ACSI STRONGER TOGETHER

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This edition is dedicated to the memory of Burt Carney (1943 to 2024), founder of the Legal Legislative Update in 1989.

Free Speech, Sex Discrimination, and Religious Employers

By Theresa Sidebotham, Telios Law, PLLC

Religious organizations and employers must comply with anti-discrimination laws while also honoring their sincerely held beliefs. The Fifth Circuit Court of Appeals recently ruled in favor of a Christian organization, Braidwood Management, shielding it from being sued by the EEOC, which argued it was engaged in unlawful sex discrimination under Title VII of the Civil Rights Act of 1964. Braidwood Management was granted protection under the Religious Freedom Restoration Act (RFRA), which is a 1993 federal law limiting government agencies' ability to burden anyone's religious freedom.

To fully understand protections that may be extended to religious organizations, let's first go back over some recent history.

Bostock v. Clayton County

This Supreme Court case in 2020 decided that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of sexual orientation or gender identity.

Title VII makes it unlawful "for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual… because of such

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ACSI will become a leading international organization that promotes Christian education and provides training and resources to Christian schools and Christian educators, resulting in:

• schools that contribute to the public good through effective teaching and learning and that are biblically sound, academically rigorous, socially engaged, and culturally relevant and

• educators who embody a biblical worldview, engage in transformational teaching and discipling, and embrace personal and professional growth.

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individual's race, color, religion, sex, or national origin."[1] The plaintiffs in the Bostock case were terminated for various reasons: one for "unbecoming" conduct shortly after he began participating in a gay recreational softball league, another after coming out as gay, and the last one after deciding to change genders. They all argued they were terminated because of their sex, so it should fall under Title VII. Even though when the Civil Rights Act was created, "sex" was referring to biological sex, the plaintiffs claimed that they would not have been terminated if not for their biological sex.

The *Bostock* decision redefined the meaning of "sex" in Title VII, so the prohibition against discrimination "because of sex" includes a prohibition against discrimination against employees on the basis of their sexual orientation or gender identity.

The Supreme Court explained that there were certain defenses and immunities for religious employers who operate on traditional convictions about sexuality, marriage, and gender. The *Bostock* court offered three possible protections for religious employers:

1. Title VII's "religious organization" exception, which states that the law does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[2]
2. The Ministerial Exception is a doctrine under the First Amendment that protects religious employers from many employment laws when applied to employees who perform important religious functions.
3. The Religious Freedom Restoration Act (RFRA) is a federal statute requiring that all federal laws creating a burden on religion must be subjected to the highest level of judicial scrutiny.

Bear Creek Bible Church & Braidwood Management, Inc. v. EEOC, et al.

The *Bear Creek Bible Church & Braidwood Management* case from 2021, which you can read more about in our previous post[3], began when two Texas employers, a nondenominational church (BCBC) and Braidwood, a management company, filed suit against the EEOC seeking a declaration that they were not in violation of Title VII, considering they were operating on their religious convictions.

They sought exemption from Title VII's requirements on the basis of RFRA; however, RFRA is only triggered when a federal statute or regulation imposes a burden on the religious exercise of the party claiming the RFRA defense. The district court determined that BCBC was exempted under the religious organization exception because it was a church. Because it was already exempted, Title VII was not burdening its religious exercise. Braidwood, on the other hand, was not found to be a "religious organization" under Title VII, and because of this, RFRA was invoked. One of the factors in determining if an organization is a religious organization is whether it is for-profit.

The court certified two classes of employers: for-profit religious businesses and those that oppose "homosexual or transgender behavior" for nonreligious reasons.

The court found that Title VII imposed a substantial burden on Braidwood's religious exercise because employers like Braidwood "are required to choose between two untenable alternatives: either (1) violate Title VII and obey their convictions or (2) obey Title VII and violate their convictions." The district court ruled that Braidwood was protected under RFRA.

Both BCBC and Braidwood were protected under the First Amendment's Free Exercise Clause as well since the court concluded that the employers' decisions not to hire or retain employment of individuals who engage in conduct opposed to their religious views were considered expressive association.

Lastly, the court addressed the scope of Title VII and the standard the *Bostock* court established for sex discrimination. The court ruled the standard for sex discrimination was "favoritism, plus blindness," and addressed five different workplace policies: policies against bisexual conduct, policies prohibiting certain sexual activities, sex-specific dress codes, policies prohibiting hormone treatments and genital surgery, and sex-specific workplace bathrooms.

The EEOC challenged the decision, and the case was taken to the U.S. Court of Appeals for the Fifth Circuit.

Braidwood Management v. EEOC[4]

The Fifth Circuit partially affirmed and partially reversed the lower court's decision, and it has been remanded to the district court.

The EEOC argued that the claim wasn't ripe for judicial review; ripeness means that the facts of the case have matured into an existing substantial controversy. However, the Fifth Circuit held that "the plaintiffs ha[d] established a credible fear of such an action sufficient to establish standing" and "no further facts [were] required to adjudicate plaintiffs' specific claims."

The EEOC asked for decertification of the two classes of employers certified in *Bear Creek Bible Church* on the grounds that both classes are "broad" and lack any specific factual development. The Fifth Circuit reversed the certification decision, concluding that the class definitions "are too broad and ill-defined to reach the thresholds of class certification."

The court did not vacate the lower court's ruling that BCBC is a religious organization not burdened by Title VII. It also addressed Title VII policies regarding bisexual conduct, gender reassignment surgery, and hormone treatment. Braidwood sought a declaratory judgment that Title VII permits employers to discriminate in certain situations. The court reiterated what the district court had concluded: that discrimination against bisexuals or prohibiting employees from taking hormone therapy or undergoing sex-reassignment surgery" *is not* permitted; it held that enforcing a sexual ethic that applies evenly to heterosexual and homosexual sexual activity and enforcing sex-specific dress code policies or sex-segregated bathroom policies *is* permitted. Ultimately, the court said "[a]lthough plaintiffs have a valid cause of action, we decline to answer these open questions for Braidwood's policies because the class certifications have been reversed," and it vacated the judgments for "all of the scope-of-Title-VII claims post-Bostock." The court notes that Braidwood did not represent a class requiring relief, which is one reason given for leaving these questions unanswered.

The *Braidwood* court affirmed that the Religious Freedom Restoration Act "requires that Braidwood, on an individual level, be exempted from Title VII because compliance with Title VII post-*Bostock* would substantially burden its ability to operate per its religious beliefs about homosexual and transgender conduct."

This RFRA exemption from the sex discrimination provisions of Title VII applies even to for-profit companies. This will allow many religious employers to claim protection from the LGBTQ discrimination rules that beforehand would not have qualified.

Understanding the protections that may be available to religious organizations

While a Fifth Circuit ruling does not apply to all jurisdictions in the country, it is still good to understand, as it offers hope for faith-based organizations in every jurisdiction to be awarded the same protections. Based on the recent *Braidwood* decision, churches and other faith-based organizations may be able to avoid liability and uphold their sincerely held religious beliefs.

RFRA

Under the Religious Freedom Restoration Act, once a party shows that a federal law substantially burdens their religion, the federal government must then show that the burden is justified by a compelling interest and that it has chosen the least restrictive means of advancing that interest. RFRA applies only to federal laws but will apply to remedy all burdens on religion, even if those burdens result from neutral, generally applicable laws.

First Exercise Clause of First Amendment

The First Amendment applies to both state and federal laws but does not protect against burdens resulting from generally applicable laws that are neutral toward religion. If a law is being challenged under the Free Exercise Clause but is determined not to be a neutral, generally

applicable law, the court will then conduct the analysis it would under RFRA: the government must show a compelling interest and that the law at issue is the least restrictive means of achieving that interest. (But usually, courts will hold that a law is neutral and generally applicable.)

The First Amendment has also been interpreted to protect the right of expressive association, specifically the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." The government can only place a burden on someone's expressive association if the law is narrowly tailored, which means it must use the least restrictive means to achieve its purpose.

This new Fifth Circuit ruling partially affirmed the BCBC & Braidwood case, maintaining important protections for religious employers.

Faith-based organizations might want to seek counsel to find out which protections apply to them and ensure that they are operating their business in a way that limits the likelihood of any violations or litigation.

303 Creative LLC v. Elenis

In the second part of this article, we will detail the Supreme Court's *303 Creative* case on free speech protection for expressive businesses against SOGI accommodation laws. Unlike the *Braidwood* case, the Supreme Court's *303 Creative* decision applies to all jurisdictions.

Not long after *Braidwood*, the Supreme Court ruled in *303 Creative LLC v. Elenis* that "the First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees."[5] This holding of this case, unlike *Braidwood*, applies to the entire country.

