

# MASA/MoSPRA 2014 Spring Conference

## Legal Aspects of School Choice

by

**Duane Martin and Rachel England**

March 20, 2014



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# Missouri



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## Information About Duane Martin



Duane Martin is a first generation college graduate who values the profound impact public educators have had on his life. With this in mind, Duane has assembled a team of advocates for public schools in Missouri. The team at Missouri EdCounsel consists of attorneys and support staff organized to defend public educational leaders and the schools they lead. This experience defending schools in litigation provides the platform for the firm's work in advising educational leaders regarding law, policy and strategy in the daily operation of Missouri's schools.

Duane's professional life has focused on public service. After serving overseas as an Army officer, Duane returned home to Missouri to attend law school. In law school, he served as Editor in Chief of the ABA's national quarterly for local government law. Following graduation from law school, Duane served as a Judicial Clerk at the Missouri Court of Appeals and as an Assistant Attorney General for the State of Missouri.

In private practice, Duane represented his first school district in 1997 and has dedicated his practice exclusively to the representation of public school districts since 2002. He has represented public school districts in state and federal court, as well as before state and federal administrative bodies. His experience includes litigation on behalf of school districts in a wide variety of issues, including claims relating to teachers and other school employees, collective bargaining, student rights and discipline, contract disputes, school construction projects, election and ballot issues, personal injury, and real estate law. Duane also routinely advises school districts regarding personnel matters, implementation and revision of board policies and regulations, contracts, and compliance with State and federal laws. He frequently speaks to groups of school administrators, school board members, and other attorneys on education law issues at seminars sponsored by state education organizations. He has published scholarly work in national and state publications regarding complex legal matters affecting local governmental bodies.

Duane and his wife, Wendy, have six children, all of whom are students in Missouri public schools.



## Information About Rachel England



After beginning her legal career in civil litigation, Rachel now exclusively represents Missouri public schools as a part of the Missouri EdCounsel team. Rachel has experience representing Missouri public schools in a broad variety of areas, including discrimination claims, employment matters involving both certified and non-certified staff, student discipline matters, constitutional matters, and contract and real estate matters. Rachel also has extensive experience advising and representing districts on complaints before the Equal Employment Opportunity Commission, the Office for Civil Rights, and the Missouri Human Rights Commission. Rachel's experience includes representation of school districts at trial and on appeal to the Missouri Supreme Court.

Another critical part of Rachel's practice involves working with administrators and teachers who need immediate guidance regarding law and policy. In the fast-paced school environment, administrators and teachers often must make decisions and act quickly. Accordingly, a point of emphasis for Rachel is the timely and accurate general counsel for school leaders regarding legal and policy issues involving the daily operation of their schools. Rachel's experience in civil litigation provides valuable insight into how best to manage legal risks in the operations of Missouri schools.

Rachel is regularly asked to speak to groups of school administrators and staff concerning the legal issues that arise in the school community. Rachel enjoys training her clients regarding the highly complicated laws and regulations that apply to public schools in a straightforward and concise manner. Rachel's practice requires her to be familiar with the dynamic legal landscape for Missouri schools and routinely present updates to administrators, board members and staff.

Rachel is an avid supporter of the Missouri public school system. She attended Missouri public school for kindergarten through her senior year of high school (Francis Howell School District), for college (Truman State University), and for law school (University of Missouri - Kansas City). She takes great pride in the public education she received and recognizes the positive impact of her public school experience. Rachel's interest in the law was first piqued when her fifth grade teacher took her on a class field trip to the old courthouse in St. Charles County and appointed her to be the judge presiding over the trial of "The Three Little Pigs vs. The Big, Bad Wolf." Rachel is passionate about school law and feels fortunate to play a part in ensuring the continued success and strength of Missouri schools.

Rachel and her husband, Adam, recently celebrated the birth of their first child, Abel.

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**Legal Aspects of  
"School Choice" Proposals**

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Any "school choice" proposal should be examined to ensure that it comports with Missouri and federal constitutional and statutory guarantees and prohibitions.

