expenses, $1,000 per child max per year; sliding scale based on income eligibility of family</td>
<td>Art. XII, §2: In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.</td>
</tr>
<tr>
<td>Minnesota Civil Liberties Union v. Roemer, 1978 - (Federal district court in Minnesota upheld refundable tax deduction); Mueller v. Allen, 1983 (U.S. Supreme Court held Federal Establishment clause not violated by granting tax credit for tuition, textbooks and transportation at private and public schools equally)</td>
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<tr>
<td>Mississippi - no school choice program, but cited by ISTA suit</td>
<td>Art. VIII, § 208: …nor shall any funds be appropriated toward the support of any sectarian school...</td>
<td>Otkon v. Lamkin, 1879 (Mississippi Supreme Court struck down statute which paid students attending private schools their pro rata share of state education funds). Chance v. Mississippi State Textbook Rating 1941 - (Mississippi Supreme Court upheld statute which allowed public school books to be used by secular schools).</td>
</tr>
<tr>
<td>New Hampshire - no voucher program, but cited by ISTA lawsuit</td>
<td>Pt.I, Art. VI: …no person shall ever be compelled to pay towards the support of the schools of any sect or denomination.</td>
<td>Opinion of the Justices, 1992 (New Hampshire Supreme Court held statute allowing “sending” public school to pay funds to religious school as against New Hampshire Constitution which is noticeably more narrow than Indiana Constitution).</td>
</tr>
<tr>
<td>New York - New York City - Mandatory Open Choice; all high school students must choose their top 12 high school choices out of 600 high school programs</td>
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</table>
TABLE 3. Compilation of School Choice Nationwide  

<table>
<thead>
<tr>
<th>State</th>
<th>Type of Voucher</th>
<th>Relevant Article(s)</th>
<th>Legal Authority</th>
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<tbody>
<tr>
<td>New York - Private Tax Credit</td>
<td>Art. XI, § 3: Neither the state nor any subdivision thereof shall use its property or credit or any public money or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.</td>
<td>Committee for Public Education &amp; Religious Liberty v. Nyquist, 1973 (U.S. Supreme Court held unconstitutional New York law which provided tuition reimbursement for parents sending children to nonpublic schools under the Federal Establishment Clause; conversely held tax credits for nonpublic school expenses constitutional)</td>
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<tr>
<td>North Carolina (2011) - Private Tax Credit</td>
<td>$6,000 refundable credit given directly to families with kids with disabilities enrolled in private schools; $2,500 refundable credit to family under $100,000 annual income</td>
<td>Art. I, § 13: All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.</td>
<td>House Bill 344</td>
</tr>
<tr>
<td>Ohio (2001) - Public Voucher - kids on the autism spectrum (2003); underperforming school (2005)</td>
<td>§ 1.07: All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship...</td>
<td>Ohio Rev. Stat. § 3310.41 and Ohio Rev. Code Ann. § 3310.02</td>
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<td>Ohio (1995) - Public Voucher; Cleveland families below 200% of federal poverty</td>
<td>§ 1.07: All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship...</td>
<td>Ohio Rev. Stat. § 3313.97.4 thru § 3313.99; Zelman v. Simmons-Harris, 2002 (U.S. Supreme Court upheld Cleveland voucher program in the face of Federal Establishment Clause challenge)</td>
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<td>Oklahoma (2010) - Public Voucher; kids with disabilities</td>
<td>Art. II, § II, Par. 5: No public money shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.</td>
<td>70 O.S.S. §13-101.1</td>
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<tr>
<td>Oklahoma (2011) - Private Tax Credit; 50% of donation w/$1,000 max for individuals, $2,000 max for couples, $100,000 for corporations; $3.4 million cap; families below 300% of federal poverty</td>
<td>Art.I, Sec.III: …we therefore, declare that no person shall be compelled to frequent or support any religious worship, place, or ministry whatever, except in fulfillment of such person’s voluntary contract.....</td>
<td>69 O.S.S. §2357.206</td>
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<tr>
<td>Pennsylvania (2001) - Corporate Private Tax Credit - 75% of donation for one-year contribution, 90% for two-year contribution, $300,000 max per corporation, $44.7 million cap; Families of four w/income less than $60,000 with $12,000 added for each additional household member</td>
<td>Art.I, Sec.III: …no preference shall ever be given by law to any religious establishments or modes of worship. Art. III, Sec.15: No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.</td>
<td>24 P.S. §§20-2001-B-20-2008-B</td>
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<tr>
<td>Rhode Island (2006) - Corporate Private Tax Credit - 75% of donation for one-year contribution, 90% for two-year contribution, $100,000 max per corporation, $1.0 million cap; Families below 250% of federal poverty</td>
<td>Art.I, Sec.III: …we therefore, declare that no person shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of such person’s voluntary contract.....</td>
<td>RIGL 44-62.1-44-62.7</td>
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<tr>
<td>Tennessee (pending) -- Public Voucher; low-income students</td>
<td>Art. I, § 3: That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent.....</td>
<td>SB 485 - passed Senate</td>
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<tr>
<td>Utah (2005) - Public Voucher; kids with disabilities</td>
<td>Art. I, § 4: …No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.</td>
<td>Utah Code Ann. § 53A-1a-701-710</td>
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**Table 3. Compilation of School Choice Nationwide (continued)**

