**ARIZONA COURT OF APPEALS**
**DIVISION ONE**

SHARON NIEHAUS; ARIZONA SCHOOL BOARDS ASSOCIATION; ARIZONA EDUCATION ASSOCIATION; and ARIZONA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS,

Plaintiffs-Appellants,

v.

JOHN HUPPENTHAL, in his capacity as Arizona Superintendent of Public Instruction,

Defendant-Appellee,

and

ANDREA WECK ROBERTSON; VICTORIA ZICAFOOSE; CRYSTAL FOX; and GOLDWATER INSTITUTE,

Intervenors-Appellees.

Court of Appeals
Division One

No. 1 CA-CV 12-0242

Maricopa County
Superior Court
No. CV 2011-017911

# RESPONSE BRIEF OF PARENT-INTERVENORS-APPELLEES ANDREA WECK ROBERTSON, ET AL.

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## STATEMENT OF THE CASE

This case asks whether the State's use of public funds to help parents exercise their right "to direct the upbringing and education of [their] children" (guaranteed by the United States Constitution) is compatible with the Arizona Constitution's guarantee that Arizonans will not have their tax dollars used "in aid of" or "to the support of" private and religious institutions. *Compare Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925), *with* Ariz. Const. art. IX, § 10 and art. II, § 12. The program challenged in this case, the Arizona Empowerment Scholarship Account Program ("Empowerment Account Program"), is a publicly funded education savings account program, codified at Arizona Revised Statutes Annotated ("A.R.S.") sections 15-2401 to -2404 (2011). Under the Empowerment Account Program, the State deposits public funds into individual empowerment accounts to be spent on educational products and services without earmarking or restricting a single dollar for use at private or religious schools. To open an empowerment account, parents must agree not to enroll their children in a district or charter school for as long as the State is depositing funds into their empowerment account. A.R.S. § 15-2402(B)(2). Participating parents must also take full responsibility for providing their children with an education "in at least the subjects of reading, grammar, mathematics, social studies and science." A.R.S. § 15-2402(B)(1).

Plaintiffs-Appellants, a school board member and three organizations affiliated with public education, filed this action on September 26, 2011 to enjoin the State from depositing public funds into empowerment accounts. [Index of Record ("IR") 1]. Plaintiffs-Appellants named the Superintendent of Public Instruction, John Huppenthal, as the Defendant. *Id.* Plaintiffs-Appellants claim that publicly funding empowerment accounts violates the Arizona Constitution's "Aid" and "Religion" clauses, Article IX, § 10 and Article II, § 12. *Id.* They also assert that the required promise not to enroll a participating student in a public school imposes an unconstitutional condition on participating families. *Id.*

Three parents who desire to open empowerment accounts for their children with disabilities, Andrea Weck Robertson, Victoria Zicafoose, and Crystal Fox (hereafter "Parent-Intervenors"), intervened to defend the program's constitutionality. [IR 7-11, 31]. The Goldwater Institute also intervened on its own behalf, represented by separate counsel, to defend the program. [IR 13, 20].

The parties agreed that Plaintiffs-Appellants' application for preliminary injunction should be consolidated with a final hearing on the merits, which was held on November 28, 2011. [IR 37, 67]. Prior to the hearing, the trial court granted the Intervenors' motion to dismiss the unconstitutional condition claim, finding that Plaintiffs-Appellants lacked standing to assert that claim. [IR 66]. The trial court issued a minute entry order on January 25, 2012 upholding the

Empowerment Account Program as constitutional. [IR 68]. The trial court entered final judgment on February 28, 2012, [IR 70], and Plaintiffs timely appealed on March 1, 2012. [IR 71-72].

This Court has jurisdiction pursuant to A.R.S. § 12-2101(A)(1), (A)(5)(b).

## STATEMENT OF FACTS

### I. ARIZONA'S EMPOWERMENT ACCOUNT PROGRAM IS THE NATION'S FIRST PUBLICLY FUNDED EDUCATION SAVINGS ACCOUNT PROGRAM.

Arizona's Empowerment Account Program, A.R.S. §§ 15-2401 to -2404, takes a pioneering approach to a familiar concept by setting up the nation's first publicly funded education savings account program. The program functions in a simple and straightforward manner: In exchange for a parent's agreement to be responsible for educating their student and not enroll that student in a district or charter school, the State makes quarterly deposits into an empowerment account in an amount slightly less than what a public school would have received to educate that student. A.R.S. § 15-2402(B)(1)-(2), (C). Parents can use the funds deposited in the empowerment account to customize an education that meets their child's unique educational needs.

Parents may use the funds deposited in their empowerment account on the widest array of educational options ever conceived and implemented in an educational reform package. Empowerment accounts allow parents to purchase educational services and products from an *a la carte* menu—or to save for future educational expenses, including tuition at a public or private college. The educational options available to parents include, but are not limited to, purchasing educational therapies or services from licensed or accredited providers, buying

curriculum and teaching their child at home, hiring one or more accredited tutors to help instruct their children, or paying tuition or fees at a private school. A.R.S. § 15-2402(B)(4). Or any mix of these (and other) options. Parents who open an empowerment account are not required to enroll their child in a private school. [IR 57-58, 68]. Students can attend a private school or be educated at home.

Empowerment accounts are currently available only for children with disabilities and certain handicaps. A.R.S. § 15-2401(5). But beginning in the 2013-2014 school year, in addition to children with special needs, students attending public schools that receive a letter grade of D or F, children who have a parent or guardian serving on active duty in the U.S. military, and certain children in the foster care system will also be able to open empowerment accounts. 2012 Ariz. Sess. Laws, ch. 360, § 5 (amending, clarifying, and expanding the Empowerment Account Program) (effective Aug. 2, 2012) (attached as App. 1).

## II. THE EMPOWERMENT ACCOUNT PROGRAM WAS DESIGNED TO COMPLY WITH *CAIN*.

Plaintiffs-Appellants make much of *Cain v Horne*, 220 Ariz. 77, 202 P.3d 1178 (2009), in their fact statement, but to no avail. Opening Br. 1-2. While this case is informed by *Cain*, it is not controlled by it because the program at issue here is different from those struck down in *Cain*.

### A. *Cain* Involved Voucher Programs That Required Beneficiaries To Transfer All Of Their Financial Aid To Private Schools.

In *Cain*, the Arizona Supreme Court struck down two private school voucher programs. The Court held that the vouchers violated Article IX, § 10 of the Arizona Constitution, which prohibits the Legislature from laying any tax or appropriating public money "in aid of any church, or private or sectarian school, or any public service corporation." *Cain*, 220 Ariz. at 84, ¶ 29, 202 P.3d at 1185. The voucher programs appropriated a total of $5 million to allow children with disabilities and children in foster care to attend private schools by paying the tuition with public funds. *Id.* at 79, ¶¶ 2-4, 202 P.3d at 1180. Under both voucher programs, after parents selected the private or religious school their child would attend, the State disbursed a check or warrant to the parent who was then required to "'restrictively endorse' the instrument for payment to the selected school." *Id.* at 79-80, ¶ 5, 202 P.3d at 1180-81. The Supreme Court said the voucher programs were a "well-intentioned effort to assist two distinct student populations with special needs," *id.* at 84, ¶ 29, 202 P.3d at 1185, but that the vouchers gave participating families "no choice" but to "endorse the check or warrant to the qualified school." *Id.* at 83, ¶ 26, 202 P.3d at 1184. Because the vouchers were "earmarked for an identified purpose," they transferred "state funds directly from the state treasury to private schools." *Id.* at 82-83, ¶¶ 23, 26, 202 P.3d at 1183-84.

### B. Lexie's Law: Tax Credits And The Legislature's First Response To *Cain*.

Governor Brewer called a special legislative session on May 29, 2009 urging the Legislature to enact a new school choice program that would provide an equivalent level of funding for the estimated 450 special needs children who lost their vouchers as a result of *Cain*.[1] In response, the Legislature adopted a $5 million corporate tax-credit-scholarship program named Lexie's Law.[2] A.R.S. § 43-1505. Lexie's Law was never challenged, perhaps because *Cain* reaffirmed that tax credits are not appropriations and do not implicate Arizona's Aid or Religion Clauses. 220 Ariz. at 82, ¶ 22, 202 P.3d at 1183. But Lexie's Law failed to generate enough money to help all of the children who were depending on the voucher programs.[3]

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[1] Proclamation by the Governor of the State of Arizona Calling for a Second Special Session of the Forty-ninth Legislature of the State of Arizona, 15 A.A.R. 921, May 29, 2009, available at http://www.azsos.gov/aar/2009/22/governor.pdf; Erik W. Robelen, *Two Voucher Programs Struck Down in Arizona*, Educ. Wk. (March 26,2009), http://www.edweek.org/ew/articles/2009/03/26/27arizona. h28. html.

[2] Lexie Law is named after Parent-Intervenor Andrea Weck Robertson's daughter, Lexie Weck, who has autism, cerebral palsy, and is mildly mentally retarded. Mrs. Robertson also intervened in *Cain* to defend the voucher programs. Lexie has been thriving emotionally, socially, and academically as a result of the tuition assistance she has received first from the voucher program for children with disabilities and now from Lexie's Law. [IR 8].

[3] In 2009, Lexie's Law generated $781,000 in donations from five corporations allowing for 115 scholarships to be awarded. Ariz. Dep't of Revenue, *Reporting*

### C. Empowerment Accounts: The Legislature's Second Response To *Cain*.

Discouraged by the lackluster corporate response to Lexie's Law, but encouraged by the Arizona Supreme Court's concluding words in *Cain* that "[t]here may well be ways of providing aid to these student populations without violating the constitution," 220 Ariz. at 84, ¶ 29, 202 P.3d at 1185, legislators and policy makers went back to the proverbial drawing board to design a new program to replace the voucher programs and supplement the under-performing Lexie's Law. Inspiration for what ultimately became the Empowerment Account Program came from a colloquy during the oral argument in *Cain* between Justice Hurwitz and plaintiff Cain's counsel, Mr. Donald Peters (who is also counsel for Plaintiffs in this case).[4] *See* Matthew Ladner & Nick Dranias, *Education Savings Accounts: Giving Parents Control of their Children's Education*, 9 (Goldwater Inst. 2011) (noting that "the attorney representing opponents of school vouchers conceded that educational choice programs could be designed to comply" with the Arizona Constitution).

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*for 2009*, available at http://www.azdor.gov/Portals/0/Reports/2009-corporate-school-tax-credit-disabled-displaced-report.pdf. In 2010, it generated $956,880 from donations by six corporations allowing 166 scholarships to be awarded. Ariz. Dep't of Revenue, *Reporting for 2010*, available at http://www.azdor.gov/Portals/0/Reports/2010-corporate-school-tax-credit-disabled-displaced-report.pdf.

[4] Archived video of the *Cain* oral argument, available at: http://supremestateaz.granicus.com/MediaPlayer.php?view_id=2&clip_id=46.

In response to a line of questions by Justice Hurwitz, Mr. Peters conceded that a program like the one challenged in this case would be constitutional:

> *Justice Hurwitz*: Do you agree that the State could pick this population of worthy parents and say to them "here's a grant for each of you for $2,500 to be used in pursuit of your children's education, spend it as you wish?"
>
> *Mr. Peters*: Yes.
>
> *Justice Hurwitz*: And if they spent it on a private or parochial school, or on a public school transfer, that would be okay?
>
> *Mr. Peters*: Yes. I think the dividing line is how much the state constrains the choice.
>
> ***
>
> *Mr. Peters*: Under the Aid Clause, that funding is for the most part only going to be used to pay one of two prohibited recipients. So the choice is constrained to the point that the odds are overwhelming that it's going to go to a prohibited recipient.
>
> *Justice Hurwitz*: So then why wouldn't that make illegal the program I just described, where we said to each parent, "here's money to use for your child's education?" Those who are going to public school would have no expenditure in any case.
>
> *Mr. Peters*: My assumption is that you can hire a tutor with it; you can do all kinds of things with it other than paying a private or religious school.

