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ESA Rules Review:

Improving Rulemaking for ESA Programs

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INTRODUCTION

Over the past few years, several states throughout the country have passed or expanded innovative Education Savings Account (ESA) programs. These programs provide scholarships for K–12 students in the state for educational purposes, typically for private school tuition, tutors, therapists, curricula, and other educational goods and services. States with ESA programs, as well as those considering these programs, should consider requiring the adoption of rules for program administration. Otherwise, the administration of the program is left to ad hoc policies and procedures by the program administrator that are subject to change at any time.

Official rulemaking offers several benefits, particularly ensuring transparency and consistency, as rules are publicly developed through a formal process that includes stakeholder feedback, such as from parents, private schools, and education service providers. Rulemaking provides a place for ESA families to participate and provide feedback in the implementation of the program they are using to educate their children. It goes without saying that ESA program administrators need to hear from ESA families—those who actually use the program. Rulemaking also makes policies and procedures more consistent from year to year, providing more certainty for ESA families, private schools, and education service providers. **Significant policy changes month to month or even year to year undermine the success of and demand for these programs.** Further, rules adopted by a regulatory body can provide needed oversight to ensure program administrators comply with ESA statutes and rules.

However, rules should focus on program administration and not seek to establish policy, unless specifically authorized in statute. Rules should be designed to implement relevant ESA statutes and therefore should not limit the flexibility of the program or create policies that conflict with legislative intent. Especially in regard to allowable educational expenses and educational service providers, rules should not restrict the program further than what the statute permits. In other words, the rules should not disallow what the statutes allow. Ultimately, rulemaking fosters accountability, transparency, and consistency. It ensures that changes are made thoughtfully, with input from all relevant stakeholders.

This paper analyzes the adopted administrative rules in Arizona, Alabama, and Arkansas for their respective ESA programs. Special attention is given to whether they focus on the program administration or whether they establish policies that restrict program flexibility. The paper highlights strengths and weaknesses of these rules and concludes with specific policy suggestions for ESA rulemaking.

ADMINISTRATIVE RULES FOR ARIZONA'S EMPOWERMENT SCHOLARSHIP ACCOUNT PROGRAM

Arizona's Empowerment Scholarship Account Program originated in 2011 for students with disabilities, allowing them to withdraw from their public school and receive 90 percent of state funds allocated to them for a variety of educational expenses, including therapy, tutors, textbooks, curriculum, and tuition at private schools.[1] The Legislature expanded the program through the years to include students in foster care; living on Indian reservations; attending failing or underperforming public schools; or with parents on active military duty, who were killed in the line of duty, or who are legally blind, deaf, or hard of hearing.[2] The program grew to more than 12,000 students before the program became universal in 2022, which made it available to all K–12 students in the state. As of March 2025, the program has grown to more than 87,000 students.[3]

Since the ESA program's inception, the Arizona Department of Education (ADE)[4] has administered it, managing daily operations, determining eligibility and allowed expenses, and terminating ESA accounts.[5] In establishing the program, the Legislature granted ADE the authority to adopt rules necessary for the administration of the program.[6] However, ADE never adopted such rules.

In 2020, in order to provide more oversight, the Legislature removed the authority from ADE to adopt rules and granted the authority to the Arizona State Board of Education (SBE).[7] Under Arizona's ESA statutes,[8] the SBE "may adopt rules and policies necessary to administer Arizona empowerment scholarship accounts."[9] The rules and policies may include, but are not limited to, those for establishing an appeals process; for conducting or contracting for examinations of the use of account monies; for conducting or contracting for random, quarterly, and annual reviews of accounts; for establishing or contracting for an online anonymous fraud reporting service; for establishing an anonymous telephone hotline for fraud reporting, and that require a surety bond or insurance for account holders.[10] Further, the Legislature requires ADE to develop an applicant and participant ESA handbook, which has to "comply with the rules adopted by the state board of education."[11]

The SBE adopted ESA rules in November 2020.[12] The rules include Definitions (R7-2-1501), Expanded Qualified Student Definition (R7-2-1502), Department Responsibilities (R7-2-1503), Application and Account Activation (R7-2-1504), Contract Between Parent and Department (R7-2-1505), Contract Renewal (R7-2-1506), Use of Funds (R7-2-1507), Review of Expenses (R7-2-1508), Misuse of Funds (R7-2-1509), Corrective Action (R7-2-1510), and Appeals (R7-2-1511).

1 Arizona Revised Statutes (A.R.S.) §15-2402(C).
2 A.R.S. §15-2401(7).
3 Arizona Department of Education, Empowerment Scholarship Account, https://www.azed.gov/esa.
4 Arizona Department of Education is tasked with oversight of public education from kindergarten to secondary school. The ADE is run by an elected superintendent of public instruction.
5 See A.R.S. §§15-2402(D); 15-2403.
6 2011 Ariz. Legis. Serv. Ch. 75 (S.B. 1553), "The department may adopt rules necessary for the administration of empowerment scholarship accounts."
7 2020 Ariz. Legis. Serv. Ch. 12 (S.B. 1224). Arizona State Board of Education, https://azsbe.az.gov/: "The State Board of Education is created by the Arizona Constitution and charged with the responsibility of regulating the conduct of the public school system. The Board is composed of the following eleven members: the superintendent of public instruction, the president of a state university or state college, four lay members, a president or chancellor of a community college district, a person who is an owner or administrator of a charter school, a superintendent of a high school district, a classroom teacher and a county school superintendent. In addition to its general regulatory responsibilities, Arizona law charges the Board with numerous other duties. The primary powers and duties of the Board are articulated in A.R.S. § 15-203."
8 A.R.S. §§ 15-2401 through 15-2406, https://www.azleg.gov/arsDetail/?title=15.
9 A.R.S. § 15-2403(I).
10 A.R.S. § 15-2403(I).
11 A.R.S. § 15-2403(K).
12 Arizona Administrative Code (A.C.C.) R7-2-1501 through R7-2-1511, https://apps.azsos.gov/public_services/Title_07/7-02.pdf.

1. The SBE's adoption of ESA rules significantly improved the program, providing more consistency and transparency for ESA families and additional oversight of ADE's administration of the program.

However, the rules are appropriate insofar as they comport with statute, both in their language and application.

As a general matter, Arizona's ESA rules appear to align with the ESA statutes and focus on administrative and procedural issues. They do not unnecessarily limit approved ESA expenditures or create barriers for schools or education service providers beyond what is found in statute. Some provisions seek to maintain parental flexibility in the use of ESA funds. However, the rules' language could be strengthened to ensure ADE's policies and practices comply with statute and rules.

