

When the Tuition Bill Goes Unpaid

Deciphering When Parents Have to Pay Tuition—and When the School Has to Give It Back

Philip Scott, Esq.

The legal cornerstone of each family and school partnership begins with the enrollment agreement. This contractual relationship will be viewed like nearly any other service contract anyone might enter into, from lawn service to tax preparation. In the Christian school context, the parents are promising to pay tuition dollars in return for an education for their child. The proof of the bargain is the tuition dollars paid on one side and the transcripts and testing scores on the other. Failing to provide one or both usually indicates someone has breached the contract.

The scenario usually falls apart somewhere along these lines. Parents sign an agreement promising to pay for a full year's tuition, but might withdraw their child before the school year has run its course (or even before the school year starts), or their child may be expelled. The agreement says the parents will pay for the full year regardless of withdrawal or expulsion. Do the parents have to pay for the outstanding tuition even though their child is no longer attending? Generally, they do—if the enrollment agreement specifies that tuition is owed regardless of the reason for their nonattendance. They will have breached the contract by not fully paying the agreed-upon tuition, even though their child will not get the full benefit of the agreement.

There are a handful of arguments that can be made as a defense or counter-claim to a contract breach. For current purposes, the more technical issues will be ignored for the most common issues parents lob at schools. A final note: contract law is inherently a state law issue, so each state may have its own quirks and oddities. The information shared below is the starting basis for common law (court-made law) in each state.



Contract law is inherently a state law issue, so each state may have its own quirks and oddities.

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

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The School Did Not Keep Its Promises or Was Deceptive

This often pops up with early voluntary withdrawals. The family is unhappy about aspects of the school or their child's progress is not to their expectations. The argument here is that the school was the first to breach its promises, either by not providing what it contracted to provide in its education program or by failing to educate; consequently, parents do not have to pay tuition. Courts will generally not interfere in claims regarding the nature and content of an academic program (see *Gupta v. New Britain General Hospital*, 239 Conn. 574, 590-92). However, courts will look at academic programs if the claim is that the program itself failed in some fundamental way (such as not offering the required courses to obtain a diploma) or if specific contractual promises were not fulfilled (enrichment programs offered, student/teacher ratios, special needs licensing/programming). Mere dissatisfaction is not enough for the court to intervene when the school is providing an academic program, teachers, and facilities.

Takeaway: Courts usually will not want to review the curriculum and validity of an academic program. They realize they have no expertise here, and so general complaints that can be reasonably addressed are usually dismissed. The school may want to have general data (teacher qualifications, accreditation, testing scores, assessments, grades, etc.) regarding the school and perhaps the student.

Additionally, schools need to be careful in the promises made to parents. General statements about the quality of a school's program are fine, but when a school makes promises about specific aspects, it must be able to deliver on them. If not, and the parents name those as the reasons they are leaving, then the school may need to refund tuition dollars.

Courts have been known to look at more than just the enrollment agreement and extend the school's promises to things said in handbooks, catalogues, flyers/advertising, brochures, newsletters, PTF/PTO newsletters, and websites. Things as simple as wording about specific program offerings have saved schools in the past. Shy away from using absolutes. For example, instead of stating, "The school will have tutors next year," state, "The desire is to hire tutors for next year."

Expulsion

When a school expels a student, it should do so in a reasonable manner with reasonable justification if the school wishes to keep or collect its tuition dollars. In *Thomas Jefferson School v. Kapros*, 729 S.W.2d 315 (Mo.App. E.D. 1987), the school dismissed a student for fighting in violation of its no fighting rule, and the parents claimed the school breached the contract by dismissing their student without just cause. The court found sufficient cause for the school's actions based on three pieces of evidence presented. First, the enrollment agreement stated that "the school reserves the right to dismiss a student at any time if, in the judgment of the faculty, the student's effort, progress, behavior, or influence is unsatisfactory" (Id., 729 S.W.2d 315, 317). Second, the student had signed the no-fighting policy, which stated dismissal was the punishment for violation. Third, there was a faculty-student hearing where three witnesses said the expelled student hit another student. The court seems to indicate the signed no-fighting policy would have been sufficient for just cause in dismissal.

Takeaway: The school should have a clause allowing for dismissing a student at any time for issues of academic progress, behavior, and violation of school standards. If the student is just not a good fit or the school is struggling to meet the student's needs, then the school should *not* demand the parents pay the outstanding tuition, and should consider refunding prepayments on a prorated basis. If a student is dismissed for cause, then it needs to be a reasonable decision that can be backed up with written policy.

Liquidated Damages

The parents understand that the obligation to pay the fees and tuition for the full year is not conditional and that no portion of such fees and tuition paid or outstanding will be refunded or cancelled in the event of absence, withdrawal, or dismissal from ABC Christian School.

