



TRANSCRIPT

The Fight for Educational Freedom: IJ's Role in Seizing the Opportunities of 2017

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Caitlyn Healy (CH): Hi everyone and welcome to IJ's Partners Club LIVE call discussing the fight for educational freedom. I'm Caitlyn Healy, Partners Club manager here at the Institute for Justice. If this is your first time joining us, this event is part of a series we designed to provide members of IJ's Partners Club with greater insight into our comprehensive strategy to advance individual liberty.

Now I'm pleased to introduce Melanie Hildreth who will be hosting our conversation today. Melanie is vice president of external relations here at IJ and works to generate support for and awareness of our efforts, from litigation and communications to activism and strategic research. Thanks so much for joining us, Melanie.

Melanie (MH): Thank you, Caitlyn, and welcome everyone. As many of you know the Institute for Justice serves as the lawyers for the school choice movement. In fact, since we opened our doors in 1991, there hasn't been a day that we haven't been in court somewhere, defending programs that offer students an opportunity to get a great education regardless of their zip code.

Now that meant, sometimes in the last 26 years, that we were defending a single program in a single state. But recently, school choice is taking an ever-increasing role on IJ's docket. In the last four years, we've successfully defended programs before five state supreme courts. We're now litigating four cases and will be before at least two more state supreme courts—Georgia and Montana—in the months ahead.

One of the key players in those efforts is our guest today: Tim Keller, managing attorney of IJ's Arizona office. Tim is a leader of our school choice team and is active both in court, representing parents and children, and behind the scenes, helping to get school choice programs off to the strongest possible start. Welcome, Tim.

Tim (TK): Well thank you, Melanie, I'm glad to be here.

MH: So Tim, the philosophy behind school choice goes back to at least the 1950s, when Milton Friedman suggested vouchers that let state education dollars follow students to the school of their parents' choice, but opportunities to implement those ideas are relatively new. To get us started, could you provide a quick background on the origins of the school choice movement?

TK: Sure. The first modern school choice program was passed in Wisconsin in 1999 and it was the result of a bipartisan proposal that was put forth by a Democratic representative named Polly Williams and Republican Governor Tommy Thompson. Polly represented a number of students who were trapped in an utterly failing school system in inner-city Milwaukee, and she wanted to empower those families that she represented to enroll in schools that would best meet her constituents' unique educational needs. And the result of their combined effort was the Milwaukee school voucher program.

Soon thereafter, we saw programs crop up in Cleveland, Ohio, statewide programs in Arizona, Florida, and Illinois, and today there are 50 school choice programs in 30 states and Washington, D.C. and over 400,000 children participating in those programs.

MH: We talk about “school choice” and “educational choice,” but those terms actually encompass many different types of programs. Could you explain how some of the most popular programs work?

TK: There are three main types of school choice programs that IJ defends. The first type are traditional voucher programs, like the one I just mentioned in Milwaukee and in Cleveland, where parents are free to choose a private school and pay for tuition or fees using some percentage of the money that would otherwise have been spent at their assigned government school.

The second type of program is funded by private charitable donations for which the donors or taxpayers receive a tax credit for their contribution to private nonprofit organizations that then award private school scholarships to those students and families that apply. These tax credits are also sometimes granted directly to parents for their out-of-pocket tuition costs.

The third and final type of program is education savings accounts, or ESAs. These are relatively new programs that deposit funds into a flexible education spending account and allow parents to spend those funds on a wide array of educational goods and services, so tutoring, homeschool curriculum, special education therapies, and of course private school tuition. The interesting thing about ESAs is that they could be funded with either tax credits or with public funds.

MH: So taking a step back, why is IJ involved in school choice at all? How did it become a pillar of our litigation?

TK: The overarching goal of IJ’s school choice litigation is the same as in our other cases—to protect and defend essential American freedoms.

One of the philosophies that undergirds our school choice work is that if the government is going to fund education, it ought to do so in a way that maximizes parental choice and minimizes government monopolization. We became involved in school choice soon after the Milwaukee program was passed. IJ lawyers recognized that it would be challenged in court and immediately flew to Wisconsin to meet with that Democratic representative I mentioned, Polly Williams. IJ asked if Polly and the state were ready for a lawsuit. Their response was, “What lawsuit?” They didn’t see one coming. It was at that point that it became clear that if the school choice movement was going to survive and thrive, it would need an advocate in court with a clearly defined legal strategy who could make a consistent, cohesive argument for why school choice is constitutional in both the courts of law and the court of public opinion in each individual state that would adopt the program.

