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# Preventing State Tax Subsidies for Private K-12 Education in the Wake of the New Federal 529 Law

Over the next few months, state lawmakers must decipher how their existing tax laws are impacted by the federal Tax Cuts and Jobs Act (TCJA) enacted in late 2017. The new federal law has consequential implications for the states that piggyback on federal law to determine their own personal and corporate income taxes. One of the changes in the federal law that has ramifications in every state with a personal income tax is the new provision allowing taxpayers to make tax-exempt withdrawals from 529 college savings accounts to pay for K-12 religious and private school tuition. These fees are now redefined as “qualified higher education expenses.” The law permits 529 savings account holders to withdraw up to \$10,000 federal income tax-free for each beneficiary per year. It also allows for the rollover of assets into ABLE accounts, a similarly-modeled savings plan for individuals with disabilities. This policy brief explains the federal and various state-level breaks for 529 plans and explores the potential impact that the change in federal treatment of 529 plans will have on state revenues.

## Tax Breaks for 529 Plans

529 plans were first introduced at the state level to incentivize saving for future college costs, and later the federal government passed legislation exempting 529 earnings from the federal income tax. The plans are savings vehicles operated by states or educational institutions. As seen in Figure 1, taxpayers can receive up to five different types of tax breaks when making use of a 529 plan, though not all of these breaks are available in every state.

Thirty-four states and the District of Columbia offer income tax credits or deductions for contributions to 529 college saving plans and exempt qualified distributions (or withdrawals) from 529 plans (see Figure 1). The other eight states levying personal income taxes exempt qualified distributions but offer no tax benefit for contributions. Of the states which offer these tax breaks:

- Thirty-one states and the District of Columbia offer deductions for contributions made to 529 plans. Most of these deductions are only available for contributions made to in-state plans, though six states (Arizona, Kansas, Maine, Missouri, Montana and Pennsylvania) allow a deduction for contributions made to any state’s 529 plan.
- Three states (Indiana, Utah, and Vermont) offer credits for contributions made to 529 plans. All of these credits are nonrefundable.
- Every state that levies a personal income tax exempts qualified distributions from 529 plans. With the exception of Alabama, this exemption is allowed regardless of whether the 529 plan is based in-state or outside of the state. (The seven states that exempt qualified distributions but offer no credit or deduction for contributions are California, Delaware, Hawaii, Kentucky, Minnesota, New Jersey, and North Carolina.)

### Figure 1: Tax Breaks Associated with 529 Plans

#### Federal:

1. Earnings inside the account accrue tax-deferred
2. Amounts withdrawn from the account are tax exempt if spent on “qualified higher education expenses”

#### State (varies by state-see Appendix A for details):

3. Tax break (either credit or deduction) for contributions into the account
4. Earnings inside the account accrue tax-deferred
5. Amounts withdrawn from the account are tax ex-

## What are qualified higher education expenses?

As defined by Section 529 of the U.S. tax code, qualified higher education expenses include tuition, room and board expenses, books, special needs expenses, computers and related technology expenses such as Internet, software, or printers when enrolled at an eligible educational institution. The federal tax bill enacted in late 2017 added language that extends the definition of qualified expenses to include expenses for religious and private K-12 education. Withdrawals from 529 plans used to pay any of these expenses are exempt from federal income tax.

Examples of non-qualified withdrawals include indirect personal expenses, student loan payments, transportation expenses, and student activity fees, including sorority and fraternity dues. Households can request non-qualified withdrawals at any time, but the earnings are subject to a 10 percent federal tax penalty in addition to potential state income tax recapture.

Extending the federal law to private K-12 education has numerous unproductive consequences. 529 accounts are intended to be long-term savings vehicles. But families who intend to withdraw funds for private K-12 education often will not contribute far enough in advance to accrue meaningful savings.

This expansion creates a tax shelter for households looking to defer paying income taxes or quickly cash-in for a tax break – families in many states can now make a contribution to a 529 account, receive a state income tax deduction or credit in exchange for their contribution, and then immediately withdraw those funds to pay for the private school tuition. In this scenario, the 529 plan is not a savings vehicle at all, but rather a brief pit stop whose only purpose is to allow taxpayers to pay for their children’s private school educations with pre-tax dollars.

