



Arizona State Senate Issue Brief

August 3, 2018

Note to Reader:

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EMPOWERMENT SCHOLARSHIP ACCOUNTS

INTRODUCTION

In 2011,¹ Arizona became the first state to establish education savings accounts, referred to as Empowerment Scholarship Accounts (ESAs), to provide students with educational options outside of the public school system.² Program eligibility was first limited to students with disabilities but has since expanded to include multiple student populations (see Program Eligibility). The ESA Program is publicly funded and administered by the Arizona Department of Education (ADE) and the State Treasurer (Treasurer). Ninety percent of the funding the student would have generated in a public school is deposited into the ESA and must be used to fund specific education expenses.

The current ESA Program is the result of similar school choice programs that were created in 2006. The Legislature enacted two voucher programs, “Arizona Scholarships for Pupils with Disabilities”³ and “The Displaced Pupils Grant Program,”⁴ which would have allowed students to attend a private school of their choice instead of the public school in their district. The Legislature appropriated \$2.5 million to each voucher program. In *Cain v. Horne* in 2009, the Arizona Supreme Court ruled that the voucher programs were unconstitutional pursuant to Article 9, Section 10 of the Arizona Constitution which prohibits appropriations of public money to private and sectarian schools. Although the Court ruled the voucher programs unconstitutional, the Court recognized the intent of the programs and opined that, “there may well be ways of providing aid to these student populations without violating the constitution.”⁵ The ruling issued by the Court provided the framework for the creation of the current ESA Program.

¹ Laws 2011, Chapter 75

² Florida, Mississippi, Nevada and Tennessee have since established similar education savings account programs.

³ Laws 2006, Chapter 340

⁴ Laws 2006, Chapter 358

⁵ *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (en banc).

PROGRAM ELIGIBILITY AND ENROLLMENT⁶

When the ESA Program was established, only students with disabilities were eligible to participate, however eligibility has expanded to include students who meet multiple criteria. Currently, students must meet at least one requirement from each of the following two sets of criteria in order to be awarded an ESA.

First, a child must meet at least one of the following requirements:

- 1) identified as having a disability;
- 2) attend a school or school district assigned a letter grade of D or F;
- 3) be a previous recipient of an ESA or a scholarship from the Arizona Scholarships for Pupils with Disabilities Program (ASPDP);
- 4) be, or have been, a ward of the juvenile court under certain circumstances;⁷
- 5) have a parent or guardian who is a member of the United States armed forces who is on active duty or was killed in the line of duty (students who meet this requirement do not need to meet any additional requirements);⁸
- 6) be a sibling of a current or previous ESA recipient;⁹
- 7) reside within the boundaries of an Indian reservation;¹⁰ or
- 8) be a child of a parent who is legally blind or deaf or hard of hearing.¹¹

Second, a child must also meet one of the following additional requirements:

- 1) attended a governmental primary or secondary school as a full-time student for at least the first 100 days of the prior fiscal year and transferred under an ESA contract;
- 2) not previously attended a governmental primary or secondary school, but is currently

eligible to enroll in a school district or charter school kindergarten program;

- 3) previously participated in the ESA Program;
- 4) received a scholarship funded by a School Tuition Organization (STO) due to being displaced or disabled, and continues to attend a qualified school; or
- 5) was eligible for an ASPDP scholarship under certain circumstances.

Table 1 – 2017 Enrollment Breakdown¹²

Category	Enrollment Percentage
Students with a Disability	58%
D and F Schools	11%
Students in a Military Family	13%
Wards of a Juvenile Court (Foster Children)	7%
Students on a Reservation	6%
Siblings	5%
Children of a parent who is legally blind or deaf or hard of hearing	less than 1%

In 2013, the Legislature established a cap that limits the amount of new ESA recipients through 2019 at 0.5 percent of the total number of students enrolled in school districts and charter schools during the previous school year. This equates to approximately 5,400 new students that may be enrolled per year.¹³

Table 2 – Total Enrollment

Fiscal Year	Enrollment
FY 2012	144
FY 2013	302
FY 2014	761
FY 2015	1311
FY 2016	2175
FY 2017	3,360
FY 2018 (est)	4,545

⁶ A.R.S. § 15-2401
⁷ Laws 2012, Chapter 360
⁸ Laws 2014, Chapter 200
⁹ Laws 2014, Chapter 199
¹⁰ Laws 2015, Chapter 225
¹¹ Laws 2016, Chapter 353

¹² Data from ADE as of 1/26/17
¹³ Laws 2013, Chapter 250

PARTICIPATION REQUIREMENTS¹⁴

In order to participate in the ESA Program, the parent of a qualified child must annually sign an agreement to follow requirements outlined in statute.