MH: So IJ’s school choice cases have the same goal as our other litigation—what makes it different from our efforts in other areas of the law?

TK: In most of IJ’s cases, we either represent plaintiffs who are challenging the government or we are defending someone in a case that was initiated by the government against our clients. But IJ’s school choice work is a little different. The school choice cases we are involved with are typically filed by opponents of school choice against the government. IJ then moves to intervene in those cases on behalf of parents and students, as defendants alongside the state. If it weren’t for IJ, the voices and interests of the true beneficiaries of school choice programs—the parents and students—would not be heard as part of the litigation.

And of course, in addition to providing a voice for parents, IJ’s role in the school choice movement is critical for another reason. That is that not every state’s attorney generals’ office will vigorously defend school choice programs. No state’s attorney generals’ office has the same strategic, nationwide vision for setting precedent that can then be used in future cases in other states when those states pass school choice programs and in federal courts as opportunities arise.

MH: Well speaking of federal courts, as many of our callers know, IJ actually won a major victory for parents and children in 2002 when the U.S. Supreme Court decided in our favor in *Zelman v. Simmons-Harris*. In that case, the Court ruled that school choice is constitutional. So Tim, after a Supreme Court victory, why are we still litigating school choice cases? Isn’t everything done?

TK: (Laughing) It would be nice. In *Zelman*, the U.S. Supreme Court upheld Cleveland’s school voucher program under the federal Establishment Clause, which prohibits the federal and state governments from making “any law respecting an establishment of religion.” There the U.S. Supreme Court said that allowing parents to choose freely between public, private, and religious schools was constitutional so long as the government remained completely neutral with regard to religion—that is, neither favoring nor disfavoring religion—and so long as parents exercised a genuine choice as to where to send their children to school.

Soon after we won that decision, however, the National Education Association’s general counsel publicly vowed to continue challenging school choice programs in state courts under state constitutions, and promised to invoke not only state religion clauses, but any “Mickey Mouse” provision that might be used to halt school choice. And so that’s where we find ourselves now. Defending school choice programs one state at a time.

MH: Are there certain favorite tools that the unions like to use?

TK: Ha, yes! Their favorite tool is known as a Blaine Amendment. Blaine Amendments are found in approximately 37 state constitutions, and they are named after a former speaker of the U.S. House of Representatives and United States Senator, James G. Blaine, who served in the late 1880s. Mr. Blaine served during a time when this country was seeing a massive influx of Catholic immigrants. And when these immigrants arrived on our shores, what they found was our public schools were inhospitable to their religious beliefs. Because far from being the nonreligious institutions we know today, they were in fact primarily Protestant schools and often thought doctrines that were inconsistent with Catholic beliefs. Our new Catholic immigrants began lobbying for a separate system of publicly funded Catholic schools alongside the then-publicly funded Protestant schools, which resulted in a huge backlash against these newly arrived immigrants. Mr. Blaine sought to ride this wave of anti-Catholic bigotry into the White House by proposing an amendment to the U.S. Constitution that would have prohibited funding for “sectarian” schools. And at that time it was an open secret that the word sectarian was really code for Catholic, and indeed the U.S. Supreme Court has acknowledged that in recent opinions. But, even though Mr. Blaine’s efforts to amend the U.S. Constitution failed, his proposed amendment found its way into numerous state constitutions shortly after his failed attempt to amend the U.S. Constitution. So now, our opponents seek to expand the original animus that underlied the Blaine Amendment (i.e. hostility towards Catholics) and expand it to hostility toward religion generally, by trying to prohibit families from choosing religious options in an otherwise neutral school choice program.

MH: So knowing that programs are challenged this way, what can advocates of school choice in a particular state do to help their program survive and to thrive once it is passed?

TK: Well, I'll give you three things that could be done. Number one, don't wait until a program is passed before you get IJ involved. The school choice team here spends countless hours reviewing draft legislation to help bulletproof it from constitutional attack.