2. SBE's ESA rules rightly focus on administrative and procedural matters related to the administration of the program.

The rules do not attempt to establish the policy of allowed and disallowed expenses nor the requirements for schools and educational providers. Language related to qualifying students, qualifying schools and service providers, and allowed expenses is largely verbatim from the ESA statutes. The rules provide some definitions, but largely use the definitions from the ESA statutes and expressly state that "unless otherwise specifically defined herein, all defined terms shall have the same meaning as those ascribed to them in the A.R.S., Title 41."[13] Overall, the rules rightly leave ESA policymaking to the Legislature.

3. SBE's ESA rules appear to protect the program's flexibility established in statute.

As for the allowed expenses, the rules cite or restate the relevant statutes almost verbatim.[14] Additionally, the rules define "supplemental materials" within the statutory definition of "curriculum," which arguably protects the flexibility for parents in purchasing educational materials. The statutory definition of "curriculum" is "a course of study for content areas or grade levels, including any *supplemental materials* required or recommended by the curriculum, approved by the department" (emphasis added).[15] The ESA rules define "supplemental materials" referenced in statute as "relevant materials directly related to the course of study for which they are being used that introduce content and instructional strategies *or that enhance, complement, enrich, extend or support the curriculum*" (emphasis added).[16]

Similarly, the rules add that the statutory requirement for ESA parents to "[u]se a portion of the [ESA] monies allocated annually to provide an education for the qualified student in at least the subjects of reading, grammar, mathematics, social studies and science"[17] does "not require a parent to spend a portion of ESA monies on each subject every quarter."[18] The rule in effect prevents ADE from reading the statute as requiring parents to use funds for each of the listed subjects each quarter, as funds are distributed quarterly. This rule therefore protects some of the flexibility in the program.

The rules do expand the requirements for "associated goods and services" for students with a disability.[19] However, the additional language does not appear to limit access to these types of resources but rather

13 A.A.C. R7-2-1501(18).
14 A.A.C. R7-2-1505. Allowable expenses under statute include tuition or fees at a qualified school; textbooks required by a qualified school; tutoring or teaching services, curricula, and supplementary materials; tuition or fees for a nonpublic online learning program; fees for a nationally standardized norm-referenced achievement test, an advanced placement examination, or any exams related to college or university admission; tuition or fees at an eligible postsecondary institution; textbooks required by an eligible postsecondary institution; fees to manage the Arizona empowerment scholarship account; services provided by a public school, including individual classes and extracurricular programs; insurance or surety bond payments; uniforms purchased from or through a qualified school; public transportation services between student residence and qualified school; and computer hardware and technological devices primarily used for an educational purpose. A.R.S. § 15-2402(B)(4). Students with disabilities may also use the ESA funds for educational therapies from a licensed or accredited practitioner or provider, including and up to any amount not covered by insurance if the expense is partially paid by a health insurance policy for the qualified student; a licensed or accredited paraprofessional or educational aide; tuition for vocational and life skills education approved by the department; and associated goods and services that include educational and psychological evaluations, assistive technology rentals, and braille translation goods and services approved by the department. A.R.S. § 15-2402(B)(4)(c).
15 A.R.S. § 15-2401(2).
16 A.A.C. R7-2-1501(16).
17 A.R.S. § 15-2402(B)(1).
18 A.A.C. R7-2-1505(A)(1).
19 A.A.C. R7-2-1505(B)(4).

is needed to demonstrate the item is an associated good or service. ESA law allows students with disabilities to use ESA funds for "[a]ssociated goods and services that include educational and psychological evaluations, assistive technology rentals and braille translation goods and services approved by the department."[20] In the rules, SBE adds documentation parents needs to provide for associated goods and services:

> **Parents that are seeking to use Program funds for an associated good or service pursuant to this subsection shall provide to the Department the special education course of study, service or educational need that the good or service is associated with or may provide the Department with the most current individualized education program, evaluation, or a letter from a qualified service provider.21**

Although these additional requirements may make it more difficult for parents, they are reasonable requirements that assist ADE in determining whether to approve an item for which the statute explicitly states approval is needed.

4. SBE's ESA rules need additional language to ensure ADE's policies and practices comply with statute and rules.

The Legislature has clearly delegated the oversight of the ESA program to SBE, even though daily administration of the program remains with ADE. As discussed above, the Legislature took away ADE's authority to adopt rules and policies for the administration of the program and gave this authority to SBE.[22] The Legislature also authorized SBE to create an appeals process to adjudicate ESA parent appeals of ADE administrative decisions, including determinations of allowable expenses.[23] In effect, the Legislature has given SBE the authority to ensure ADE's policies and practices comply with the law. SBE was also given the authority to issue a stay on ADE administrative decisions to suspend ESA accounts pending an appeal, and ADE is not allowed to withhold funds during the stay.[24]

In addition, the Legislature requires ADE on or before July 1 of each year to develop an ESA handbook that includes information relating to policies and processes of the ESA program.[25] The handbook "shall comply with the rules adopted by the state board of education."[26] To carry out this statute, SBE adopted A.A.C. R7-2-1503(1), which requires ADE "[o]n or before March 1 of each year, provide the Board with a handbook, developed in consultation with parents of children on the Program, that includes information relating to policies and processes of ESAs and complies with A.R.S. § 15-2401 et seq and this Article." The rule continues, "The Board shall adopt the handbook on or before May 1 of each year. The Board shall limit substantive changes to the handbook to once every three years. The Board may approve changes to the handbook more frequently than every three years to conform and comply with changes to statute or this Article or at the Board's discretion."[27]

Within the statutory language and SBE's own rules, SBE has the authority to evaluate whether ADE's proposed handbook—which includes ADE's policies and procedures for administering the ESA program—complies with SBE rules and, by extension, ESA statutes. This should include the authority to require ADE to make changes to its proposed handbook before SBE will approve it. In practice, SBE has not done so, arguing that it only has the authority to vote up or down on the proposed handbook. Certainly, this should not be the case. If ADE proposes a handbook with a policy limiting or allowing educational items SBE believes goes beyond what is allowed by statute and or rule, SBE should not be forced to approve the handbook or deny it, which leaves the prior year's handbook in place. SBE should have the authority to approve the proposed handbook (which might include needed changes and updates to the program), provided problematic policies are removed.

20 A.R.S. § 15-2402(B)(4)(c)(iv).
21 A.A.C. R7-2-1505(B)(4).
22 A.R.S. § 15-2403(I).
23 A.R.S. § 15-2403(D) and (I). For a detailed discussion and evaluation of Arizona's ESA appeals process please see https://spn.org/esa-appeals-and-parent-voice/.
24 A.R.S. § 15-2403(N).
25 A.R.S. § 15-2403(K).
26 A.R.S. § 15-2403(K).
27 A.A.C. R7-2-1503(1).