The Supreme Court's opinion in *Cain* echoes this exchange by emphasizing the voucher programs' lack of parental choice. 220 Ariz. at 83, ¶ 26, 202 P.3d at 1184.

### D. Empowerment Accounts Are Not Vouchers Because Beneficiaries Do Not Have To Spend Any Of Their Financial Aid At Private Schools.

The Empowerment Account Program is far more robust and flexible than Plaintiffs-Appellants describe in the opening pages of their brief. Opening Br. 7-9. Empowerment accounts borrow their basic structure and operation from two well-known, but privately funded, federal education savings account programs. So-called "529" accounts give parents and students a way to save money tax-free for "qualified higher education expenses" at eligible colleges and universities. 26 U.S.C. § 529(e)(3), (5). Coverdell Education Savings Accounts similarly allow tax-free savings for educational expenses, but allow for expenses at elementary and secondary schools in addition to colleges and universities. 26 U.S.C. § 530(b)(2)(a).

Empowerment accounts improve on both models by (1) being publicly funded and (2) by giving parents tremendous freedom to customize their child's education through any mix of tutoring, curriculum, educational therapies and services, private schooling, and post-secondary education. A.R.S. § 15-2402(B)(4). And, beginning on August 2, 2012, parents may use empowerment account funds to pay for individual classes and extracurricular activities at public schools. 2012 Ariz. Sess. Laws, ch. 360 § 6 (adding subsection (l) to A.R.S. § 15-2402(B)(4)). This new authorization to spend empowerment account funds to

purchase classes at public schools must be considered by this Court because Plaintiffs-Appellants seek only injunctive, *i.e.*, prospective, relief and nothing more. Thus, what is at issue in this case is the statute in effect at the time this Court renders its decision, not the statute as it read when this case was filed.

## III. EMPOWERMENT ACCOUNTS ALLOW PARENTS TO DESIGN AN INDIVIDUALIZED EDUCATION FOR THEIR CHILD.

Plaintiffs-Appellants use their fact section to try and cloak the Empowerment Account Program in a shroud of mystery. They express confusion about student eligibility and allowable expenses, and they offer a tortured reading of the law in an effort to find a requirement that parents must enroll their children in private school. Opening Br. 3-9. But there is nothing mysterious about the program.

### A. The Empowerment Account Program's Operation Is Simple And Straightforward.

Children with disabilities or qualified handicapped students are eligible to open an empowerment account if they (1) attended a public school for at least the first 100 days of the prior school year; or (2) received a Lexie's Law scholarship.[5]

[5] Plaintiffs-Appellants note that the Empowerment Account Program states that a student who is "identified as having a disability pursuant to section 504 of the rehabilitation act," A.R.S. § 15-2401(5), is eligible for the program, but they claim that Section 504 does not identify a category of disabled students and thus the citation to Section 504 is in error. Opening Br. 4. Plaintiffs-Appellants are mistaken. This citation expands eligibility to all students defined by federal law as "qualified handicapped students." Section 504, codified at 29 U.S.C. § 794,

In the first quarter of the first year, which was the only data available at the time judgment was entered below, 81 parents had signed agreements to open an empowerment account. [IR 58 (Aff. Morley 2, ¶ 4)].

When parents sign an agreement to open an empowerment account they promise (1) not to enroll their child in a public school and (2) to provide their child an education "in at least the subjects of reading, grammar, mathematics, social studies and science." A.R.S. § 15-2402(B)(1), (2). How parents choose to provide that education is entirely up to them. Beginning on August 2, 2012, parents are permitted to spend the money deposited in their empowerment account on twelve broad categories of educational goods and services. 2012 Ariz. Sess. Laws, ch. 360 § 6. Beyond establishing the twelve general categories of educational expenditures, the program places no constraints on parents when deciding how to spend the funds deposited in their empowerment account.

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provides that no "qualified individual . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . ." and applies to all recipients of Federal funds, including public school districts. School districts must therefore abide by the regulations implementing Section 504, found at 34 C.F.R. Part 104. These regulations define who is a qualified "handicapped person," 34 C.F.R. 104.3(j), and require that handicapped persons be provided a free appropriate public education. 34 C.F.R. 104.33. As such, any student who has been identified as a qualified handicapped person pursuant to Section 504 and its implementing regulations is eligible to obtain an empowerment account.

### B. Parents Decide How, When, Where, And On Whom And What, To Spend Empowerment Account Funds.

Plaintiffs-Appellants suggest that parents have limited choices because empowerment account funds may be used "only for eleven purposes." Opening Br. 7. Even putting aside the new authorization to spend empowerment account funds to purchase individual public school classes and extra-curricular activities (which itself encompasses an abundance of options from Mr. Cleary's Algebra course at Prescott High School to Mrs. MacColl's Zoology course at Chaparral High School),[6] the "eleven" categories of permissible educational expenditures offer numerous different services, tools, and products. And the evidence from the first quarter expenditures demonstrates that parents are quickly acclimating to spending money on a mix of educational services.

A parent could, for example, choose to purchase curriculum to teach her or his child at home and hire tutors to supplement that instruction. A.R.S. § 15-2402(B)(4)(d), (e). In the first quarter, at least one parent spent $1,886.94 on curriculum, [IR 58 (Aff. Morley 3, ¶ 8(e))], and another spent $3,195.00 for tutoring services. [IR 58 (Aff. Morley 3, ¶ 8(d))]. A parent could also enroll her or his child in a private school and use empowerment account funds to pay tuition and

[6] *PHS Faculty Directory*, Prescott High Sch., http://mypusd.prescottschools.com/pusdwp/phs/ about/phs-faculty-directory/ (last visited July 6, 2012); and *Staff Directory*, Chaparral High Sch., http://susd.chaparral.schoolfusion.us (follow "Staff Directory" hyperlink) (last visited July 6, 2012).

purchase after-school therapies from private providers. A.R.S. § 15-2402(B)(4)(a), (c). That is exactly what Tonya Reiner, a declarant below, plans to do for her son. [IR 42]. *See also* [IR 58 (Aff. Morley 3, ¶ 9(a) (parent spent $1,650 on private school tuition and $465 for educational therapies and services)]. Other parents are also using their empowerment accounts to purchase educational therapies—like the parents who spent $9,948.41 on such services. [IR 58 (Aff. Morley 3, ¶ 8(c))]. One parent chose to spend funds on private school tuition, educational therapies, and a tutor. [IR 58 (Aff. Morley 4 ¶ 9(b) ($3,262.50 on tuition, $917 on therapies and $390 for tutoring)]. *See also* [IR 58 (Aff. Morley 4, ¶ 9(c) (parent spent $515 for therapies and $1,830 for tutoring)].

Additionally, empowerment account funds may be used to pay for college classes and textbooks at public or private universities and community colleges. A.R.S. § 15-2402(B)(4)(i), (j). Students educated at home or who attend a private or online high school could enroll in one or more college courses—while still in high school—and pay for those courses with empowerment account funds. *Id.* Alternatively, parents might save empowerment account funds and use them at a postsecondary institution upon their child's graduation from high school. A.R.S. § 15-2402(B)(4)(i). Additionally, parents may, at any time, transfer empowerment account funds to a college savings plan authorized by 26 U.S.C. § 529. A.R.S. § 15-2402(B)(4)(h). Indeed, at least one parent has already transferred

empowerment account funds to a 529 college savings account. [IR 58 (Aff. Morley 3, ¶ 8(h))].

The Plaintiffs-Appellants complain that of the $198,764.42 expended by parents from their empowerment accounts, $182,636.88 was spent on tuition and fees at private schools. Opening Br. 8-9. But Plaintiffs-Appellants ignore that $286,354.32[7] was deposited into empowerment accounts in the first quarter, and that $70,971.51—nearly 25% of the total amount disbursed—remained unspent by parents as of November 1, 2011. [IR 58 (Aff. Morley 3, ¶ 8(l))]. Because the State makes deposits into empowerment accounts on a quarterly basis, most private schools ask that tuition be paid at the start of each quarter, meaning that these remaining, unspent funds are very likely to be spent or saved on things other than private school tuition.

Finally, parents always have the freedom and option to re-enroll their child in a public school. And they may do so at any time. [IR 58 (Aff. Morley 4, ¶ 10) ("[A] parent may terminate the agreement *at any time*, enroll his or her child in a public school and return the ESA funds to ADE.") (Emphasis added)]. *See also id.* at 3, ¶ 7 (during the first quarter, "[a] total of five recipients … [withdrew] from the program and re-enrolled in a public school and forfeited $16,622.28 from the first quarter's disbursement"). While any remaining empowerment account funds

[7] This amount represents .009% of the $3,105,201,100 in basic state aid to public schools in FY 21012. [IR 58 (Aff. Morley 2, ¶ 6)].

must be returned to the State, there are no penalties for re-enrolling in a public school and as long as empowerment account funds were spent on an authorized expenditure, there is no requirement to reimburse the State—even if the student returns to public school mid-year.

### C. Empowerment Account Students Do Not Have To Enroll In Private School.

Not one dollar of the money deposited in any empowerment account is earmarked for or required to be spent on private school tuition. Parents may opt to pursue an education in their home, either by instructing their child themselves, by hiring one or more private tutors, by using a private, online program, or any combination of those options. Plaintiffs-Appellants dispute this claim and argue that parents must enroll their children in private school to be eligible for an empowerment account. Opening Br. 5. Plaintiffs-Appellants are wrong, as demonstrated by: (1) the plain language of the Empowerment Account Program; (2) the recent legislative amendments to the program; (3) Defendant Huppenthal's clear statements to the contrary in the record below; (4) the Department's public statements to the contrary; and (5) the trial court's contrary conclusion.

As originally drafted, the Empowerment Account Program required a "qualified student" to attend a "qualified school," which was defined in relevant part as "a nongovernmental primary or secondary school." A.R.S. § 15-2401(4). Not all "nongovernmental" schools are private schools. Home schools are

nongovernmental schools, but they are not private schools. Arizona law defines a "homeschool" as "a *nonpublic school* conducted primarily by the parent, guardian or other person who has custody of the child or nonpublic instruction provided in the child's home." A.R.S. § 15-802(F)(1) (emphasis added). A "private school" is "a nonpublic institution, *other than the child's home*, where academic instruction is provided for at least the same number of days and hours each year as a public school." A.R.S. § 15-802(F)(2) (emphasis added). If the Legislature had intended to limit "qualified students" only to those attending private schools it would have done so. But it did not. It allowed eligible students to attend any *nongovernmental* school—a description that included both private and home schools.

