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May 6, 2021

## **Use of Public Tuition for Private Religious Schools**

### **Legal Principles and Analysis**

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1. Are Vermont school districts required to pay public tuition to private religious schools?

(a) Vermont’s statutes authorize Vermont school districts to pay public tuition to approved independent schools—which are schools that meet standards established by the State Board of Education. These schools may include both secular schools and religious schools. For example, Thetford Academy (secular) and Rice Memorial High School (religious) are both approved independent schools.

(b) Because this public benefit is available to secular schools, it cannot be denied to religious schools based solely on their religious status. To do so violates the Free Exercise of Religion clause of the U.S. Constitution.

(c) However, the Vermont Constitution requires that if public tuition is paid to religious schools, the schools must establish safeguards to ensure that the public funds are not used for religious instruction.

1 (d) The nature of these safeguards has not been defined in statute and  
2 school districts have not received State guidance on this question (except for  
3 recent AOE guidance that was then withdrawn).

4 (e) In the absence of guidance, school districts have been denying requests  
5 from parents to pay public tuition to religious schools based on their religious  
6 status.

7 (f) Religious schools have challenged the denial of public funding in court  
8 and through the State Board of Education’s administrative process, and  
9 because these denials were based on their religious status, the rulings in these  
10 cases are in favor of the religious schools (or settled out of court with the same  
11 result).

12 (g) A draft bill being considered in Senate Education would prohibit a  
13 school district from paying public tuition to an approved independent school,  
14 whether secular or religious, unless it receives a certification from that school  
15 that states that none of the tuition for which payment is requested has been or  
16 will be used to support religious instruction or worship or the propagation of  
17 religious views.

18 (h) The certification method is a familiar mechanism used by both the  
19 federal and state governments in the past with court approval to provide  
20 assurance that taxpayer supported funds are not used for the purpose of  
21 religious instruction or worship.

1 (i) This solution is designed to provide school districts guidance to allow  
2 them pay public tuition to religious schools in compliance with the U.S. and  
3 Vermont Constitutions.

4 (j) While the U.S. Supreme Court has recently ruled that public tuition  
5 cannot be denied to religious schools based solely on their religious status, it  
6 left open the question of whether states can restrict the use of public funds to  
7 nonreligious instruction, as is required under the Vermont Constitution.

8 (k) Therefore, if the bill language on this topic being considered by Senate  
9 Education were to be enacted, it is likely to be challenged in court. The U.S.  
10 Supreme Court could use this case (if appealed to it) to establish whether such  
11 “use” restrictions violate the Free Exercise Clause of the U.S. Constitution. It  
12 is unclear how the Court would rule (the Justices appear divided on this issue).

13 (l) A secondary question related to the payment of public tuition to  
14 religious schools is the question of student eligibility for dual enrollment. This  
15 is because only a student on public tuition is eligible for dual enrollment.  
16 Because religious school have been denied public tuition based on their  
17 religious status, their students have also been denied dual enrollment. This has  
18 led to further litigation against school districts, and the bill language being  
19 considered by Senate Education addresses this.

1       2. Can Vermont require religious schools to comply with the  
2       antidiscrimination laws that apply to public schools as a condition to receiving  
3       public tuition?

4           (a) Under the U.S. Constitution, religious schools are exempt from  
5       antidiscrimination employment laws for employees in a “ministerial role”—  
6       this permits employment discrimination. The definition of “ministerial role” is  
7       vague but includes teachers who provide religious instruction.

8           (b) Vermont’s antidiscrimination public accommodations laws prohibit  
9       discrimination based on race, creed, color, national origin, marital status, sex,  
10       sexual orientation, or gender identity in schools if the schools are places of  
11       public accommodation. Religious schools are exempt from these laws if they  
12       are not places of public accommodation—i.e., if their services are not offered  
13       to the general public. While determining whether a school offers its services to  
14       the general public is a fact specific analysis, some religious school do  
15       discriminate against students in these protected classes, and therefore  
16       presumably do not believe they are places of public accommodation and  
17       therefore believe they are allowed to discriminate in this manner.

18           (c) Public schools are subject to antidiscrimination employment laws and  
19       antidiscrimination public accommodations laws.

20           (d) If religious schools were required to follow the anti-discrimination laws  
21       that apply to public schools in order to receive public tuition, they would be

1 required to give up their Free Exercise of Religion Constitutional rights to  
2 discriminate against employees and students.

3 (e) In 2017 the U.S. Supreme Court stated, in essence, that a religious  
4 organization’s right to participate in a public benefit program cannot be  
5 conditioned on a requirement for it to disavow its’ religious character, which is  
6 protected by the Free Exercise of Religion Clause.

7 (f) Therefore, requiring religious schools to comply with the  
8 antidiscrimination laws that apply to public schools as a condition to receiving  
9 public tuition would almost certainly be challenged in court, and given the  
10 Supreme Court’s focus in the last 20 years on finding in favor of religious  
11 freedom under the Free Exercise of Religion Clause, there is a reasonably high  
12 chance of the Court holding, if the case were appealed to it, that this  
13 requirement violates that Clause.