The case began when Lorie Smith, who is a Christian and an owner of a graphic/website design business, wanted to expand and offer wedding websites. But due to her personal beliefs, she wanted to make this offering available only to heterosexual couples, and she wanted to include that information on her website. However, Colorado's public accommodations law prohibits businesses serving the public from discriminating against LGBTQ people or giving notice of intent to discriminate.[6]

Both the state of Colorado and Smith agreed that her wedding websites would constitute expressive activity. In some situations, there might be difficulty in determining "what qualifies as expressive activity protected by the First Amendment," but Smith's case wasn't one of them.

Smith argued that Colorado's anti-discrimination law infringed on her rights, as she was not able to provide services to same-sex couples due to her sincerely held Christian beliefs. The Supreme Court agreed with her, but on the basis of free speech rather than religious freedom.

"Disagreement isn't discrimination, and the government can't mislabel speech as discrimination to censor it," said Kristen Waggoner of Alliance Defending Freedom and counsel for 303 Creative LLC.

You can find the full opinion here.

Understanding the implications this case has for businesses

Faith convictions often play a central role in business practices. Business owners bring personal values and beliefs to their work. The question is whether business owners should be required to have their businesses participate in certain activities that conflict with their religious beliefs and whether they can be barred from publicly announcing their beliefs. The position of the state of Colorado was that business owners could not hold openly or promote publicly any values that violated Colorado's anti-discrimination stance. Business owners who did not agree would then have to compromise the sincerity of their convictions and their integrity.

The case was about balancing the principles of individual expression against the societal push toward broad non-discrimination rights. This involves respecting the rights and dignity of all individuals involved.

The *303 Creative* case, since it came down in a very different place from the state of Colorado, will have a long-lasting impact beyond the case itself. It will influence how laws are interpreted and applied in similar situations and will spark broader discussions about the balance between individual rights and societal norms.

Business owners might not have to abide by anti-discrimination laws if they are engaging in an expressive activity, and adhering to the anti-discrimination standards would infringe upon their freedom of speech.

The Court did not precisely define "expressive activity," so the lower courts will have to evaluate what qualifies as speech in cases such as Lorie Smith's.

Supreme Court Justice Neil Gorsuch wrote the 6-3 opinion, concluding that "[t]he First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands."[7]

What is an expressive activity or expressive conduct?

Since this case is about expressive activity, defining that becomes important. Expressive activities refer to all forms of non-commercial speech that are protected by the First Amendment of the U.S. Constitution. Expressive activities include peaceful assemblies, speeches, protests, picketing, leafleting, circulating petitions, distributing literature, and more.

When determining whether expressive conduct should be protected under the First Amendment, courts often apply a two-part test developed in *Spence v. Washington* and *Texas v. Johnson*:

1. The speaker must intend to convey a message; and
2. The message conveyed must be one likely to be understood by the listeners.

When there is uncertainty or ambiguity on whether something is considered an expressive activity or whether certain expressive conduct deserves First Amendment protection, the courts will decide.

In Lorie Smith's case, the State of Colorado argued that her speech involved "only the sale of an ordinary commercial product," which would not award her any protection; it later stipulated that rather, she "intends to create 'customized and tailored' speech for each couple."[8] The Court found that Smith's websites constituted pure speech rather than commercial conduct.

How do the 303 Creative and Braidwood Cases differ?

The *Braidwood* case dealt with religious freedom, but the *303 Creative* case was decided based on free speech. In *Braidwood*, the company sought exemption from following the anti-discrimination laws because the religious beliefs of the owners were contradictory; *Braidwood* was protected under RFRA. In *303 Creative*, it was found that creating a website constituted speech and the First Amendment protected Lorie Smith. An important distinction between the two is that *Braidwood* involved religious and constitutional exemptions and defenses in the context of employment discrimination, while *303 Creative* involved public accommodations discrimination.

The ruling in *303 Creative* is much broader in some ways. Because it applies to all speech, it applies in all contexts, including when RFRA doesn't apply (such as state law cases). But it also applies only to speech, not to forms of personal or religious expression that are not speech.

The *Braidwood* case is ongoing, and the courts may have additional clarifications in the months and years to come.

Conclusion

The *303 Creative* ruling supports free speech and also religious freedom to the extent that speech is religious. Further litigation will likely center around what is meant by expressive speech. For example, does a gender transition cake that is pink on the outside and blue on the inside convey a message that is likely to be understood as such by hearers or viewers?

Speaking of cakes, the Masterpiece Cakeshop case is still pending in the Colorado Supreme Court. The case involves a Christian owner of a cakeshop who declined to make a custom wedding cake celebrating a same-sex wedding because doing so would violate his beliefs. The Colorado Anti-Discrimination Act (CADA) prohibits businesses from discriminating, including based on sexual orientation. The Supreme Court ruled in Philips' favor in 2018, but not because his free exercise of religion or freedom of speech under the First Amendment were violated; rather, because the Civil Rights Commission of Colorado demonstrated "impermissible hostility toward the sincere religious beliefs that motivated his objection."[9] While the Supreme Court reversed the Court of Appeals' ruling, the Colorado Court of Appeals has once again found Philips in violation of CADA, this time for refusing to create a cake for a transgender person as it would violate his beliefs. The *303 Creative* case might affect its outcome as well as other professionals engaging in expressive services and speech in the future.

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1 42 U.S.C. § 2000e-2(a)(1)

2 42 U.S.C. § 2000e-1(a)

3 https://telioslaw.com/blog/commandments-law-and-religion/bending-bostock-bibles-burdens-bisexuals-blindness-blouses

4 Braidwood Management v. EEOC, No. 22-10145 (5th Cir. 2023)

5 303 Creative LLC v. Elenis - SCOTUSblog

6 Discrimination | Colorado Civil Rights Division

7 21-476 303 Creative LLC v. Elenis (06/30/2023) (adflegal.org)

8 Id. at 16

9 16-111 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n (06/04/2018) (supremecourt.gov)

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New Overtime and Exempt Employee Salary Rules Struck Down

On November 15, 2024, history was repeated as the same federal district court that overturned the Obama-era salary increases for the exempt employee salary tests overturned the Biden Administration's own salary increases. Here, just as in 2016, the court struck the increases as out of line with the intent of the Fair Labor Standards Act (FLSA) exempt duties standards and the historical operation of the salary standards test.

The bottom line is that all three new standards created by the Department of Labor's rules were rejected by the court as overstepping the authority of the agency and have been invalidated. The original salary threshold is reinstated. When we entered 2024, the pay requirement minimum for exempt status was $35,568. Now, as we look to wind down 2024, the district courts have reinstated that standard, effective immediately.

The three standards that have been invalidated are: 1) the July 1, 2024, exempt minimum pay increase to $43,888 or higher; 2) the January 1, 2025, exempt minimum pay increase to $58,656 or higher; and 3) the automatic minimum pay increase every three years.

This is a massive victory for many schools that have been facing the prospect of finding tens of thousands of dollars to fund these new mandates. Continue reading for next steps and implications.

How we got here

In September 2023, the Department of Labor (DOL) released proposed changes to the exempt salary thresholds. The Association of Christian Schools International (ACSI) responded with public comment asking the DOL both to limit its changes and to implement them over time (a year or more foreknowledge of these changes) so that their impact could be better absorbed by schools that cannot make significant budgetary changes mid-year. Those suggestions were ignored.

On April 23, 2024, DOL released its final salary rules impacting overtime and elevated minimum pay rates for exempt employees to $43,888 or more on July 1 and a second increase to $58,656 or more on January 1, 2025, for employees to remain qualified for exemptions from overtime under the executive, administrative, and professional exemption rules under the FLSA.

On August 12, 2024, ACSI filed a lawsuit against the DOL, claiming it had exceeded its authority by creating such a

burdensome standard for member schools. ACSI's lawsuit is still in process and is awaiting a final ruling.

What happens now

The DOL can certainly appeal the Texas ruling, but time is not on the DOL's side. For an appeal to be successful, they will need time to reinstate enforcement of the rule before Trump's inauguration on January 20. It is unlikely the court will take up the case and give a ruling by then. However, even if they do, the Trump Administration is very unlikely to support such a policy. He certainly didn't in 2016, when he quashed the Obama-era attempt and instead created a much more gradual increase.

So, the old standard of $35,568 has been reinstated.

Next steps

If you have already made employment changes.

If you have already increased staff pay to make sure that it meets the now defunct July 1 increase, you may be stuck, not legally but practically. Legally, you could make additional pay changes and lower the pay you raised just under six months ago if it is not discriminatory against a protected status. Practically, such a move would be a morale killer going into the Thanksgiving and Christmas breaks. A few suggested steps to consider if this is your situation.