On May 14, 2012, Governor Brewer signed H.B. 2622, 2012 Ariz. Sess. Laws, ch. 360, which clarified that parents are not required to enroll their children in a private school. 2012 Ariz. Sess. Laws, ch. 360, § 3 (effective Aug. 2, 2012). The revised law deletes the requirement that qualified students must attend a "nongovernmental school" and now says that qualified students must be educated "under a contract to participate in an empowerment scholarship account." 2012 Ariz. Sess. Laws, ch. 360, § 6 (renumbered as A.R.S. § 14-2401(6)(b)(i)). H.B. 2622 also adds A.R.S. § 15-802(G)(1), which defines an empowerment account student as "a child whose parent has signed a contract pursuant to section 15-2402 to educate the child outside of any school district or charter school and in which

the parent may *but is not required to* enroll the child in a private school or to educate the child through any of the methods specified in 42 section 15-2402." 2012 Ariz. Sess. Laws, ch. 360, § 3 (emphasis added). The amendment is relevant to the proper construction of the original act, particularly with regard to whether or not participating students are, or ever have been, required to enroll in private schools. *City of Mesa v. Killingsworth*, 96 Ariz. 290, 297, 394 P.2d 410, 414 (1964) ("An amendment which, in effect, construes and clarifies a prior statute will be accepted as the legislative declaration of the original act.").

Plaintiffs-Appellants wrongly assert that "Defendant John Huppenthal and the Arizona Department of Education have acknowledged that only private-school students can qualify for" an empowerment account. Opening Br. 5. To support this erroneous assertion, Plaintiffs-Appellants cite to the Empowerment Scholarship Account Agreement that the Department asks parents to sign when they open an empowerment account. The provision of the agreement to which Plaintiffs-Appellants point is paragraph 3(A)(1), which states that empowerment account expenditures are limited to "1. Tuition, fees, and/or required textbooks at a qualified school" and which defines qualified schools as private schools. [IR 58 Aff. Morley, Ex. 2]. In context, this makes perfect sense because, as Plaintiffs-Appellants themselves recognize, "home-schooling does not require the payment of tuition or fees." Opening Br. 15. To the extent that parents who home school

must expend money for textbooks, the authorization for such expenditures is found in section 3(A)(4 allowing for the purchase of curriculum.[8] [IR 58 Aff. Morley, Ex. 2].

Plaintiffs-Appellants' claim also conflicts with the Department's plain and unambiguous statements in the court below, and to the general public, declaring that qualified students do not need to be enrolled in a private school. Defendant Huppenthal clearly explained that empowerment account students may be home schooled rather than enrolled in private school. [IR 57 at 2, 7 ("The authorized education-related expenses support diverse education options including tutors, therapies, and *curriculum for qualifying students who are home schooled* and tuition, fees, and textbooks for qualifying students who attend private schools.") (Emphasis added); *and* ("The account holders spent the monies for tuition and fees, textbooks, educational therapies, tutoring, *curriculum for home-schooled students*, and contributions to a qualified § 529 tuition program.") (Emphasis added)]. In an official memorandum, the Department explains that empowerment accounts "allow[] parents to remove their special needs child/children from the public school system and enroll them in a private, online or a home school setting." Memorandum from Aiden Fleming, Legislative Liaison, Ariz. Dep't of Educ., to

[8] H.B. 2622 defines "curriculum" as "a complete course of study for a particular content area or grade level, including any supplemental materials required by the curriculum." 2012 Ariz. Sess. Laws, ch. 360, § 5.

Directors and Special Education Staff (March 26, 2012), http://www.azed.gov/esa/files/2011/09/esa-district-memo.pdf.[9]

Finally, Plaintiffs-Appellants' claim conflicts with the trial court's conclusion that an empowerment account "student does not have to be enrolled in a private or religious school to make use of the monies." [IR 68].

In light of the foregoing, Plaintiffs-Appellants are wrong when they assert that the Empowerment Account Program "exact[s] promises from recipients that restrict the choices that recipients can actually make in practice." Opening Br. 18. Parents are free to spend (or save) empowerment account funds for any combination of allowable educational services and resources and are not required to enroll their child in a private school.

[9] This Court may take judicial notice of statements made in official public records and documents that have been posted on a government website. Ariz. R. Evid. 201(b)(2). *See also Giragi v. Moore*, 48 Ariz. 33, 42, 58 P.2d 1249, 1252 (1936) ("[T]he court may, when it becomes necessary to determine whether an act has been enacted in conformity with the Constitution, take judicial notice of the pertinent facts appearing in these journals, because they are public records . . . .").

## STATEMENT OF THE ISSUES

1. Is the financial assistance provided to families by Arizona's publicly funded education savings account program the type of institutional aid prohibited by the Arizona Constitution's Aid or Religion clauses?

2. Do the Plaintiffs-Appellants have statutory standing to bring an unconstitutional conditions claim that does not allege an illegal expenditure of public funds?

3. If Plaintiffs-Appellants do have standing, does a publicly funded education savings account program that does not allow participants to enroll their student in a public school while participating in the program, but does allow them to return to public school at any time with no financial penalties, impose an unconstitutional condition on participants?

## ARGUMENT

### I. STANDARD OF REVIEW

The issues presented pose questions of law that are reviewed *de novo*. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). Plaintiffs-Appellants bear the burden of establishing that empowerment accounts are unconstitutional. *Hall v. A.N.R. Freight Sys.*, 149 Ariz. 130, 137, 717 P.2d 434, 437 (1986). Any doubt about whether empowerment accounts conflict with the Arizona Constitution must "be resolved in favor of constitutionality." *Ariz. Downs v. Ariz. Horsemen's Found.*, 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981). As demonstrated below, Plaintiffs-Appellants fall well short of discharging their burden.

### II. THE EMPOWERMENT ACCOUNT PROGRAM IS CONSTITUTIONAL.

To determine whether the Empowerment Account Program passes constitutional muster, the court must "look at the facts and circumstances . . . and realistically analyze the situation to see if there is any violation of state or federal constitutional prohibitions." *Cmty. Council v. Jordan*, 102 Ariz. 448, 456, 432 P.2d 460, 468 (1967). When interpreting a constitutional provision, the court's "primary purpose is to effectuate the intent of those who framed the provision." *Cain*, 220 Ariz. at 80, ¶ 10, 202 P.3d at 1181. The first step in effectuating our Framers' intent is to "examine the plain language of the provision." *Id*. If the

intent is clear from the language, the court will not depart from that language by engaging in any further analysis. *Id.* *See also Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 12, 730 P.2d 186, 189 (1986) ("We interpret constitutional provisions by examining the text and, *where necessary*, history in an attempt to determine the framers' intent.") (Emphasis added). If a provision is not clear, the court may "consider 'the history behind the provision, the purpose sought to be accomplished by its enactment, and the evil sought to be remedied.'" *Cain*, 220 Ariz. at 80, ¶ 10, 202 P.3d at 1181 (quoting *McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 290, 645 P.2d 801, 805 (1982)).

Plaintiffs-Appellants' constitutional arguments fail because they refuse to acknowledge how the challenged program actually operates. They try to avoid the facts by rewriting the Empowerment Account Program so that it functions like the voucher programs struck down in *Cain*, which required the programs' beneficiaries to transfer all of their public financial aid to private or religious schools. 220 Ariz. at 83, ¶ 26, 220 P.2d at 1184. But empowerment accounts are emphatically *not* vouchers because the beneficiaries have complete discretion as to how to spend their public financial aid without having to spend *any* of that aid at private or religious schools.

Parent-Intervenors do not dispute that empowerment accounts are a form of public financial aid to parents. The question is whether empowerment accounts are

the type of aid that is prohibited by the text of either the Aid or Religion Clause. *See* Ariz. Const. art. IX, § 10 (prohibiting appropriations "in aid of" private or sectarian schools); Ariz. Const. art. II, § 12 (prohibiting appropriations that "support" any religious establishment). While Plaintiffs-Appellants protest otherwise, not every type of financial "aid" is prohibited by our Constitution. *Cain*, 220 Ariz. at 84, ¶ 29, 202 P.3d at 1185 ("There may well be ways of providing aid to these student populations without violating the constitution."); *Kotterman v. Killian*, 193 Ariz. 273, 287 ¶ 43, 972 P.2d 606, 620 (1999) (stating that the Framers' "intent in prohibiting aid to religious institutions was not as all-encompassing as petitioners would have us hold"); *Pratt v. Ariz. Bd. of Regents*, 110 Ariz. 466, 468, 520 P.2d 514, 516 (1974) (holding that the Framers never intended to "entirely prohibit the use by religious groups of public and school property for religious purposes"); *Jordan*, 102 Ariz. at 451, 432 P.2d at 463 (rejecting the "strict view" that "no public monies may be channeled through a religious organization for any purpose whatsoever without, in fact, aiding that church").

Empowerment accounts provide financial aid to individuals without earmarking a single dollar for use at private or religious schools. As shown below, this sort of generalized aid is entirely consistent with the plain text, purpose, and history of the Aid and Religion Clauses.

### A. The Aid Clause, Article IX, § 10, Prohibits Aid To Institutions, Not Aid To Individuals.

Plaintiffs-Appellants do not seriously question that the Empowerment Account Program is intended to benefit families and children. But they refuse to acknowledge that the Legislature has designed a program that ensures that the program's beneficiaries do not have to use their public money at either a private or religious school, thus ensuring that any money that may ultimately be spent on private school tuition benefits the child and not the institution. The Empowerment Account Program passes constitutional muster because (1) none of the public funds deposited in any parents' empowerment account are earmarked for use at private or religious schools; and (2) the program provides parents abundant alternatives when deciding how to provide their children with an education.

#### 1. The Empowerment Account Program Comports With The Plain Text Of The Aid Clause By Providing Financial Aid To Individuals In A Manner That Ensures Those Individuals Have A Choice As To How To Use Their Aid.

Article IX, § 10, dubbed the Aid Clause in *Cain*, prohibits "appropriation[s] of public money made in aid of any church, private or sectarian school, or public service corporation." The language of Article IX, § 10 is addressed to legislative actions. Appropriating money for aid programs is plainly a *legislative* act. The operative language is not directed at private actors or actions. The Aid Clause's key phrase, "in aid of," suggests an inquiry into the legislative purpose behind, and

the constraints placed upon, the appropriation. Is an individual or a prohibited institution the intended beneficiary of the appropriation? And if the intended beneficiary is the individual, is the aid to that individual structured in such a way that, regardless of legislative intent, the aid must be viewed as aid to a prohibited institution? The Supreme Court has consistently demonstrated concern for both the intended beneficiary of the program and whether the program is structured to ensure that aid truly is given to an allowable aid recipient and not merely used as a conduit to funnel aid to a prohibited institution. As discussed below, in the Arizona Supreme Court's first two Aid Clause cases, *Kotterman* and *Jordan*, the appropriation had both a permissible intended beneficiary and a proper structure. But in *Cain*, although there was a proper intended beneficiary, there was not the proper structure; that is, the structure required the intended beneficiaries to direct all of their aid to one of the prohibited institutions.

In *Kotterman*, the Court upheld a scholarship-tax-credit plan because tax credits are not appropriations of public funds. 193 Ariz. at 287, ¶ 45, 972 P.2d at 620. And absent an appropriation, neither the Aid nor Religion Clause is implicated. *Id*. But the Court did not stop its analysis after determining tax credits were not appropriations. It continued and offered an alternate holding based on the program's intended beneficiaries and on the program's operation. The Court not only found that "scholarship recipients . . . are the primary beneficiaries of

contributions," *Kotterman*, 193 Ariz. at 282, n. 4, 972 P.2d at 615, but it also examined the structure and operation of the program, finding that the "*safeguards built into the statute* ensure that the benefits accruing from this tax credit fall generally to taxpayers making the donation, to families receiving assistance in sending children to schools of their choice, and to the students themselves." *Id*. at 287, ¶ 47, 972 P.2d at 620 (emphasis added).

