

Senate Appropriations Committee - Education & Environment Division
Chairman Ron Sorvaag
March 27, 2023

Testimony
Shane Goettle
Lobbyist for State Association of Nonpublic Schools (SANS)

HB 1532

Chairman Sorvaag and members of the Senate Appropriations E&E Division, my name is Shane Goettle, and I am here as the registered lobbyist for the State Association of Nonpublic Schools (SANS).

This bill is about empowering parents and giving them the freedom to choose the educational environment they believe is best for their child.

The North Dakota Constitution

Let me start with the North Dakota Constitution. I am sure you are familiar with Article VIII, Section 5, which reads, in part:

“No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.”

N.D. Const. art. VIII, § 5.

This provision is called the “Blaine Amendment” and in 1889 when North Dakota became a state, this provision was required of states desiring to enter the Union. So, this policy was really decided in Washington, D.C., and not by the people of North Dakota.

On November 29, 2022, Attorney General Drew Wrigley interpreted this section of our state constitution to conclude, in accordance with U.S. Supreme Court precedent cited in his opinion, that:

“...the Blaine Amendment cannot be enforced in any situation where doing so would disadvantage a sectarian school as compared to a non-religious private school simply because of the school’s sectarian nature.”

Letter Opinion 2022-L-07 (Attached)

The Attorney’s General opinion is binding and governs the actions of public officials unless a court decides otherwise. So, the takeaway here is that you are serving in the first legislative session that can fully consider a proposal such as the one before you without concern that it violates the Blaine Amendment.

But let me point out one the lesser cited sections of Article VIII, namely Section 4:

“Section 4. The legislative assembly shall take such other steps as may be necessary to prevent illiteracy, secure a reasonable degree of uniformity in course of study, and to promote industrial, scientific, and agricultural improvements.” N.D. Const. art VIII, § 4. [Emphasis added.]

With the Blaine Amendment dead, Section 4 charges the legislative assembly to “take such other steps as may be necessary” to promote education of our people.

What you have before you is a proposal to do just that.

House Bill 1532

I want to draw the committee’s attention to a few things in the bill. First, on Page 1, lines 19-20 you will see the definition of “qualified school.” The definition limits “qualified schools” to schools inside the state of North Dakota, and does not include homes schools. I think that is important so that you know this program will apply only to qualified expenses a parent might incur at nonpublic schools that are approved as such by the Superintendent of Public Instruction under NDCC § 15.1-06-06.1.¹

On page 2, lines 2-3, you can see the whole process proposed in this bill starts with a “parent” (defined in the bill) requesting a program form from a qualified school for the upcoming school year. Now, while a parent initiates this process with a particular nonpublic school of their choice, this bill is not designed as a traditional school choice voucher bill. The parents don’t handle the funds, nor do they receive any kind of redeemable certificate.

Rather, on page 2, lines 4-5, the qualified school receives the request from the parent, certifies

¹ Approval is mandatory:

- The superintendent of public instruction must approve all nonpublic schools offering elementary or secondary education. *N.D. Cent. Code* §15.1-06-06.1.
- For those nonpublic schools that are not in compliance with the requirements for approval and do not then receive a certificate of approval, the superintendent of public instruction is to notify those nonpublic school students' parents that they may be in violation of the compulsory attendance requirements. *N.D. Cent. Code* §15.1-06-06.1.
- The superintendent of public instruction may not approve a school unless each teacher is licensed or approved to teach by the education standards and practices board; teacher is teaching courses only in fields in which he or she is licensed or for which he or she has received an exception under section 15.1-09-57; students are offered all subjects required by law; the school is in compliance with all local and state health, fire, and safety laws; and the school has conducted criminal history record checks on employees who have unsupervised contact with children. *N.D. Cent. Code* §§15.1-06-06 and 15.1-06-06.1.
- The superintendent of public instruction may approve a nonpublic secondary school with enrollment of fifty students or fewer if the school provides courses in all subjects required by law, complies with statutes regarding the length of the school year, and meets all health, fire, and safety standards. Curricular programs offered by schools that deliver courses by telecommunications or other electronic means must be prepared by individuals holding at least baccalaureate degrees and delivered by those with a North Dakota professional teaching license or who at least meet the average cutoff scores of states that have normed the national teacher's examination. The school must have at least one state-licensed high school teacher for each twenty-five students. *N.D. Cent. Code* §15.1-06-07.

enrollment at that school, and then requests program funds for the child's qualified educational expenses. In short, the dollars are handled between DPI and the qualified school.