<table>
<thead>
<tr>
<th>State</th>
<th>Program Details</th>
<th>Relevant Legal References</th>
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<tbody>
<tr>
<td>Vermont (1869) - Public Voucher</td>
<td>Ch. I, Art. III: …no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience…</td>
<td>16 V.S.A. §166 Chittenden Town School Dist. v. Dept. of Ed. 1999 (Vermont Supreme Court held tuition reimbursement to sectarian schools unconstitutional if given without restriction of religious instruction)</td>
</tr>
<tr>
<td>Virginia - no voucher program, but cited by ISTA lawsuit</td>
<td>Art. VIII, §10 (formerly § 141): No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof…</td>
<td>Almond v. Day, 1955 (Virginia Supreme Court overturned voucher program not on the “compelled support clause” of Art. I, §16 of Virginia Constitution as indicated by the ISTA lawsuit, but on Art. VII, §10 of the Virginia Constitution which is noticeably more specific than Indiana’s “compelled support clause”). Glassman v. Arlington County, Virginia, 2010 (U.S. Ct. App. 4th Dist. held that it was constitutional for the state to give funds to a church so that the church could build affordable housing).</td>
</tr>
<tr>
<td>Washington, D.C. (2004) - Public Voucher</td>
<td>Art. I, § 18: …nor shall any person be compelled to…support any place of worship, or to maintain any ministry…nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.</td>
<td>D.C. Code §§38-1851.01-1851.11</td>
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**Looking Forward…How Should Indiana Measure Success?**

Much research has been conducted on the effectiveness of school choice, but several factors have made conclusive research difficult to accomplish. A 2007 survey by the U.S. Department of Education’s What Works Clearinghouse has labeled them the only research design that meets its evidence standards for rigor “without reservations” (Betts & Hill, 2006; Wolf, 2008). “With random assignment, you can know something with much greater certainty and, as a result, can more confidently separate fact from advocacy” (Gueron, 2000, p.429).

In addition to determining if school choice programs have a positive effect on student achievement, Indiana may wish to determine why school choice programs may or may not have a positive effect on student achievement (Wolf & Hoople, 2006). In general, both proponents and opponents of school choice assert that the characteristics of a student’s peer group have independent and significant effects on the student’s academic achievement. If one of the goals of the implementation of school choice programs is to improve education, simply measuring outcomes is not enough — further study into how peer groups and other more-difficult-to-measure internal school factors improve or harm student achievement is critical.
Some also suggest that research on the effects of school choice should transcend analysis of student achievement and look to levels of civic responsibility instilled in students and the effects school choice may have on the health of a community. By choosing to be a part of a smaller school community, some argue “choice parents” accept more ownership and commitment to the schools thereby increasing student achievement but improving the neighborhood immediately surrounding the school as well (Brinig & Garnet, 2010). One study found that attending a private school for one year led to a considerable increase in students’ political tolerance and political knowledge (Campbell, 2008). Others argue that school choice tends to geographically distance students’ homes from their schools, which decreases the feeling of ownership and commitment to the community immediately surrounding schools. Research which tracks the impact of school choice programs should also include measures to track parent involvement, students’ civic knowledge and involvement, and improvements or deterioration in the community immediately surrounding a school.