To ensure ADE's policies and practices comply with ESA statute and rules, SBE should revise A.A.C. R7-2-1503(1) to include language that in adopting ADE's ESA handbook each year, SBE may amend or require SBE to amend the handbook before approval. After all, the Legislature has determined that SBE, not ADE, has the final authority in the administration of the ESA program.[28]

In sum, the Arizona State Board of Education's adoption of ESA rules improved the program by providing more consistency and transparency for ESA families and additional oversight of ADE's administration of the program. Generally, the rules rightly focus on administrative matters and protecting parental flexibility. However, there is room for improvement in ensuring the Arizona Department of Education's policies and practices comply with statute and rules.

28 See A.R.S. § 15-2403(I), "I. The state board of education may adopt rules and policies necessary to administer Arizona empowerment scholarship accounts" and A.R.S. § 15-2403(K), "On or before July 1 of each year, the department shall develop an applicant and participant handbook that includes information relating to policies and processes of Arizona empowerment scholarship accounts. The policy handbook shall comply with the rules adopted by the state board of education pursuant to this section."

ADMINISTRATIVE RULES FOR ALABAMA'S CREATING HOPE AND OPPORTUNITY FOR OUR STUDENTS' EDUCATION (CHOOSE) PROGRAM

Alabama's Creating Hope and Opportunity for Our Students' Education (CHOOSE) Program was enacted in 2024 and launched in 2025.[29] The CHOOSE Act program "makes refundable income tax credits called education savings accounts (ESAs) available to support the success of every K–12 student in Alabama which may be used by parents of participating students to cover tuition, fees, and other qualified education expenses at approved education service providers (ESPs) in Alabama."[30] Participating students enrolled in participating schools receive up to $7,000 annually.[31] Participating students in a home education program receive up to $2,000 per student, with a cap of $4,000 (two students) per family.[32]

Starting in the 2025–26 school year, the CHOOSE Act program is available to eligible students whose family had an adjusted gross income not exceeding 300 percent of the federal poverty level for the preceding year.[33] Starting in the 2027–28 school year, the program will be available to all eligible students regardless of their family's adjusted gross income.[34] The Legislature has established a priority for awarding the tax credits: The first 500 tax credits should be awarded to participating students with "special-needs."[35] The second priority goes to students awarded in the prior academic year. The third priority goes to students who are dependents of active-duty service members enrolled in or assigned to a priority school as defined in Section 16-6D-4. The fourth priority is for the remaining participating students whose family income does not exceed 300 percent of the federal poverty level. Regardless of these priorities, the Department of Revenue, which administers the program, is required to prioritize siblings of participating students.[36] The priorities assigned in statute are important because the Legislature has allocated $100 million per fiscal year as a floor. However, in response to families, the Legislature increased funding for the CHOOSE Act program by $80 million, bringing the total to $180 million for the 2025–26 school year,[37] though unused funds may accumulate up to $500 million before excess funds are reverted to the Education Trust Fund.[38]

The CHOOSE Act designates the Alabama Department of Revenue (Department) as the administrator of the program and requires the Department to adopt rules to implement the CHOOSE Act Program statutes, Ala. Code § 16-6J-1 through § 16-6J-9. The Department adopted rules, effective January 11, 2025, and can be found in Ala. Admin Code r. 810-28-1-.01 through r. 810-28-1-.07. The rules include The CHOOSE Act Program Definitions (r. 810-28-1-.01), Program Overview and Fund Allocation (r. 810-28-1-.02), Program Eligibility Guidelines and Verification Requirements (r. 810-28-1-.03), Requirements of the Parent of an Eligible or Participating Student (r. 810-28-1-.04), Requirements for

29 Alabama Department of Revenue, "Creating Hope and Opportunity for Our Students' Education Act of 2024: The CHOOSE Act," https://www.revenue.alabama.gov/tax-policy/the-choose-act/.
30 Alabama Administrative Code (Ala. Admin. Code) r. 810-28-1-.01 (The CHOOSE Act Program Definitions)
31 Ala. Code § 16-6J-3(c)(1).
32 Ala. Code § 16-6J-3(c)(2).
33 Ala. Code § 16-6J-3(b)(1); Alabama Department of Revenue, "Creating Hope and Opportunity for Our Students' Education Act of 2024 The CHOOSE Act," https://www.revenue.alabama.gov/tax-policy/the-choose-act/.
34 Ala. Code § 16-6J-3(b)(2); Alabama Department of Revenue, "Creating Hope and Opportunity."
35 Ala. Code § 16-6J-3(d); Alabama Department of Revenue, "Creating Hope and Opportunity."
36 Ala. Code § 16-6J-3(e); Alabama Department of Revenue, "Creating Hope and Opportunity."
37 yes. every kid., "yes. every kid. Applauds Alabama for Nearly Doubling CHOOSE Act Funding," https://yeseverykid.com/press/yes-every-kid-applauds-alabama-for-nearly-doubling-choose-act-funding/#:~:text=In%20response%20to%20overwhelming%20demand%2C%20the%20Alabama,program%20by%20$80%20million%2C%20bringing%20the%20total.
38 Ala. Code § 16-6J-8.

Education Service Providers (r. 810-28-1-.05), Qualifying Educational Expenses (r. 810-28-1-.06), and Fund Availability and Payment Process (r. 810-28-1-.07).

1. Alabama's CHOOSE Act Program rightly required rulemaking from the program's inception

Unlike Arizona's ESA program, the Alabama Legislature recognized the importance of having rules in place from the beginning and therefore made rulemaking mandatory, not optional. Under Ala. Code § 16-6J-6(e), the Department of Revenue is required to "adopt and enforce rules necessary to implement" the CHOOSE Act program. Further, the Legislature rightly prioritized having rules in place from the beginning of the program, but also made sure the rulemaking did not delay implementation:

> **Notwithstanding the Alabama Administrative Procedure Act, the department *shall adopt emergency rules necessary to promptly and effectively* begin administration of the program. Any rule necessary for initial implementation of the program may be adopted as an emergency rule, which shall remain effective for as long as necessary to facilitate initial implementation of the program.[39] (emphasis added)**

2. The Department's CHOOSE Act program rules largely mirror statutory language and focus on administrative and procedural matters related to the administration of the program.

Much of the Department's rules repeat or reword statutory language. In its Definitions section, the definitions for "education service provider (ESP)," "eligible student," "participating school," and "qualifying educational expenses" are directly from the statutes.[40] In addition, rules related to "Program Overview and Fund Allocation," (r. 810-28-1-.02) and "Requirements of the Parent of an Eligible or Participating Student" (r. 810-28-1-.04) are largely rewording of statutory language.

