

# North Dakota House of Representatives

STATE CAPITOL  
600 EAST BOULEVARD  
BISMARCK, ND 58505-0360



Legislative Assembly

## Representative Claire Cory

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## COMMITTEES:

Judiciary  
Government and Veterans Affairs

March 28, 2023

Chairman Sorvaag and members of the Senate Appropriations Committee,

For the record, my name is Claire Cory, and I represent District 42 in the northwestern corner of Grand Forks. I am here as the prime sponsor seeking your support for House bill 1532.

House Bill 1532 seeks to improve the way education works in North Dakota by respecting the right of parents to choose the best educational setting for their child. Currently, a parent is provided one of three options when educating their child; enroll their child in a public school, pay out of pocket for a private school, or educate their child through a homeschool program.

House Bill 1532 recognizes that not all of these choices are created equal, in terms of their burden upon a family. As such, House Bill 1532 seeks to facilitate parents' individual decisions by alleviating a portion of the financial costs required by parents who educate their child in a nonpublic school. In these instances, the parent is forced to consider the financial burden, and this financial burden can be prohibitive.

Mechanically, this bill works as follows:

- When a parent enrolls their child in a nonpublic school, the school gives the parent a form requesting reimbursement for the cost of educating that parent's child
- If the parent completes the form requesting the reimbursement, the school furthers that request to the Superintendent of Public Instruction
- The superintendent then issues a payment to the school for the cost of educating that parent's child
- The reimbursement payment must be at least 15% of and no more than 30% of the per-student payment rate
- The parent will see this as a credit on the invoice they receive from the nonpublic school for the cost of educating that child

This bill is asking for a \$24 million appropriation out of the General Fund to fund a portion of tuition costs at qualified schools. The initial version of the bill was asking for \$24 million for the 2024-2025 school year. The payment will be the sum of tuition but, not to exceed 30% of the per pupil payment. The house appropriations committee amended the appropriation to \$12 million for each half of the biennium. There are roughly 7,500 students in North Dakota who attend a nonpublic school. If all of these nonpublic school students attended a public school, it would cost the state at least an additional \$75 million.

For families in Grand Forks, private tuition can reach \$7,000 a year, and for a family of four this could represent \$14,000 expenditure, assuming 2 adults and 2 children. With our median incomes in North Dakota, this would represent roughly 20% of their pretax income going to tuition. This is an incredible financial burden requiring substantial sacrifice; for a poorer family; it becomes ultimately impossible to afford.

As a result, the current system deprives families of making the choice of a nonpublic school. As many will testify before you today and as many have submitted written testimony, this sacrifice is simply not possible and places an undue burden on the family. No family should be forced to choose between a school which does not fit their child's needs and paying the bills. This is the main reason why I and many of my colleagues introduced House Bill 1532.

Mr.Chairman and members of the Senate Appropriations Committee, this concludes my testimony. I respectfully ask for a do pass recommendation out of committee. I am happy to answer any questions.



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Drew H. Wrigley  
ATTORNEY GENERAL

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”)<sup>1</sup> 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.”<sup>2</sup> 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.’”<sup>3</sup> Over time, the definition of “sectarian” has broadened to include “relating to” or “supporting a particular religious group and its beliefs.”<sup>4</sup> As a result, the Blaine Amendment effectively means “[n]o money raised for the support of

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<sup>1</sup> 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.”

<sup>2</sup> N.D. Const. art. VIII, § 5.

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

<sup>4</sup> Black’s Law Dictionary (11<sup>th</sup> 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].”<sup>5</sup>

The Teacher Support System is a mentoring program for new teachers operated by the North Dakota Education Standards and Practices Board (ESPB).<sup>6</sup> 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.<sup>7</sup> The legislature appropriated \$2,125,764 to the ESPB for the 2021-23 biennium to provide grants to Teacher Support System mentors.<sup>8</sup> 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*,<sup>9</sup> 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.’”<sup>10</sup> 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.<sup>11</sup>

The Supreme Court went even further in *Espinoza v. Montana Dept. of Revenue*.<sup>12</sup> 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.<sup>13</sup> The Court made clear an interest in separating church and

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<sup>5</sup> N.D. Const. art. VIII, § 5.

<sup>6</sup> N.D.A.C. § 67.1-04-04-03.

<sup>7</sup> N.D.C.C. § 15.1-13-10(9).

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

<sup>9</sup> 137 S.Ct. 2012 (2017).

<sup>10</sup> *Id.* at 2021 (citations omitted).

<sup>11</sup> *Id.* at 2021-2022.

<sup>12</sup> 140 S.Ct. 2246 (2020).

<sup>13</sup> *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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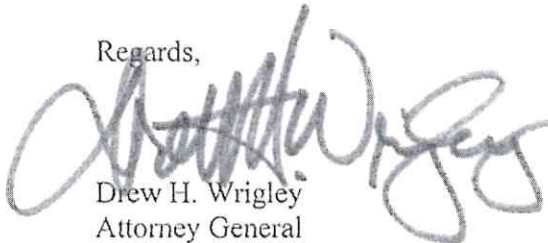
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State “cannot qualify as compelling in the face of the infringement of free exercise.”<sup>14</sup> The Court concluded that “[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”<sup>15</sup> Recently, the Supreme Court expanded the *Espinoza* holding in *Carson v. Makin*.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