Conclusion

It is important to consider how both parents and children will be assisted in making the decision to change schools. In the creation of school choice programming, it is natural to consider parents as the primary decision-maker. However, what results if a child and a parent disagree over school choice? Will Indiana allow a child’s preference to trump a parent’s? Will there be a review process for students who disapprove of a parent’s decision? And what results when a parent is disengaged or unable to engage in the school choice process? Will information be available for students to disseminate so that they may advocate for themselves? Will educational surrogates be appointed for students who wish to exercise their right to school choice in the face of parents who are disinterested? In order for school choice programs to have the greatest potential for granting equal access to school choice programs, students as well as parents need systematic help in making school choice decisions. Special attention must be given to transfer students, immigrant students, children of immigrant parents, and children of less-educated parents as the students are more likely to be the sole choice decision-makers about school choice (Saporit & Lareua, 1999).

Recommendations

To help school choice have the most positive impact on education, the IDOE should provide tools and supports to parents and children for navigating the often complicated nuances of school choice and give special attention to (a) a student’s role in the school choice decision-making process, and (b) how best to educate families about their school choice options.

Recommendations

The process currently outlined in Indiana’s school choice statutes partially helps to prevent such a feeling of rejection by requiring a public lottery drawing when a school is faced with more applicants than seats available. Enforcement of the lottery system will be important as school choice programming moves forward in Indiana. Students left without much parental direction in New York’s school choice system reported making mistakes and feeling “stuck” in a “bad” school (Rosenbloom, 2010).

Recommendations

The IDOE should, from the outset, create, maintain, and monitor information and statistics for all Indiana schools — both public and private — so parents may make informed decisions for their children’s education. Uniform regulations or guidelines should also be created which provide firm parameters for schools’ reporting of curriculum offerings, testing results, discipline procedures and statistics, and other aspects of schools’ cultures which may be relevant to discerning parents.

Conclusion

In order to be relevant, any school choice research platform should (a) be longitudinal and randomized, (b) study factors within individual schools causing positive and negative achievement results, (c) monitor changes in students’ civic knowledge and involvement, and (d) monitor any positive or negative impacts in the communities immediately surrounding schools impacted by school choice.

Recommendations

The issues and controversies surrounding school choice are endless, and passionate advocacy often blurs the line between fact and fiction, further complicating IDOE’s efforts to implement Indiana’s school choice statutes. The landscape will be further complicated by legal challenges as well as legislative debates over funding. By enacting the most comprehensive school choice offerings expressed frustration with school administrators’ publication of inflated or false program offerings and statistics (Rosenbloom, 2010). “Classical economics tell us that a free market guarantees the highest quality goods and services for the lowest price only when the consumer has ‘perfect information’ about the available goods and services. In the free educational market that ‘choice’ is designed to create, how are students and parents supposed to get this information? And just what information should they get?” (Rosenbloom, 2010, quoting Astin, A., 1992, pp. 255-260). The Rosenbloom analysis suggested a neutral outside entity be used to publish information about all participating schools using standardized language to describe course offerings, academic focus, and statistics.
choice program in the country, Indiana has been thrust into the spotlight and will be intensely scrutinized by education policy advocates and scholars nationwide. As Indiana is observed by the nation, it is critical for those at the helm to forge ahead and make decisions based on objective data, hopefully procured by the IDEOE’s engagement of an independent research entity to conduct longitudinal random assignment studies and other assessments on the effects of school choice on Indiana’s students, families, schools, and communities.

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For additional information on school choice see the IDEOE’s website (www.MyChoiceNed.com) for a list of participating schools, the ISTA website (www.ista-in.org), or www.schoolexchangenindiana.com.

REFERENCES


AUTHORS

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Knowlton v. Baumhover, 166 N.W. 202 (Iowa 1918).


Loving v. Virginia, 388 U.S. 1, 12 (1967).


Otkin v. Lamkin, 56 Miss. 758 (1879).


Trust v. Ketteler Training School, 118 N.E. 743 (Ill. 1918).

Van Zandt v. Thompson, 839 F.2d 1215 (7th Cir. 1988).


WEB RESOURCES

The Heritage Foundation, School Choice in America
http://www.heritage.org/applications/schoolchoice

Complete Information for All 2011 Indiana General Assembly Regular Session Bills
http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2011&session=1&request=all#house

House Enrolled Act 1003 (School Scholarships)

School Choice Indiana, a non-partisan state advocacy group
http://www.schoolchoiceindiana.com/

Indiana Department of Education (IDOE) School Choice Website
http://www.doe.in.gov/schoolchoice/

The Friedman Foundation for Educational Choice
http://www.edchoice.org/