Similarly, in *Jordan*, 102 Ariz. at 455, 432 P.2d at 467, the Supreme Court did not end its inquiry upon finding that the public funds given to the Salvation Army in that case were intended to benefit indigent individuals requiring emergency assistance. Instead, the Court examined what the public funds were used to purchase; what, if any, strings the Salvation Army attached to the provision of aid (such as attendance at religious chapel or profession of a particular faith); whether any care was taken to determine if a *bona fide* emergency existed before aid was given; and whether the expenses were proportional to the actual costs incurred by the Salvation Army. *Jordan*, 102 Ariz. at 451, 455-56, 432 P.2d at 463, 467-68. After taking all of these factors into account, the Court determined that "'[a]id' in the form of partially matching reimbursement for only the direct, actual costs of materials given entirely to third parties of any or no faith or denomination and not to the church itself is not the type of aid prohibited by our constitution." *Id*. at 454, 432 P.2d at 466. Of course, *Jordan* did not uphold the

"aid" just because it was in the form of a partial reimbursement. The Court noted that regardless of whether the reimbursement was full or partial, "aid" of some sort "in fact has been given to the religious organization." *Id*. at 453-54, 432 P.2d at 465-66. The question was whether, given the structure of the program and the intent to benefit indigent individuals, the "aid" was "the type of aid prohibited by our constitution." *Id*. at 454, 432 P.2d at 466.

Plaintiffs-Appellants argue that in *Cain* the Supreme Court abandoned the inquiry into who the Legislature intended to benefit and replaced it with a rigid rule that does not allow any public funds to flow to private schools. Opening Br. 22. But that is not at all what the Court did in *Cain*. Rather, the Court did take into account the programs' intended beneficiaries, but found the structure of the voucher programs so restrictive as to constitute an unconstitutional form of aid to private schools. The Court determined that the voucher programs were "a well-intentioned effort to assist two distinct student populations with special needs," *Cain*, 220 Ariz. at 84, ¶ 29, 202 P.3d at 1185, but found them unconstitutional because "*given the composition* of these voucher programs, applying the true beneficiary theory exception would nullify the" prohibition on aid to private and religious schools. *Id.* at 83, ¶ 27, 202 P.3d at 1184 (emphasis added).

Thus, under *Cain*, any program that required all participants to surrender the entirety of their State aid to a prohibited institution likely runs afoul of the Aid

Clause. *Id.* But the Empowerment Account Program is not such a program. Empowerment accounts are publicly funded education savings accounts—not vouchers. Students who have empowerment accounts are *not* required to spend even a single dollar at a private school. Participants may instead spend empowerment account funds on any mix of allowable educational services, such as tutors, home school curriculum, tuition to a community college, and beginning on August 2, 2012, they may purchase individual courses and extracurricular activities from public schools. A.R.S. § 15-2402(B)(4); 2012 Ariz. Sess. Laws, ch. 360, § 6.

Plaintiffs-Appellants assert that under no circumstances can the State permit parents to spend public funds at private schools because the State itself is prohibited from ever spending funds at such schools. Opening Br. 19. But the Supreme Court has never interpreted the Aid Clause to mean that no public money whatsoever can be spent at private or religious schools. *See, e.g.*, *Kotterman*, 193 Ariz. at 286, ¶ 42, 972 P.2d at 619 ("[W]hile the plain language of the provisions now under consideration indicates that the framers opposed direct public funding of religion, including sectarian schools, we see no evidence of a similar concern for indirect benefits."). Nor does *Cain* stand for the proposition that the State may never spend public funds at private—or even religious—schools. 220 Ariz. at 84, ¶ 29, 202 P.3d at 1185 ("There may well be ways of providing aid to these student populations without violating the constitution."). Indeed, if Plaintiffs-Appellants'

interpretation of *Cain* was correct, public school districts would be prohibited from their routine use of public funds to place students at private schools. And yet, for 30 years, the State has permitted public school districts to use public funds to place students with disabilities at private schools. *See* A.R.S. § 15-765(D). Any time a school district or charter school determines it is not able to provide a student with a disability an appropriate education, that student may be placed at a private school and the tuition paid with public funds. [IR 58 (Aff. Friesen 5, ¶ 13)].

The Arizona Supreme Court did not discuss A.R.S. § 15-765(D) in *Cain*. But the public placement statute would most certainly pass constitutional muster if challenged. Under the voucher programs, all appropriated funds were certain to flow to private schools because parents could *only* use the vouchers to pay for tuition at private schools. Section 15-765(D), however, permits public school officials to exercise discretion as to whether or not to place a student in a private school. This discretion ensures that any public funds spent to pay tuition at a private school are spent "in aid of" the individual child and not "in aid of" the private school, thus satisfying the Aid Clause.

Empowerment accounts function similarly to the public placement statute. The public funds deposited into an empowerment account are intended first and foremost to provide a child with a good education. It is only after parents determine the most appropriate educational placement for their child that any

money *might* be made available to private schools. Parents are thus given the same freedom that school district and charter school officials possess to contract—or not—with private schools depending on their child's individual needs.

Nicole Goodwin, a declarant below, is a perfect example of why parents need the same discretion that school districts possess to determine their children's educational placement. Ms. Goodwin's son James is eight-years-old and has autism. [IR 43]. When James started kindergarten, the Paradise Valley Unified School District determined that it could not provide him with an appropriate education. *Id.* The District placed him at the Hi-Star Center for Children ("Hi-Star"), a private school that specializes in working with special needs children who have the potential to perform well academically.[10] *Id*. The District paid the full tuition at Hi-Star as well as transportation costs for a public school bus to drive him to and from Hi-Star each day. *Id*. At Hi-Star, James became a model student and stopped engaging in unruly behaviors. *Id*.

These circumstances changed dramatically when James' parents moved to the Scottsdale School District. *Id*. Officials from that District observed James at Hi-Star and determined that the Scottsdale public schools could meet his needs. *Id.*

[10] James is not the only student to be placed by a school district at Hi-Star. In FY 2011, 54 students were in private placement at Hi-Star and the State provided school districts $1,055,987.43 in public funds for these students. [IR 58 Aff. Friesen 6 ¶ 14(b)].

James' parents did not initially object to giving Scottsdale schools a chance to serve James. *Id*. James started first grade in a Scottsdale public school in a self-contained classroom alongside other special needs children with academic potential. *Id*. Unfortunately, James' behavioral issues resurfaced immediately, and he lost the skills he had learned at Hi-Star. *Id*. He even developed new negative behaviors, such as intentionally soiling himself to express displeasure with his environment. *Id*.

James' parents believed that Hi-Star was the best place for James and asked the District to return him to Hi-Star. *Id*. Scottsdale refused and instead moved James to a different self-contained classroom—one full of lower-functioning children who did not possess James' academic potential. *Id*.

Obtaining an empowerment account allowed James' parents to return James to Hi-Star. *Id*. Two-months after James had returned to Hi-Star, he had relearned most of the skills he lost during his time in Scottsdale public schools and his negative behaviors had been extinguished. *Id*. The Empowerment Account Program permits James' parents to make the same educational placement decisions for him that State law allows school districts to make—decisions that are clearly "in aid of" James, not Hi-Star.

The Aid Clause does not prohibit the Empowerment Account Program because the program was passed "in aid of" individuals and not private schools and

because nothing in the program limits the ability of participants to decide where to use their public benefits or requires them to use those benefits at private schools.

### 2. The Empowerment Account Program Is Consistent With The Identified Purposes Of The Aid Clause Because The Program Does Not Require Parents To Use Their Aid At Private Or Religious Schools.

As with past cases involving the Aid Clause, the "textual analysis" above is "sufficient to decide the issues presented here." *Kotterman*, 193 Ariz. at 288, ¶ 53, 972 P.2d at 621. However, if the Court believes an inquiry into the purposes of the Aid Clause is necessary, the Empowerment Account Program is consistent with the purposes thus far identified by the Arizona Supreme Court as animating the Aid Clause.

Prior to *Cain*, the Arizona Supreme Court had identified only one purpose motivating the Framers' inclusion of the Aid Clause. It was "included in the Arizona Constitution to provide for the historical doctrine of separation of church and state, the thrust of which was to insure that there would be no state supported religious institutions thus precluding governmental preference and favoritism of one or more churches." *Jordan*, 102 Ariz. at 451, 432 P.2d at 463. This same purpose has also been identified as motivating the inclusion of the Religion Clause. Parent-Intervenors thus explain why the religious neutrality that characterizes the Empowerment Account Program satisfies this purpose in section II.B.2 below.

In *Cain*, however, the Court suggested a brand new purpose, quoting a law professor who had written that the provision seems designed to "'insure that the Arizona legislature adequately meets its affirmative constitutional obligation . . . to provide for the establishment and maintenance of a general and uniform public school system.'" 220 Ariz. at 82, ¶ 21, 202 P.3d at 1183 (quoting Paul Bender *et al.*, *The Supreme Court of Arizona: Its 1998-99 Decisions*, 32 Ariz. St. L.J. 1, 18 (2000)). The quoted article contains no historical evidence or other discussion to support that view. However, accepting that the purpose of the Aid Clause is to maintain such a system, *Cain* says only that this purpose is undermined by a system in which parents are required to use their aid at private schools. *Id*. at 84, ¶ 29, 202 P.3d at 1185. It left the door open to a program like the one at issue here where parents have a wide array of choices. *Id.* The challenged program is entirely consistent with the Aid Clause's identified purposes.[11]

[11] The purpose of the Aid Clause should be held to mirror the purpose of the Gift Clause, Article IX, § 7. *See* John D. Leshy, *The Arizona Constitution: A Reference Guide*, 212 (Greenwood Press, 1993) (noting that the Aid and Gift Clauses are closely related). The Gift Clause prohibits the State from "giv[ing] or loan[ing] its credit *in the aid of*, or mak[ing] any donation or grant, by subsidy or otherwise, *to any individual* . . . ." (Emphasis added). Thus, to the extent that Arizona's Framers intended to prohibit certain types of grants or subsidies "in the aid of" individuals, it appears they did so in the Gift Clause—not the Aid Clause. The Supreme Court has stated that the Gift Clause "was historically intended to protect against the extravagant dissipation of public funds by government in subsidizing private enterprises such as railroad and canal building in the guise of public interest," *Kotterman*, 193 Ariz. at 286, ¶ 52, 972 P.2d at 619, and that scholarships for private school tuition do not implicate such "evils." *Id.*

### B. The Religion Clause, Article II, § 12, Prohibits Appropriations That Support Religious Establishment, Not Appropriations That Provide Financial Support To Families.

Article II, § 12, the Religion Clause, simply does not apply to publicly funded education savings accounts like those at issue here. The clause deals with government actors "appropriating" or "applying" public money. It does not constrain private choices. There is no constitutional breach because the State remains entirely neutral regarding religious and nonreligious schools, curriculum, tutoring, and other services, by not dictating or influencing how parents spend empowerment account funds.

#### 1. The Empowerment Account Program Comports With The Plain Language Of The Religion Clause Because Private Individuals, Not Government Actors, Decide How The Funds Are Spent.

Plaintiffs-Appellants seek to extend the reach of the Religion Clause's language prohibiting religious establishments, which limits the conduct of government actors, to a restriction on how private citizens can use government benefits provided to them for a valid public purpose. *Cain* did not discuss how the Religion Clause would apply to the voucher programs at issue in that case. Therefore, the plain text of Article II, § 12 and the Supreme Court's interpretation of that provision in *Kotterman*, 193 Ariz. 273, 972 P.2d 606, controls this case.