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

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

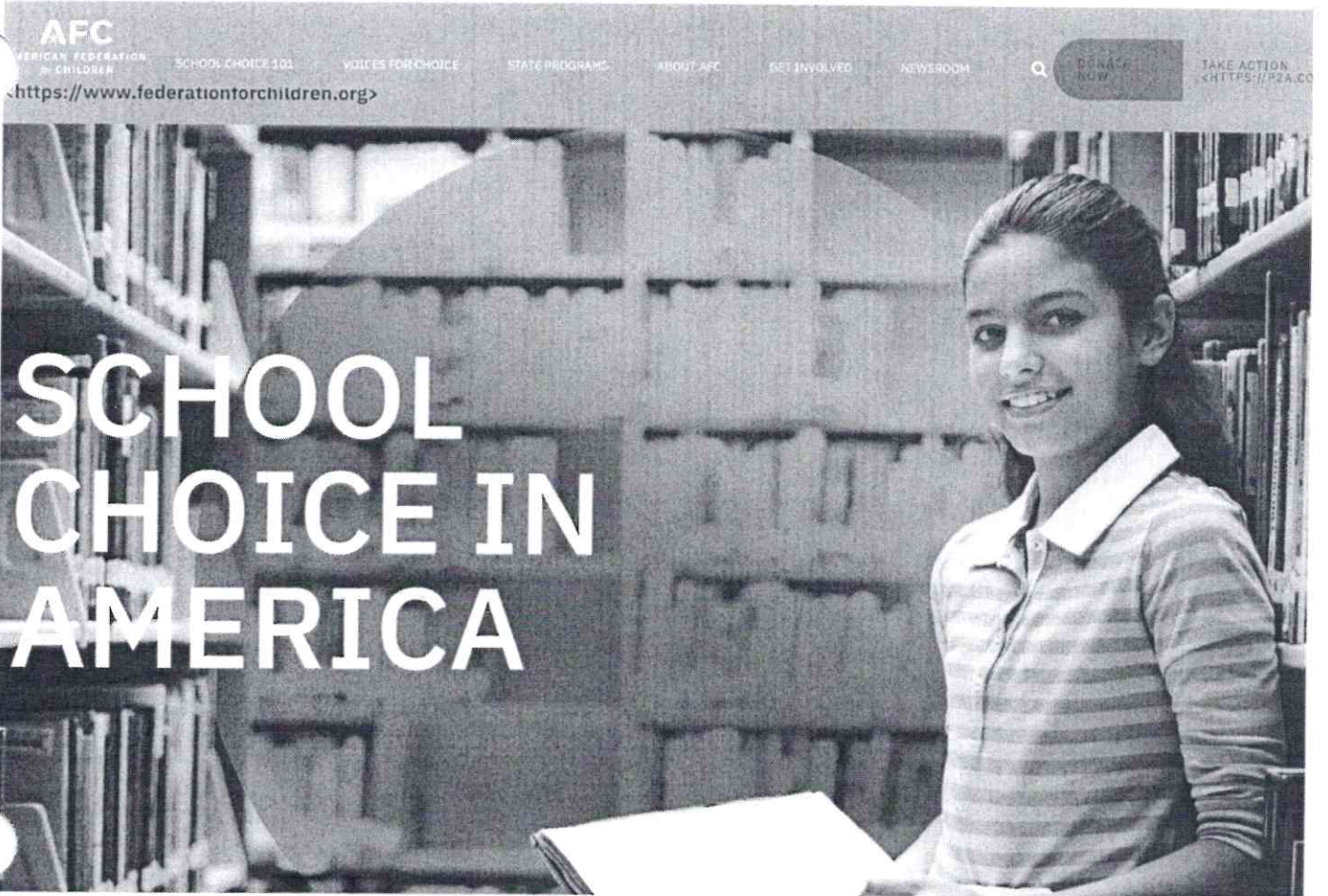
<sup>15</sup> *Id.* at 2261.

<sup>16</sup> 142 S.Ct. 1987 (2022).

<sup>17</sup> *Id.* at 2002.

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





School Choice Is About A Fundamental Right For Parents To Have Access To The Educational Environment That Serves Their Children Best.

The American Federation for Children knows that education needs in America vary for every individual student. At AFC, we want to give every child the opportunity to have his or her education needs met. Through our state programs, parents can find an option that best serves their child's situation. Learn more about available school choice programs in your area by visiting your state program page.

VIEW PROGRAMS & ELIGIBILITY

FIND YOUR STATE PROGRAM



# AT A GLANCE

**31** STATES, D.C. AND PUERTO RICO HAVE PRIVATE SCHOOL CHOICE PROGRAMS

OVER **\$3.3** BILLION EXPENDED FOR PRIVATE SCHOOL CHOICE PROGRAMS

<b>12</b> states + D.C. and Puerto Rico with Voucher Programs	<b>21</b> states with Scholarship Tax Credit Programs	<b>\$1.6</b> Billion Expended for Voucher Programs	<b>\$1.4</b> Million Expended for Scholarship Tax Credit Programs
<b>10</b> states with Educational Savings Account Programs	<b>14</b> states with Special Needs Scholarship Programs	<b>\$335</b> Million Expended for Educational Savings Account Programs	<b>\$629.1</b> Million Expended for Special Needs Scholarship Programs

**65** PRIVATE SCHOOL CHOICE PROGRAMS

**\$5,400** AVERAGE SCHOLARSHIP AMOUNT EXPENDED PER STUDENT IN PRIVATE SCHOOL CHOICE PROGRAMS

<b>27</b> Voucher Programs	<b>25</b> Scholarship Tax Credit Programs	<b>\$7,299</b> Average Scholarship Amount in Voucher Programs	<b>\$3,955</b> Average Scholarship Amount for Scholarship Tax Credit Programs
<b>9</b> Educational Savings Account Programs	<b>23</b> Special Needs Scholarship Programs	<b>\$9,329</b> Average Scholarship Amount in Educational Savings Account Programs	<b>\$9,272</b> Average Scholarship Amount in Special Needs Scholarship Programs