On page 2, lines 12-13, a qualified school that receives funds is to use the funds only to offset the cost of qualified education expenses the program participant or parent would otherwise be obligated to pay. How will this be documented? The school will need to credit that amount back to the parent on their invoice, demonstrating a reduction in the amount the parent would otherwise pay the school for services provided to the parent's student.

The appropriated dollars for this program are found in Section 3, on page 4 of the bill. It is \$24m for the biennium from the general fund. Note: this is a new appropriation. It is NOT being taken from public school funding. It is NOT decreasing the amount going to any school in this state, rural or urban.

In fact, based on other bills you are voting on this session, public schools stand to gain more money from this legislative session. Note the \$24m equates to \$12m per school year. That is what House Appropriations intended in the amendments they took up and added to the bill.

You can also note on page 2, lines 10-11, no matter the appropriation level or participation level in the program, no more than 30% of the state's per-student payment rate may be paid out per student. This is further limited as an offset against only the qualified education expenses the parent might otherwise have paid. In summary, once the qualified school receives the funds, the parent would see this a credit on the invoice the qualified school sends to the parents for that family, but never more than qualified expenses the parent must pay, or 30% of the state's per-student payment rate, whichever is less.

You will note on page 3 that HB 1532 has accountability, including the power to suspend a school from the program if there is any abuse. It also has protections for the schools that participate in that no other additional requirements may be imposed through rulemaking. Nor does a school need to alter its creeds, practices, admissions policies, or curriculum to participate as a qualified school.

Mr. Chairman and members of the committee, I have with me today Gerald Vetter, the President of the State Association of Nonpublic Schools, who will follow me if you any questions for the qualified nonpublic schools.

I will also gladly stand for any question myself that help this committee get to a "do pass" recommendation!



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LETTER OPINION
2022-L-07

Dr. Rebecca S. Pitkin
Executive Director
North Dakota Education Standards and Practices Board
2718 Gateway Ave., Ste. 204
Bismarck, ND 58503-0585

Dear Dr. Pitkin:

Thank you for your questions regarding the Teacher Support System and the availability of related grants for private school teachers. Specifically, you ask (1) whether private school teachers who are also mentors may participate in the Teacher Support System, and (2) whether private school teachers who are also mentors may receive grants to participate in the Teacher Support System. Nowhere in the applicable statute or administrative code are non-public school teachers prohibited from participating in the Teacher Support System. However, the context of your question indicates the key issue underlying these questions is whether Article VIII, Section 5 of the North Dakota Constitution (“the Blaine Amendment”)¹ prohibits teachers at sectarian schools from receiving grants from the Teacher Support System. It is my opinion that the Blaine Amendment is not enforceable under United States Supreme Court caselaw, and therefore teachers at sectarian schools may receive grants from the Teacher Support System.

ANALYSIS

The Blaine Amendment was adopted as Article 152 of the 1889 North Dakota Constitution and provides that “[n]o money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.”² The North Dakota Supreme Court has held “[a] ‘sectarian institution’ is ‘an institution affiliated with a particular religious sect or denomination, or under the control or governing influence of such sect or denomination.’”³ Over time, the definition of “sectarian” has broadened to include “relating to” or “supporting a particular religious group and its beliefs.”⁴ As a result, the Blaine Amendment effectively means “[n]o money raised for the support of

¹ In 1875, then Speaker of the U.S. House of Representatives James Blaine proposed an amendment to the United States Constitution which would prohibit states from providing public funds to religious schools. After Blaine’s amendment failed to pass the U.S. Senate, 38 states passed amendments to their state constitutions barring state funding of religious or sectarian schools. These amendments are colloquially referred to as “Blaine Amendments.”

² N.D. Const. art. VIII, § 5.

³ *Gerhardt v. Heid*, 267 N.W. 127, 131 (N.D. 1936).

⁴ Black’s Law Dictionary (11th ed. 2019).

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the support of the public schools of the state shall be appropriated to or used for the support of any [religious private school].”⁵

The Teacher Support System is a mentoring program for new teachers operated by the North Dakota Education Standards and Practices Board (ESPB).⁶ A teacher who holds an initial, two-year license must participate in the Teacher Support System to be eligible to apply for a five-year-renewal license.⁷ The legislature appropriated \$2,125,764 to the ESPB for the 2021-23 biennium to provide grants to Teacher Support System mentors.⁸ The applicable statutes and administrative code do not prohibit private school teachers from participating in the Teacher Support System as either mentors or mentees. Given that participation in the mentor program is a requirement for renewed licensure and the lack of contrary language in statute, it is my opinion that teachers at private schools may participate in the Teach Support System as mentors. Similarly, it is my opinion that teachers at private schools may receive grants for participating in the Teacher Support System.