In relevant part, Article II, § 12 prohibits the Legislature from appropriating or applying public money "to any religious worship, exercise, or

instruction, or to the support of any religious establishment." As a textual matter, the phrases "appropriated for" and "applied to" constrain governmental—not private—action. "Appropriating" public money obviously refers to the Legislature's power of appropriating money. It is not a word used to describe the act of private individuals paying for the education of their children. Similarly, "applying" public money is something that administrators or other persons charged with executing public functions do with public money. It is not a term used to describe what private individuals do with their public benefits.

Taking into account the plain language of the provision, the Supreme Court in *Kotterman* upheld a tax-credit program that funds private school scholarships. The Court held that tax credits are not public funds and therefore not an appropriation. *Kotterman*, 193 Ariz. at 287, ¶ 45, 972 P.2d at 620. Programs that do not involve appropriations do not implicate the Religion Clause. *Id*. But the Court also offered this alternate holding:

> Even if we were to agree that an appropriation of public funds was implicated here, we would fail to see how the tax credit for donations to a student tuition organization [STO] violates this clause. The way in which an STO is limited, the range of choice reserved to taxpayers, parents, and children, the neutrality built into the system—all lead us to conclude that benefits to religious schools are sufficiently attenuated to foreclose a constitutional breach.

*Id*. at 287, ¶ 46, 972 P.2d at 620.

This language tracks closely with the U.S. Supreme Court's Establishment Clause jurisprudence. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). As such, the Court of Appeals in *Cain* reasoned that the Religion Clause is "'virtually indistinguishable from the United States Supreme Court's interpretation of the federal Establishment Clause.'" *Cain*, 220 Ariz. at 80, ¶ 11, 202 P.3d at 1181 (quoting *Cain v. Horne*, 218 Ariz. 301, 306, ¶ 8, 183 P.3d 1269, 1274 (App. 2008)). The Court of Appeals thus upheld the voucher programs under the Religion Clause concluding that, "the voucher programs neither favor 'one religion over another nor religion over nonreligion,' because 'the parents . . . make an independent . . . choice to direct the funds to a particular school.'" *Id*. at 80-81, ¶ 12, 202 P.3d at 1181-82 (quoting *Cain*, 218 Ariz. at 306-07, ¶ 11, 183 P.3d at 1274-75). The Empowerment Account Program is constitutional for the same reasons.

As the trial court held, "[t]here is no purpose by the State to directly benefit any religious school. The monies flow from the State to the students' parents, and then to the entity of the parents' choice—which may or may not be a religious entity—for the benefit of the student." [IR 68]. This textual analysis is entirely consistent with the purpose the Arizona Supreme Court has identified as animating this provision; namely, to ensure there is no religious establishment and that the State remains impartial and completely neutral regarding religion.

### 2. The Empowerment Account Program Is Consistent With The Purpose Of The Religion Clause Because The Program Neither Favors Nor Disfavors Religion.

According to the Arizona Supreme Court, the purpose of Article II, §12 is to ensure "that there would be no *state* supported religious institutions" and to preclude "*governmental* preference and favoritism of one or more churches." *Pratt*, 110 Ariz. at 468, 520 P.2d at 516 (upholding lease of Sun Devil stadium to Reverend Billy Graham to conduct worship, religious exercise, and instruction) (emphasis added). "The State is mandated by this constitutional provision to be absolutely impartial when it comes to the question of religious preference, and public money or property may not be used to promote or favor any particular religious sect or denomination or religion generally." *Id.* at 468, 520 P.2d at 516. By depositing funds into an empowerment account, the Legislature maximizes parents' free and independent choice of educational services. The State does not care if parents contract with public, private or religious schools; purchase religious or nonreligious curriculum; or hire tutors to provide instruction from the Bible or tutors to help their students improve their math skills. The State does not condition any aspect of the program, from eligibility to expenses to termination, on religion or religious preference. The State remains impartial on matters of religion.

The Supreme Court further illuminated this purpose by adding, "We believe that the framers of the Arizona Constitution intended by this section to prohibit the

use of the power and the prestige of the State or any of its agencies for the support or favor of one religion over another, or of religion over nonreligion." *Id*. at 468, 520 P.2d at 516. Empowerment accounts do "not place the power, prestige or approval of the State . . . behind the religious beliefs" of any parent that may utilize her account to send her child to a religious school, to purchase religious curriculum, or employ tutors to provide religious instruction. *Id*. at 469, 520 P.2d at 517. As this Court stated in *Green v. Garriott*, 221 Ariz. 404, 410, ¶ 22, 212 P.3d 96, 102 (App. 2009), "[t]he State is not involved in encouraging parents to choose a sectarian school over a non-sectarian school. Sectarian schools receive aid only after parents, not the State, have selected sectarian schools to educate their children." The Empowerment Account Program is entirely consistent with the purpose of the Religion Clause.

### C. The History And Purpose Of The Aid And Religion Clauses Provides Further Evidence Of The Program's Constitutionality.

As discussed above, the Empowerment Account Program is constitutional under both the text and purpose of the Aid and Religion Clauses. This conclusion is further reinforced by an examination of the history surrounding the enactment of these two clauses. That history demonstrates that those clauses cannot be read as barring aid to individuals who have the option to use part of that aid to obtain educational services at private religious or nonreligious schools.

The constitutional provisions at issue in this case are "Blaine" Amendments, named after the politically ambitious James Blaine who introduced a federal constitutional amendment to prohibit aid to "sectarian" schools.[12] Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992). "Consideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). Both the Arizona Supreme Court and the U.S. Supreme Court have recognized the "shameful pedigree" and "insidious discriminatory intent" of the Blaine Amendments.[13] *Id*. at 828; *Kotterman*, 193 Ariz. at 291, ¶ 66, 972 P.2d at 624.

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[12] The text of the House and Senate versions of the federal Blaine Amendment can be found in Justice Feldman's dissent in *Kotterman*, 193 Ariz. at 299-300, ¶ 107, 972 P.2d at 632-33.

[13] There is a natural reaction inside every Arizonan to jump to the defense of our Framers, especially when charged with something as ugly as anti-Catholic bigotry. But they were not perfect men. For example, the Committee on Education and Public Institutions, which was chaired by delegate Moeur, proposed to require the State to maintain separate schools for white and colored children. The Records of the Arizona Constitutional Convention of 1910, 310, 1068 (John S. Goff, ed.). Moeur defended the proposition by arguing, "If the gentlemen of this convention want their children to go to school with colored children they have my permission, but I for one will never vote for white and colored children to attend the same school." *Id.* at 537. Thankfully, this regrettable provision was not included in the final Constitution albeit barely. But while delegate Moeur's proposal did not make it into the Constitution, Arizona's first Legislature proceeded to segregate its black and white children by statute. *See Harrison v. Riddle*, 44 Ariz. 331, 334, 36 P.2d

While Congress failed to pass the federal Blaine Amendment, "[b]y 1890, twenty-nine states had incorporated at least some language reminiscent of the Blaine amendment in their own constitutions," *Kotterman*, 193 Ariz. at 291, ¶ 66, 972 P.2d at 624 (citation omitted). The resulting state Blaine Amendments were drafted to rebuff efforts by the Catholics to obtain public funding for their schools equal to the public funding provided to the "nondenominationally" Protestant public schools. *See* Lloyd P. Jorgenson, *The State and the Non-Public School: 1825-1925* (1987); Thomas F. Buckley, *A Mandate for Anti-Catholicism: The Blaine Amendment*, America 18-21 (Sept. 27, 2004). In other words, the language of the federal Blaine Amendment and the state Blaine Amendments that it spawned were aimed at a specific target: halting the efforts of the Catholic Church to obtain direct funding for its parochial schools.

Such direct payments of public funds to Catholic schools were a controversial issue in Arizona's educational history. *Kotterman*, 193 Ariz. at 300-02, ¶¶ 110-114, 972 P.2d at 633-35 (Feldman, J., dissenting). Arizona's territorial

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984, 985 (1934) (explaining that the Revised Statutes of 1913, paragraph 2733, Civil Code, subdivision 2 instructed school districts to "segregate pupils of the African race from pupils of the white race"). Given this shameful history, it would be naïve to presume that no other forms of prejudice or bias could possibly have influenced the language chosen by our Framers. *Cf.* Linda Gordon, *The Great Arizona Orphan Abduction*, 305 (First Harvard Univ. Press 2001) ("Racism and anti-Catholicism infused western anti-Mexicanism, although not necessarily in equal parts, and the fused bigotry . . . proceeded from strength to strength for the next three decades" into the 1910s and 1920s.).

government appropriated public funds first to the mission school of San Xavier in 1866 and seven years later to St. Joseph's Academy. *Id*. Those actions triggered a battle royale between Governor A.P.T. Safford and Arizona Chief Justice Edmund Dunne, with Dunne supporting direct aid to Catholic schools and Safford opposing it. *Id*. The Safford faction prevailed, and President Ulysses S. Grant relieved Chief Justice Dunne of his position in 1875—the same year President Grant urged passage of the federal Blaine Amendment.

While there is no recorded discussion of our Blaine Amendments at the constitutional convention, the Arizona Supreme Court concluded that it "would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it." *Kotterman,* 193 Ariz. at 291, ¶ 66, 972 P.2d at 624. Of course, in the end it is irrelevant whether the adoption of Arizona's Blaine Amendments was in fact motivated by any "discriminatory intent" because Plaintiffs-Appellants ask this Court to extend the interpretation of the Aid and Religion Clauses far beyond their plain meaning. Our Supreme Court refused in *Kotterman* to revive the spirit of discrimination that gave rise to the Blaine Amendments by reading into them a requirement to discriminate against *all* religions (and not just Catholicism). This Court should similarly decline Plaintiffs-Appellants' invitation to abandon the plain text of the Aid and Religion Clauses, which only prohibit aid to institutions, by extending them to prohibit individuals

participating in a neutral government program from choosing among a wide array of both religious and nonreligious educational service providers.

Plaintiffs-Appellants do cite some history of their own to try and support their statement that it is "morally wrong to tax people to support religious practices." Opening Br. 16. They appeal to James Madison and Thomas Jefferson, *id*. at 16-17, who would both likely support the notion that it is morally wrong to compel individuals to financially support churches, as was a common practice during our nation's founding. *Cf.* Richard D. Komer, *School Choice and State Constitutions' Religion Clauses*, 3 Journal of School Choice 331, 335 (2009). However, in the context of religious freedom and issues of church and state separation, Madison and Jefferson held divergent views on many things and would likely have come to different conclusions regarding the constitutionality (under the First Amendment) of the Empowerment Account Program. *See* Vincent Phillip Muñoz, *God and the Founders: Madison, Washington, and Jefferson*, 157-58 (Cambridge Univ. Press 2009).

In Jefferson's view, religious instruction suppressed intellectual and political freedom. *Id*. at 72 (quoting Jefferson as arguing that history "furnishes no example of a priest-ridden people maintaining a free civil government"). It is very likely that Jefferson, whose vision for public education was to replace the religious schools so prevalent at the time, would likely have viewed any program

authorizing public expenditures at religious schools as violating the principle of separation of church and state. *Id*. at 146, 164.