Parents must agree to use a portion of the ESA monies allocated each quarter to provide an education to the student in at least reading, grammar, mathematics, social studies and science. The student may not be enrolled in a school district or charter school and the school district is released from all obligations to educate the student. Parents are also prohibited from accepting a scholarship from an STO while participating in the ESA Program.

The agreement contains the following permitted expenses of ESA monies:

- 1) tuition or fees at a qualified school or eligible postsecondary institution;
- 2) textbooks required by the qualified school or eligible postsecondary institution;
- 3) educational therapies or services under certain conditions;
- 4) tutoring or teaching services provided by an accredited individual or facility;
- 5) curricula;
- 6) tuition or fees for a nonpublic online learning program;
- 7) fees for national standardized norm-referenced achievement tests, advanced placement exams or any college admission exams;
- 8) contributions to a Coverdell education savings account under certain conditions;
- 9) fees for management of the ESA;
- 10) services provided by a public school, including individual classes and extracurricular programs;
- 11) insurance or surety bond payments; and
- 12) uniforms purchased from or through a qualified school.

Prohibited expenses include: computer hardware or other technological devices,

transportation of the student or consumable educational supplies including paper, pens or markers. In the agreement, parents agree to submit a quarterly expense report that details their expenditures.

The majority of expenditures (83 percent) are used for private school tuition while a small percentage is spent on other allowable expenses such as tutoring (7 percent) and educational therapies (5 percent). Almost a third of account holders spend their funds on multiple educational expenses. Because the ESA Program allows parents to rollover funds, some ESA monies are unspent and saved for future education related expenses.¹⁵

FUNDING

ESAs are funded at 90 percent of Basic State Aid per pupil costs (which is the sum of the Base Support Level and additional assistance). Due to funding weights, this amount varies per pupil from \$2,900 to \$31,500 with the average award for a non-disabled student equaling \$5,400.¹⁶ The monies that would otherwise be allocated to an ESA recipient's prior school district or charter school are transferred by ADE to the Treasurer for deposit into each ESA.

In order to cover the costs of administering the Program, ADE may retain up to five percent of the total ESA disbursement and is required to transfer one percent to the Treasurer, subject to legislative appropriation.¹⁷ In FY 2017, the Legislature appropriated \$799,000 to ADE to administer the Program that will disburse an estimated \$76 million to ESAs.¹⁸

The net costs or savings to the state associated with the ESA Program depends on where the student would have otherwise attended school. ADE interprets statute as setting the funding amount for ESAs at the level at which charter schools are funded. Charter schools

¹⁴ A.R.S. § 15-2402

¹⁵ "The Education Debit Card II"

¹⁶ See "Arizona's School Finance System" Issue Brief

¹⁷ A.R.S. § 15-2402

¹⁸ Laws 2016, Chapter 117

receive more funding through additional assistance than school districts under the Basic State Aid formula. Therefore, according to the Joint Legislative Budget Committee, non-disabled students who would otherwise attend a charter school save the state an average of \$700. Non-disabled students who would otherwise attend a school district cost the state an average of \$700. For disabled students, the state saves \$2,700 for charter school students and \$1,400 for school district students (See Table 3).

	Disabled Students		Non-Disabled Students	
	Former Charter	Former District	Former Charter	Former District
Cost Per Pupil	-	-	-	\$700
Savings Per Pupil	\$2,700	\$1,400	\$700	-

FINANCIAL ACCOUNTABILITY

In order to prevent the misspending of ESA monies, ADE reviews all Program expenditures listed on quarterly expense reports submitted by parents. Additionally, ADE: 1) provides parents with guidance on appropriate and inappropriate spending of Program monies; 2) automatically denies inappropriate expenditures; and 3) prevents cash withdrawals.