Rules relating to "Program Eligibility Guidelines and Verification Requirements" (r. 810-28-1-.03) and "Fund Availability and Payment Process" (r. 810-28-1-.07) provide necessary administrative and procedural rules. They include both statutory requirements as well as additional regulations reasonably necessary to administer the program. For example, to implement the priorities enumerated in statute, the department includes specific documentation parents need to provide for the department to verify income, residency, guardianship, special-needs status, and active-duty service member status (r. 810-28-1-.03). These types of requirements in the rules are reasonably necessary for the implementation of the program and do not unduly limit the program.

3. The Department's CHOOSE Act program rules include provisions that preserve and promote flexibility in the program.

The Department's rules include some provisions that appear to preserve and promote flexibility in the program, especially as to student eligibility and qualifying educational expenses. For example, the rule's definition for "Participating Student" includes the statutory language but adds language to make clear it includes both students attending a participating school and homeschool students. The added language states, "The term includes an eligible student attending a participating school. The term includes a homeschool student, even if enrolled in a church school, homeschool co-op, or similar entity, provided that the homeschool student is an eligible student."[41] Although this is an expansion of the statutory definition, it corresponds with statutory intent and makes clear that it includes homeschool students, even those enrolled in more organized groups.

39 Ala. Code § 16-6J-6(e).
40 Ala. Admin. Code r. 810-28-1-.01 (The CHOOSE Act Program Definitions).
41 Ala. Admin. Code r. 810-28-1-.01(10).

In addition, the Department's rule regarding "qualifying educational expenses" includes language that appears to promote flexibility for participating students as they use the program.[42] The CHOOSE Act allows participating students to use funds for textbooks.[43] The statute is silent as to the subject of the textbooks. The Department could have limited textbooks to traditional K–12 subjects like math, language arts, science, and social studies.[44] Instead, the rules include an expansive and flexible list of subjects: "Mathematics, English Language Arts (including Phonics, Grammar, Reading, and Writing), Science (including Computer Science and Engineering), Social Studies (including History, Civics, and Character Education), Religion, Art, Music, Foreign Languages and other electives."[45]

The CHOOSE Act also allows participating students to use funds for "private tutoring."[46] The statute is silent as to whether the private tutoring is exclusively in person. The Department rules state that the private tutoring may be in person or online, which provides more flexibility for students in the program and allows for more private tutors to provide services.[47]

The CHOOSE Act also allows students to use funds for "curricula and instructional materials."[48] The Department rules provide an expansive (though not exhaustive) list of resources available under this category:

> **Resources available for individual student use only, and includes: reference books, curriculum, workbooks, flashcards, charts and supplemental reading materials that are associated with approved textbook subjects; markers (including dry erase and highlighters); notebooks (including composition notebooks); paper (lined, copy, and graph); binders; pencils; pens; rulers; folders; glue; colored pencils; crayons; erasers; scissors; and calculators (including graphing); computers and technological aids. The bulk purchase of such products is not allowed.**[49]

In addition, the rules further expand the flexibility of the program for students by including "computers" and "technological aids" as "instructional materials" for a student's educational needs and approved by the Department or required by a licensed physician.[50] Computers include a laptop, desktop, or tablet, not to exceed $1,200 and are limited to one item every two years. The $1,200 cap on the technology was added during rulemaking and is restrictive—it is not in the statute. Technological aids include "printers and ink (3D printers are not approved), headphones, keyboards, mouse and mouse pad, protective cases for such technological aids, and assistive technology devices for special-needs," and are limited to $500 per academic year.[51] This is another example of placing a limiting cap on items, which the statute does not outline.

The above examples demonstrate that the Department rules include some provisions that seek to make the program flexible for participating students. This flexibility aligns with the purpose of the CHOOSE Act, which is to create hope and opportunity for students by providing them with educational choice. However, as we will discuss next, other provisions in the rules appear to unduly limit the program's flexibility.

4. The Department's CHOOSE Act program rules include restrictions on education service providers and qualifying educational expenses that appear to limit the program's flexibility.

Administrative rules are often necessary to implement statutory programs; however, they are not meant to establish policy, unless explicitly stated in statute. The Alabama Legislature has established the CHOOSE Act program and requires the Department of Revenue to administer the program and "adopt and enforce rules necessary to implement this chapter [CHOOSE Act of 2024]." As noted above, the majority of the rules adopted

42 Ala. Admin. Code r. 810-28-1-.06. In addition, the Department's rule regarding "Qualifying Educational Expenses" includes language that appears to promote flexibility for participating students as they use the program.
43 Ala. Code § 16-6J-2(10)(b).
44 Whether the Department has the authority or should restrict the subjects in the first place will be discussed below.
45 Ala. Admin. Code r. 810-28-1-.06(1)(b).
46 Ala. Code § 16-6J-2(10)(d).
47 Ala. Admin. Code r. 810-28-1-.06(1)(d).
48 Ala. Code § 16-6J-2(10)(e).
49 Ala. Admin. Code r. 810-28-1-.06(1)(e).
50 Ala. Admin. Code r. 810-28-1-.06(1)(e).
51 Ala. Admin. Code r. 810-28-1-.06(1)(e).

by the Department use statutory language and implement new but necessary administrative requirements. Some provisions protect the flexibility of the program; however, others, especially related to education service providers and qualifying educational expenses, establish restrictive policies not found in statute.

As discussed previously, the CHOOSE Act allows participating students to use funds for "private tutoring."[52] The Act includes requirements for "education service providers," but it does not include any specific requirement for private tutors.[53] Nonetheless, the Department's rules require private tutors to "[s]ubmit proof of a Bachelor's degree, or certification by the state, or accreditation by a regional or national accrediting organization in order to provide tutoring services."[54] Besides the fact that it is questionable whether tutoring accrediting organizations exist, requiring a bachelor's degree or certification by the state certainly limits who can tutor participating students.

The Legislature has also authorized the Department to "administer the program with respect to participating schools and education service providers"; however, the Department should do so by performing specific enumerated tasks in statute.[55] The enumerated tasks do not include establishing additional qualifications for education service providers beyond those included in statute.

The Department's rules also add restrictions to the statutorily enumerated qualifying educational expenses that appear to unduly limit the access to educational goods and services.[56] The CHOOSE act allows participating students to use funds for "[t]uition and fees at participating school."[57] The Department rules state that this includes "enrollment and registration fees, student fees, activity fees, school fee, security fee, programming fee, administration fee, technology fees, supply fees, and tuition."[58] The word "includes" is typically not restrictive, which means this is not an exhaustive list. However, the rule continues by stating that tuition and fees at participating school do "not include athletic fees, missed session/cancellation fees, late fees, capital or building fees, commitment fees, transportation fees, food, field trip fees, child-care fees, and uniforms."[59] These restrictions might advance good public policy (some more than others), but they are not expressly prohibited in statute and therefore arguably limit the program beyond statutory intent.