Madison's views on church and state interactions, on the other hand, are rooted in jurisdictional concerns. He believed "that states lack jurisdiction to enact a law that takes cognizance of religion." *Id.* at 28 n. 48. He famously stated, "[w]e maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." James Madison, *Memorial & Remonstrance Against Religious Assessments* 1 (1785). According to Madison's "no cognizance of religion" theory, the state must be religion blind. Muñoz at 26. Madison would not have objected to the Empowerment Account Program because its eligibility requirements and expenditure authorizations take no cognizance of religion. *See id*.

The Madisonian view accords with the settled purposes identified by the Arizona Supreme Court that our Constitution is designed to preclude "*governmental* preference and favoritism of one or more churches" and ensure the State remains "absolutely impartial when it comes to the question of religious preference, and public money or property may not be used to promote or favor any particular religious sect or denomination or religion generally." *Pratt*, 110 Ariz. at 468, 520 P.2d at 516 (emphasis added).

## III. PLAINTIFFS-APPELLANTS LACK STATUTORY STANDING TO RAISE AN UNCONSTITUTIONAL CONDITIONS CLAIM BECAUSE THAT CLAIM DOES NOT ALLEGE THAT THE EXPENDITURE OF PUBLIC FUNDS IS ILLEGAL.

Plaintiffs-Appellants lack statutory standing to assert an unconstitutional conditions claim under A.R.S. § 35-213. The unconstitutional conditions claim does not allege that the Empowerment Account Program's expenditure of public funds is illegal. It merely seeks to invalidate a condition placed upon the acceptance of those funds. If the Plaintiffs-Appellants' claim for relief was granted, only the alleged unconstitutional condition—that parents agree not to enroll their children in a district or charter school as long as they are participating in the challenged program—would be invalidated. The underlying legislative authority to appropriate funds for deposit into education savings accounts and the authorization to spend those funds on all the educational products and services delineated in A.R.S. § 15-2402(B)(4) would still remain. The trial court thus properly dismissed Plaintiffs-Appellants' unconstitutional conditions claim.

### A. Plaintiffs-Appellants Have Abandoned Their Argument That They Possess Common Law Standing To Assert Their Unconstitutional Conditions Claim.

On appeal, Plaintiffs-Appellants rely exclusively on their argument that they have statutory standing under A.R.S. § 35-213. Their opening brief does not argue they have common law standing to bring an unconstitutional conditions claim. Plaintiffs-Appellants have thus abandoned any argument they possess common law

standing. ARCAP 13(a)(6) (The opening brief "shall concisely and clearly set forth . . . argument[s] which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."). Any claim not argued is abandoned. *DeElena v. S. Pac. Co.*, 121 Ariz. 563, 572, 592 P.2d 759, 768 (1979) (questions for review raised but not argued considered abandoned).

### B. Section 35-213 Only Authorizes Taxpayers To File A Lawsuit To Halt The Illegal Expenditure Of Public Funds. It Does Not Grant Plaintiffs-Appellants Standing To Bring An Unconstitutional Conditions Claim Wholly Divorced From Any Question About The Legality Of Any Expenditure.

Arizona law authorizes the Attorney General to "bring an action in the name of the state to enjoin the illegal payment of public monies . . . ." A.R.S. § 35-212(A). Similarly, A.R.S. § 35-213 authorizes taxpayers, after appropriate notice to the Attorney General, to likewise bring an action "to enjoin the illegal payment of public monies." Taxpayers possess precisely the same standing to challenge illegal expenditures under A.R.S. § 35-213 as the Attorney General possesses under A.R.S. § 35-212. The Arizona Supreme Court has held that certain constitutional challenges may be brought pursuant to these statutes if the outcome of any such challenge would preclude the expenditure of public funds. *State ex rel. Woods v. Block*, 189 Ariz. 269, 274, 942 P.2d 428, 433 (1997).[14]

[14] Whether *Woods* should remain good law is reserved for the proper forum.

Plaintiffs-Appellants' unconstitutional conditions claim does not seek to halt any expenditure of funds. Instead, it seeks to invalidate the condition that parents promise not to enroll their children in public school while using empowerment account funds to educate their children. If Plaintiffs-Appellants prevail on this claim, it will not halt either Defendant Huppenthal's ability to transfer funds to the State Treasurer for deposit into empowerment accounts or the expenditures that parents are authorized to make under the program. *See* Opening Br. 30 ("The State is free to grant the benefit without the waiver . . . ."). Thus, unlike the sort of constitutional challenges authorized by *Woods*, Plaintiffs-Appellants' unconstitutional conditions claim does not fairly encompass any request to prohibit expenditures under the program. Plaintiffs-Appellants therefore lack statutory standing.

## IV. IF THE PLAINTIFFS-APPELLANTS DO HAVE STANDING, THE EMPOWERMENT ACCOUNT PROGRAM DOES NOT IMPOSE AN UNCONSTITUTIONAL CONDITION.

Plaintiffs-Appellants' unconstitutional conditions claim is premised on an incorrect factual assertion, which is that students participating in the Empowerment Account Program are barred from enrolling in public school for the one-year term of the empowerment account agreement. Opening Br. 27-28. But, as explained below, students can return to public school at any time.

Unconstitutional conditions claims arise when the individual (or institution) upon whom the government is imposing the condition challenges the government's demands because the condition makes him, her, or it *worse* off. Indeed, all of the cases cited by Plaintiffs-Appellants were filed by the individuals or corporate entities upon whom the government imposed the condition. *See, e.g*., *Emp'rs' Liab. Assurance Corp. v. Frost*, 48 Ariz. 402, 62 P.2d 320 (1936); *Havasu Heights Ranch & Dev. Corp. v. State Land Dep't*, 158 Ariz. 552, 764 P.2d 37 (App. 1988); *State v. Quinn*, 218 Ariz. 66, 178 P.3d 1190 (App. 2008). But the situation here is quite different. The individuals who are subject to the condition being challenged in this case—individuals like the Parent-Intervenors and the declarants who have obtained empowerment accounts—believe the program makes them better off. Only Plaintiffs-Appellants, who are third parties with no connection to the program participants, assert that the promises parents make to obtain an account violate participants' rights. Plaintiffs-Appellants have not cited—nor are Parent-Intervenors aware of—any unconstitutional conditions case litigated by third party plaintiffs. This fact alone should conclusively demonstrate that there is no unconstitutional condition imposed by the program.

Second, and more importantly, the record clearly establishes that Plaintiffs-Appellants are factually incorrect about the ability of an empowerment account holder to close his or her account and return to public school. Soon after the

program began "[a] total of five recipients … [withdrew] from the program and re-enrolled in a public school and forfeited $16,622.28 from the first quarter's disbursement." [IR 58 (Aff. Morley 3, ¶ 7)]. Plaintiffs-Appellants' suggestion that public schools could turn away participants who close their accounts until the following school year runs head-long into two significant obstacles: the Arizona Constitution and federal law.

The Arizona Constitution states in no uncertain terms that: "The legislature shall provide for a system of common schools by which a free school shall be established and maintained in every school district for at least six months in each year, *which school shall be open to all pupils* between the ages of six and twenty-one years." Article XI, § 6 (emphasis added). The contract signed by parents to obtain an empowerment account cannot abrogate this right, and public schools cannot constitutionally decline to enroll a student. And with regard to students with disabilities, Plaintiffs-Appellants' interpretation would conflict with Arizona's duties under the federal Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. §§ 1400-1490. Under the IDEA, a school district cannot refuse to provide a free appropriate public education to any child with a disability.

Plaintiffs-Appellants' unconstitutional conditions claim fails because parents are free to exercise their constitutional rights and return their children to a public school at any time without any financial or other penalty attaching to that decision.

## CONCLUSION

The Empowerment Account Program is an education savings account program that ensures eligible parents have the ability to design an educational program that best meets their child's unique learning style. Opening an empowerment account does not require a student to enroll in or attend a private school. Empowerment accounts give parents a genuine choice when deciding where and how to educate their child. Because the Empowerment Account Program fully complies with the Arizona Constitution, Parent-Intervenors respectfully request that the trial court's judgment denying Plaintiffs-Appellants' request for injunctive relief and granting judgment in favor of Defendant and Defendant-Intervenors be affirmed.

Respectfully submitted this 9th day of July 2012,

INSTITUTE FOR JUSTICE
ARIZONA CHAPTER

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## CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the foregoing brief uses a proportionately spaced typeface of 14 points, is double-spaced using a Roman font and contains approximately 11,753 words.

/s/ Timothy D. Keller

# APPENDIX

H.B. 2622

**Conference Engrossed**

**State of Arizona**
**House of Representatives**
**Fiftieth Legislature**
**Second Regular Session**
**2012**

# CHAPTER 360
# HOUSE BILL 2622

## AN ACT

**AMENDING TITLE 15, CHAPTER 1, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTION 15-114; AMENDING SECTIONS 15-236, 15-802, 15-1182, 15-2401, 15-2402 AND 15-2403, ARIZONA REVISED STATUTES; MAKING AN APPROPRIATION; RELATING TO THE DEPARTMENT OF EDUCATION.**

**(TEXT OF BILL BEGINS ON NEXT PAGE)**

Be it enacted by the Legislature of the State of Arizona:

Section 1. Title 15, chapter 1, article 1, Arizona Revised Statutes, is amended by adding section 15-114, to read:

15-114. Display of school, charter school and school district achievements, classifications or rankings; expiration; definition

A. A SCHOOL, CHARTER SCHOOL OR SCHOOL DISTRICT SHALL NOT DISPLAY ANY ACHIEVEMENT, CLASSIFICATION OR RANKING THAT WAS ASSIGNED BY A PUBLIC OR PRIVATE ENTITY AFTER THE ACHIEVEMENT, CLASSIFICATION OR RANKING IS NO LONGER CURRENT UNLESS THE YEAR OF ISSUANCE OF THE ACHIEVEMENT, CLASSIFICATION OR RANKING IS PROMINENTLY DISPLAYED.

B. ANY PERSON MAY SUBMIT A COMPLAINT IN WRITING TO THE DEPARTMENT OF EDUCATION WITH EVIDENCE AND SPECIFIC FACTS OF AN ALLEGED VIOLATION OF SUBSECTION A OF THIS SECTION. THE DEPARTMENT OF EDUCATION SHALL INVESTIGATE THE COMPLAINT. IF THE DEPARTMENT DETERMINES THAT THERE IS A VIOLATION OF THIS SECTION, IT SHALL SEND TO THE SCHOOL, CHARTER SCHOOL OR SCHOOL DISTRICT WRITTEN NOTIFICATION OF THE VIOLATION AND INSTRUCTION TO COMPLY WITH THIS SECTION.

C. FOR THE PURPOSES OF THIS SECTION, "DISPLAY" MEANS THE PLACING OF AN ACHIEVEMENT, CLASSIFICATION OR RANKING ON OR IN ANY BILLBOARD, MARQUEE, PUPIL TRANSPORTATION VEHICLE, LETTERHEAD, ADVERTISING, INTERNET WEB PAGE, INTRANET PAGE, OFFICE, CLASSROOM, HALLWAY, GYMNASIUM OR SIMILAR PLACE.

Sec. 2. Section 15-236, Arizona Revised Statutes, is amended to read:

15-236. Special education programs; program and fiscal audits

A. The department of education shall conduct program and fiscal audits of selected district special education programs. The audits shall be designed to determine the degree of compliance with existing statutes and regulations and the appropriate placement of students in special education programs. A report of the findings of such audits shall be completed on or before ~~January~~ FEBRUARY 3 of each year. If the department of education determines that a child has been inappropriately placed in a special education program of a school district, the district's weighted student count for educational support services for students in group B as provided in section 15-943 shall be recomputed and the district's entitlement to state aid adjusted accordingly.

