

Montana Quality Education Coalition



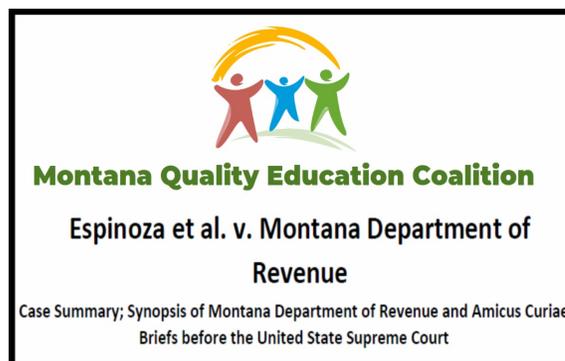
Winter Update
February 2020



Espinoza v. Montana Department of Revenue - NOT a Foregone Conclusion

NOTE: MQEC has been involved with SB410 litigation, including *Espinoza v. Montana Department of Revenue*, since 2015. For an overview of *Espinoza*, please refer to the [Espinoza Case Summary](#) document.

The [MQEC SB410 web page](#) has additional detailed information on SB410 and all litigation efforts to date.



Following the oral arguments in *Espinoza v. Montana Department of Revenue* in January, I've spent considerable time reviewing commentary and 'analysis' of the hearing from a variety of perspectives. Wishful thinking aside ("Sweeping Reforms Anticipated", "A Win for School Choice", "Supreme Court Favors Religious Education Funding"), the arguments indicated the realistic potential of a more narrow outcome that, in the end, may not be decisive at all in Montana.

Of the nine Justices on the Court, there are clear indications that four are sympathetic to the Espinoza argument – Justices Alito, Kavanaugh, Thomas, and Gorsuch. [The Court transcript shows the line of questioning and statements made by Justices Alito and Kavanaugh.](#) Justice Thomas customarily asks no questions (and followed this tradition during arguments), but his action in *Trinity Lutheran* by declining to sign on to Justice Roberts' footnote* are indicative of support for the Espinoza position. Justice Gorsuch asked few questions, but the absence of his signature on the *Trinity Lutheran* footnote* suggests a similar position as Justice Thomas.

Questions from Justices Ginsberg, Sotomayor, and Kagan indicate support for the Department of Revenue (see [written transcript](#) and [audio recording](#)). This leaves Justices Breyer and Roberts as more unknown regarding their positions.

Many Supreme Court experts predict a 5-4 ruling that would be supportive of *Espinoza* to some degree. Critically, the Court did **not** indicate a desire to declare all state no-aid provisions unconstitutional, nor did they indicate that states **must** provide financial support for religious education. However, there seemed to be some agreement that if financial support for private education is offered by a state, it must include support for **both** religious and non-religious options. Court experts would not be surprised if this ruling or one similar were handed down in *Espinoza*.

If this is indeed the outcome, it's not clear how this would play out in Montana. For states that currently provide state funding for private education, *Espinoza* could require state funding for religious and non-religious schools. However, Montana's Constitution – specifically [Article X §6](#) – prohibits state aid to sectarian schools. It is certainly conceivable that the [2018 decision of the Montana Supreme Court to invalidate the private school component of Senate Bill 410](#) will render an *Espinoza* ruling moot. [Without approval from Montana's voters](#), Article X §6 remains intact and cannot be disregarded.

Of course, this doesn't mean that advocates for funding of religious schools cannot or will not attempt other methods of achieving their intended outcome. This issue, and others involving competition for state dollars and 'alternatives' for public education in Montana will not go away. Your involvement as MQEC members and proponents of public education is critical to preserve our system of excellence in public education. I am exceptionally appreciative of your work on behalf of our public school system and the students we educate.

*** *Trinity Lutheran Footnote***

In 2017 the U.S. Supreme Court heard the [Trinity Lutheran Church of Columbia, Inc. v. Comer](#) matter, which challenged the state of Missouri's decision to exclude Trinity Lutheran preschool from a statewide program that distributed playground resurfacing materials. The Missouri Constitution contains a no-aid provision similar to [Montana's Article X §6](#), prohibiting direct or indirect aid to religious institutions. The Trinity Lutheran decision narrowly held that Missouri should include religious preschools as recipients in the program. Justice John Roberts' opinion included a footnote stating:

This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.

Justices Thomas and Gorsuch did not support the footnote, suggesting they favor a wider interpretation beyond the distribution of playground resurfacing material.

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