



January 28, 2013

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Re: Response to the Southern Education Foundation's Issue Brief

Gentlemen,

Recently, the Southern Education Foundation (SEF) released an issue brief entitled "Georgia's Tax Dollars Help Finance Private Schools with Severe Anti-Gay Policies, Practices, & Teachings." The brief is replete with mischaracterizations—most notably its insistence that scholarships derived from tax credits are the state's "tax dollars"—and with a clear agenda that seeks to punish private schools who choose to adhere to Biblical standards of morality for its faculty, staff, and students. We write to shed light on the inaccuracies contained in SEF's issue brief and to encourage you and the other members of the Georgia legislature to reject SEF's call to place unconstitutional restrictions on the participation of religious schools in the scholarship program.

By way of introduction, Alliance Defending Freedom is an alliance-building legal ministry that advocates for the right of people to freely live out their faith. Alliance Defending Freedom has been a leading proponent of the school choice movement, most notably in its successful representation of an Arizona school tuition organization at the U.S. Supreme Court in defending Arizona's similar tax credit scholarship program. See *Arizona Christian School Tuition Organization (ACSTO) v. Winn*, 131 S. Ct. 1436 (2011).

Allowing Individuals and Corporations to Receive Tax Credits for Donations to Scholarship Organizations Does Not Divert Public Funds to Private, Religious Schools

SEF's entire issue brief is grounded in its inaccurate claim that "Georgia's tax dollars help finance private schools." SEF repeatedly claims that private, religious schools are "receiving public funds" and that "public funds from Georgia's tax credit scholarship program are being denied students in private schools." It claims that corporations can "divert tax dollars" to support the program. These claims are simply false.

In *ACSTO*, the individuals challenging Arizona's tax credit scholarship program made similar claims that the program was supported by taxpayer dollars. The Supreme Court categorically rejected this argument. "When Arizona taxpayers choose to contribute to STOs [school tuition organizations—which are analogous to Georgia's SSOs], they spend their own money, not money the State has collected from respondents or from other taxpayers." 131 S.Ct. at 1447. The Court noted that "[l]ike contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations.

Respondents' contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands." *Id.* at 1448.

SEF's issue brief asserts the same fallacy. It treats every donation by an individual or corporation to a scholarship organization of their choice as if that donation were government property. Under SEF's theory, every cent that an individual or corporation earns in the State of Georgia belongs to the State unless it allows the individual or corporation to keep it. Also under its theory, every expenditure by an individual is really an expenditure by the State because the State could have taxed that money rather than allowing the individual to keep it.

The Supreme Court found no merit to such arguments, instead finding that "contributions [to scholarship organizations] result from the decisions of private taxpayers regarding their own funds." *Id.* "[T]he tax credit system is implemented by private action and with no state intervention." *Id.* The same is true of Georgia's system. There is no state intervention in the decision of individuals and corporations to choose between contributing to an SSO or paying taxes to the State. The complete lack of State intervention establishes that, contrary to SEF's claims, there are no "public funds" involved in the private funding of SSO's by individuals and corporations.

The Decision of Which SSOs to Fund (Or Whether to Fund Them At All)
Is Based Solely Upon the Private Choices of Individuals and Corporations.

Just as SEF attributes the funds donated to SSOs to the State, so too does it attribute the choice as to which SSOs are funded to the State. For example, SEF's alleges that "[t]he State of Georgia is supporting these anti-gay schools with more than tax money." But contrary to SEF's claims, the private choices of individuals and corporations about how they spend their money—whether it is to support a religious SSO or otherwise—are not attributable to the State.

Indeed, these same arguments were rejected by the U.S. Supreme Court. Like in Georgia, under the Arizona program, "[p]rivate citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs." *Id.* "Objecting taxpayers know that their fellow citizens, not the State, decide to contribute and in fact make the contribution." *Id.* In other words, every penny that flows to STOs is based upon the private choices and actions of individuals who decide on their own to donate to STOs. The State plays absolutely no role in the decision of the individual to give or not, who to give to, or how much.

The same is true of Georgia's program. Individuals and corporations decide whether to donate to SSOs or whether to use their money for another purpose. The State in no way influences these decisions. Because the decision to contribute rests solely with the individual or corporation, it cannot be attributed to the State as SEF unsuccessfully attempts to do.

Yet if SEF is as troubled by the numerous donations of individuals and corporations to SSOs that support private, religious schools that expect their faculty and students to adhere to Biblical standards of morality—or "anti-gay" schools as SEF scurrilously calls them—then it has an easy solution: start its own SSO and give scholarships to schools of which SEF approves. Georgia's program embraces the freedom of individuals and corporations to support schools that align with their beliefs. Christians can donate to SSOs for schools that affirm Biblical values; Jews can support SSOs that fund Jewish schools; and homosexual activists groups can support schools that promote and affirm homosexual behavior. As the Supreme Court stated in *ACSTO*, the objecting taxpayers can "contribute to an STO of their choice, either religious or secular. And [they] also have the

option of contributing to other charitable organizations, in which case respondents may become eligible for a tax deduction or different tax credit.” *Id.* at 1447.

By allowing individuals and corporations to choose which SSO to support (or whether to support one at all), the State of Georgia shows proper respect for the private beliefs of these groups. It is a respect that SEF itself refuses to show by labeling Christian schools—who simply want to “practice what they preach” by following Biblical teaching—as “anti-gay.”

Religious SSOs and Private Schools Have the Constitutional Right to Equal Participation in the Georgia Tax Credit Scholarship Program.

It is telling that an organization like SEF, which brazenly accuses private, religious schools of being intolerant to students that do not adhere to the schools’ Biblical worldview, is itself unable to tolerate the participation of religious school that hold a different worldview than its own in the State program. SEF brazenly calls for the complete exclusion of religious schools from the program unless those schools throw out the Bible, water down their faith, and agree to embrace SEF’s homosexual agenda.

Submitting to SEF’s demands would take the State down a dangerous path—one that would lead to unconstitutional government intrusion upon the religious beliefs and practices of religious groups to ensure anything that SEF deems “anti-gay” is scrubbed away. Today, religious schools are denied participation in the scholarship program because of their religious beliefs; tomorrow it is churches facing denial of their tax-exempt status if they preach adherence to Biblical standards. Fortunately, the U.S. Supreme Court has repeatedly struck down any such intrusion upon religious organizations’ internal affairs, finding that it would amount to a violation of the Establishment and Free Exercise Clauses of the First Amendment. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 704, 181 L. Ed. 2d 650 (2012) (Recognizing “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”).

Conclusion

Georgia is leading the way in providing school choice to families, allowing them to select the best school—whether secular or religious—to meet their child’s educational needs. And Alliance Defending Freedom is ready to stand with the State of Georgia, private SSOs, and the hundreds of private, Christian schools in the State to defend the tax credit scholarship program. If you or your colleagues have any questions, please feel free to contact us here at our Lawrenceville, Georgia offices at 770-339-0774.

Cordially,



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