First, don't make additional changes until there is no chance, regardless of how slim it is today, that the DOL will appeal the ruling and bring back enforcement for the remaining week(s) of the Biden Presidency.

Second, consider a compromise solution. If you are

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going to reduce pay, look at not reducing it to their old rate but work to make it possible for staff to keep some of that increase. Alternatively, you could consider one-time bonuses or an increased benefit offering as well. Third, beyond just pay increases, you may have also changed job descriptions or the exempt and non-exempt status of some employees. This is an opportunity to change them back to exempt. The same caution applies here. Don't make those changes until the window for the DOL appeal has closed.

If you have not made employment changes.

If you were waiting for January 1 to implement pay or status changes, then this will be a windfall for you. If changes were scheduled to take place on January 1 and staff already know, you can tell them those changes are on hold until a final outcome is known. Here again, if staff knew to expect changes and you no longer have to implement them, you may want to keep those or look at a compromise situation where they get a pay increase or one-time bonus; it may just not be the 65% that would have been required by the revoked standard.

ACSI will continue to track this issue and keep you updated in the days and weeks ahead.

More Information:
April 30, 2024, Memo to School Leaders
May 10, 2024, DOL OT Webinar

CHOICES

School Choice and Elections

For the last three years, school choice measures have had great expansion on the state level, both in total number of programs offered and expansion of existing programs. This year, three states either went backward (revoking a program) or failed to create new programs.

Voters in Colorado rejected Amendment 80, which would have created a state constitutionally protected right "to school choice for children in kindergarten through twelfth grade (K-12) and create the right for parents to direct the education of their children." No program would have been created as a result of the constitutional amendment. Rather, it would have simply reserved the right for the state and local governments to create them. More importantly, it also ensured parents had the right to direct their own child's education. Heavy opposition was levied by the teacher's unions to block this amendment. Colorado already has a healthy charter school segment and an active homeschooling community. School choice that includes private schools was introduced for a very short time, a few years before COVID-19 in Douglas County, before it was eventually revoked as well.

Kentucky voters easily rejected a state constitutional amendment that would have allowed for state funding of private school choice programs. Just three years ago, Kentucky had a statewide school choice tax credit program, but that state's Supreme Court struck down its funding mechanism before the program could ever be implemented and rejected the entire law. The state has yet to recover popular support for a future program, and the opposition has grown much greater than it originally was. Future school choice efforts in Kentucky are at a new low this election year. The Blue Grass state is a holdout in its region, with six of the seven bordering states offering families educational freedom.

In Nebraska, voters repealed a new law that created a $10 million school choice program. The law had created a tax credit scholarship program to be funded through charitable gifts that could also be used as tax credits at the state level.

President-Elect Trump's platform on education includes school choice at the federal level. In part, "President Trump supports universal school choice so that parents can send their children to the public, private, or religious school that best suits their needs, their goals, and their values."

For the last several years, variations of a universal, federal tax credit program have been introduced. Over the last Congress, support has expanded, and one of the aims for the new administration is to pass the Educational Choice for Children Act and create the first national school choice tax credit program. Only time will tell if there is the political will to create such a program. If there is, it would be a momentous opportunity for the private school sector.

Ending the U.S. Department of Education:

What It Would Mean and Why Trump and Project 2025 Want It

By Erica Meltzer, Chalkbeat National Editor

When Donald Trump told Elon Musk one of his first acts as president would be to "close the Department of Education, move education back to the states," he was invoking a GOP promise that goes back to President Ronald Reagan and the department's founding.

Yet through multiple Republican administrations, including Trump's first term, the U.S. Department of Education has persisted.

That hasn't stopped Democrats from sounding the alarm that Trump's views epitomize the GOP's bad intentions for public schools. The fact that the Republican Party's platform also calls for closing the department, as does the conservative Heritage Foundation's Project 2025, has only intensified Democrats' distress.

"We are not going to let him eliminate the Department of Education that funds our public schools," Vice President Kamala Harris said to thunderous applause in her speech at the Democratic National Convention, where she placed the department alongside prized institutions and programs like Social Security, Medicare, and the Affordable Care Act.

The department has become a "kind of trophy" in a larger debate about the meaning of public education, said Rick Hess, director of education policy studies at the American Enterprise Institute.

In fact, he said, "The Department of Education actually has very little to do with that debate. Abolishing it doesn't advance school choice and keeping it doesn't do much for traditional district schools. But it's become a symbol of which side you're on in that debate."

So, what exactly does the U.S. Department of Education do? Why do so many conservatives want to see it go away? Why has it survived? And what would it take for that to actually happen?

The U.S. Department of Education: A brief history

The federal government spent money on education and developed education policies going back to the 19th century. But the U.S. Department of Education didn't become a stand-alone agency until 1980, when it split off from the U.S. Department of Health, Education, and Welfare.

President Jimmy Carter advocated for the creation of the department to fulfill a campaign promise to the National Education Association. Congress passed the Department of Education Organization Act in 1979. Some Democrats and the American Federation of Teachers opposed the idea, due to fears about excessive federal meddling in local education decisions and concerns that it would cater to the NEA's interests.

Reagan, Carter's successor, campaigned on abolishing the brand-new department. But Reagan's first education secretary, Terrel Bell, commissioned the landmark report "A Nation at Risk: The Imperative for Educational Reform," warning that America was losing its competitive edge. It advocated for a strong federal role to ensure students received a high-quality education.

"If the federal government is coming out with a report that shows all the things that need to be fixed and, at the same time, we're backing out of it, those are not compatible positions," said Michael Feuer, dean of George Washington University's Graduate School of Education and Human Development.

The U.S. Department of Education does a lot of things, like monitor school performance and promote evidence-based practices. Its biggest K-12 programs by dollar amount provide money to high-poverty schools and for students with disabilities. Some of its most high-profile and controversial work involves enforcing civil rights protections. The department also plays a major role in distributing financial aid for higher education.

The department is not the primary funder of U.S. schools. Before the infusion of pandemic relief dollars, the federal government only covered about 8% of K-12 educational costs. In recent years, it's been closer to 11%. But refusing that money to avoid federal rules isn't necessarily easy.

Why do conservatives want to end the Department of Education?

Some of the dislike is purely ideological.

For conservatives, less government is better. Education is not mentioned directly in the U.S. Constitution. And a new department overseeing functions that remain mostly the purview of local government is low-hanging fruit.

Under Democratic administrations, the department has also sided with more progressive approaches to education and to civil rights enforcement.

The Obama administration, for example, told schools that if they suspended or expelled Black students at much higher rates than other groups, that could be a sign they were illegally discriminating in how they administered student discipline. Critics said the rules pushed schools to adopt laxer disciplinary policies that made schools less safe. Betsy DeVos, Trump's education secretary, rescinded those rules. (The Biden administration has not reinstated them.)

More recently, the Biden administration issued Title IX rules that provide greater and more explicit protections for LGBTQ students—rules that Republican-led states have sued to block.

Jonathan Butcher, a senior fellow at The Heritage Foundation, said states have been a source of innovation, like charter schools and educational savings accounts. The federal department not only distracts states from efforts to improve education but also creates unnecessary bureaucracy.

All the while, achievement gaps based on race and poverty haven't gone away, Butcher noted, though they have narrowed by some measures.

"We have ample evidence that it is not serving its purpose," Butcher said of the department. Abolishing it, he added, is "consistent with both the interest in smaller government and the interest in doing what's right for kids."

What does Trump say about abolishing the Department of Education?

In his conversation with Musk that aired on X, the social media platform previously known as Twitter, Trump said the U.S. had a "horrible" education ranking at the bottom of developed countries while spending the most.

It's not totally clear what sources Trump was using. On recent international tests, the U.S. ranked sixth in reading, tenth in science, and 26th in math among 81 countries. Older test results show the U.S. ranked lower, especially in math. The U.S. does spend more per pupil than most developed nations, including many that score better on key measures.

Trump said some states won't do well, but many would do a better job on their own while spending less money.

"Of the 50, I would bet that 35 would do great, and 15 of them or 20 of them would be as good as Norway," Trump told Musk. "You know Norway is considered great."

He said the federal government could provide "a little monitor. You want to make sure they are teaching English, as an example. Give us a little English, right?"

Trump's campaign did not respond to a request to elaborate on the candidate's plans.

How would abolishing the Department of Education work?

Abolishing a federal department would require an act of Congress, just as creating one does. It likely would also require broad bipartisan support, which the idea doesn't have.

U.S. Rep. Thomas Massie, a Kentucky Republican, has regularly introduced legislation to abolish the department—but the bill has failed to gain traction.