B. For each fiscal year the department of education shall request a separate line item appropriation for program and fiscal audits of special education programs in the budget estimate submitted pursuant to section 35-113.

Sec. 3. Section 15-802, Arizona Revised Statutes, is amended to read:

15-802. School instruction; exceptions; violations; classification; definitions

A. Every child between the ages of six and sixteen years shall attend a school and shall be provided instruction in at least the subjects of reading, grammar, mathematics, social studies and science. The person who has custody of the child shall choose a public, private or charter school or a homeschool as defined in this section to provide instruction OR SHALL SIGN A CONTRACT TO PARTICIPATE IN AN ARIZONA EMPOWERMENT SCHOLARSHIP ACCOUNT PURSUANT TO SECTION 15-2402.

B. The parent or person who has custody shall do the following:

1. If the child will attend a public, private or charter school, enroll the child in and ensure that the child attends a public, private or charter school for the full time school is in session. In accordance with guidelines adopted by the department of education, school districts and charter schools shall require and maintain verifiable documentation of residency in this state for pupils who enroll in the school district or charter school. If a child attends a school that is operated on a year-round basis, the child shall regularly attend during school sessions that total not less than one hundred eighty school days or two hundred school days, as applicable, or the equivalent as approved by the superintendent of public instruction.

2. If the child will attend a private school or homeschool, file an affidavit of intent with the county school superintendent stating that the child is attending a regularly organized private school or is being provided with instruction in a homeschool. The affidavit of intent shall include:

(a) The child's name.

(b) The child's date of birth.

(c) The current address of the school the child is attending.

(d) The names, telephone numbers and addresses of the persons who currently have custody of the child.

3. If the child will attend homeschool, the child has not reached eight years of age by September 1 of the school year and the person who has custody of the child does not desire to begin home instruction until the child has reached eight years of age, file an affidavit of intent pursuant to paragraph 2 of this subsection stating that the person who has custody of the child does not desire to begin homeschool instruction.

C. An affidavit of intent shall be filed within thirty days from the time the child begins to attend a private school or homeschool and is not required thereafter unless the private school or the homeschool instruction is terminated and then resumed. The person who has custody of the child shall notify the county school superintendent within thirty days of the termination that the child is no longer being instructed at a private school or a homeschool. If the private school or homeschool instruction is resumed, the person who has custody of the child shall file another affidavit of intent with the county school superintendent within thirty days.

D. A person is excused from the duties prescribed by subsection A or B of this section if any of the following is shown to the satisfaction of the school principal or the school principal's designee:

1. The child is in such physical or mental condition that instruction is inexpedient or impracticable.

2. The child has completed the high school course of study necessary for completion of grade ten as prescribed by the state board of education.

3. The child has presented reasons for nonattendance at a public school that are satisfactory to the school principal or the school principal's designee. For the purposes of this paragraph, the principal's designee may be the school district governing board.

4. The child is over fourteen years of age and is employed, with the consent of the person who has custody of him, at some lawful wage earning occupation.

5. The child is enrolled in a work training, career education, career and technical education, vocational education or manual training program that meets the educational standards established and approved by the department of education.

6. The child was either:

(a) Suspended and not directed to participate in an alternative education program.

(b) Expelled from a public school as provided in article 3 of this chapter.

7. The child is enrolled in an education program provided by a state educational or other institution.

E. Unless otherwise exempted in this section or section 15-803, a parent of a child between six and sixteen years of age or a person who has custody of a child, who does not provide instruction in a homeschool and who fails to enroll or fails to ensure that the child attends a public, private or charter school pursuant to this section OR FAILS TO SIGN A CONTRACT TO PARTICIPATE IN

AN EMPOWERMENT SCHOLARSHIP ACCOUNT PURSUANT TO SECTION 15-2402 is guilty of a class 3 misdemeanor. A parent who fails to comply with the duty to file an affidavit of intent to provide instruction in a homeschool is guilty of a petty offense.

F. IF A CHILD WILL BE EDUCATED PURSUANT TO AN EMPOWERMENT SCHOLARSHIP ACCOUNT PURSUANT TO SECTION 15-2402, THE DEPARTMENT OF EDUCATION SHALL PROVIDE A COPY OF THE CONTRACT TO PARTICIPATE IN THE EMPOWERMENT SCHOLARSHIP ACCOUNT TO THE SCHOOL SUPERINTENDENT OF THE COUNTY WHERE THE PUPIL RESIDES.

~~F.~~ G. For the purposes of this section:

1. "EDUCATED PURSUANT TO AN EMPOWERMENT SCHOLARSHIP ACCOUNT" MEANS A CHILD WHOSE PARENT HAS SIGNED A CONTRACT PURSUANT TO SECTION 15-2402 TO EDUCATE THE CHILD OUTSIDE OF ANY SCHOOL DISTRICT OR CHARTER SCHOOL AND IN WHICH THE PARENT MAY BUT IS NOT REQUIRED TO ENROLL THE CHILD IN A PRIVATE SCHOOL OR TO EDUCATE THE CHILD THROUGH ANY OF THE METHODS SPECIFIED IN SECTION 15-2402.

~~1.~~ 2. "Homeschool" means a nonpublic school conducted primarily by the parent, guardian or other person who has custody of the child or nonpublic instruction provided in the child's home.

~~2.~~ 3. "Private school" means a nonpublic institution, other than the child's home, where academic instruction is provided for at least the same number of days and hours each year as a public school.

Sec. 4. Section 15-1182, Arizona Revised Statutes, is amended to read:

15-1182. Special education fund; administration

A. There is established a special education fund, which shall consist of legislative appropriations made to the fund for purposes of this section and section 15-1202 ~~and chapter 19, article 1 of this title~~.

B. The fund shall be administered by the superintendent of public instruction for the purposes provided in this article and article 7 of this chapter ~~and chapter 19, article 1 of this title~~.

C. Each fiscal year the state board of education shall include in its budget request for assistance to schools a separate line item for the fund.

D. The fund shall provide monies for the education of a child who has been placed in a residential facility by a state placing agency or who requires a residential special education placement as defined in section 15-761 ~~or for deposit into an Arizona empowerment scholarship account pursuant to section 15-2402~~.

E. If a child has been placed in a residential facility by a state placing agency, the fund shall provide monies for the following types of vouchers:

1. Initial residential education vouchers to fund the educational costs for any child, whether or not eligible for special education. This paragraph applies to a child who has been placed in a residential facility and who has either not received a comprehensive education evaluation as provided in section 15-766, who has previously received such an evaluation and was determined to be ineligible for special education services or who is eligible for special education and for whom necessary procedures for changing the child's educational placement must be completed. This voucher expires on the expiration of sixty calendar days or completion of the educational evaluation or review of special education placement, whichever occurs first.

2. Continuing residential education vouchers that fund the educational costs for any child, whether or not eligible for special education, who requires placement in a residential facility after the expiration of the initial education voucher and who is not eligible for a residential special education voucher.

F. When a school district makes a residential special education placement, the fund shall provide monies to fund the residential special education placement.

G. Monies in the fund are exempt from the provisions of section 35-190 relating to lapsing of appropriations. Any monies left unexpended may be distributed to school districts by the department of education for the following purposes:

1. To provide educational counseling, training and support services to a child with a disability in order to maintain the child's educational placement in the least restrictive environment.

2. To provide educational transition assistance to children who return to their home after placement in a residential facility.

3. To train personnel for and develop and implement model programs for use by school districts to serve children with emotional disabilities.

H. The total amount of state monies that may be spent in any fiscal year by the superintendent of public instruction for the purposes of this article ~~and chapter 19, article 1 of this title~~ shall not exceed the amount appropriated or authorized by section 35-173 for that purpose. This article shall not be construed to impose a duty on an officer, agent or employee of this state to discharge a responsibility or to create any right in a person or group if the discharge or right would require an expenditure of state monies in excess of the expenditure authorized by legislative appropriation for that specific purpose.

Sec. 5. Section 15-2401, Arizona Revised Statutes, is amended to read:

15-2401. Definitions

In this chapter, unless the context otherwise requires:

1. "CURRICULUM" MEANS A COMPLETE COURSE OF STUDY FOR A PARTICULAR CONTENT AREA OR GRADE LEVEL, INCLUDING ANY SUPPLEMENTAL MATERIALS REQUIRED BY THE CURRICULUM.

~~1.~~ 2. "Department" means the department of education.

~~2.~~ 3. "Eligible postsecondary institution" means a community college as defined in section 15-1401, a university under the jurisdiction of the Arizona board of regents or an accredited private postsecondary institution.

~~3.~~ 4. "Parent" means a resident of this state who is the parent or legal guardian of a qualified student.

~~4.~~ 5. "Qualified school" means a nongovernmental primary or secondary school or a preschool for handicapped students that is located in this state and that does not discriminate on the basis of race, color or national origin.

~~5.~~ 6. "Qualified student" means a resident of this state who:

(a) Is ~~either~~ ANY OF THE FOLLOWING:

(i) Identified as having a disability under section 504 of the rehabilitation act OF 1973 (29 United States Code section 794). ~~;~~

(ii) Identified by a school district as a child with a disability as defined in section 15-761. ~~or~~

(iii) A child with a disability who is eligible to receive services from a school district under section 15-763.

(iv) ATTENDING A SCHOOL OR SCHOOL DISTRICT THAT HAS BEEN ASSIGNED A LETTER GRADE OF D OR F PURSUANT TO SECTION 15-241.

(v) A PREVIOUS RECIPIENT OF A SCHOLARSHIP ISSUED PURSUANT TO SECTION 15-891 OR THIS SECTION.

(vi) A CHILD OF A PARENT WHO IS A MEMBER OF THE ARMED FORCES OF THE UNITED STATES AND WHO IS ON ACTIVE DUTY.

(vii) A CHILD WITH A GUARDIAN WHO IS A MEMBER OF THE ARMED FORCES OF THE UNITED STATES AND WHO IS ON ACTIVE DUTY.

(viii) A CHILD WHO IS A WARD OF THE JUVENILE COURT AND WHO IS RESIDING WITH A PROSPECTIVE PERMANENT PLACEMENT PURSUANT TO SECTION 8-862 AND THE CASE PLAN IS ADOPTION OR PERMANENT GUARDIANSHIP.

(ix) A CHILD WHO WAS A WARD OF THE JUVENILE COURT AND WHO ACHIEVED PERMANENCY THROUGH ADOPTION OR PERMANENT GUARDIANSHIP.

(b) And who did any of the following:

~~(a)~~ (i) Attended a governmental primary or secondary school as a full-time student as defined in section 15-901 for at least the first one hundred days of the prior fiscal year and who transferred from a governmental primary or secondary school ~~to a qualified school~~ UNDER A CONTRACT TO PARTICIPATE IN AN EMPOWERMENT SCHOLARSHIP ACCOUNT.

~~(b)~~ (ii) PREVIOUSLY participated in the empowerment scholarship account program ~~in the previous year and whose parent renews the agreement pursuant to section 15-2402, subsection B~~.

~~(c)~~ (iii) Received a scholarship under section 43-1505 and who continues to attend a qualified school.

(iv) WAS ELIGIBLE FOR AN ARIZONA SCHOLARSHIP FOR PUPILS WITH DISABILITIES AND RECEIVED MONIES FROM A SCHOOL TUITION ORGANIZATION PURSUANT TO SECTION 43-1505 OR RECEIVED AN ARIZONA SCHOLARSHIP FOR PUPILS WITH DISABILITIES BUT DID NOT RECEIVE MONIES FROM A SCHOOL TUITION ORGANIZATION PURSUANT TO SECTION 43-1505 AND WHO CONTINUES TO ATTEND A QUALIFIED SCHOOL.