The CHOOSE Act also allows participating students to use funds for textbooks, private tutoring, tuition or fees for nonpublic online learning programs, and educational software and applications.[60] The Department's rules limit these to the following subjects: "Mathematics, English Language Arts (including Phonics, Grammar, Reading, and Writing), Science (including Computer Science and Engineering), Social Studies (including History, Civics, and Character Education), Religion, Art, Music, Foreign Languages and other electives." These restrictions are not found in statute, nor are these subjects mentioned as subjects that need to be taught. As discussed previously, the list of subjects is extensive and includes "other electives," making it quite flexible. However, as long as the textbook, private tutoring, nonpublic online learning program, or educational software and applications are educational in nature, it should be allowed even if it does not fit within this list of approved subjects. Limiting these educational resources to a list of educational subjects to the exclusion of others appears to unduly limit the program's flexibility.

To conclude, Alabama's CHOOSE Act program rightly required rulemaking from the program's inception. The Department of Revenue's rules largely mirror statutory language and focus on administrative and procedural matters related to the administration of the program. Some provisions in the rules promote flexibility in the program, but other language related to education service providers and qualifying educational expenses appear to unduly limit the program beyond statutory authority.

52 Ala. Code § 16-6J-2(10)(d).
53 Ala. Code § 16-6J-5.
54 Ala. Admin. Code r. 810-28-1-.05(2)(a)(i).
55 Ala. Code § 16-6J-6(c): "(c) The department shall administer the program with respect to participating schools and education service providers by doing all of the following: (1) Create and disseminate a standard application form for a person or entity to establish eligibility as a participating school or education service provider. (2) Establish and publicize a deadline by which application forms must be submitted to the department. (3) Receive applications and approve applications for participating schools and education service providers that meet the requirements of section 5(a) or 5(b) of this act. (4) Provide to education service providers and participating schools a written explanation of qualifying expenses, their responsibilities under the program, and the duties and responsibilities of the department. (5) Maintain and routinely update the list of approved participating schools and education service providers on the department's website."
56 Ala. Code § 16-6J-2(10).
57 Ala. Code § 16-6J-2(10)(a).
58 Ala. Admin. Code r. 810-28-1-.06(1)(a).
59 Ala. Admin. Code r. 810-28-1-.06(1)(a).
60 Ala. Code § 16-6J-2(10)(b), (d), (f), and (g).

ADMINISTRATIVE RULES FOR THE ARKANSAS CHILDREN'S EDUCATIONAL FREEDOM ACCOUNT PROGRAM

The Arkansas Children's Educational Freedom Account program (EFA) was enacted in 2023 and launched in the 2023–24 school year for the first phase of implementation. The EFA program provides education savings accounts for participating students in which they receive 90 percent of the prior year's state education funding per student to be used for private school tuition, instructional materials, tutoring, and other educational goods and services.[61]

The EFA program was designed to expand student eligibility over three years before becoming fully universal in the 2025–26 school year. For the 2023–24 school year, eligibility was limited to the following categories: students with a disability, students who are homeless, students who are a current/former foster child, participants in the Succeed Scholarship Program, children of active-military families, students enrolled the prior year in public school with rating of "F" or public school district classified as in need of Level 5 intensive support, and students entering kindergarten for the first time.[62] For 2023–24, program size was capped at 1.5 percent of the 2022–23 total public school enrollment.[63]

For the 2024–25 school year, student eligibility was expanded to include students whose parents are veterans, in the uniformed service reserve components, first responders, or law enforcement officers. For the 2024–25 school year, program size was capped at 3 percent of the 2022–23 total public school enrollment.[64] For the 2025–26 school year, all K–12 students are eligible for the EFA program and there is no enrollment cap.[65]

The EFA program directs the Division of Elementary and Secondary Education to administer it and requires the State Board of Education to adopt rules to implement its statutes, Ark. Code Ann. § 6-18-2501 through § 6-18-2511.[66] The Arkansas State Board of Education adopted rules for the program which became effective August 10, 2024, and can be found in Code Ark. R. 005.28.61-1.00 through 005.28.61-12.00.

The administrative rules include Purpose (005.28.61-1.00), Definitions (005.28.61-2.00), Student Eligibility (005.28.61-3.00), Student Application (005.28.61-4.00), Agreement and Funds Transfer (005.28.61-5.00), Term of EFA Eligibility (005.28.61-6.00), Participating Schools and Service Providers (005.28.61-7.00), Monitoring and Compliance (005.28.61-8.00), Appeals Process (005.28.61-9.00), Procurement and Contracting (005.28.61-10.00), Payments Under the Educational Freedom Account Program (005.28.61-11.00), and Program Evaluation (005.28.61-12.00).

61 Ark. Code Ann. § 6-18-2503(11) and § 6-18-2505(a)(1).
62 Ark. Code Ann. § 6-18-2506.
63 Ark. Code Ann. § 6-18-2506.
64 Ark. Code Ann. § 6-18-2506.
65 Ark. Code Ann. § 6-18-2506.
66 Ark. Code Ann. §§ 6-18-2504, -2506(d).

1. EFA statutes include language emphasizing flexibility for EFA families to access more educational options.

The Legislature directs the State Board of Education to adopt rules that help EFA families access a variety of educational goods and services. The EFA statute requires the State Board of Education to include in their rules a process for determining the eligibility of service providers, including the "*removal of unnecessary barriers or disincentives to participation by potential participating service providers*"[67] (emphasis added). That is, the rules should not be burdensome and therefore discourage service providers from participating in the program. In addition, in directing the State Board of Education to adopt rules to disqualify participating schools or service providers when necessary, the Legislature makes clear that the purpose of the EFA program is "[t]o ensure that account funds . . . provide for the *expansion of access to educational options* by reducing family financial burdens"[68] (emphasis added). Similarly, the EFA rules state the purpose of the EFA program is "to provide Arkansas families with more educational options for their children as they seek educational solutions and curricula that fit the needs of their families."[69]

EFA statutes also contain language emphasizing flexibility for EFA families to access more educational options. Under statute, "qualifying expenses" includes, in part, "[e]xpenses determined by a participating school to be necessary for the education of a participating student and required to be paid by a participating student who is enrolled in the participating school, including *without limitation expenses related to*: (1) Supplies; (2) Equipment;(3) Access to technology; and (4) Services provided by or at the participating school" (emphasis added).[70] The language of "including without limitation expenses related to" is broad and would prohibit the rulemaking body or program administrator from excluding or limiting expenses a participating school determines to be necessary. Further, after listing more than 17 "qualifying expenses," the statute concludes the list with "[a]ny other educational expense approved by the Division of Elementary and Secondary Education."[71] This last provision makes clear that the statute's list of qualifying expenses is not meant to be exhaustive and provides the Division discretion to approve additional categories of educational goods and services.

