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Response to Treasury Department and IRS Notice 2025-70: Request for Comments on Individual Tax Credit for Qualified Contributions to Scholarship Granting Organizations

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To Whom It May Concern:

I am writing in response to the Treasury Department and IRS's request for comments regarding the Federal tax-credit scholarship program established under the One Big Beautiful Bill Act (OBBBA). This new tax credit leaves many important questions to be answered through the regulatory process. My comments focus on what I believe is the most critical issue: the extent of discretion that States should have in setting rules for the scholarship granting organizations (SGOs) that operate within their borders.

It is essential that States opting into this program retain sufficient authority to safeguard their residents from waste, fraud, and abuse, while ensuring SGOs act in the best interests of those they serve. **The forthcoming regulations should establish OBBBA's (very limited) requirements for SGOs as baseline guardrails—allowing States to impose additional restrictions within those guardrails.**

Background

The U.S. Constitution is silent on education, leaving primary authority over education policy and practice to the States. While the Federal government plays important roles—such as protecting students' civil rights, administering programs that provide compensatory funds to students in need, and supporting research to identify effective educational practices—the States remain the principal decision-makers.²

OBBBA's tax-credit scholarship program represents a major departure from previous Federal K-12 policies. Its legislative language resembles tax policy more than education policy and offers little guidance on core issues typically addressed in K-12 policy, including how to measure

¹ The views expressed in this letter are submitted in Dr. Valant's personal capacity and do not necessarily reflect the views of the Brookings Institution or its affiliates.

² https://www.brookings.edu/wp-content/uploads/2016/12/gs_20161206_principled_federal_role_browncenter1.pdf

academic performance and safeguard civil rights. OBBBA establishes only the broadest and weakest guardrails for this program. This reality underscores the need for States to have sufficient discretion to ensure the program serves the best interests of their residents.

Illustrating the Need for State Discretion

Consider a hypothetical scenario—extreme by design—that appears permissible under OBBBA’s rules. This example illustrates the risks of waste, fraud, abuse, and discrimination if States cannot establish rules for SGOs while remaining within OBBBA’s guardrails.

An SGO is founded in the wealthiest part of a State to provide tutoring assistance to local families. It raises \$5.5 million from local donors by promising they can support their community at no personal cost. The SGO retains \$500,000 for itself and distributes the remaining \$5 million equally among 10 students—all from wealthy families. The SGO’s eligibility rules exclude LGBTQ+ children, children with disabilities, and Jewish children, so none of these students receive scholarships. Each recipient gets \$500,000 to cover one year of private tutoring, which must be purchased from a designated tutoring company—a new company created by a friend of the SGO’s founder. The SGO requires no academic assessments or reporting.

This scenario highlights the serious problems that could arise under OBBBA’s tax-credit scholarship program. If the forthcoming regulations prevent States from setting their own rules for SGOs (within OBBBA’s guardrails), States will have limited ability to protect against these abuses. This will make the program less attractive for States to opt into and place even the most enthusiastic participants in an untenable position—forcing them to tolerate such abuses or withdraw from the program entirely.

To mitigate these risks, States should have the authority to:

- Protect students from discrimination.
- Safeguard taxpayers from fraudulent and wasteful practices by SGOs and the organizations they support.
- Provide donors with evidence of SGO performance to inform their giving.
- Provide families with evidence of program performance to inform their decision-making.
- Ensure that funds reach the students and communities that need them.
- Ensure that funds are used for legitimate and worthwhile educational purposes.

Notably, the scenario described above would be prohibited under nearly all of the 22 tax-credit scholarship programs currently operated by States.³ For example, most programs have much stricter income eligibility criteria than OBBBA’s restriction. Many programs explicitly prioritize students with disabilities. Some require participating programs to administer statewide or

³ <https://www.edchoice.org/school-choice/tax-credit-scholarship/>

nationally normed assessments (particularly for private schools).⁴ Several have a maximum scholarship value per child.

States adopted these restrictions to prevent waste and abuse and better serve students, families, donors, and taxpayers. These concerns are neither abstract nor alarmist. Many large-scale choice programs have been plagued by waste, fraud, and abuse—even with stricter rules. For example, a recent audit of Florida’s school choice programs alleges “a myriad of accountability challenges” that may have led to an extraordinary amount of wasteful spending.⁵

Options for Giving Discretion to the States

The Treasury Department and IRS have several options for clarifying how States may set rules for SGOs that operate within their borders without violating OBBBA’s terms. Here, I describe a few of those options:

Option 1: Allow Governors (or other designated State officials) to decide which SGOs to include on the lists they submit to the Treasury Department.