Second, begin building a coalition of parents, children, liberty-minded folks, and educational service providers as early on in the process as possible and make sure their voices are heard both before and after a program is passed.

Then the third thing is not to neglect the hard work of implementing a school choice program once it is passed. It takes a lot of effort to get a program off the ground: to make sure that parents know that it exists, to make sure that private schools know that it exists, and, if it's an ESA program and there are other educational service providers that can participate, to make sure they know the program exists and how it operates. And then work together to ensure that whatever program you have will continue to thrive and expand in the future. It's been our experience that school choice begets school choice when programs are carefully and successfully implemented from the get-go.

MH: Well I actually know for a fact that people from all over the country are calling you and others on IJ's school choice team to talk about new programs. And given what you know from those sorts of conversations, what would you say the prospects are for advancing school choice this legislative session?

TK: Well we have seen an unprecedented number of states considering school choice bills this session, or at least asking for our review of draft legislation. Right now, we are aware of at least 37 proposals, the vast majority of which are in states that, right now, either have no school choice or only very small programs. With the recent influx of pro-school choice legislators and governors, the prospects at this point are looking very bright for school choice in 2017.

MH: What are the obstacles that you see, or what are the biggest obstacles at this point to those programs?

TK: Well, as the popularity of and interest in school choice continues to grow, our opponents have become more strident and they are dedicating more and more resources to preventing state legislatures from passing new programs in the first instance. I believe strongly that it's due in part to the fact that IJ has been able to successfully defend so many school choice programs in our 25-year history. We've won 16 victories for school choice, we've taken 14 school choice cases to state supreme courts, and no court has ever

struck down a tax credit funded school choice program under our watch. We expect that our opponents will continue to make their voices heard at state legislatures to try and defeat these numerous proposals, and we fully expect that they will continue to challenge them in court as new programs are enacted.

CH: Thank you guys so much for that great overview, Melanie and Tim. We do have lots of questions coming in from Partners, so we want to start turning to those. If you have a question you would like to ask, please press * on your telephone now and we'll add you to our queue.

We had a couple questions come in in advance from our Partners, so we will start with those questions. First off, both Richard in California and Ken in Illinois had questions about how the incoming federal administration (President-Elect Trump and Education Secretary nominee Betsy DeVos) will affect IJ's school choice efforts. Tim, could you speak to that?

TK: I really believe the major focus of the school choice movement is going to remain on state, and not federal, programs. I do expect the incoming administration will look for ways to give states more freedom to use federal education dollars that are already being spent and hopefully look at rolling back federal regulation. Of course, I'm sure that Betsy DeVos will use her proverbial bully pulpit to promote school choice throughout the country, but again I think that the vast majority of IJ's work will remain focused in state legislatures and state courts.

CH: Our next question comes from Deborah in Indiana, she asks: "Unlike public schools, private schools are not obligated, and often do not accept and keep children having trouble keeping up or who are disruptive. What will happen to children with behavioral and/or cognitive disabilities? If private schools accept and keep only those students who are likely to excel, then their success rate for student achievement would be much higher than public schools that are mandated to serve all students regardless of ability. Further, schools receiving federal funds are mandated to provide a free and appropriate education to children with disabilities. If private schools receive vouchers or other types of support from the state or federal governments, will they be held to those mandates?"

TK: In my experience, in every state where I have litigated a school choice program, there are numerous private schools whose mission is to serve the proverbial "least of these." Many schools seek to work with children with disabilities, children with low income, and children who are behind in school.

One of my favorite examples of this is a former IJ client named Austin Fox. Austin has Asperger's Syndrome, and so he is a high-functioning student with autism. He was enrolled in a really very good public high school in the state of Arizona and that

school was doing everything they could to serve him, following all the dictates of his individualized education program. But regardless of how hard the school tried, because his senses were simply overwhelmed by the regular classrooms and his inability to go to a self-contained classroom due to the fact that he was such a high-functioning student, he was struggling. He had a 2.0 GPA and he was about to drop out of school after his sophomore year. However, he agreed to give private school a shot with an ESA here in Arizona.