States offering tax deductions or credits based on annual contributions to 529 accounts will be left facing shortfalls of income tax revenue because of this change hastily enacted by Congress. Since many states’ definition of “qualified higher education expenses” are tied to federal law, the states that offer the deduction will be significantly impacted by budget shortages.

The complication here for states is how they interpret “qualified higher education expenses” and also how state statutes conform to federal law. West Virginia has already defined qualified higher education expenses specifically for college and university expenses in its state statute through its “SmartWV529 Direct College Savings Plan.”

Many others including Louisiana, Nebraska, and New York all have issued public statements in the wake of the new federal law. Louisiana state law allows funds to be withdrawn for higher education expenses only: “The use of funds in a START Saving Program account will not be available for use for any K-12 educational expenses unless the Louisiana Legislature acts to amend the current START laws.”

Nebraska also responded, “while the new federal tax law passed by the U.S. Congress and signed into law on Dec. 22 allows for the use of state-sponsored 529 savings accounts for K-12 tuition at private and parochial schools, Nebraska State Statutes do not provide favorable tax treatment unless those accounts are used for qualified higher education expenses at colleges, universities, community colleges, technical schools, or graduate programs.”

In direct contrast, Pennsylvania’s “PA 529 College Savings Program” explained that the program is working to ensure families may be able to process payments for K-12 expenses as they would for higher education, even though Pennsylvania’s individual taxes do not conform to the federal tax code.

**“This expansion creates a tax shelter for households looking to defer paying income taxes or quickly cash-in for a tax break.”**

Utah's 529 educational savings plan website now clearly states: "Qualified higher education expenses" include "eligible K-12 tuition expenses at public, private, or religious schools."

## Recommendations

States that are concerned about a potential reduction in state income tax revenue or shifting money from public to private schools will need to reconsider their definitions of educational expenses that qualify for state tax breaks. Although withdrawals for K-12 tuition expenses are now exempt from federal income taxation, states have autonomy over their own state income taxation. States should do everything possible, including amending or retaining federal conformity rules, to ensure expenses for private K-12 education remain non-qualified withdrawals. This would prevent the creation of a regressive state tax break for those making withdrawals for K-12 private and religious education.

States with 529 savings programs have the capacity to tailor the rules regarding their individual programs because these educational savings programs are state-administered. The federal government's newly expanded definition of "qualified higher education expenses" will likely decrease state income tax revenues. In addition to costing the federal government \$500 million over the next decade, the American Enterprise Institute forecasts that Indiana could lose \$117 million in annual revenues while Pennsylvania could see a loss of \$92 million per year. Expanding the tax break to New York's 465,000 students enrolled in private schools could cost the state \$120 million per year.

This expansion would encourage income tax sheltering while allowing for public funds to be redirected toward private schools. It is in states' best interest to clarify that these programs are for college and university expenses. There is no action necessary for states that have explicitly written that these educational savings programs are designated for college and university expenses. States have the autonomy to levy taxes on "non-qualified withdrawals," similar to federal law. States conform to the federal tax system for simplicity, but also have the option of separating from it. State legislators can "decouple" from the new federal provision by disallowing deductions for state income amounts withdrawn from 529 plans to pay for K-12 private and religious education.

But as outlined in Figure 1 earlier in this brief, state tax deductions for 529 withdrawals are not the only type of tax benefit that states offer on these plans. Most states also offer a tax deduction or credit for contributions into 529 plans, and all states with income taxes allow for a deferral of taxes on earnings within the plans. Taxpayers using 529 plans to pay private K-12 education expenses will continue to receive these state tax breaks because there is no way for state tax administrators to know how any particular 529 contribution or earning will eventually be spent. But once a 529 withdrawal is used for K-12 education expenses, states offering these contribution and/or deferral tax breaks should assess penalties on that withdrawal—just as they would on any other non-qualifying withdrawal—to recapture the state tax benefits the taxpayer received in the past.