However, this does not end the inquiry. As noted above, the Blaine Amendment bars appropriated funds and public money from being used to support any sectarian school. On its face, this prohibition would apply to Teacher Support System grants provided to mentors employed by sectarian schools. However, in two recent decisions, the United States Supreme Court cast doubt on whether Blaine Amendments can be reconciled with the First Amendment to the United States Constitution. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*,⁹ the Court held a “law . . . may not discriminate against ‘some or all religious beliefs.’ . . . The Free Exercise Clause protects against laws that ‘impose [] special disabilities on the basis of . . . religious status.’”¹⁰ The Blaine Amendment functionally prohibits religious private schools from receiving grants from the Teacher Support System, while teachers at non-religious private schools are allowed to receive the grants. This is precisely the type of disadvantage the Supreme Court concluded may not be imposed on the basis of religious status.¹¹

The Supreme Court went even further in *Espinoza v. Montana Dept. of Revenue*.¹² In that case, the Court held that, because Montana’s Blaine Amendment had been applied to discriminate against schools and parents based on the religious character of the school at issue, the amendment was subject to the strictest level of judicial scrutiny.¹³ The Court made clear an interest in separating church and

⁵ N.D. Const. art. VIII, § 5.

⁶ N.D.A.C. § 67.1-04-04-03.

⁷ N.D.C.C. § 15.1-13-10(9).

⁸ See H.B. 1013, 2021 N.D. Leg., Section 1, Subd. 1 - part of the “Grants – program and passthrough” line item.

⁹ 137 S.Ct. 2012 (2017).

¹⁰ *Id.* at 2021 (citations omitted).

¹¹ *Id.* at 2021-2022.

¹² 140 S.Ct. 2246 (2020).

¹³ *Id.* at 2260 (noting that, to satisfy this “strictest scrutiny” test, the government action in question must “advance ‘interests of the highest order’ and must be narrowly tailored in pursuit of those

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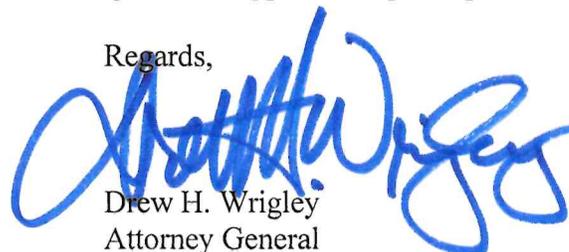
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State “cannot qualify as compelling in the face of the infringement of free exercise.”¹⁴ The Court concluded that “[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”¹⁵ Recently, the Supreme Court expanded the *Espinoza* holding in *Carson v. Makin*.¹⁶ In *Carson*, the Court held the application of Maine’s Blaine Amendment to generally available tuition assistance payments violated the Free Exercise Clause of the First Amendment. The Court said the Blaine Amendment impermissibly denied public funding to certain private schools solely because the schools are religious.¹⁷

Here, as in *Carson* and *Espinoza*, the state created a mentorship program that is mandatory for licensure renewal. Fairly applied, the Blaine Amendment would permit teachers at public schools and non-religious private schools to receive grants for participating in the mandatory program, while barring teachers at religious private schools from receiving the same grants. Based on *Trinity Lutheran*, *Espinoza*, and *Carson*, the Blaine Amendment cannot be enforced in any situation where doing so would disadvantage a sectarian school as compared to a non-religious private school simply because of the school’s sectarian nature. As a result, it is my opinion the United States Supreme Court has barred the state from enforcing its Blaine Amendment.

Based on binding United States Supreme Court caselaw, it is my opinion the Blaine Amendment unconstitutionally disadvantages sectarian schools. As a result, it is my opinion that teachers at all schools, including both non-religious and sectarian private schools, may participate in the Teacher Support Program as mentors, and may receive grants to support their participation.

Regards,



Drew H. Wrigley
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹⁸

interests.” (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)))

¹⁴ *Espinoza v. Mont. Dep’t of Revenue*, 140 S.Ct. 2246, 2260 (2020).

¹⁵ *Id.* at 2261.

¹⁶ 142 S.Ct. 1987 (2022).

¹⁷ *Id.* at 2002.

¹⁸ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).