Finally, the Legislature requires the Department of Education to adopt a payment system that "provides *maximum flexibility to parents* for facilitating direct payments to participating service providers and requests for preapproval of and reimbursements for qualifying expenses" (emphasis added).[72] The Legislature wants a flexible program that allows parents to access a broad array of educational options.

2. EFA statutes authorize the State Board of Education to set additional eligibility criteria for private schools, which could limit the educational choices for students beyond legislative intent.

EFA statutes include an extensive list of requirements private schools must meet in order to participate in the EFA program.[73] These requirements include that a private school has to "[m]eet any other eligibility criteria set by the board rules."[74] In effect, this provision seems to authorize the State Board of Education to make the eligibility criteria more demanding for private schools, potentially limiting the number of qualifying schools.

The adopted EFA rules largely restate the statutory eligibility criteria, though the State Board has added some requirements.[75] For example, the adopted rules require private schools to either offer in-person classroom instruction within the state or—if the private school operates exclusively as a virtual school—maintain a registered agent who is a resident of the state.[76] The statute does not explicitly require the private school to be

67 Ark. Code Ann. § 6-18-2504(b)(1).
68 Ark. Code Ann. § 6-18-2504(d).
69 Code Ark. R. 005.28.61-1.00 (Purpose).
70 Ark. Code Ann. § 6-18-2503(11).
71 Ark. Code Ann. § 6-18-2503(11)(xi).
72 Ark. Code Ann. § 6-18-2505(e)(3)(B).
73 Ark. Code Ann. §§ 6-18-2503(8), -2507(a).
74 Ark. Code Ann. § 6-18-2507(a)(8).
75 Code Ark. R. 005.28.61-7.00 (Participating Schools and Service Providers).
76 Code Ark. R. 005.28.61-7.01.1.

located in Arkansas and is silent as to the requirements for virtual private schools. Additionally, the Legislature requires participating private schools to "complete background checks and fingerprinting for any employee working in the private school."[77] The rules add that a private school must attest that "[a]ll the private school personnel have cleared a background check every five (5) years and with fingerprinting documentation on file."[78]

These additional requirements may not appear to unduly limit the number of private schools able to participate in the program. However, the prevalence of fully online private schools (who might not have a registered agent who is a resident of the state) and the possibility of otherwise qualifying private schools across state lines might unnecessarily limit educational options for students in the program. In any case, the current statutory language would allow rule changes that could make it even more restrictive for private schools to qualify.

3. The EFA statutes appear to authorize the State Board of Education to determine the eligibility criteria for education service providers, which could unduly limit the educational choices for students.

The EFA statutes appear to leave eligibility criteria for education service providers to the State Board of Education's rulemaking. The EFA statutes define "participating service provider" as a "person or an entity, including participating public or private school, that receives payments from program accounts to provide goods and services that are covered as qualifying expenses."[79] This broad definition does not provide much eligibility criteria. Unlike with private schools,[80] the Legislature did not include an extensive list of eligibility criteria for education service providers.

The EFA law requires the State Board of Education to adopt rules that include a "[p]rocess for determining the eligibility of . . . service providers, including the . . . removal of unnecessary barriers or disincentives to participation by potential participating service providers.[81] Additionally, the Legislature required the State Board to adopt rules no later than June 30, 2024, "providing for program eligibility for participating service providers that are not participating schools."[82] Further, the Legislature included that the "department may bar a service provider from accepting payments from accounts and restrict the service provider's ability to serve additional participating students if the department determines that the participating service provider has," among other things, "[f]ailed to maintain continuing *eligibility criteria established by the state board*" (emphasis added).[83] These provisions appear to leave eligibility criteria for education service providers in the hands of the State Board of Education. This approach provides a lot of authority to the State Board in determining the extent of the program's flexibility.

On the one hand, EFA rules appear to provide flexibility to EFA families by defining education service providers in general terms and including an extensive list of potential education service providers. The rule states that an "education service provider" includes an "individual, business, nonprofit organization or other entity which offers educational materials or services that are qualifying expenses reimbursable by EFA funds."[84] The rules go on to state that "[e]ducation service providers *may include without limitation*" (emphasis added)[85]:

2.04.1.1 Public school districts, in person or virtual;

2.04.1.2 Full-time student-facing providers (e.g., micro-schools, learning pods, full-time homeschool instructional support group, and contracted educators) which provide the majority of a participating student's instructional time;

2.04.1.3 Part-time student-facing providers (e.g., part-time homeschool co-op, part-time homeschool instructional support group, tutors, educational therapists, transportation providers); and

2.04.1.4 Vendors (entities that do not directly interface with students such as retailers, curriculum providers, etc.).

77 Ark. Code Ann. § 6-18-2507(a)(12).
78 Code Ark. R. 005.28.61-7.01.4.2.
79 Ark. Code Ann. § 6-18-2503(9).
80 Ark. Code Ann. § 6-18-2507(a).
81 Ark. Code Ann. § 6-18-2504(b)(1).
82 Ark. Code Ann. § 6-18-2507(c).
83 Ark. Code Ann. § 6-18-2507(e)(1).
84 Code Ark. R. 005.28.61-2.04.
85 Code Ark. R. 005.28.61-2.04.1.

The rules go on to define "student-facing" as including "either in-person or virtually."[86] Certainly, this list of potential education service providers is meant to be as inclusive as possible, yet not exhaustive (e.g., "may include without limitation"). Thus, the rules appear to protect the flexibility of the program.

On the other hand, the rules impose definitions and eligibility criteria on some education service providers that may limit the eligible providers and thereby reduce educational options for EFA families. For example, the rules provide detailed definitions for "learning pod"[87] and "micro-school."[88] This appears forward thinking and innovative, allowing for more novel educational models to be included. However, the detailed definitions may limit or at least dissuade existing groups that understand themselves to be a "learning pod" or "micro-school" from participating if they do not meet every single element of the detailed definition.

Additionally, because the statute is largely silent as to eligibility criteria for education service providers, the State Board applies many of the eligibility criteria in statute (and rules) for private schools and applies them to service providers. A service provider must attest that it "does not discriminate on any basis prohibited by the Civil Rights Act of 1964, 42 U.S.C. § 2000d, as it existed on January 1, 2023."[89] It must also attest that it "is not an individual who may reasonably pose a risk to the appropriate use of EFA Program funds if disbursed and does not employ any individual who may reasonably pose a risk to the appropriate use of EFA Program funds if disbursed."[90] The education service provider must additionally attest that "[a]ll personnel of student-facing education service providers have cleared a background check every five (5) years and have fingerprinting documentation on file" unless "[v]irtual direct instructional providers, for whom fingerprinting is not required by Arkansas law, are exempt from the fingerprinting requirement in section 7.04.1.1."[91]

Because these requirements are at first glance reasonable and mirror those the Legislature expressly imposed on private schools, they do not appear to unduly limit the program. However, it should be noted that these requirements are being imposed on learning pods and homeschool co-ops, which are created and led by a voluntary association of parents. Requiring these attestations from homeschool groups seems like excessive regulation, and could discourage participation in the program.