~~6.~~ 7. "Treasurer" means the office of the state treasurer.

Sec. 6. Section 15-2402, Arizona Revised Statutes, is amended to read:

15-2402. Arizona empowerment scholarship accounts

A. Arizona empowerment scholarship accounts are established to provide options for the education of students in this state.

B. To enroll a qualified student for an empowerment scholarship account, the parent of the qualified student must sign an agreement to do all of the following:

1. Provide an education for the qualified student in at least the subjects of reading, grammar, mathematics, social studies and science.

2. Not enroll the qualified student in a school district or charter school and release the school district from all obligations to educate the qualified student. THIS PARAGRAPH DOES NOT RELIEVE THE SCHOOL DISTRICT OR CHARTER SCHOOL THAT THE QUALIFIED STUDENT PREVIOUSLY ATTENDED FROM THE OBLIGATION TO CONDUCT AN EVALUATION PURSUANT TO SECTION 15-766.

3. Not accept a scholarship from a school tuition organization pursuant to title 43 CONCURRENTLY WITH AN EMPOWERMENT SCHOLARSHIP ACCOUNT for the qualified student in the same year a parent signs the agreement pursuant to ~~subsection B of~~ this section.

4. Use the money deposited in the qualified student's Arizona empowerment scholarship account only for the following expenses of the qualified student:

(a) Tuition or fees at a qualified school.

(b) Textbooks required by a qualified school.

(c) Educational therapies or services for the qualified student from a licensed or accredited practitioner or provider, INCLUDING LICENSED OR ACCREDITED PARAPROFESSIONALS OR EDUCATIONAL AIDES.

(d) Tutoring services provided by a tutor accredited by a state, regional or national accrediting organization.

(e) Curriculum.

(f) Tuition or fees for a nonpublic online learning program.

(g) Fees for a nationally standardized norm-referenced achievement test, advanced placement examinations or any exams related to college or university admission.

(h) Contributions to a qualified tuition program established pursuant to ~~11~~ 26 United States Code section 529 FOR THE BENEFIT OF THE QUALIFIED STUDENT.

(i) Tuition or fees at an eligible postsecondary institution.

(j) Textbooks required by an eligible postsecondary institution.

(k) Fees for management of the empowerment scholarship account by firms selected by the ~~department~~ TREASURER.

(l) SERVICES PROVIDED BY A PUBLIC SCHOOL, INCLUDING INDIVIDUAL CLASSES AND EXTRACURRICULAR PROGRAMS.

5. NOT FILE AN AFFIDAVIT OF INTENT TO HOMESCHOOL PURSUANT TO SECTION 15-802, SUBSECTION B, PARAGRAPH 2 OR 3.

6. NOT USE MONIES DEPOSITED IN THE QUALIFIED STUDENT'S ACCOUNT FOR ANY OF THE FOLLOWING:

(a) COMPUTER HARDWARE OR OTHER TECHNOLOGICAL DEVICES.

(b) TRANSPORTATION OF THE PUPIL.

(c) CONSUMABLE EDUCATIONAL SUPPLIES, INCLUDING PAPER, PENS OR MARKERS.

C. In exchange for the parent's agreement pursuant to subsection B of this section, the department shall transfer from the ~~special education fund pursuant to section 15-1182~~ MONIES THAT WOULD OTHERWISE BE ALLOCATED TO A RECIPIENT'S PRIOR SCHOOL DISTRICT to the treasurer for deposit into an Arizona empowerment scholarship account an amount that is equivalent to ninety per cent of the base support level prescribed in section 15-943 for that particular student. THE DEPARTMENT MAY RETAIN UP TO FIVE PER CENT OF THE BASE SUPPORT LEVEL PRESCRIBED IN SECTION 15-943 FOR EACH STUDENT WITH AN EMPOWERMENT SCHOLARSHIP ACCOUNT FOR DEPOSIT IN THE DEPARTMENT OF EDUCATION EMPOWERMENT SCHOLARSHIP ACCOUNT FUND ESTABLISHED IN SUBSECTION D OF THIS SECTION, OUT OF WHICH THE DEPARTMENT SHALL TRANSFER ONE PER CENT OF THE BASE SUPPORT LEVEL PRESCRIBED IN SECTION 15-943 FOR EACH STUDENT WITH AN EMPOWERMENT SCHOLARSHIP ACCOUNT TO THE STATE TREASURER FOR DEPOSIT IN THE STATE TREASURER EMPOWERMENT SCHOLARSHIP ACCOUNT FUND ESTABLISHED IN SUBSECTION E OF THIS SECTION.

D. THE DEPARTMENT OF EDUCATION EMPOWERMENT SCHOLARSHIP ACCOUNT FUND IS ESTABLISHED CONSISTING OF MONIES RETAINED BY THE DEPARTMENT PURSUANT TO SUBSECTION C OF THIS SECTION. THE DEPARTMENT SHALL ADMINISTER THE FUND. MONIES IN THE FUND ARE SUBJECT TO LEGISLATIVE APPROPRIATION. MONIES IN THE FUND SHALL BE USED FOR THE DEPARTMENT'S COSTS IN ADMINISTERING EMPOWERMENT SCHOLARSHIP ACCOUNTS UNDER THIS CHAPTER. MONIES IN THE FUND ARE EXEMPT FROM THE PROVISIONS OF SECTION 35-190 RELATING TO LAPSING OF APPROPRIATIONS. IF THE NUMBER OF EMPOWERMENT SCHOLARSHIP ACCOUNTS SIGNIFICANTLY INCREASES AFTER FISCAL YEAR 2012-2013, THE DEPARTMENT MAY REQUEST AN INCREASE IN THE AMOUNT APPROPRIATED TO THE FUND IN ANY SUBSEQUENT FISCAL YEAR IN THE BUDGET ESTIMATE SUBMITTED PURSUANT TO SECTION 35-113.

E. THE STATE TREASURER EMPOWERMENT SCHOLARSHIP ACCOUNT FUND IS ESTABLISHED CONSISTING

OF MONIES TRANSFERRED BY THE DEPARTMENT TO THE STATE TREASURER PURSUANT TO SUBSECTION C OF THIS SECTION. THE STATE TREASURER SHALL ADMINISTER THE FUND. MONIES IN THE FUND SHALL BE USED FOR THE STATE TREASURER'S COSTS IN ADMINISTERING THE EMPOWERMENT SCHOLARSHIP ACCOUNTS UNDER THIS CHAPTER. IF THE NUMBER OF EMPOWERMENT SCHOLARSHIP ACCOUNTS SIGNIFICANTLY INCREASES AFTER FISCAL YEAR 2013-2014, THE STATE TREASURER MAY REQUEST AN INCREASE IN THE AMOUNT APPROPRIATED TO THE FUND IN ANY SUBSEQUENT FISCAL YEAR IN THE BUDGET ESTIMATE SUBMITTED PURSUANT TO SECTION 35-113. MONIES IN THE FUND ARE SUBJECT TO LEGISLATIVE APPROPRIATION. MONIES IN THE FUND ARE EXEMPT FROM THE PROVISIONS OF SECTION 35-190 RELATING TO LAPSING OF APPROPRIATIONS.

~~D.~~ F. A parent must renew the qualified student's empowerment scholarship account on an annual basis. NOTWITHSTANDING ANY CHANGES TO THE STUDENT'S MULTIDISCIPLINARY EVALUATION TEAM PLAN, A STUDENT WHO HAS PREVIOUSLY QUALIFIED FOR AN EMPOWERMENT SCHOLARSHIP ACCOUNT SHALL REMAIN ELIGIBLE TO APPLY FOR RENEWAL UNTIL THE STUDENT FINISHES HIGH SCHOOL.

~~E.~~ G. A signed agreement under this section constitutes school attendance required by section 15-802.

~~F.~~ H. A qualified school or a provider of services purchased pursuant to subsection B, paragraph 4 of this section may not share, refund or rebate any Arizona empowerment scholarship account monies with the parent or qualified ~~child~~ STUDENT in any manner.

~~G.~~ I. On the qualified student's graduation from a postsecondary institution or after any period of four consecutive years after high school graduation in which the student is not enrolled in an eligible postsecondary institution, the qualified student's Arizona empowerment scholarship account shall be closed and any remaining funds shall be returned to the state.

~~H.~~ J. Monies received pursuant to this article ~~does~~ DO not constitute taxable income to the parent of the ~~qualifying~~ QUALIFIED student.

Sec. 7. Section 15-2403, Arizona Revised Statutes, is amended to read:

15-2403. Empowerment scholarship accounts; administration; audit; rules

A. The treasurer may contract with private financial management firms to manage Arizona empowerment scholarship accounts with the supervision of the treasurer.

B. The department shall conduct or contract for annual audits of a random sample of empowerment scholarship accounts to ensure compliance with section 15-2402, subsection B, paragraph 4. The department may also conduct or contract for audits of empowerment scholarship accounts as needed to ensure compliance with section 15-2402, subsection B, paragraph 4.

C. The department may remove any parent or qualified student from eligibility for an Arizona empowerment scholarship account and shall notify the treasurer. A parent may appeal the department's decision pursuant to title 41, chapter 6, article 10.

D. The department may refer cases of substantial misuse of monies to the attorney general for investigation if the department obtains evidence of fraudulent use of an account.

~~E. The treasurer may deduct up to three per cent of the amount of student state aid from each empowerment scholarship account for the costs of administering empowerment scholarship accounts under this chapter, including costs incurred by the department.~~

~~F.~~ E. The department shall make quarterly transfers of the amount calculated pursuant to section 15-2402, subsection C to the treasurer for deposit into the empowerment scholarship account of each qualified student.

F. THE DEPARTMENT SHALL DETERMINE A PERIOD THAT IS BETWEEN JULY 1 AND MAY 1 OF EACH YEAR DURING WHICH IT WILL ACCEPT APPLICATIONS FOR THE FOLLOWING FISCAL YEAR. ON OR BEFORE MAY 30 OF EACH YEAR, THE DEPARTMENT SHALL FURNISH TO THE JOINT LEGISLATIVE BUDGET COMMITTEE AN ESTIMATE OF THE AMOUNT REQUIRED TO FUND EMPOWERMENT SCHOLARSHIP ACCOUNTS FOR THE FOLLOWING FISCAL YEAR. THE DEPARTMENT SHALL INCLUDE IN ITS BUDGET REQUEST FOR THE FOLLOWING FISCAL YEAR THE AMOUNT ESTIMATED IN SECTION 15-2402, SUBSECTION C FOR EACH QUALIFIED STUDENT.

G. The department may adopt rules AND POLICIES necessary for the administration of empowerment scholarship accounts.

Sec. 8. Appropriation; department of education; exemption

A. The sum of $200,000 is appropriated from the department of education empowerment scholarship account fund established by section 15-2402, Arizona Revised Statutes, as amended by this act, in fiscal year 2012-2013 to the department of education for the purposes prescribed in that section.

B. The appropriation made in subsection A of this section is exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations.

Sec. 9. Effective date

Section 15-1182, Arizona Revised Statutes, as amended by this act, is effective from and after June 30, 2013.

APPROVED BY THE GOVERNOR MAY 14, 2012.

FILED IN THE OFFICE OF THE SECRETARY OF STATE MAY 15, 2012.