Despite that, Massie said his proposals were serious. "I want to terminate the Department of Education," he said in a statement. "Public education in America has gone downhill ever since this bureaucracy was created."

The Heritage Foundation's Project 2025, widely seen as a blueprint for a future Trump administration (despite the candidate's denials) lays out a much more detailed plan that considers necessary steps from Congress and the executive branch.

For example, the plan says civil rights enforcement should move to the Department of Justice, educational data collection to the U.S. Census Bureau, and support for Native American students to the Bureau of Indian Affairs.

Butcher acknowledged that BIA schools don't have a good track record. But he argued that the agency was better positioned to work on improving educational outcomes.

Meanwhile, Project 2025 says Title I funding for high-poverty schools should be turned into vouchers and then phased out over time, while money from the Individuals with Disabilities Education Act should be given directly to parents.

On a podcast earlier this year, Lindsey Burke, The Heritage Foundation's director of the Center for Education Policy and author of Project 2025's education chapter, acknowledged the political difficulty of simply abolishing the department.

But she said the executive branch could take certain actions on its own, such as ending student loan forgiveness programs and not enforcing the new Title IX rules.

Ending the Education Department now 'part of the conversation'

Hess, of the American Enterprise Institute, said he doesn't oppose eliminating the department, but the idea has become a kind of "bogeyman or quick fix" that's become a substitute for substantive debate on the federal role in education.

"So much of the culture war that reached a boil during the pandemic focused on schools and colleges, which made the department more contested terrain and made education more contested terrain," he said.

He's skeptical that a future Trump administration would get any closer to eliminating the department than the first one did. And a recent U.S. Supreme Court decision limiting the power of administrative agencies could make it even harder to make dramatic changes via executive order, Hess said.

Feuer, of George Washington University, thinks the department has made positive contributions, despite some flaws, and wants to see it stick around. An unfriendly administration could dramatically cut funding or eliminate programs without eliminating the department. That's the wrong debate to have when students are still recovering from COVID-19 disruptions, he said.

"If we now take this really important moment and get everyone fighting about maintaining the department, instead of keeping our eyes on the kids and the teachers and doing some good work, that would be a really unfortunate distraction," he said.

Butcher acknowledged that it's "a big, ambitious idea," but said it's also a serious one. Past efforts, he said, lacked willpower and an advocate who prioritized it.

He was encouraged when every candidate in Republican presidential primary debates last year (except Trump, who did not participate) said they supported ending the department.

"We have made it a part of the conversation," Butcher said.

This story was originally published by Chalkbeat. Chalkbeat *is a nonprofit news organization covering public education. Sign up for their newsletters at ckbe.at/newsletters.*

Editor's Note: Similar questions around Title funds and other programs private school students benefit from have been raised as to what their future might be if the Department of Education were abolished. The underlying laws that created such programs are not being repealed, so the operation and enforcement of the program would have to shift to another government agency, just like the IDEA programs referenced above would.

Making Your Voice Heard: Best Practices for Christian School Advocacy

By Dr. Jay McCurry, Ed.D., ACSI National Director for State Advocacy

Recently, I had an elected official tell me, "Jay, if I hear from a minimum of five constituents that live in my district… it changes the way I vote." It was a sobering moment for me in that I realized the effectiveness that our schools have in influencing the political landscape. I want you to sense an urgency in getting involved. An urgency in letting those who represent you know how you want them to vote. We must speak up and let our voice be heard. So, what are best practices in communicating with elected officials? Let's begin by examining the importance of staying informed on current issues and legislation impacting Christian education.

Staying informed on current issues and legislation impacting Christian education is crucial for school leaders who aim to protect and promote their schools' mission and values. Legislation at the local, state, and federal levels can have significant consequences on the autonomy, funding, and operations of Christian schools. By staying up-to-date, heads of schools can proactively address challenges, such as regulatory changes or threats to religious freedoms, and seize opportunities to advocate for beneficial policies. Informed leaders are better equipped to engage with elected officials, make compelling cases based on accurate data, and mobilize their school communities for collective action. Moreover, being well-versed in the legislative landscape helps

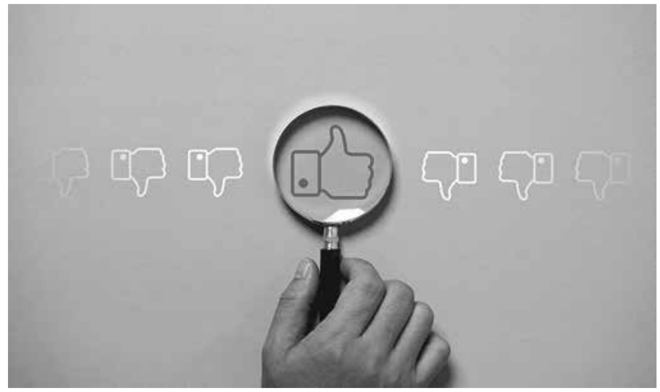
Christian educators maintain credibility and influence as they work to safeguard the interests of their institutions.

Utilizing resources like ACSI's Legal and Legislative Updates (LLU), state advocacy groups, and other Christian school networks is essential for staying connected and effective in advocacy efforts. ACSI's updates provide critical information on current legislative developments, court rulings, and policy changes that specifically impact Christian education, equipping school leaders with the knowledge they need to respond appropriately. State advocacy groups offer localized insights, enabling heads of schools to understand the specific issues affecting their region and connect with officials who influence those policies. Additionally, engaging with other Christian school networks allows leaders to share strategies, collaborate on advocacy initiatives, and amplify their collective voice. By leveraging these resources, school leaders can stay well-informed, proactive, and influential in their efforts to protect and promote the values of Christian education.

Knowing the key players—such as identifying your senator or representative and understanding their roles in education legislation—is a critical step for effective advocacy. School leaders must be familiar with the elected officials who represent their districts at the local, state, and federal levels, as these individuals have direct influence over education policies that impact Christian schools. Understanding each representative's stance on education, their committee assignments, and their voting record provides insight into how they might respond to specific advocacy issues. By building relationships with these key players, heads of schools can tailor their messaging to align with the priorities and values of these officials, increasing the likelihood of gaining their support. Additionally, knowing the right people to contact allows for more targeted and efficient communication, helping school leaders focus their efforts on the decision-makers who can bring about meaningful change.

Research and Preparation

To effectively advocate for a specific issue or bill, it is vital for school leaders to have a thorough understanding of the legislation they are supporting or opposing. This means researching the bill's background, its potential implications for Christian education, and its current status in the legislative process. By understanding the nuances and language of the bill, heads of schools can craft more compelling and informed arguments when engaging with elected officials. Additionally, gathering relevant data, facts, and testimonies from their school community is essential to personalize the issue and make it more impactful. For instance, sharing stories from parents,



students, or teachers about how the legislation could directly affect their education experience or the school's mission provides a human element that resonates with lawmakers. Hard data, such as enrollment numbers, economic impact studies, or academic outcomes, can also strengthen the case by demonstrating the broader effects of the issue. Combining a thorough understanding of the legislative details with real-life examples and compelling data makes the advocacy effort more persuasive and increases the likelihood of influencing policymakers effectively.

Effective Methods for Communicating Advocacy Issues

In-Person Meetings

Scheduling face-to-face meetings with elected officials is one of the most effective ways for heads of schools to advocate for issues impacting Christian education. To make the most of these meetings, it is important to prepare thoroughly and build a relationship with legislative staff, as they often act as gatekeepers and can be influential in setting up appointments and communicating your message. Establishing rapport with staff members by being respectful, professional, and consistent in your communications can open doors for future meetings and ongoing collaboration. When the meeting occurs, time is usually limited, so having a clear and concise presentation is crucial. Start by introducing yourself, your school, and its mission, then quickly move into the specific issue you are advocating for. Focus on the most important points, using a well-structured outline that highlights key facts, personal stories, and data that support your position. It's also important to anticipate questions or objections and be prepared to respond confidently and respectfully. Finally, end the meeting with a clear call to action, stating exactly what you hope the official will do (e.g., vote a certain way, sponsor a bill, or consider further dialogue). Following up with a thank-you note and any additional materials discussed during the meeting can reinforce your message and show your commitment, helping to establish a lasting and productive relationship.