ADE may remove any parent or qualified student from ESA eligibility if the parent or student: 1) fails to comply with the terms of the contract, applicable laws, rules or orders; 2) knowingly misuses monies; or 3) knowingly fails to comply with the contract with intent to defraud. Per the Program agreement, parents are required to repay any misspent monies. In cases of noncompliance, the Treasurer suspends the account and all transactions are halted. Additionally, ADE notifies the parent or qualified student in writing that the ESA is suspended and provides the reason for the suspension. The parent or qualified student has 10 days to respond or take corrective

action. In cases of substantial misuse of monies, ADE may refer the parent to the Attorney General.¹⁹

According to the Auditor General, between August 2015 and January 2016, ADE identified \$102,602 in misspending and since 2011 has referred 27 cases to the Attorney General for fraud investigations.²⁰

REFERENDUM

Laws 2017, Chapter 139, which phases in expansion of the ESA Program over four years, extends the temporary enrollment cap through 2022, establishes a hard cap beginning in FY 2023 and makes various changes to the ESA Program, was referred to the ballot via a referendum filed August 8, 2017. The changes made by this legislation are on hold pending the results of the 2018 general election. For more information on S.B. 1431, please visit: https://www.azleg.gov/legtext/53leg/1R/summary/S.1431ED_ASENACTED.pdf

NIEHAUS V. HUPPENTHAL

In 2013, the Arizona School Boards Association, the Arizona Education Association and the Arizona Association of School Business Officials challenged the constitutionality of the ESA Program on the grounds that the Program: 1) violates the Religion Clause of the Arizona Constitution; 2) violates the Aid Clause of the Arizona Constitution; and 3) acts as a waiver of constitutional right.

The Court of Appeals concluded²¹ that the ESA Program does not violate the Religion Clause which prohibits public funds, “appropriated for or applied to any religious worship, exercise or instruction,”²² because, “the ESA is neutral in all respects toward religion and

¹⁹ A.R.S. § 15-2403
²⁰ ADE refers parents who misspend more than \$1,000 however the Attorney General may investigate misspending of smaller amounts.
²¹ Niehaus v. Huppenthal, 310 P.3d 983, 984 (Ariz. Ct. App. 2013).
²² Article 2, Section 12 Arizona Constitution

directs aid to a broad class of individuals defined without reference to religion.”

The Aid Clause²³ prohibits the appropriation of public money to private or sectarian schools. Through the ESA Program, parents may spend the funds on a wide range of services in order to educate their eligible children. Because ESA monies are not pre-ordained for a particular destination or earmarked for private schools, the court found that the ESA Program is not in violation of the Aid Clause.

Finally, the plaintiffs asserted that the ESA Program is a waiver of the constitutional right to free public education because eligible students must not be enrolled in a public school while receiving the ESA. However, the court decided that the ESA Program is not a waiver of constitutional right, but is “simply an exchange from one educational service for another, and the choice is voluntary and reversible.”

For these reasons, the Court of Appeals upheld the ESA Program and the Arizona Supreme Court refused to hear the appeal.

ADDITIONAL RESOURCES

- Arizona Department of Education
<http://www.azed.gov/esa/>
- *Cain v. Horne*
<http://www.azcourts.gov/Portals/23/pdf2009/CainOpinionCV080189PR.pdf>
- *Niehaus vs. Huppenthal*
<http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2013/1%20CA-CV%2012-0242-171447.pdf>
- “Performance Audit: Arizona Department of Education” published by the Arizona Auditor General, June 2016
https://www.azauditor.gov/sites/default/files/16-107_Report.pdf
- S.B. 1279 Fiscal Note published by the Joint Legislative Budget Committee
<http://www.azleg.gov/legtext/52leg/2r/fiscal/sb1279.docx.pdf>
- “The Education Debit Card II: What Arizona Parents Purchase with Education Savings Accounts” published by the Friedman Foundation, February 2016
<http://www.edchoice.org/wp-content/uploads/2016/02/2016-2-The-Education-Debit-Card-II-WEB-1.pdf>

²³ Article 9, Section 10 Arizona Constitution