North Dakota Catholic Conference

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To: Senate Appropriations - Education and Environment Division
From: Christopher Dodson, Executive Director
Subject: House Bill 1532 - Educational Reimbursement and Parental Choice
Date: March 28, 2023

The North Dakota Catholic Conference supports House Bill 1532.

All children have a right to state-supported education. This right is rooted in who we are as human persons and the obligations of the political community to concretely assist in the development of all children so that they can reach their full potential. At the same time, parents, as the primary educators of their children, have a right to choose the best educational setting for their children.

These two basic human rights are not mutually exclusive. Treating them as such violates both the child's rights and the parent's rights, and mostly hurts poorer families.[1] This is why House Bill 1532 is not about nonpublic schools and certainly not about Catholic schools. Indeed, these rights of children and parents are so fundamental that the North Dakota Catholic Conference would support HB 1532 even if there were no Catholic schools in North Dakota.

House Bill 1532 respects both rights by allowing a parent to request that the school they freely chose for their child receive reimbursement for part of the child's costs of education. It is constitutional, does not take money from public schools, and includes all the oversight, requirements, and accountability that go with operating a school in North Dakota and implementing the program.

House Bill 1532 is Constitutional

Opponents of parental choice will often cite Article VIII, Section 1, of the North Dakota Constitution. It states that "the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control." The provision does not prohibit parental choice programs. It merely says that there must be a system of public schools. House Bill 1532 does not affect this provision in any way.

The other constitutional provision often cited by opponents of parental choice is Article VIII, Section 5, which states: "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." This provision is often called the "Blaine Amendment."

Of course, HB 1532 does not use "money raised for the support of the public schools," but, more importantly, the time has come that we no longer give any credence to arguments appealing to the state's Blaine Amendment.

After two opinions from the United States Supreme Court in 2017 and 2020 that found that state Blaine Amendments violated the First Amendment, state Blaine Amendments were on life-support, at best.[2] In 2022, the U.S. Supreme Court finished them off.[3]

As expressed in the *Espinoza* case, "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." North Dakota's Blaine Amendment does just that. Article VIII, Section 5 is unconstitutional on its face.

On November 29, 2022, Attorney General Drew Wrigley issued a formal opinion affirming the unconstitutionality of the provision.[4] The opinion states: "the Blaine Amendment is not enforceable under United States Supreme Court case law" and "the United States Supreme Court has barred the state from enforcing its Blaine Amendment."

Nevertheless, we continue to hear that although the state's Blaine Amendment is unconstitutional, the legislature should respect the intent of the state's Founders and enforce it legislatively. The assertion is deeply troubling. The state's Blaine Amendment is unconstitutional because it violates the First Amendment of the United States Constitution. Proponents of keeping its "spirit" because of "tradition" or respect for the state's founders are asking this legislative body to knowingly violate the First Amendment of the U.S. Constitution.[5]

Alternatively, we hear that the drafters of our state constitution intended to prohibit any assistance to nonpublic schools, religious and secular. But that is not what the state constitution states. It only — unconstitutionally — drew the line at "sectarian." By implication, it authorized funding for nonpublic schools. Moreover, Article VIII, section 4, expressly authorizes the state to take steps to provide education "other" than providing for a system of public schools.[6] In short, nothing in the state constitution prevents HB 1532.

House Bill 1532 Does Not Take or Divert Money from Public Schools

The appropriation for HB 1532 comes from the general fund, not public schools. Despite this clear language or, perhaps because of it, some argue that any money that does not go to public schools is money taken from the public schools. If we follow that logic, however, money this body appropriates for roads, human services, law enforcement, or anything else is taken from the public schools.

House Bill 1532 Does Not Mean the Schools Should Take Every Student

We have heard in opposition to HB 1532, that nonpublic schools are not required to take all students, as if this is somehow relevant to the bill. Others will comment on how

nonpublic schools do take special needs students and could take more with HB 1532, but a few flaws of this argument are worth noting.

First, HB 1532 is not about public schools or nonpublic schools or which students they take. This bill is not about the schools at all. It is about the parents and their choice. The school is merely incidental to parents' choice. There is no rational reason why the decision of a parent should trigger legal mandates on the school unrelated to the decision or the costs borne by the parent.

Second, if we follow the logic of the "take every student" argument, it would have to apply to every nonpublic school, including the Anne Carlson Center, Full Circle Academy, and the school at the Dakota Boys and Girls Ranch. Such a policy would eventually undermine and destroy their ability to adhere to their missions and provide specialized educational services.

Parental Choice and Reimbursement Should Not Trigger Unrelated Regulations

Another argument made by opponents is that HB 1532 should require nonpublic schools to follow every regulation and law applicable to public schools as if nonpublic schools were government institutions from top to bottom.

Here again, there is no rational reason why the decision of a parent should trigger legal mandates on the school unrelated to the decision or the reimbursement. Every nonpublic school already meets every requirement for operating as a school in North Dakota. HB 1532 includes whatever oversight, open records requirements, and rules that are necessary to implement the legislation. There is no rational reason to apply to a nonpublic school additional requirements appropriate to a government institution merely because a parent is reimbursed for services provided by that school. According to that logic, all the state's hospitals and clinics, Catholic Charities, and Village Family Services should be turned into government institutions merely because the state reimburses them for provided services.

HB 1532 Does Not Hurt Rural Public Schools

We have already established that HB 1532 does not take any funding from public schools, including rural public schools. Despite this fact, some opponents of HB 1532 argue that this body should defeat the bill merely because rural areas do not have nonpublic schools. This, of course, is patently untrue. Nonpublic schools operate in Rugby, Langdon, Valley City, Belcourt (two), Fort Yates (two), and Fordville. Four of these schools serve Native American communities.[7]

Moreover, if you follow the logic of this appeal, we should not fund anything that might, as a result of where people live, benefit one area more than another. According to this thinking, we should not fund English Learner programs because 76% of those students live in urban areas. Parental rights and children's rights to education should not depend on where they live.

House Bill 1532 does not negate the state's constitutional obligations to public schools. It does not violate the state constitution. It does not violate the federal constitution. It does not take any money from public schools. It does not require adding any more requirements to the bill. Instead, it respects the rights of parents and children and strengthens education in North Dakota.

We urge a **Do Pass** recommendation on House Bill 1532.

[1] Please read the filed testimony of Monsignor Chad Gion, pastor of the Catholic Indian Mission in Fort Yates, North Dakota. Available at: https://ndlegis.gov/assembly/68-2023/testimony/SEDU-1532-20230314-24343-F-GION_CHAD.pdf.

[2] *Trinity Lutheran Church of Columbia, Inc. v Comer,* 137 S.Ct. 2012 (2017); *Espinoza v. Montana Dept. of Revenue*, 140 S.Ct. 2246 (2020).

[3] *Carson v. Makin*, 142 S.Ct. 1987 (2022).

[4] North Dakota Attorney General Opinion 2022-L-07. (Attached to this testimony.)

[5] The state's founding fathers did not willingly choose to include the Blaine Amendment in the state constitution. Congress, which was swept up in anti-Catholic and anti-immigrant hysteria, forced the state to include the Blaine Amendment in the state's constitution as a condition of obtaining statehood. (Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889).)

[6] **"**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." North Dakota Constitution, Art. VIII, sec. 4.

[7] The positive impact these schools have on their community is illustrated by St. Bernard's at Fort Yates. The high school graduation rate on the Standing Rock Reservation is 40%-49%. Yet, 90% of the students who start at St. Bernard's go on to finish high school.

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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
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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).

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

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[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

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]

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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).