## Conclusion

Since their inception, 529 education savings plans were created to encourage long-term savings for higher education in the face of rising tuition costs. While the details of these plans may not be perfect, their purpose is broadly popular and well established.

Late last year, with very little debate, Congress decided to radically change these plans by allowing taxpayers sending their children to K-12 private and religious schools to begin using them as a tool for reaping immediate tax rewards. While states cannot prevent the federal government from exempting 529 withdrawals spent on private K-12 education from federal tax, they can and should ensure that taxpayers using 529 plans for this purpose will not be showered with state tax breaks as well.



Missouri	Funds in Missouri 529 education savings program grow deferred from federal and state income taxes. Residents do not have to pay federal or state income taxes if funds are withdrawn "to pay for qualified higher-education expenses." Non-qualified withdrawals are subject to federal income tax, a 10% federal penalty tax, and Missouri state and local taxes.	Missouri's updated 529 website explicitly states "Missouri taxpayers can use MOST 529 assets to pay for K-12 tuition up to \$10,000 per year per student without state tax consequences."	<a href="#">Missouri State Treasurer</a>	<a href="#">\$ 166,415.1</a>	Contributions to any state's 529 plan can be deducted from taxable income. The maximum deduction is \$8,000 for single filers and \$16,000 for joint filers. Account holders can contribute up to \$15,000 per year (\$30,000 if married filing jointly) without triggering the federal gift tax.
Montana	Achieve Montana 529 plans are tax advantaged savings accounts designed to save "for tomorrow's higher education expenses." All withdrawals used for "qualified higher education expenses" are free from federal income taxes. Non-qualified withdrawals are subject to federal income tax, a 10% federal penalty tax, and Montana state and local income taxes.	Montana is currently assessing the potential impact of TCJA on education savings. They will update their website as information becomes available.	<a href="#">Montana Office of the Commissioner of Higher Education</a>	<a href="#">20-25-902</a>	Montana taxpayers' contributions to any state's 529 plan are eligible for a Montana income tax deduction. Distributions from plans are not subject to income tax. The maximum deduction is \$3,000 for single filers and \$6,000 for joint filers. The maximum aggregate balance of all accounts in 529 plans sponsored per beneficiary is \$396,000.
Nebraska	Nebraska posted a post-TCJA response to federal law: "While the new federal tax law passed by the U.S. Congress and signed into law on Dec. 22 allows for the use of state-sponsored 529 savings accounts for K-12 tuition at private and parochial schools, Nebraska state statutes do not provide favorable tax treatment unless those accounts are used for qualified higher education expenses at colleges, universities, community colleges, technical schools, or graduate programs." State legislation is still needed for 529 plans to be used for K-12 education.	Nebraska's statutes currently restrict the use of 529 plans for "qualified higher education expenses." The current statutes allow for recapture of the Nebraska state tax deduction. The State Treasurer's Office is working with the Legislature to bring statutes in line with the federal provisions. Until then, the state has the authority to recapture nonqualifying withdrawals.	<a href="#">Nebraska State Treasurer</a>	<a href="#">Nebraska Revised Statute 85-1807</a>	Nebraska filers who own Nebraska's 529 College Savings Plans (NEST) can deduct contributions from taxable income for state income tax purposes. The maximum deduction is \$5,000 for single filers and \$10,000 for joint filers.
New Jersey	Earnings are free from federal income tax when withdrawn for qualified higher education expenses. Withdrawals can be used for any qualified higher education expense, including tuition, mandatory fees, supplies, books, computers or other required equipment, and room and board, if the beneficiary is enrolled in school at least half-time. Many states provide additional 529 state tax benefits to residents, including state income tax-free earnings for qualified withdrawals and/or state income tax deductions for contributions.	No response as of publication date.	<a href="#">New Jersey Higher Education Student Assistance Authority</a>	<a href="#">18A:71B-36</a>	No Additional Tax Break.