Phone Calls and Social Media

Making phone calls to elected officials is an effective and direct method of advocacy that requires thoughtful preparation to maximize impact. To ensure clarity and effectiveness during these calls, school leaders should prepare a brief script that articulates their position on specific issues and outlines the action they want the official to take. This script should include a concise introduction of who they are, the name of their school, and the key issue at hand, followed by a compelling reason why the official should support their stance. Providing specific examples or data can enhance the message's effectiveness. After the call, it is essential to follow up with a thank-you email or note to reinforce the conversation and show commitment to the issue. This follow-up not only reminds the official of the discussion but also underscores the importance of the advocacy effort. In addition to phone calls, leveraging social media is an increasingly important tool for engaging with elected officials on key issues. By publicly tagging officials in posts and sharing relevant updates, school leaders can raise awareness and encourage dialogue about important topics. To maintain professionalism and impact, it is crucial to craft messages that are respectful, clear, and focused on solutions rather than solely highlighting problems. Using hashtags related to education policy can also help broaden the reach of the message, ensuring that it resonates within the larger community. Together, these strategies—effective phone calls and social media engagement—can significantly enhance advocacy efforts and promote the values of Christian education in a digital age.

Inviting Officials to School Events

Inviting elected officials to school events is a powerful way to demonstrate the value of Christian education while fostering meaningful dialogue about advocacy issues. By welcoming officials into the school environment, leaders provide them with firsthand experience of the impact their policies have on students and the broader community. These visits allow officials to interact directly with students, staff, and parents, showcasing the vibrant, nurturing atmosphere that Christian schools offer. Engaging with students during performances, open houses, or community service events can humanize the educational experience and create lasting impressions on policymakers. Moreover, such interactions present an excellent opportunity to discuss advocacy issues in a positive, supportive setting. Rather than approaching discussions with an adversarial tone, school leaders can frame conversations around shared values, such as the importance of faith-based education, character development, and community service. This approach not only fosters goodwill but also encourages elected officials to see the real-world implications of their decisions, making them more receptive to the concerns and needs of Christian schools. By leveraging these visits, school leaders can effectively advocate for policies that support their mission and strengthen the relationship between the school and its representatives, paving the way for future collaboration and support.

Joining Local and State Advocacy Groups

Joining local and state advocacy groups is a powerful strategy for heads of schools looking to strengthen their influence in the legislative process and expand their advocacy network. Becoming an active member of Christian education advocacy groups connects school leaders with like-minded individuals and organizations that share similar values and goals. These groups often have established relationships with lawmakers, lobbyists, and community leaders, providing members with insider knowledge and resources that can enhance their own advocacy efforts. By participating in meetings, events, and campaigns organized by these groups, school leaders gain valuable insights into the latest legislative developments and best practices for engaging with elected officials. Additionally, advocacy groups provide opportunities to collaborate on larger initiatives, pooling resources and amplifying their collective voice to make a more significant impact. Active involvement also allows school leaders to build meaningful relationships with other members, which can lead to partnerships and support systems that extend beyond advocacy work. Ultimately, joining and actively participating in these groups not only increases a school leader's reach and influence but also strengthens the overall Christian education movement's ability to advocate effectively for its interests.

Leveraging the School Community in Advocacy Efforts

Leveraging the school community in advocacy efforts is essential for amplifying the message and creating a powerful, unified voice that elected officials cannot ignore. Mobilizing parents, staff, and students to participate in advocacy campaigns not only increases the number of advocates but also shows the breadth of support within the community. When these groups actively engage by writing letters, making phone calls, or attending rallies, it adds a personal and diverse perspective to the issue, demonstrating to policymakers that the legislation impacts real people in their constituency. Training school leaders and staff is another crucial element—equipping them with the skills and knowledge to effectively communicate advocacy issues ensures consistency and clarity when they spread the message within their networks. This training can include strategies for speaking confidently about the issue, tailoring messages to different audiences, and responding to common questions or concerns. By highlighting the importance of a unified voice, heads of schools can emphasize that advocacy is not just the responsibility of one person but a collective effort where every individual's contribution matters. When a school community speaks as one, it shows strength and commitment, making it more likely that elected officials will take notice and act accordingly. This united approach helps Christian schools make a larger impact and effectively advocate for policies that align with their values and mission.

Conclusion

In conclusion, proactive communication with elected officials is not only a vital strategy for advancing the interests of Christian schools but also a biblical imperative. As stated in Proverbs 31:8-9, "Speak up for those who cannot speak for themselves; ensure justice for those being crushed." This verse reminds us of our responsibility to advocate for our students, families, and the values we hold dear in our educational institutions. Heads of schools are encouraged to embrace the strategies outlined in this article—such as building relationships with lawmakers, mobilizing their communities, and staying informed about legislative developments—to effectively represent the interests of Christian education. Furthermore, ACSI offers a wealth of resources, including legal updates and networking opportunities, to support school leaders in these efforts. By leveraging these tools and working together, we can amplify our voices and impact policy in a way that honors our mission and supports the future of Christian education. As we engage in this important work, let us remember the call in 1 Peter 3:15 to "always be prepared to give an answer to everyone who asks you to give the reason for the hope that you have." Through diligent advocacy, we can confidently stand up for our beliefs, ensuring that our schools continue to flourish and fulfill their divine purpose.

Teacher Wins $575K Settlement After Being Fired for Not Using Student's Preferred Pronouns

By Sarah Parshall Perry and Seth Lucas, Heritage Foundation

Peter Vlaming, a longtime high school French teacher in Virginia, was fired in 2018 for refusing to use a student's preferred pronouns. On September 30, 2024, after years of litigation and a win for Vlaming at the Virginia Supreme Court, the school board finally capitulated and agreed to settle the case for $575,000.

But the West Point School Board's refusal for five years to protect Vlaming's free speech and religious freedom rights came with an exorbitant price tag.

In 2018, one of Vlaming's female students at West Point High School began identifying as a transgender male. Although Vlaming consistently used the student's preferred name, the French teacher carefully avoided using third-person pronouns so as not to violate his own religious beliefs.

That courtesy wasn't good enough for West Point's school board and school administrators. When Vlaming refused to use preferred pronouns, they fired the teacher for "creating a hostile learning environment."

That's right. Vlaming wasn't fired for what he said. He was fired for what he didn't—and couldn't—say.

Represented by Alliance Defending Freedom and a local attorney, Vlaming sued in state court in 2019, asserting claims under Virginia law and the Virginia Constitution.

The school board didn't flinch but instead tried to move the case to federal court.

And no wonder. If the West Point School Board succeeded, it could invoke the 4th U.S. Circuit Court of Appeals' decision in another Virginia case called Grimm v. Gloucester School Board, which largely adopted gender ideology in its reasoning. That case—and its deeply flawed reasoning—would have mandated the use of preferred personal pronouns.

Thankfully, the school board failed in Vlaming's case. But it took nearly two years of litigation simply to determine what court should hear it.

The school board then asked the state lower court to dismiss the case. The judge agreed and tossed Vlaming's lawsuit, ruling from the bench without an opinion.

Vlaming appealed to the Virginia Supreme Court, which ruled in his favor in December 2023 and reinstated his lawsuit.

The majority decision, written by Justice D. Arthur Kelsey, was a landmark victory for religious freedom and free speech. The state Supreme Court held that the Virginia Constitution protects religious exercise—not just religious speech—unless it threatens the public's safety or order.

In so ruling, the state's highest court rejected U.S. Supreme Court Justice Antonin Scalia's highly criticized majority opinion in Employment Division v. Smith. That decision gutted religious freedom when a challenged law could be considered both neutral and generally applicable to everyone.

Instead, Kelsey's opinion for the state Supreme Court relied on the Virginia Constitution's text and its framers' views on religious freedom. The Virginia Constitution, the court explained, protects not just beliefs but also the right to act on those beliefs in every aspect of life.

The court also ruled for Vlaming on his claim of compelled speech. Merely "objectionable" or "hurtful" speech, it emphasized, poses no threat to public safety or order.

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The court also ruled for Vlaming on his claim of compelled speech. Merely "objectionable" or "hurtful" speech, it emphasized, poses no threat to public safety or order.

The school board fought for five years to avoid respecting Vlaming's rights to free speech and the free exercise of religion. In the end, that fight cost the board (or, more likely, its insurance provider) more than half a million dollars.

That's to say nothing of what the school board had to pay its own lawyers.

It turns out that compelling a teacher's speech carries a hefty price tag and causes quite a lot of trouble.

In the end, Peter Vlaming's courage in defending his right to remain silent is exemplary and achieved far more than money. His stand resulted in one of the clearest statements in history from the Virginia Supreme Court that religious exercise is robustly protected under the state Constitution.

This is a victory that we all can celebrate. Hopefully, it also serves as a stark reminder to school boards and school administrators that mandating the use of gender-based personal pronouns just isn't worth it.

