



TEXAS PUBLIC POLICY FOUNDATION

FAQ: DO THE U.S. AND TEXAS CONSTITUTIONS ALLOW ESAs?

SUMMARY

ESAs may be used by parents at religious schools and their choice is protected by the First Amendment.

The Texas Constitution does not prohibit ESAs because the Legislature has wide discretion over education.

KEY POINTS

- In 2023, the attorney general confirmed that ESAs are constitutional.
- Texas Constitution Article VII, Section 1 allows the Legislature to achieve the goal of education *by any means*, including ESAs.
- Parents choose where to spend ESA funds. Excluding religious families and schools is “odious” to the U.S. Constitution and violates the First Amendment.
- Blaine Amendments violate the First Amendment and are unenforceable.

YES, THE U.S. CONSTITUTION ALLOWS ESAs

ESAs allow public funds to flow to educational settings of a parent’s choice, including religious schools. The First Amendment of the U.S. Constitution protects the free exercise of religion and prohibits the establishment of religion. ESAs are compatible with the First Amendment, as U.S. Supreme Court precedent makes clear:

ZOBREST V. CATALINA FOOTHILLS (1993) First, if religious institutions were prohibited by the First Amendment from participating in public programs, “a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.”

ZELMAN V. SIMMONS - HARRIS (2002) Moreover, education choice is allowed by the First Amendment “if it is neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice.”

CARSON V. MAKIN (2022) Finally, a choice program cannot exclude religious organizations because states cannot pursue the separation of church and state in a way that violates the free exercise of religion under the First Amendment: “A State’s antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.”

TEXAS ATTORNEY GENERAL (2023) As Attorney General Paxton concludes: “An ESA program offering parents and students education assistance payments that can be directed to public and private schools, including “sectarian” schools, and that offers parents and students a genuine and independent choice to select a private religious school *does not violate the Establishment Clause.*”

YES, TEXAS' CONSTITUTION ALLOWS ESAs

Our lasting freedom depends upon many good laws, but the first among these are laws pertaining to education. Thomas Jefferson first gave force to this idea in America:

THOMAS JEFFERSON (AUG. 1786) "I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom and happiness."

Texas' founders enshrined Jefferson's idea into our Constitution as Article VII, Section 1:

ARTICLE VII, SECTION 1 (1876) "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

As Texas Supreme Court rulings explain, this section does not prohibit ESAs for two reasons:

WEST ORANGE -COVE II (2005) First, the section provides wide discretion to the legislature to achieve the goal of education: "As long as the Legislature establishes a suitable regime that provides for a general diffusion of knowledge, the Legislature may decide whether the regime should be administered by a state agency, by the [school] districts themselves, or by any other means."

DUNCAN V. GABLER (1948) Second, the section does not preclude lawmakers from enacting *additional* educational initiatives independent of public free schools. As the court has held, except as constrained by the U.S. Constitution, "the legislative department may exercise all legislative power which

is not forbidden expressly or by implication by the provisions of the Constitution of the state of Texas."

TEXAS ATTORNEY GENERAL (2023)

For these reasons, Attorney General Paxton concludes: "An ESA program does not violate Article VII, Section 1."

BLAINE AMENDMENTS ARE UNENFORCEABLE

The Texas Constitution has two Blaine Amendments from 1876: Article I, Section 7 prohibits appropriating money for sectarian purposes, while Article I, Section 5(c) prohibits the permanent and available school funds from being appropriated to a sectarian school. Both violate the First Amendment, as U.S. Supreme Court precedent demonstrates.

MITCHELL V. HELMS (2000) "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.'"

ESPINOZA V. MONTANA DEPT. OF REVENUE (2020) "That supreme law of the land condemns discrimination against religious schools and the families whose children attend them. They are members of the community too, and their exclusion from the scholarship program here is odious to our Constitution and cannot stand."

CARSON V. MAKIN (2022) "A State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits."

TEXAS ATTORNEY GENERAL (2023) For these reasons, the attorney general concludes: "Texas' Blaine Amendments violate the Free Exercise Clause of the First Amendment to the United States Constitution."