6 legal questions can guide this inquiry

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### The Six Legal Questions

1. Does the proposal violate the establishment clauses of U.S. and Missouri constitutions?
2. Would the operation of proposed program result in discrimination on the basis of race or other protected classification?
3. Does the program use public funds for a private purpose?
4. Is the proposed program consistent with Missouri's constitutional obligation to maintain free public schools?
5. Does the proposed program provide access and programming to allow children with disabilities to participate in the program?
6. Does the proposed program operate in a manner consistent with current statutory requirements?

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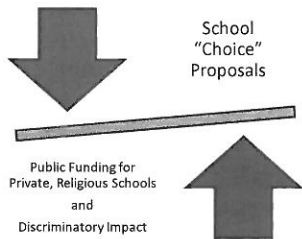
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### Clearest Legal Challenges



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Does the proposal violate the establishment of religion clauses in the U.S. and Missouri Constitutions?

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### Establishment Clause

Prohibits government officials from adopting any policy or practice "respecting an establishment of religion."

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### U.S. Establishment Clause

- Some programs allow private religious schools to participate thereby providing public funding for both religious and secular education.
- The question as to whether allowing public funds to purchase private religious education violates the Establishment Clause was resolved by *Zelman v. Simmons-Harris* in 2002.
- The five-member majority held that a Cleveland program served a legitimate secular purpose of providing low-income families a means to purchase educational opportunities for their children.
- In addition, the Court held that as long as parents (the recipients of the aid) were not held to religious criteria for participation and had available to them a "genuine choice" from among a variety of secular and sectarian schools, the program was not unconstitutional.
- A key factor in the ruling was the fact that the decision to enroll in a religious school was made by private individuals, not the state.

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### Missouri's Establishment Clause Art. IX, Section 8

- Neither the general assembly, nor any county, city, town, township, *school district* or other municipal corporation, shall ever make an appropriation or *pay from any public fund whatever; anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever;* nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

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Would the operation of proposed program result in discrimination on the basis of race or other protected classification?

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**Federal Law**

- The Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C.A. §§ 1701 et seq., is one among several statutes that declare a strong legislative policy against **discrimination** in public schools and colleges on the basis of race, color, or national origin, and sex.
- This legislation supplements the commands of the Equal Protection Clause of the 14th Amendment and the Due Process Clause of the Fifth Amendment, that **discrimination** on the basis of race, color, or national origin in public education is unconstitutional.
- Section 204 of the EEOA, 20 U.S.C.A. § 1703, broadly prohibits denial of equal educational opportunity on the basis of race, color, sex, or national origin.

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**Federal Desegregation Law**

- The U.S. Supreme Court has held that school boards in districts that previously segregated students have an affirmative responsibility to ensure that pupil assignment policies are not used to perpetuate or re-establish a segregated system. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).
- Any school choice program must be in compliance with desegregation court orders

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**Missouri Human Rights Act**

- The MHRA prohibits “any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, as defined in section 213.010 and this section, or to segregate or discriminate against any such person in the use thereof on the grounds of race, color, religion, national origin, sex, ancestry, or disability.”
- Public schools are undeniably a place of public accommodation.

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Does the program use public funds  
for a private purpose?

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**Article 6, Section 23**

- No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or *grant public money or thing of value to or in aid of any corporation, association or individual*, except as provided in this constitution. *any corpora*

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### Article 6, Section 25

- No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation

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### Unless to Accomplish a "Public Purpose"

- No violation of §§ 23 or 25 occurs where the expenditure of public funds is for a public purpose. *State ex rel Mitchell v. Sikeston*, 555 S.W.2d 281 (Mo banc 1977) (citing *State ex rel. Farm Elec. Coop., Inc. v. State Env. I.A.*, 518 S.W.2d 68 (Mo. banc 1975); *State ex rel. City of Boonville v. Hackmann*, 293 Mo. 313, 240 S.W. 135 (Mo. banc 1922)).
- "It has long been recognized in Missouri ... that the constitutional prohibitions noted are not violated when money and property are expended or utilized to accomplish a 'public purpose.'" *Id.*

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### Primary Effect and "Public Purpose"

- If the *primary object* of a public expenditure is to subserve a public municipal purpose, the expenditure is legal under constitutional prohibition against using public funds for a private benefit, notwithstanding that the expenditure also involves as an incident an expense, which, standing alone, would not be lawful. *St. Louis County v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116 (Mo. 2013).
- If the *primary object* is not to subserve a public municipal purpose, but to promote some private end, the expense is illegal, even though it may incidentally serve some **public purpose**.