Now Austin was an Atheist and yet he chose to enroll in a relatively small, Christian school because their classroom environment was highly unstructured. Rather than sitting in regular classrooms, students worked at their own pace at their own desk and had access to master teachers from across all the subjects who would basically supervise each individual student's progress to allow them to move at their own pace. Austin thrived in this environment and ultimately graduated with a near 4.0 GPA, scored in the 98th percentile on his SATs, and he was recruited to ASU's computer programming course upon his high school graduation. Now, he is working at another private school and is working with children with autism, similar to where he found himself not too long ago. It is my firm belief that with school choice programs, private schools will find a way to serve children with special needs and children from lower-income families.

CH: Thanks so much Tim. We've got a question from Bernie in Lee County, Florida. Bernie, you are live.

Bernie: Good afternoon, I am in Lee County, Florida, where the only school choice is charter schools and they are reluctant to do that. But there are a lot of charter schools here in Lee County. The issue that is frequently raised by opponents here, particularly from the liberals on the county school board, is that charter schools really don't do on average much better for the students than the general public schools. I wonder if you have statistics in that regard?

TK: IJ's school choice work focuses on programs that allow children to attend private schools; our focus is not on charter schools. We do support charter schools but again it's not our area of expertise. What I can tell you with regard to our private school choice work is that there is a significant number of studies that show children who participate in the school choice program do exceedingly well and those schools that are subject to real competition from private school choice programs also tend to improve academically for those students. The research is rock solid with regard to the efficacy of private school choice programs, and in fact, I think it is really the only truly proven method to improve public education in America.

CH: As a reminder, if you have a question for Tim or Melanie, please press * on your telephone now and we will get you in the queue. Our next question was submitted in advance from Benjamin in Texas. He asks: “Charter Schools depend upon government for funding and performance evaluations. Governments, unfortunately, are rarely big fans of charter schools, preferring their own government schools. It seems to me that as long as charter schools are beholden to their ‘masters’ in government this way, they will never get a fair shake. Is there any movement at this time to give charter and private schools more independence? What could possibly be done to get these institutions out from under the government’s thumb?”

TK: I agree with Benjamin that the trend both in the area of charter school and even with private school choice programs, particularly from our opponents, is advocacy for additional regulations in an effort to homogenize our private and charter schools and make them look like our failed public schools. Obviously, we want to do everything we can to resist these types of efforts. I think the recent emphasis and interest in ESAs actually holds a strong potential to sort of undo some of these regulations that have been passed. That’s because ESAs offer parents the opportunity to create a truly individualized education program for their student. A student who has an ESA may not attend one private school for his or her entire education career. Instead, you could have a student who is taking one class at a private school, taking another class online, studying history using a home-school curriculum, and maybe learning another subject one-on-one with a tutor. It’s this sort of very innovative, creative, and disruptive type of choice that could really cause us to rethink accountability in this country and start thinking about accountability as parental accountability, instead of looking strictly at test scores and seeing that students perform well according to certain state metrics.

CH: Alright, we have Bill on the line from California with a question. Go ahead, Bill.

Bill: I am frequently on social media talking about school choice and I get arguments that the only reason that any of this school choice—public funding of private schools or charter schools—is there is to support religious schools. I don’t see any evidence of that. Is there documentation that I could get on IJ’s site or that you could send me so I would be able to support the contention that that is not the case? That yes, there are some religious schools, but they’re not the preponderance?

TK: So this is a question that really varies from state to state, in terms of the preponderance of private religious schools versus private non-religious schools. It varies from state to state. There this no question in my mind that the efforts behind advancing school choice have nothing to do with promoting religion, but rather with promoting parental choice and spurring competition. One of the things I think we will see, if we can

pass large enough school choice programs or universal school choice programs, is a tremendous amount of new educational service providers entering the marketplace. Some of which may be religious, but I believe many of those will not be religious. It will be a truly market-based educational system because parents will have a genuine choice as to where and how to educate their kids.

CH: Alright, we have a question from John in Florida. Go ahead, John.

John: Hi, this is a very interesting discussion. I know how fragmented these programs are and how toughly they are fought by teachers' unions in particular, but also by lots of liberal groups. I am also aware of how much misinformation is being issued about school choice and its effectiveness and so forth. I thought when the Obama administration first came in, that they were going to be very favorable to school choice. But as so often happens in the Democratic Party and perhaps in the Republican Party, you can talk about it but then you find how hard it is to do it. First of all, I congratulate you for having gotten something done. But assuming that Ms. DeVos and that Donald Trump really mean it this time and could come up with some federal programs to put on the table in the Congress or by Executive Order, what would you like this federal program to look like?