Moreover, the State Board also imposes credential requirements for any employee or individual that provides instructional or tutoring services for an education service provider.[92] They must hold an Arkansas Standard or Provisional Professional Teaching License or be otherwise qualified through a department-recognized Alternative Route Program, meet the requirements set by a tutoring organization accredited by an accrediting association recognized by the State Board, be employed in a teaching or tutoring capacity at an accredited institution of higher education, or hold a baccalaureate or graduate-level degree. On a case-by-case basis the Department may allow exceptions if the instructor or tutor "has a prior teaching experience of not less than three (3) years, which demonstrates special skills, knowledge, or expertise that qualifies the individual to provide instruction on a specific subject; or [e]vidence is found that the individual has subject matter expertise in their field or can otherwise demonstrate possession of, or a satisfactory plan to acquire, the necessary skills, knowledge, or resources to teach a particular course or tutor in a particular subject area."[93]

86 Code Ark. R. 005.28.61-2.19.

87 Code Ark. R. 005.28.61-2.10. "Learning pod" means a community of homeschool students, such as a homeschool co-op or support group, created by a voluntary association of parents, taught by instructors or facilitators, that provide part-time or full-time academic services, including without limitation: Core academic subjects of mathematics; English language arts; Social studies; and Science. A learning pod is not a micro-school, a daycare facility, or a private school." Tangentially, it should be noted that under "Full-time student-facing providers" (Code Ark. R. 005.28.61-2.04.1.2), the rule includes "learning pods" and "homeschool instructional support group" as separate examples, yet the above definition of "learning pod" includes "a homeschool co-op or support group" as an example of a "learning pod." This could cause confusion. Further, the rule includes "learning pods" as an example of a "full-time student facing provider" and not as an example of a "part-time student-facing provider" (Code Ark. R. 005.28.61-2.04.1.2 and 005.28.61-2.04.1.3). However, the definition of "learning pod" states that it includes both "part-time or full-time academic services" (Code Ark. R. 005.28.61-2.10). This also could cause confusion.

88 Code Ark. R. 005.28.61-2.11. "Micro-school means a tuition-based organization that serves a community of homeschool students, simultaneously in the same space, and that maintains responsibility for employing instructor or facilitators to provide part-time or full-time academic services, including without limitation: Core academic subjects of mathematics; English language arts; Social studies; and Science. A micro-school is not a learning pod, a daycare facility, or a private school." Tangentially, the rule includes "micro-schools" as an example of a "full-time student facing provider" and not as an example of a "part-time student-facing provider" (Code Ark. R. 005.28.61-2.04.1.2 and 005.28.61-2.04.1.3). However, the definition of "micro-schools" states that it includes both "part-time or full-time academic services" (Code Ark. R. 005.28.61-2.11). This could cause confusion.

89 Code Ark. R. 005.28.61-7.04.1.1.

90 Code Ark. R. 005.28.61-7.04.1.2.

91 Code Ark. R. 005.28.61-7.04.1.4.

92 Code Ark. R. 005.28.61-7.04.4.5.

93 Code Ark. R. 005.28.61-7.04.4.5.e.

These requirements might unduly limit who qualifies as an education service provider. First, it's uncertain whether accrediting associations for tutoring organizations exist for the State Board to recognize. Second, depending on how strict the Department is in approving exceptions, it could limit potential tutors or instructors. Would the Department deny a homeschool co-op from using EFA funds to pay a college student to tutor or instruct their young children in math? In any case, the imposed requirements for service providers are largely not in statute. If the Legislature finds the eligibility criteria established by the State Board or the Department's evaluation of exceptions too limiting, there will need to be statutory changes making clear what eligibility criteria the Legislature would prefer.

4. The EFA rules largely preserve the statutory flexibility for qualifying expenses, but they do impose additional restrictions for some categories.

The rules define "qualifying expenses" as "all expenses that an account holder can pay from an EFA on behalf of the participating student who is enrolled in private school, or a home school under Arkansas Code § 6-15-501 et seq, including *without limitation*"[94] (emphasis added). The rules proceed to lay out the qualifying expenses under statute, with minor rewording at times.[95] However, the rules impose additional restrictions on "transportation costs" and "technological devices."

EFA statutes allow the use of EFA funds for "[c]osts associated with transportation to and from a participating service provider or participating school."[96] State Board rules add that these costs cannot "exceed the reimbursement rate adopted by the State for state employees."[97]

Under the EFA statutes, program participants may use EFA funds for "[t]echnological devices used to meet a participating student's educational needs, which shall not include (1) A television; (2) A video game console or accessory; or (3) Home theatre or audio equipment."98 But, the Legislature also includes that "[t]echnological devices . . . are subject to approval by the Department of Education or a licensed physician."99 This provision requires additional review and approval by either the Department or a physician; it does not expressly state that the State Board in its rulemaking may impose further restrictions. Nonetheless, the rules impose a $1,000 cap:

> **All technology purchases will be reviewed by the department for appropriateness and need. Personal devices including without limitation: laptops, Chromebooks, or iPads, with a cost of more than one thousand dollars ($1,000) will not be allowed unless the participating student can demonstrate to the department's satisfaction that there is a specific school requirement or that the technology is deemed necessary for the participating student by a qualified professional.**[100]

These restrictions appear to limit qualifying expenses beyond what is expressly allowed by statute. Especially as it relates to technological devices, it would be preferable for the Legislature to include dollar amount limits if it so chooses.

In sum, the Arkansas Educational Freedom Account program includes statutory language emphasizing flexibility for EFA families to access more educational options. The EFA statutes authorize the State Board of Education to set additional eligibility criteria for private schools, which could limit the educational choices for students beyond legislative intent. Similarly, the statutes appear to authorize the State Board of Education to determine the eligibility criteria for education service providers, which could unduly limit the educational choices for students. The EFA rules largely preserve the statutory flexibility for qualifying expenses, but they do impose additional restrictions for some categories.

94 Code Ark. R. 005.28.61-2.16.
95 Code Ark. R. 005.28.61-2.16.
96 Ark. Code Ann. § 6-18-2503(11)(B)(x).
97 Code Ark. R. 005.28.61-2.16.18.
98 Ark. Code Ann. § 6-18-2503(11)(B)(ix).
99 Ark. Code Ann. § 6-18-2503(11)(B)(ix)(b).
100 Code Ark. R. 005.28.61-2.16.17.3.

POLICY RECOMMENDATIONS

As states adopt and expand ESA programs, it is essential to ensure clarity and consistency in how the programs are administered. To maintain legislative intent, uphold program integrity, and protect parental choice and flexibility, the following policy principles should guide the delegation of rulemaking authority.