New Mexico	New Mexico's state-sponsored 529 education savings programs allow taxpayers to contribute to "a student's qualified higher education expenses." 529 plans are tax-free as long as they are used to pay for "qualified higher education expenses."	No response as of publication date.	<a href="#">New Mexico Higher Education Department</a>	<a href="#">N.M. Stat Ann. § 21-1-40</a>	New Mexico residents who contribute to a New Mexico 529 Plan receive a state income tax deduction for the entire amount contributed. The tax break has no maximum deduction, although the total deduction cannot exceed the cost of attendance at the applicable eligible higher education institutions.
New York	Earnings from 529 plans grow federal tax-deferred and qualifying withdrawals are tax-free. Withdrawals can be used to pay for "qualified higher-education expenses" at "any eligible 2- or 4-year college or university, vocational or technical school, or graduate school in the United States or abroad."	New York State issued a post-TCJA statement. The tax treatment of 529 withdrawals for K-12 purposes are "determined by the account owner's state of residence and may result in state tax recapture related to those distributions."	<a href="#">Office of the New York State Comptroller</a>	<a href="#">FDN § 695-e</a>	State income tax deduction available for contributions to New York 529 plan. The maximum deduction is \$5,000 for single filers and \$10,000 for joint filers. State tax deductions may be subject to recapture in certain circumstances such as rollovers to another state's 529 plan or nonqualified withdrawals.
North Carolina	Earnings in 529 accounts aren't subject to North Carolina or federal taxes as long as they, along with contributions, are used to help pay for Qualified Higher Education Expenses (QHEE). Tuition, fees, room and board, books, computers and required equipment are examples of QHEE considered qualified. The earnings portion of withdrawals not used for QHEE expenses is subject to federal income tax and a 10% federal penalty tax, as well as state and local income taxes. The availability of tax benefits may be contingent on meeting other requirements.	No response as of publication date.	<a href="#">College Foundation of North Carolina</a>	<a href="#">Chapter 105 Article 8D</a>	No Additional Tax Break.
North Dakota	North Dakota issued a post-TCJA statement. The tax treatment of 529 withdrawals are determined by the account owner's state of residence. "States may ultimately determine the treatment of these withdrawals independently." All withdrawals for "qualified higher education expenses are federal and state tax free."	North Dakota updated their website acknowledging the passage of TCJA and its allowance of K-12 private and religious schools for federal tax benefits. However, they stipulate: "The tax treatment of such withdrawals at the state level, determined by the account owner's state of residence is less clear, and states may ultimately determine the treatment of these withdrawals independently."	<a href="#">Bank of North Dakota</a>	<a href="#">Chapter 12.5-02-01</a>	North Dakota taxpayers can deduct from their state taxable income for contributions into the College SAVE Plan each year. The maximum deduction is \$5,000 for single filers and \$10,000 for joint filers. Taxpayers can contribute up to \$15,000 (up to \$30,000 for married couples) per beneficiary each year, without incurring federal gift tax consequences. The maximum contribution per designated beneficiary in a single year is \$75,000 (up to \$150,000 for married couples) by
Ohio	Ohio interprets the purpose of Section 529 is to save for college and higher education. Funds within CollegeAdvantage can be used at colleges across the country. The savings accounts grow tax-free. Qualified withdrawals are free from federal and state income tax. Nonqualifying withdrawals will result in federal and state income taxes.	Prior to the 2017 federal tax law, the program noted: "Your withdrawal must be for 529-qualified higher education expenses." In February 2018, the Ohio House Ways and Means Committee passed a tax conformity bill that would conform Ohio's 529 plan to federal tax law, making K-12 education a qualifying education expense.	<a href="#">Ohio Tuition Trust Authority</a>	<a href="#">House Bill 74</a>	Ohio filers can deduct contributions to Ohio 529 plans with unlimited carry forward in future years. Ohio also exempts distributions from Ohio 529 plan attributable to the beneficiary's death, disability, or receipt of a scholarship. The maximum deduction is \$4,000 per beneficiary.