TK: I think that the one opportunity that the Trump Administration, the Congress, and Ms. DeVos have to really advance school choice is in the Washington, D.C., Opportunity Scholarship Program. Washington, D.C., is the one school system that is under the control and supervision of the federal government. There is a relatively small school voucher program that operates in Washington, D.C., that has had tremendous success in increasing graduation rates for students who participate in that program. This administration has an opportunity to create a truly universal school choice program in Washington, D.C., and remove regulation from that program and watch it thrive. Then set it as the model for the rest of the country to follow. If I were advising the Trump administration, I think the number one priority would be to ensure the Washington, D.C., Opportunity Scholarship Program is expanded, deregulated, promoted, and implemented across the entire district.

CH: Our next question came to us from Kathy in Kentucky. Kathy wants to know: "Tim, do you have any advice for advancing school choice in Kentucky? We have a charter school bill before the legislature right now, but it is problematic. Kentucky has a great opportunity right now with Governor Matt Bevin, who homeschools his own children and is pro-school choice, and a Republican House and Senate who are mostly in favor of school choice."

TK: Kentucky is one of those states that has a real shot at passing a school choice program this legislative session. Myself and IJ attorney Erica Smith have both reviewed a draft tax credit bill that we expect to be introduced this session. It's a terrific bill;

we've ensured that it is constitutionally bulletproof, we have supplied legislators there with a memorandum explaining why this particular bill is constitutional that we hope will help it along its way, and IJ and others I know intend to put some resources into helping Kentucky get that bill passed. Kentucky is one of those interesting states, at least from a distance, where in many ways charter schools have seemed more controversial than the tax credit scholarship bills in the past. Now we have what appear to be pro-school choice majorities in both houses and a governor who has been supportive of school choice in the past; I think this could really be the session for Kentucky.

MH: If I could interject for a moment, for others on the call who are interested in getting involved in generating momentum for school choice efforts, even if you're not in Kentucky or in a state that has a program in place or pending, you might consider getting involved in National School Choice Week. It actually starts next week, and it's a celebration of opportunity in education that's designed to raise public awareness of all kinds of educational options for children—so that includes the kinds of programs we've been discussing, ESAs and other private school choice programs all the way to charter schools and homeschooling. Their website is www.schoolchoiceweek.com. You can check out it out and see what events are going on in your area or find other ways to connect with supporters of educational choice where you are.

CH: We will make a link to that website available on our Partners Club web page later this week. We are getting short on time so if you have a question, you are welcome to press * on your telephone. We have a question from Chris in New Hampshire.

Chris: We do have school choice in New Hampshire, but we have had a change in the governor's office so we have an opportunity to improve it this term. What is IJ's view on the best form of school choice going forward, given all the experience and all the studies?

TK: New Hampshire is one of those states that we have been involved with in the past. We defended New Hampshire's scholarship tax credit program all the way up to the New Hampshire Supreme Court successfully. We have worked with folks on the ground as that program has been implemented. IJ tends to be supportive of all forms of school choice, and not necessarily promote one over another. What I can tell you right now is that there is significant interest in creating an ESA program in New Hampshire. I have reviewed draft legislation that would create an ESA program there; it is a solid bill.

I think there are also opportunities to increase your existing scholarship tax credit program. It's a program that is really laden with a lot of difficult implementation aspects for the scholarship organizations that run it. There are onerous regulations that they have to comply with in terms of the particular dollar amounts for every scholarship, which are

relatively low. So those could be increased to give parents more purchasing power with their scholarships. There are definitely improvements that can be made with the existing program. And there's a lot of interest in an ESA program in New Hampshire as well.

CH: We had the flip side of this question submitted earlier from Anne in Georgia, who wants to know: "Are there any school choice programs that IJ won't defend? If so, why not?"

