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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).

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).