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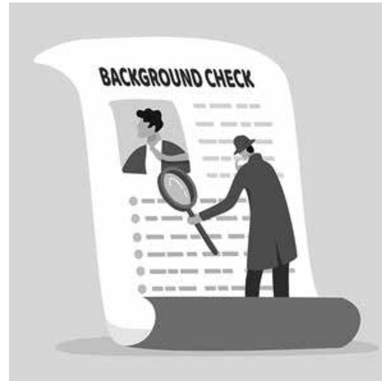
Editor's Note: While this case deals with government-forced speech in a public school and not speech at a private school, it is worthy of taking note from all Christian schools. The protections upheld in this case broadly apply, and they largely get it right that the government cannot compel some speech or deny other speech simply because it is deemed unwanted. The constitutional rights the court reinforced apply to protect all educators, public and private alike, and the government cannot force politically correct gender identity speech simply because to not do so is unpopular.

Basics of Background Checks



Your organization is, for many, a place of refuge and security. All reasonable steps must be taken to ensure the safety of your people and property. A background check process can be an important tool to provide that protection. Church Mutual has partnered with Trusted Employees to help your organization select reputable and affordable background check options.

Why is it important to conduct background checks?

In today's world, conducting background checks is more important than ever before. With criminal incidents increasing among organizations like yours, background checks are no longer just an option; they're essential. A well-designed background check process will keep your organization a safe place to work, volunteer, and participate.

Youth abuse prevention: This issue is felt by all organizations—both big and small, urban and rural—throughout the country. Conducting background checks through the nationwide sex offender registry greatly reduces the possibility of a convicted sex offender becoming a volunteer or employee at your organization.

Theft and embezzlement: Your organization has a lot of hard-earned assets on the line. Checking those who handle money can help reduce your risk of direct losses from activities such as theft, fraud, or misappropriation of funds.

Transportation: When you allow people to operate any vehicle on behalf of your organization, you must make sure they are safe and responsible on the road. Your organization should verify whether their motor vehicle record (MVR) makes them a desirable candidate.

Reputation: Certain types of incidents can damage an organization's reputation by losing the public's trust and eroding donor support or government funding. Background checks can demonstrate your desire to protect common interests and ensure your organization is doing its best to prevent crime.

Safety: Background checks will help your organization identify people who demonstrate risky behaviors such as criminal activity, sexual offenses, money management problems, lack of qualifications, and poor driving history. Limiting these exposures can help create a safe environment and prevent future accidents.

Who should be subject to background checks?

Background check procedures must be in place to help protect people within your organization. Church Mutual recommends that you conduct a background check for anyone who works or volunteers with children, the elderly, vulnerable populations, money, or transportation.

The type and depth of background checks you order is at your organization's discretion. Those who have greater access to your organization's assets or vulnerable groups require a more thorough and intensive background check process. Church Mutual offers predetermined background check packages available through Trusted Employees to help aid in the selection process.

What types of background checks are available?

There are several different options available:

- Criminal history, including sex offender checks
- Employment verification
- Education verification
- Reference checks
- Credit history
- Drug testing
- Motor vehicle report (MVR)

When and how often should a background check be performed?

It is always important to conduct background checks prior to making an offer and routinely throughout employment or volunteer service.

Initial: When you're considering someone new for a position, whether paid or volunteer, a background check will help verify information they provided on their application. It also will provide potential vital information the applicant did not disclose.

Annually: Employees and volunteers are not likely to voluntarily reveal any criminal charges or other risky behaviors. This makes periodic background checks necessary to identify potential risks. It is recommended that criminal background checks, sex offender registry checks, and motor vehicle reports be done annually.

What if the background check is incomplete?

Minors, refugees, new immigrants, and others might not have verifiable records available for background checks. In these cases, you can ask for references from sponsors, teachers, and other organizations they've participated with, such as youth groups. Refugees and recent immigrants should be asked to provide you with names and contact information for Homeland Security officials who dealt with their cases.

Background checks best practices

- Always obtain a signed authorization from the applicant before ordering the background check.
- Always provide a clear and conspicuous background check disclosure on a stand-alone form.
- Conduct background checks at both a state and national level.
- Re-check current employees and volunteers annually.
- For minors, ask for references since criminal records might not show up on public databases.

Questions?

For more information regarding background checks, contact Church Mutual's Risk Control Central team.
Call: (800) 554-2642 (option 4), ext. 5213
Email: riskconsulting@churchmutual.com
To begin background checks today, contact our partners Trusted Employees.
Call: (888) 808-8350
Email: accountmanagement@trustedemployees.com

Reprinted with permission from Church Mutual's Safety Resources. https://www.churchmutual.com/10451/Basics-of-Background-Checks

THE LAW LIBRARY dusts off classic Legal Legislative Update articles of yesteryear that deal with perennial issues and introduces them to a new audience. The content has been updated to ensure it is current. You can find this article along with several hundred other LLU articles at acsi.org.

Bartering for Tuition

By ACSI Public Policy and Legal Affairs Staff

Discounted tuition for employees

Schools are permitted to establish "Qualified Tuition Reduction Plans" (QTR) for different groups within their organization. Under such a plan, tuition discounts are legal if everyone within a particular employment classification is offered the same discount. For instance, teachers could make up one group and support staff another group. A school board may set up its groups to include any type of discount for part-time staff. However, most offer part-timers a discount proportionate to the discount offered to a full-time person in the same group. It is a good idea for the board to include information on the different groups and their discounts as a part of the board minutes and written policy for your school. In most cases, highly compensated employees may receive the discount without it being considered a taxable event if "such reduction is available on substantially the same terms to each member of a group of employees that is defined under a reasonable classification... that does not discriminate in favor of highly compensated employees" (see Internal Revenue Code §117(d)(3)). (In 2025, the IRS considers compensation of $160,000 or more to make someone a "highly compensated employee.") In most cases, church staff of the sponsoring church also may receive a discount on tuition, but it is also taxable to that individual unless the church staff member also has significant school responsibilities.

Please contact your accountant or tax attorney for information as it pertains to your fact-specific situation.

Example 1
Full-time schoolteachers receive a 60% tuition reduction for their own children to attend school. The amount of money that is saved by the discount is not reportable income for federal, state, or social security purposes since the school has a QTR and all full-time teachers are offered the same discount.

Example 2
A part-time schoolteacher teaching subjects for half a school day could be a part of the teacher group in Example 1 but receive only half of the benefit or a 30% tuition reduction. School boards may set the amount of the discount when the written QTR is established. The tax information given in Example 1 also applies.

Example 3
Since school secretaries and custodial personnel were included in the school's QTR, Mr. Jones, who does custodial work full-time, has children that qualify for the 25% discount offered by the school to all that work within the support classification. The tax information given in Example 1 also applies.

Frequently, ACSI is asked whether a teacher may pay any remaining tuition that is due (after any applicable discount) for their child with pre-tax salary dollars. The answer is clearly "no," according to the Internal Revenue Code. All applicable taxes must be deducted from the full salary before any required tuition is paid by the employee. A teacher may request, as a convenience, for the school to deduct any owed tuition from his or her remaining take-home pay. Failure to follow this procedure subjects the teacher and could ultimately subject the school to tax and penalty liabilities!

Tuition barter arrangements

Frequently, schools will barter or swap tuition charges for goods (books, equipment, supplies, etc.—essentially any item of value) or services (accounting, legal, secretarial, teaching, etc.— essentially any service). On the surface, this arrangement is very appealing due to the simplicity of the swap. Education that generally adds no additional cost to the school is exchanged for goods or services with no accounting or taxes. However, **this is not the case** since the Internal Revenue Service and all states require any exchange of goods and services (excepting those of relatively minor value, say $25 or so) to be reported. This will necessitate both valuation and full accounting.

Generally, the exchange of goods or services as they relate to tuition should be valued objectively "at arm's length." The value of the tuition would be used as the yardstick for determining the valuation for the wages paid. One needs to be conscious of the prevailing wage structure at his or her school and the surrounding community (especially if your school's wage structure is not representative) when determining the values for both sides of the exchange. The parameter of the hours or goods that make the exchange should then be set so that the exchange is relatively equal. It is not good practice to exchange services that would create an extremely higher or lower wage than comparable workers at your school receive. Exchanging a good or service whose value is much greater or less than the tuition being exchanged creates its own set of problems. "Good deals" may become accounting nightmares if reviewed by your state or federal authorities. **You must also keep in mind that the exchange of value must meet federal and state minimum wage guidelines.**

It is important to consider that many barter exchanges of tuition for services performed personally will result in the individual being classified as an employee, whether you would have normally considered the person a member of your staff or not. This is because the substance of the transaction is one of an employer-employee relationship because you have control over the person's methods of work and times to report. Also, this relationship is continuous over time. However, in conditions where the individual does not personally provide the service (such as in Example 8 below), the employee relationship generally will not exist.