TK: Yes, there are programs that IJ would not defend, although that universe is relatively small. Basically, the criteria that IJ uses is that if we believe the program passes constitutional muster, we will defend it. In just about every state, some type of school choice program is constitutionally feasible and defensible. If a state refused to take our advice or did not consult with IJ in its drafting process and passed a program that we believed was unconstitutional, we would not defend that program. That situation has been few and far between in our 25-plus years of defending school choice, thankfully.

CH: We have a question from Eddie in Florida. Go ahead, Eddie.

Eddie: Hi, I was wondering if you could tell us what the likelihood of success is in the teachers' unions' suit against the Florida Tax-Credit Scholarship program?

TK: I like to believe that it continues to be fairly low, in terms of their probability of success. The Florida Teachers' Union filed a lawsuit challenging the Florida Tax-Credit Scholarship program, which was enacted in 2000 and now serves over 80,000 students. That lawsuit was thrown out by the trial court, and the Florida Court of Appeals recently affirmed that ruling. The teachers' unions have asked the Florida Supreme Court to review that decision, but it is a discretionary review. The Florida Supreme Court does not have to take the case, and if they do take it, we have high hopes that they will affirm the lower courts' ruling and toss that lawsuit out. The issue, in that case, is a technical, procedural issue, but has a lot to do with the merits of the case as well.

The Florida Constitution has a Blaine Amendment which talks about appropriations of public funds. Our contention and the contention of the state, and is a contention we have successfully argued in numerous tax credit contexts, is that tax credit programs are not funded with appropriations of public dollars, but rather with private donations to private charities that are then given to private individuals to be used at the private schools of their choice. It's private, private, private all across the board. We have had tremendous success advocating that argument all across the country. If the Florida Supreme Court agrees that it is a program funded with private, not public, funds then the result is that the plaintiffs in that case don't have standing to bring the case, which is why the lawsuit was thrown out. They do not have any harm to themselves because there are no public dollars used in the program. Now if the court did determine that tax credits were the equivalent of public funds, we have additional legal arguments in our arsenal,

namely that those public funds are not being used “in aid of private and religious schools,” but rather in aid of families, parents, and children. So we would hope to prevail under numerous legal theories, but if the Supreme Court of Florida does take the case, we remain confident that we have strong legal arguments to continue defending what is, at this point, one of the country’s largest school choice programs.

CH: Alright, we are just about out of time. We will wrap things up with one last question from Jeff in Virginia. He wants to know if there are any particular battleground states on the school choice front in 2017 that we are keeping our eye on.

TK: Yes, the list is long and I’ll break the list into basically two different types of programs. I can’t give necessarily every state. Those states where we are hoping for brand new programs and that don’t currently have much in the way of school choice would be Texas, where we are going to have a big battle over an ESA bill. Iowa has a real chance of passing a universal program. We are looking at tax credit funded ESAs in Missouri and Arkansas, both of which have pro-school choice majorities and governors who are likely to sign school choice bills, Kentucky and West Virginia are states we are keeping a real close eye on as well to pass new school choice programs.

There is a set of states where we are looking to pass bills to expand school choice. We are keeping an eye on Arizona, where there is an opportunity to expand our existing ESA program to a universal program. Tennessee, Oklahoma, Georgia, and North Carolina all have relatively small programs and those states have the potential to pass expanded school choice programs. There is one other state that is a really important battleground for us at IJ, and that is the state of Nevada, where we successfully defended the constitutionality of a universal ESA program but the court struck down its funding mechanism. That is going to be a real challenge for us because Nevada, unlike much of the country, lost its school choice majorities in both houses although they do have a pro-school choice governor, and so we are going to be working to fund that program this legislative session.

CH: Well with that, we are out of time today. Thank you so much, Melanie and Tim, for being with us and for providing such a great, comprehensive look at the school choice landscape. Thanks to all of you Partners for joining us as well. If you missed any part of this conversation, we will have links to the audio recording and transcript of the call available on our Partners Club LIVE web page later this week. If you have any further questions that we weren’t able to get to, please just stay on the line to leave us a message, or you are welcome to email me directly at chealy@ij.org, and we will be sure to get back to you. We look forward to keeping you updated on the many exciting developments that 2017 will bring across all areas of IJ’s work. Thank you again for the important role you play in making our

progress possible. We hope you have a great evening, and best wishes for the new year.