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Is the proposed program consistent with Missouri’s constitutional obligation to maintain free public schools?

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**Missouri’s Maintenance of Free Public Schools**

- “A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain **free public schools** for the gratuitous instruction of all persons in this state within ages not in excess of [21] years as prescribed by law.” Mo. Const. art. 9, § 1(a).

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**Missouri’s Funding of “Public Schools”**

- The constitution also provides that “[i]n event the public school fund provided and set apart by law for the support of free public schools, shall be insufficient to sustain free schools at least eight months in every year in each school district of the state, the general assembly may provide for such deficiency; but in no case shall there be set apart **less than twenty-five percent of the state revenue**, exclusive of interest and sinking fund, to be applied annually to *the support of the free public schools.*” Mo. Const. art. 9, § 3(b).

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What is the impact of the "choice" proposal on the 25% requirement?

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Does the proposed program provide access and programming to allow children with disabilities to participate in the program?

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**IDEA/504: General Principles**

- Publicly funded "choice" programs must be accessible to children with disabilities.
- Parents and children cannot be required to waive required services as a condition of participation of the program.
- A students right to FAPE must be preserved in any program delivered in public schools.
- DESE will need to determine who will serve as the LEA for purposes of IDEA.

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### IDEA/504

- Claims center around accessibility or appropriate programming.
- Access requires that publicly funded benefits must be provided without discrimination on the basis of disability.

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### IDEA/504

- Challenges to voucher programs have determined that private schools need only accept children with disabilities to the same extent required of nonparticipating private schools.
- Must accept voucher students with disabilities unless it would require the private school to substantially alter their educational program.
- At least one court has determined that since private schools are not required to provide special education and related services, they could not be required to comply with IDEA.

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### Missouri Human Rights Act

- The MHRA prohibits “any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, as defined in section 213.010 and this section, or to segregate or discriminate against any such person in the use thereof on the grounds of race, color, religion, national origin, sex, ancestry, or disability.”
- Public schools are undeniably a place of public accommodation.

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Does the proposed program operate in a manner consistent with current statutory requirements?

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**Missouri Statutes**

- Obviously, the General Assembly can overcome this challenge *ab initio* by revising conflicting statutes.
- Nevertheless, if they fail to do so, there may be opportunities for challenges based upon the conflicting statutes.

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**SB 493: Expands Options for Students Residing in Unaccredited Schools/Districts**

- When a district or school building becomes unaccredited, the district must promptly notify parents and taxpayers. The notice must include an explanation of the option to transfer to another accredited school in the district, to another accredited district, or to a private nonsectarian school.
- Students enrolled in and attending an unaccredited school may transfer to another accredited school in their district of residence.
- If a student living within the attendance boundaries of an unaccredited school is unable to transfer to an accredited school within his or her district, he or she may transfer to an accredited school in an accredited district in the same or an adjoining county. Alternatively, the student may enroll in a nonsectarian private school.
  - The student’s district of residence must pay the student’s tuition.
  - Transportation by the district of residence is not required.

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### Proposed School "Choice" Programs

- Open enrollment;
- Private school vouchers;
- Charter school expansion;
- Statewide virtual schools; and
- Tuition tax credits.

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### Potential Issues for Litigation of School Choice Options

	Establishment Clauses	Discrimination	Private Purpose	Education Clause	Special Education	Statutory Issues
Open Enrollment		X			X	X
Private School Vouchers	X	X	X	X	X	X
Charter School Expansion		X			X	X
Statewide Virtual School		X			X	X
Tuition Tax Credits	X	X	X	X		X

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