Oklahoma	Oklahoma's 529 College Savings Plan is a state-sponsored, tax-advantaged college savings plan that helps residents plan for the growing cost of higher education. Non-qualified withdrawals are subject to tax, including the 10% federal tax.	Oklahoma issued a post-TCJA response regarding 529 withdrawals: "Language in the bill includes the expansion of qualified education expenses in Section 529 of the Internal Revenue Code to include expenses for K-12 as well as other provisions."	<a href="#">Oklahoma State Treasurer</a>	<a href="#">§68-2368.27</a>	Contributions to a Oklahoma 529 College Savings Plan can be deducted from Oklahoma taxable income. The maximum deduction is \$10,000 for single filers and \$20,000 for joint filers. Any amount of a contribution made after 2004 that is not deducted by the taxpayer may be carried forward as a deduction from income for the succeeding five (5) years, subject to the annual maximum deduction on contributions. Amounts transferred from another 529 college savings plan
Oregon	Oregon's 529 education savings plan is tax-advantaged, where earnings grow tax-free from federal and state taxes "when used for qualified higher education expenses." Qualifying expenses include: "tuition, certain room and board expenses in addition to any fees, books, supplies and equipment required for enrollment and attendance at an eligible educational institution, which includes most post-secondary institutions." Non-qualified withdrawals are subject to tax.	On January 9th, Oregon acknowledged that qualifying withdrawals have expanded to tuition for private, public, and religious elementary and secondary schools on the federal level. The state is still reviewing the statewide impact "to determine whether they require changes to state legislation."	<a href="#">Oregon College Savings Plan</a>	<a href="#">ORS 316.680</a>	Contributions made to accounts in Oregon's 529 plan are deductible up to a limit indexed annually for inflation. The maximum deduction in 2017 is \$2,330 for single filers and \$4,660 for joint filers.
Pennsylvania	"Account owners can use assets to pay for qualified K-12 tuition expenses up to \$10,000 per year, per student. Account owners can treat qualified K-12 withdrawals as qualified expenses with respect to the federal and Pennsylvania state tax benefits. Account owners can roll over 529 plans to ABLE plans, up to the ABLE annual contribution limit."	Pennsylvania responded to the new federal tax law with the following statement: "The PA 529 College Savings Program is working to ensure families may be able to process payments for K-12 expenses as they would expenses for higher education." They later updated their website to reflect that account owners can treat qualified K-12 withdrawals as qualified expenses with respect to the federal and Pennsylvania state tax benefits.	<a href="#">Pennsylvania Treasury Department</a>	<a href="#">House Bill No. 1385</a>	Pennsylvania taxpayers can deduct contributions to any state's 529 plan from taxable income. Accounts in a Pennsylvania 529 plan are also exempt from Pennsylvania inheritance tax. The maximum deduction is \$14,000 in contributions per beneficiary per year for single filers and \$28,000 if married filing jointly.
Rhode Island	Rhode Island's 529 savings program is designed "to help individuals and families save for college in a tax-advantaged way." The earnings grow tax-deferred. "All withdrawals used for qualified higher education expenses are exempt from federal income tax. Some 35 states also waive state taxes on withdrawals, along with offering other incentives."	No response as of publication date.	<a href="#">Rhode Island General Treasurer</a>	<a href="#">§44</a>	Rhode Island residents who contribute to a RI 529 Plan receive a state income tax deduction. The maximum deduction is \$500 for single filers and \$1,000 for joint filers. If an account owner makes a non-qualified distribution or certain transfers or rollovers to another state's program, the amount of the deduction may be "recaptured" and included in the account owner's Rhode Island income.
South Carolina	South Carolina's 529 education savings plans are: tax-deductible from state income tax returns, grow tax-deferred, and tax-free when withdrawn for "qualified higher education expenses." Funds from the program "can be used to pay for tuition and qualified higher education expenses at eligible two- and four-year public and private colleges, and graduate, professional and certain vocational programs."	No response as of publication date.	<a href="#">South Carolina Office of the State Treasurer</a>	<a href="#">59-112-10</a>	Filers' contributions to and earnings from South Carolina 529 plans are deducted from taxable income. There is no maximum deduction limit for contributions. The maximum contribution limit is \$426,000 per beneficiary.