OBBBA stipulates that States can choose whether to opt into the Federal tax-credit scholarship program. It further requires that a State that opts in “shall provide to the Secretary a list of the scholarship granting organizations that meet the requirements described in subsection (c)(5) and are located in the State.”⁶

One option is that a Governor, after opting into the program, could omit an SGO from the list provided to the Secretary. This could prevent an egregiously bad actor, such as the hypothetical SGO described in the previous section, from participating in this program.

However, Notice 2025-70 signals that this approach is unlikely. It says, “The Treasury Department and the IRS anticipate that the forthcoming proposed regulations would provide, consistent with § 25F(g)(1)(A), that the State list must include all organizations located in the State that have requested to be designated as an SGO and that meet the § 25F(c)(5) statutory requirements.”⁷

I believe this decision would be misguided. That said, Option 1 may not be the best approach. A practical downside is that it could leave SGOs vulnerable to arbitrary or biased decisions by Governors when submitting lists to the Secretary. While this risk is less severe than the problems that could arise from denying States any discretion, it can be avoided through alternative approaches.

⁴ <https://fordhaminstitute.org/sites/default/files/2025-01/FINAL%20TABLE%201%20Testing.pdf>

⁵ https://flauditor.gov/pages/pdf_files/2026-046.pdf

<https://www.washingtonpost.com/education/2025/12/08/florida-school-vouchers-audit/>

⁶ <https://www.congress.gov/bill/119th-congress/house-bill/1/text>

⁷ https://www.irs.gov/irb/2025-50_IRB

Option 2: Allow Governors (or other designated State officials) to set rules for the SGOs that operate in their States.

Another option is to allow States to establish rules for SGOs operating within their borders.

States reasonably expect to regulate organizations within their jurisdiction. They already exercise considerable authority over 501(c)(3) organizations, even though the IRS retains authority over these organizations' Federal tax-exempt status.

By extension, States should have the ability to set rules for SGOs. For example, a State should be able to require any SGO operating within its borders to comply with State anti-discrimination laws. The Treasury Department and IRS should not allow OBBBA to create a loophole that enables organizations to violate State laws simply because they meet OBBBA's minimal requirements for SGOs.

It is essential that the forthcoming regulations explicitly affirm that States, at minimum, have this level of discretion.

Option 3: Allow Governors (or other designated State officials) to set rules for the private schools and other organizations that accept SGO funds.

A third option is to allow States to focus their regulations on the organizations that receive SGO funds rather than the SGOs themselves. For instance, a State could require private schools that receive SGO funds to participate in a statewide or nationally norm-referenced assessment program—at least for students who receive scholarship funds. Some State-run school choice programs have this type of requirement.⁸

This approach, like the other approaches, would empower States to safeguard their residents against potential abuses of the Federal tax-credit scholarship program. The forthcoming regulations should affirm States' authority to impose these types of conditions.

The Importance of Allowing States to Serve Their Legitimate Roles

Education is foundational to individual opportunity and societal well-being. We must take our investments in education seriously, ensuring that public funds are used appropriately and for the benefit of students and communities. This is especially true for the federal tax-credit scholarship program created by OBBBA, which appears poised to become one of the nation's largest and most consequential K–12 education initiatives.

As the Treasury Department and IRS develop regulations for this new program, they must recognize the significant risks it presents. The legislation—enacted through the budget reconciliation process—is silent on many issues we would expect any major education policy to

⁸ For example, see Louisiana's LA GATOR education scholarship account program: <https://doe.louisiana.gov/topic-pages/louisiana-school-choice/la-gator/la-gator-faq>

address, including accountability for academic performance, anti-discrimination measures, and safeguards against waste, fraud, and abuse.

This does not mean that Federal regulators alone should craft these protections. In fact, those responsibilities fall primarily to the States. However, forthcoming regulations must enable the States to fulfill those responsibilities.

The Trump administration has repeatedly called for the Federal government to “return” control of education decision-making to the States. For example, in an Executive Order titled “Improving Education Outcomes by Empowering Parents, States, and Communities,” the President directed the Secretary of Education to “return authority over education to the States and local communities.”⁹

In this case, we should heed that call. It is critically important that the Treasury Department and IRS treat the rules for SGOs as guardrails within which the States can operate—and then provide States with the discretion to make this program work for their residents. Otherwise, the program risks becoming an extraordinary source of waste, fraud, and abuse, while undermining opportunities for America’s students.

Respectfully,

Jon Valant

⁹ <https://www.whitehouse.gov/presidential-actions/2025/03/improving-education-outcomes-by-empowering-parents-states-and-communities/>