1. Require Official Rulemaking for the Administration of ESA Programs.

States with ESA programs, as well as those considering these programs, should require the adoption of rules for the administration of the program. Otherwise, the administration of the program is left to ad hoc policies and procedures by the program administrator that are subject to change at any time. Official rulemaking ensures more transparency as rules are publicly developed through a formal process that includes stakeholder feedback. In addition to transparency, rules governing the administration of the program provide more consistency over the years and certainty for parents, schools, service providers, and vendors. Significant policy changes month to month or even year to year ultimately undermine the success and demand for these programs. Unlike the Alabama and Arkansas ESA programs, which required rules from their inception, it took eight years before the Arizona program had the added transparency and consistency that comes with rulemaking.

2. Grant Rulemaking Authority to an Agency that Does Not Directly Administer the Program.

Rules adopted by a regulatory body can provide day-to-day program oversight to ensure administrators comply with ESA statutes and rules. In Arizona and Arkansas, the State Board of Education is tasked with rulemaking, and the Department of Education, which administers the day-to-day operations, is required to comply with these rules. This additional layer of accountability may help prevent program administrators from unduly restricting the program due to differing policy objectives or pragmatic purposes.

3. Rules Should Focus on Administrative and Procedural Matters, Not Substantive Policymaking.

While the rulemaking body should have the flexibility to adopt administrative and procedural rules—such as timelines, application forms, and compliance processes—substantive elements of the ESA program should be determined by the legislature. Rules should be designed to implement relevant ESA statutes and therefore should not limit the flexibility of the program or create policies that conflict with legislative intent. Especially in regard to allowable educational expenses and educational service providers, rules should not restrict the program more than what the statute permits. In other words, the rules should not disallow what the statute allows. The legislature may choose, as is the case in Arkansas, to authorize the rulemaking body to establish substantive policies related to private schools, education service providers and qualifying expenses; however, this risks restrictions on the program not intended by the legislature.

4. Rules Should Expressly Preserve and Promote Flexibility in the Program.

Consistent with the purpose of ESA programs—expanding educational choice for students—ESA administrative rules should seek to preserve and promote the flexibility of the program. The rules, as well as statute, should include express language stating that the purpose of the program is to provide families with more educational options and that the statute and rules should be read and applied to promote flexibility. For example, the Arkansas EFA rules state the purpose of the program is "to provide Arkansas families with more educational

options for their children as they seek educational solutions and curricula that fit the needs of their families."[101] Rules should use language like "without limitation" and "maximum flexibility to parents" as in Arkansas.[102] In addition, definitions for qualifying expenses and education service providers should be left as broad as in statute to allow the most flexibility. However, if the rules are going to expand statutory definitions, they should be written to preserve program flexibility by using an inclusive list. It should be made clear that the list provided is not exhaustive. Further, the rules should include specific language prohibiting the program administrator, like a Department of Education, from further restricting the program, especially as it relates to qualifying expenses and education service providers.

5. Rules Should Not Unduly Restrict the Flexibility of the Program.

Whether intentionally or not, some provisions in the Alabama and Arkansas program restrict the flexibility of their programs. Overdefining potential education service providers—like EFA rules defining "learning pod" and "micro-school"—may unintentionally limit the program's flexibility. Adding non-statutory eligibility criteria to private schools and education service provides (e.g, tutors and homeschool groups) could likewise unduly limit the flexibility of the program. When it comes to qualifying educational expenses, rules should not add non-statutory limitations (e.g., dollar caps and disallowing of certain fees) unless expressly authorized in statute.

6. Rules Should Include Accountability Measures for the Program Administrator.

Rules (as well as statutes) should include accountability measures for the program administrator to ensure rules and statutes are complied with. Rules are not that helpful if the program administrator can simply choose not to follow them. Arizona's requirement for the State Board to approve the Department's ESA handbook on a yearly basis is one way to keep the Department accountable to the Board, to ESA families, and to other stakeholders. The rules should also include an appeals process so that ESA families, schools, and education service providers can appeal administrative decisions by the Department. Otherwise, the program administrators are largely free to operate as they choose.

7. Clarify Legislative Intent Where Authority Is Delegated.

If the legislature intends to grant authority to an agency to impose additional restrictions (e.g., additional eligibility criteria for service providers or dollar caps on certain items), that authority must be made explicit in the statutory language. Ambiguity in the law can lead to legal challenges, misinterpretations, and barriers for families and education providers. Clear statutory language is essential for ensuring rulemaking bodies understand the scope of their authority. Conversely, if the legislature does not want these types of additional restrictions to be added by the rulemaking body or the program administrator, the statute should expressly say so. Ambiguity as to what the statute allows often creates problems between the program administrator and ESA families.

8. Codify Good Policy into Law.

If the rulemaking body identifies good policies (as allowed by statute)—such as reasonable restrictions on service providers or qualified educational expenses—those policies should be codified directly in statute. The legislature, not administrative agencies, should determine the foundational structure of the program. Granting broad discretion without legislative clarity risks inconsistent application and unintended limitations on families' choices. Continuing to push for changes to be in the law, to avoid rules that are overly restrictive, is good governance and practice.

101 Code Ark. R. 005.28.61-1.00 (Purpose).
102 See Ark. Code Ann. § 6-18-2505(e)(3)(B) and Code Ark. R. 005.28.61-2.04.1.

CONCLUSION

As this analysis demonstrates, rulemaking plays a vital role in the effective administration of ESA programs. States like Arizona, Alabama, and Arkansas have taken different approaches to rule adoption, each offering important lessons in how to strike the right balance between agency oversight and legislative intent. Across all three states, the clearest takeaway is this: **Administrative rules should enhance program transparency and functionality without limiting the core flexibility that ESAs are designed to provide.**

The findings in this paper underscore the importance of legislative clarity when delegating rulemaking authority. While procedural and administrative rules are necessary for efficient program management, substantive decisions—such as determining eligible expenses and qualifying education providers—must remain in the hands of elected lawmakers. Otherwise, agencies risk overstepping their bounds, either by imposing burdensome restrictions or by slowly reshaping the program away from its intended purpose.

Policymakers considering new ESA legislation or revisiting existing statutes should proactively define the limits of rulemaking authority in statute. They should also codify essential policies directly into law, rather than relying on administrative discretion, which is susceptible to change with agency leadership turnover. Most critically, the legislature should make clear distinctions between what agencies may administer and what only lawmakers may decide.

ESA programs are fundamentally about empowering families with educational options. Maintaining that empowerment requires a careful legal and regulatory framework—one that supports program stability, respects legislative authority, and prioritizes the needs of students and families. States that follow these principles will not only strengthen their ESA programs but also uphold the public trust and confidence that such programs rely on to thrive.

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