Utah	Tax penalties for nonqualified withdrawals include: the earnings portions are subject to federal and state income taxes and the federal tax penalty. Under state statute, the savings programs are called "Utah Educational Savings Plan" with little clarification of which type of education (e.g. primary, secondary, postsecondary).	Following TCJA, Utah amended their program's qualified higher education expenses to "eligible K-12 tuition expenses at public, private, or religious schools." When funds are withdrawn for qualified higher education expenses or K-12 tuition expenses, taxpayers are not taxed on gains associated with the withdrawal.	<a href="#">Utah Educational Savings Plan</a>	<a href="#">§53B Chapter 8a</a>	Account owners who are Utah taxpayers/residents may be able to claim a credit equal to 5 percent of their contributions to their UESP accounts. Credit is not refundable and cannot be carried forward. Individual tax filers and Utah-based trusts can claim up to \$95 in tax credits per qualified beneficiary. Married filing jointly taxpayers can claim up to \$190 in tax credits per qualified beneficiary.
Vermont	Vermont's state income tax credit for contributing to a 529 college savings plan have the following tax advantages: earnings are tax-free from federal and state taxes with the exception of non-qualifying withdrawals; withdrawals "used for qualified higher education expenses are exempt from federal and state tax."	No response as of publication date.	<a href="#">Vermont Higher Education Investment Plan</a>	<a href="#">16 V.S.A. § 2885</a>	A Vermont taxpayer (or, in the case of a married couple filing jointly, each spouse) is eligible for a non-refundable income tax credit of 10 percent on the first \$2,500 contributed (or \$5,000 if filing jointly). It cannot be carried forward. The maximum credit is \$250 per beneficiary per taxable year for single filers and \$500 for joint filers.
Virginia	Virginia stipulates that funds "can be used to pay for qualified higher education expenses at schools nationwide and even overseas." Virginia's 529 education savings plans allow for funds to grow "free from federal taxes and be used to fund qualified higher education expenses at eligible educational institutions nationwide." The accounts grow tax-deferred "when contributions are used for qualified higher education expenses."	No response as of publication date.	<a href="#">Virginia Department of the Treasury</a>	<a href="#">§§ 23.1-700 through 23.1-713</a>	Filers can deduct contributions to Virginia 529 accounts from taxable income. Virginia also exempts distributions from a Virginia 529 plan attributable to the beneficiary's death, disability, or receipt of a scholarship. The maximum deduction is \$4,000 for taxpayers under 70. The undeducted amount can be carried forward. Taxpayers over 70 can deduct the entire amount of contribution.
West Virginia	Earnings from West Virginia's 529 savings program grow tax-deferred. Withdrawals for "qualified higher education expenses are federal income tax free." Non-qualified withdrawals are "taxable as ordinary income and also subject to a 10% federal income tax penalty and may also have state tax implications."	West Virginia acknowledges that the tax treatment of 529 "nonqualifying withdrawals" will be determined by the state.	<a href="#">West Virginia State Treasurer</a>	<a href="#">H. B. 2579, §18-30-2</a>	Contributions to West Virginia's 529 plans are fully deductible in computing West Virginia taxable income. There is no maximum deduction limit for contributions. Account holders can contribute up to \$14,000 per year (\$28,000 for married couples filing jointly) to a beneficiary's SMART529 account without gift tax consequences.
Wisconsin	Wisconsin's 529 education savings programs offer tax-advantaged investments "to encourage saving for future higher education expenses." All withdrawals from 529 plans for qualified higher education expenses remain tax-free from federal income law. Wisconsin and other states mirror the federal rules for state tax purposes.	No response as of publication date.	<a href="#">Wisconsin Office of the State Treasurer</a>	<a href="#">224.50</a>	Taxpayers can deduct contributions to Wisconsin 529 plans from taxable income. Under Wisconsin law, a beneficiary's right to qualified withdrawals from a Wisconsin 529 plan is not subject to garnishment, attachment, execution, or other process of law. The maximum deduction was raised in 2018 to \$3,200 per beneficiary. Filers may also contribute greater than the eligible amount each year and use for subsequent years' state tax benefits until exhausted. Wisconsin's maximum 529 account balance is \$472,000 as the sum of all Wisconsin plan accounts per beneficiary. The maximum account balance was increased in November 2017.