Regardless of whether the individual is placed in an employer-employee relationship, all transactions will be reportable! The reportable amounts are the full value of the items or services being exchanged when compared to the value of the tuition. The only difference is in **how** it is reported. Consider these examples:

Example 4
A school needs weekly janitorial services. John Smith agrees to provide such services personally in exchange for his son's annual tuition charge of $4,000. He will be working for 40 weeks, receiving $4,000 in pay (the value of tuition), which works out to $100.00 per week. Since he is working 10 hours per week, this is equivalent to $10.00 per hour, which for this example we assume is above the federal and his state's minimum wage.

The $4,000 in salary should be included in all state and federal payroll reports. Smith will receive a W-2 form listing the $4,000 income since he technically qualifies as an employee. He really should be identified as such. Applicable state and federal withholdings are required. He should be covered by workers compensation and social security.

Example 5
All the facts are the same as Example 4, except that John Smith works 20 hours per week. Result: The school is then in effect paying him $5.00 per hour, an amount below both the state and federal hourly minimum wage, which is a violation of the federal Fair Labor Standards Act and the state's counterpart law. If a state has a higher minimum wage, it will take precedence, and Smith's pay must at least match the higher standard of the two. Violation of the Act could easily result in substantial financial penalties for the school.

Working 20 hours per week may also create a situation where he is qualified to participate in the school's 25% tuition reduction for full-time custodial staff depending upon how the school board set up its QTR. Since he is now a "half-time" person, he may qualify to receive a proportionate 12.5 percent tuition discount in addition to his pay.

Example 6
Same facts as Example 4, except that John Smith is employed at the school as a teacher and provides janitorial services after hours. The school does **not** have a QTR. In this case, the $4,000 for custodial work is added to his teacher's salary, which should be included in all state and federal payroll reports. He pays his son's full tuition, and his W-2 reflects the full income of both his teacher's salary and the custodial income. Applicable state and federal withholdings are required.

If the school had a QTR, and his classification group received a 50% tuition discount on $4,000 of tuition, he would have a tax-free benefit of $2,000 of discounted tuition. However, he still must report his full teacher's and custodian's income.

Example 7
Lynn Jones, a "volunteer" office worker at the school, pays only 50% of the annual tuition charges for her daughter's tuition. Annual tuition charges are $4,000, of which she pays $2,000. Mrs. Jones is **not** a part of a QTR. Her $2,000 salary should be reported as income in all state and federal payroll reports. Jones' W-2 reflects the income. Applicable state and federal withholdings are required. She should be covered with worker's compensation.

Example 8
Bill Jones owns ABC Janitorial Service, and his daughter attends the school. He barters janitorial service for the year for his daughter's tuition. The work is done by employees of his company. This is not an employee relationship, which would result in a W-2 form, but rather that of an independent contractor. ABC Janitorial will receive an IRS Form 1099-Misc., which reflects the $4,000 of income since it is miscellaneous income over $600. The school reports the $4,000 on IRS form 1096 "Annual Summary and Transmittal of U. S. Information Return." This is the form on which all 1099 forms for miscellaneous or barter transactions are summarized at the end of the year. It is suggested in any such transaction that both the school and Bill Jones consult their tax accountants or attorneys for guidance.

Example 9
If, as an individual, Bob Smith trades computer equipment worth $4,000 to the school in exchange for his son's tuition of $4,000. "Fair market value" must be used when the equipment's value is determined when compared to the tuition. If the trade involves equipment with a "fair market value" worth more than the tuition, a tax-deductible receipt may be given to Smith for the difference in value. If the equipment is worthless, he must pay the difference in tuition.

If Bob Smith owns a company or corporation and removes this equipment from its inventory to give to the school, additional tax issues are raised that are beyond the scope of this article. It is suggested in any such transaction that both the school and Bill Jones consult their tax accountants or attorneys for guidance.

Example 10
Jean Everson volunteers to help several mornings a week as a teacher's aide in the kindergarten class. She receives no compensation and has one child in the school. Now here's a true **volunteer**! Isn't it wonderful when the Lord sends us someone like this from time to time?

From the above discussion, bartering services for tuition can present a host of problems. It is for this reason that **ACSI suggests that you take the conservative approach and classify all individuals illustrated by Examples 4-7 as employees. (In Example 8, the person working on school property is an employee of someone else.) When employees receive their payroll checks, they can always sign them over to pay their school obligations, and you are in the clear!**

To summarize this section, the first thing is to make sure that all exchanges being made in your school are accounted for. Next, you need to fix a value to the service or good being exchanged based on the value of the tuition to ensure the equality of the transaction. Then, determine whether all individuals exchanging services are properly classified and that all goods and services are included in the applicable federal and state payroll reports. Finally, make certain that all applicable state and federal withholdings have been made and that the individuals are covered by worker's compensation.

Addendum

Here are several things that your school should be concerned about if you allow individuals to barter for school tuition:

1) *You need to check to see if the number of hours that are worked for the discount is at least equal to the minimum wage required for your state. Minimum wage laws still apply.*
2) *Did you count the person that is bartering as an employee for worker's compensation and pay a premium that includes that bartering person? If not, and the person is injured at your school, it is likely that the school may have to pay the medical bills out of pocket. Talk to your insurance carrier about how to count "bartering" employees.*
3) *If you discount $600 or more tuition, the person must be issued an appropriate IRS form documenting the amount of money "earned." The problem with this is that school years do not coincide with calendar years, so you must keep track of the discount for one-half of one school year and one-half of a different school year and then be prepared to issue the IRS form to the person by the end of January for the previous calendar year.*
4) *If the person doing the bartering is on the school premises on a regular basis, such as for nightly custodial work, is he or she considered an employee? If so, does this person have to meet the lifestyle requirements like other employees? Is the person invited or expected to attend staff in-service or other training events? Do you issue the person an employee handbook? I don't know the answer to these questions, but your school board or administrative team should discuss these questions.*

Previously released in LLU 24.2

Public Policy & Advocacy Summit 2024
Inspiration & Impact!

By P. George Tryfiates, Vice President for Public Policy & Legal Affairs

What is it the kids say these days? IYKYK—if you know, you know! And if you were at ACSI's Public Policy & Advocacy Summit 2024 last September 16–18, in Washington, D.C., then you know what it's like to experience both inspiration and impact. Another incredible event took place, which, thanks to more than 250 of you—school leaders and others—was (again!) our largest Summit ever. You can check out the highlight video of the event to get a feel for the excitement.

First, it was amazing to be entirely in the Museum of the Bible for the event. We've had the privilege of using the museum for the opening banquet, but to have two full days of the Summit at that inspiring location was another level. How amazing it is to walk out of the main room and see the Capitol dome before your eyes. Our opening banquet speaker was none other than Dr. Ben Carson. Who knew he was so funny? Dr. Carl Trueman brought it home Tuesday evening with a powerful message on identity and how to navigate the cultural collapse. The school choice bill we worked on passed out of the House Ways & Means Committee shortly before the Summit and nearly went to the floor for a vote—highly unusual, but in God's providence, *perfect* timing for attendees to meet with their Members of Congress or their staff. The Summit addressed three issues during Tuesday's briefing day: school choice, parental rights, and protecting the tax-exempt status of nonprofits.

Those who attended and took the post-event survey reported that in addition to Carson and Trueman, the highest-rated Summit speakers included Katherine Schweit, retired FBI special agent and developer of the FBI Active Shooter Program; Vanessa Cheng, Australian Association of Christian Schools; West Virginia State

ANONYMOUS TIPS

Senator Patricia Rucker, sponsor of that state's HOPE Scholarship program; and Mary Rice Hasson of the Ethics and Public Policy Center on the culture's crisis over sexuality issues. Senator James Lankford (R-OK), a Christian ministry leader before entering politics, encouraged everyone in their engagement in the policy process; retiring Rep. Doug Lamborn (R-CO), ACSI's "hometown" congressman from our headquarters city of Colorado Springs, welcomed everyone to D.C. and praised their commitment.

The Summit gave reason for ACSI's divisional councils of heads of school to meet ahead of the event as well as for the Board of Directors and key supporters to enjoy added features. But the highlight is the final day when attendees go up to Capitol Hill to put into practice what they learned during the Tuesday briefing day. Multiple groups met with Members of Congress or their staff to talk about the legislation on which they'd been briefed and urge Members to support the bills. I joined teams from Virginia and Pennsylvania in their meetings—in one case with the Member of Congress himself. What an inspiration to see heads of school exercising real influence for good on Capitol Hill.

If you missed it this year, please know there's a reason the Summit keeps growing. IYKYK! You're always invited to hone your own professional development in the public policy realm, where you have real authority and real impact, and even inspire others.

Save the date: Summit 2025 will be September 15–17, 2025.

BOTTOM LINE

Is Expulsion a Breach of Contract?

Steven Thompson began attending St. Louis School in the seventh grade. St. Louis is a private boys' school of Catholic Marianist affiliation in Hawaii. Wendell Staszkow was the principal of the school, and part of his responsibility was overseeing student discipline. While attending the school, Steven participated in St. Louis' baseball, football, and wrestling programs. However, Steven also skipped classes and detention periods.

On one occasion, Steven reportedly choked another student and cursed at him. For this incident, Steven was put on a behavioral contract with the school during his junior year. After being placed on contract, Steven was sent out of a class for being disrespectful and insubordinate. In January, after this incident, St. Louis' administrative review board met and decided that Steven had violated his behavioral contract, and they expelled him. The next day, Steven's father appealed his son's case to the principal. Father Allen DeLong and Staszkow met with Steven's mother and father and agreed to give Steven another chance. However, they decided that any further misconduct, "no matter how minor," would be grounds for expulsion. From January to May of that year, Steven continued to cut classes and failed to show up for detention.

One morning in early May, Michael Miske, a parent of a student attending St. Louis, threatened another student who attended St. Louis—and who was a friend of Steven—after a traffic incident. Miske returned to campus that afternoon and again approached the student he had previously threatened. At that point, Steven stepped in between the two of them and asked what was going on. Miske threatened Steven, and then Steven tried to get Miske to hit him on two occasions. At that point, a teacher interrupted and asked all the students to go into the classroom.

Steven did not listen to the teacher's instruction. When

Staszkow arrived on the scene, Steven and Miske were still threatening each other.

Staszkow stated that he instructed Steven to stop swearing and threatening Miske and to leave the scene. Steven did not obey those instructions and continued to swear, shout, and challenge Miske to a fight. Staszkow then walked between Steven and Miske in order to stop a physical altercation. He asked Miske to leave, and Miske left. Staszkow then spent three to five minutes trying to get Steven to calm down and walk away.

Steven was expelled immediately following the incident with Miske.

After the expulsion, Steven's parents filed a lawsuit (*Thompson v. Saint Louis School,* 257 P.3d 1219 (2011)) claiming the following: "(1) retaliation, (2) violation of public policy, (3) intentional infliction of emotional distress (IIED), (4) breach of an express contract, (5) breach of an implied contract, (6) breach of the covenant of good faith and fair dealing, (7) detrimental reliance, (8) loss of consortium, (9) libel, and (10) slander. The complaint also sought punitive damages."

So, what did the court decide? You be the judge!

Saint Louis School immediately filed a motion for summary judgment. A *summary judgment* refers to the court's making a decision on the basis of the undisputed facts without holding a trial. The circuit court did grant summary judgment to the school, and the family appealed. The case then went to the Intermediate Court of Appeals of the State of Hawaii. The appeals court took a look at each of the charges to see if the lower court had erred in its decision.

Retaliation claim

The retaliation claim was based on the antiretaliation statutes concerning discriminatory employment practices (the Civil Rights Act of 1964 and the Hawaii antiretaliation statutes governing an employment relationship). However, there has never been a case that applied employment-law statutes to a private school's expulsion of a student, and this claim was denied.

Public-policy claim

The family argued that "St. Louis's expulsion of Steven violated public policy because 'expelling a student for protecting another student… would frustrate the criminal code allowing defense of others and self. Hawaiian courts have recognized an affirmative claim for 'violation of public policy' only in the context of the wrongful discharge of an employee" (single quotation marks denote material from other court cases cited in *Thompson v. Saint Louis School*). And the court was unwilling to do so here.

Intentional infliction of emotional distress

To establish an IIED claim, the parents would have had to establish "(1) that the act allegedly causing the harm was intentional or reckless, (2) that the act was outrageous, and (3) that the act caused extreme emotional distress to another." The parents argued that Saint Louis' conduct was outrageous because it sought to punish Steven, the victim, and reward Miske, the aggressor. However, the court stated, "The undisputed facts in the record demonstrate that Steven was expelled for his insubordinate and inappropriate behavior in conjunction with the Miske incident, following multiple prior disciplinary infractions, prior warning, and strict conditions for Steven's continued attendance at St. Louis." The court rejected the claim of IIED.

Breach of express or implied contract, including the implied covenant of good faith and fair dealing

The parents based the various express and implied breach-of-contract claims on the agreement that St. Louis would provide education in exchange for tuition. They contended that the information provided in St. Louis' student handbook constituted enforceable terms of their agreement. The court here stated, "A number of jurisdictions have recognized a contractual relationship between private schools and their students, even absent an express written contract… Courts may loosely rely on student handbooks as a source of contractual terms, precluding schools from acting in direct contravention of handbook provisions." The court then went on to say, "In applying contract principles, however, courts must be careful to avoid treading on private schools' discretion, particularly with regard to disciplinary measures."

Detrimental reliance

On the issue of the family's relying detrimentally on the school's "promises" in the school handbook, the court decided that the family had failed to identify any express or implied handbook provision that was violated by the school. In fact, the handbook specifically provided that a student could be expelled for insubordination, including ignoring or defying a teacher's instructions. Again, this claim was rejected by the court.

Loss of consortium

To maintain a claim of loss of consortium, the underlying injury to the spouse or the child has to be maintained.

Steven's underlying claims failed, and the court barred this claim.

Libel or slander

The parents' sole contention is that, by innuendo, the Saint Louis School published a letter to its students insinuating that Steven is a liar. The parents stated that another student had said that when a school administrator read the letter to the students, the administrator stated that the content was related to an incident occurring the day before. But the court determined that the letter had in fact been read the day before Steven's encounter with Miske. So again, the court saw no grounds for slander or libel.

> "The appeals court did acknowledge that there is a contractual relationship between the school and the parents despite the nonexistence of a written, express contract."

What can we learn from this case?

Contractual Agreement

The appeals court did acknowledge that there is a contractual relationship between the school and the parents despite the nonexistence of a written, express contract. This acknowledgment should remind schools that a contractual relationship between Christian schools and their students can be created not just through express contracts but through other important documents, such as student handbooks. That is why it is important to have an up-to-date handbook and to follow the handbook provisions in all matters. If a school violates its handbook, the violation could be construed as a breach of contract by the courts. Christian schools should be sure to place a disclaimer in the handbook that allows the school flexibility to discipline for unexpected situations. Finally, schools should have an attorney review all their handbooks. [Editor's note: ACSI recommends that you contact attorney John L. Cooley if you do not have a local attorney who understands Christian schools and private school law.]

Documentation

The Saint Louis School won the decision in this case because of the good documentation it had on hand to share with the court regarding the decision to expel Steven. It is extremely important to document all disciplinary procedures. The school should include statements from both teachers and other witnesses. It should include the reasoning behind the decisions and the policies violated by the student. Having good documentation available, a school can many times avoid liability if a disciplinary decision is challenged by parents.

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not apply (there is an exception in one case where even private entities must comply with privacy constraints). Students in a private Christian school do not have First Amendment protections against the school. Thus, the school can regulate speech on and off campus. Second, to enroll a student in a Christian school, parents—on their own behalf and for their children—agree to be bound by the school's policies. The school can enforce the agreement if it does so consistent with the policy and not arbitrarily and capriciously. Lastly, when the conduct standards are tied to the school's religious values, the school has a right to impose the standards. Otherwise, the Christian school loses its distinctive religious nature.

The school is not required to amend or alter its conduct policy. This Supreme Court case and its analysis do not apply to Christian schools.

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CLOSING ARGUMENTS

Do Students Have Free Speech Rights in the Christian School?

Q: In recent months, several parents have raised concerns about the school's conduct policy as it applies to students' behavior outside of campus. Their primary focus has been on how the policy addresses student comments or posts on social media. Both parents and some students argue that the school has no authority to regulate speech or language outside of school or school-related activities, claiming this infringes on students' First Amendment rights. One parent even referenced a recent U.S. Supreme Court case, where the Court ruled 8-1 that a school violated a student's free speech rights by removing a cheerleader from the squad due to her profane Snapchat post. Are these parents correct? Should the school reconsider its conduct policies?

A: In *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021), the Supreme Court sided with the student, finding that the school had indeed violated her First Amendment speech rights. The Court noted that it had recognized three specific categories of student speech that schools could regulate: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds; (2) speech uttered during a class trip that promotes "illegal drug use"; and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper. Absent the vulgarity, the speech involved criticism of the team, the coach, and the school. In the Court's view, although the speech was vulgar, it was not obscene. In the final analysis, the Court concluded that the speech did not fall into any of the three areas and was protected speech.

However, there are significant differences in addressing conduct standards imposed by a Christian school. First, private Christian schools are not governmental entities, and as a result, constitutional constraints do

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