This clause is in nearly every Christian school's enrollment packet. Such clauses are known as liquidated damages. The school is naming the set amount of damages if the parents violate the agreement. As a rule, these are allowed when the actual amount of damages for a breach would be hard or impossible to know at the time the contract is made and the liquidated damages amount is not higher than the actual loss if the contract is violated. It is generally recognized that it is difficult to determine the school's actual financial harm when a student is withdrawn early.

The intent is to avoid abuse of liquidated damages clauses, such as the party with the most leverage inserting huge penalties for violation into the contract. Contract law theory attempts to make both parties whole as if there was no breakdown of the agreement; generally, there is no desire to punish one side or the other unless bad faith has been shown. Court after court has upheld the year's tuition as a reasonable liquidated damages amount. However, courts have taken note of additional fees or costs associated with a student attending that the school would save when the student is no longer there, and yet those fees are included in the liquidated damages clause. Some courts have taken out the additional fees, but we have not seen a case where the school lost because of the fees.

Takeaway: If a school has a clause that requires parents to pay the full year's tuition regardless of the reason the child is no longer attending, then it needs to ensure that any additional fees or costs the school would save are passed to the parents. This is especially true for boarding programs. Courts have taken issue with boarding schools that include room and boarding cost in their liquidated damages clause. Lower or take out such fees where the school will save money (such as not having to provide food for that child). For traditional day schools, that might mean book, supply, or technology fees. This does not mean a school cannot include any of these fees, but it will want to make sure it is prorating them or justifying how it is still a cost to the school whether the child is there or not. While we are not aware of a court ruling against a school for having such costs lumped into their liquidated damages clause, too many courts have pointed them out to ignore it. Eventually, someone will lose a close case based on these additional fees.

Duty to Mitigate

It is a general principle in contract law that the party being breached upon still has a duty to mitigate its losses in a reasonable manner—see Restatement (Second) of Contracts § 350 (1981). Think of a banana shipment where the shipper violates the agreement by not shipping the farmer's bananas. The farmer has a duty to find another shipper and then sue for the higher shipping cost and potential lost profits of the delay, but the farmer cannot let the whole load of bananas rot and then sue for the value of the bananas.

Courts have looked at similar issues with schools, particularly when the contract is broken early on. Some courts have ruled the school has a duty to try to mitigate the loss of the student by finding another one (note that the requirement is for an effort to find one, not that one has to be found). This can sometimes hinge on whether the spot was reserved just for that student or whether the school had additional seats it could have filled either way. The majority of states have said that if there is a valid liquidated damages clause, then there is no duty for the school to mitigate.

Takeaway: In a majority of states, there is no duty to mitigate if the school has a valid liquidated damages clause. In the remainder of states where there is such a duty, the school needs to show it had made a good faith effort to fill the slot by advertising or reaching out to families that earlier showed interest or were wait-listed.

Impossibility

There is some ambiguity as to whether a serious illness preventing a student from attending a given school is a valid excuse for not fulfilling the contract. It appears the majority of courts have found it a valid defense of impossibility; the contract could not be fulfilled. A minority of states have enforced the contract and required tuition to be paid if illness is listed as one of the qualifications that do not allow excuse.

Takeaway: We would suggest letting the family out of the agreement for serious illness of the student if for no other reason than brotherly love—although the strong likelihood is the law requires it anyway.

Editor's Note: WEB EXCLUSIVE CONTENT. This article will be posted on the ACSI website and will include additional sample policy language for a liquidated damages clause. ¶

Researching What Parents Want in a Christian School

It's the marketing question every school leader has to ask: how do you attract students by sending the right message about your school to the right audience? To answer that question, ACSI commissioned the Barna Group, a faith-based research firm, to conduct a comprehensive study this past school year; the major findings and implications of the study were discussed at district meetings this fall.

The Barna Group's nationwide study surveyed:

- A nationally representative sample of 400 prospective parents regarding their goals for education, the importance of specific school features, and perceptions of school types
- A national sample of 221 homeschool parents who were "open to" private Christian schooling regarding what they like and dislike about homeschooling and what alternative forms of school they have considered
- 971 current parents from ACSI member schools regarding their goals for education, the importance of specific school features, and perceptions of school types
- A national sample of 456 senior pastors and church leaders regarding their perceptions on the importance of Christian education and their past or future recommendation of Christian schools

Reports and findings from the research will be available in early 2017. ☞

DOL Overtime Pay Requirements Put on Hold

This update is current as of time of publication in early December. It is possible there are new developments on this fluid situation by the time of your reading. Visit the Legal Legislative portion of acsi.org for the latest updates.

The day before Thanksgiving, a federal judge in Texas issued a nationwide injunction on the Department of Labor's (DOL) new overtime rules that were to become effective on December 1. At this time, it is unclear how long the injunction will last, but it is likely President-elect Trump will be sworn into office before the injunction is lifted. As the Department of Labor operates under the supervision of the president, if Mr. Trump becomes president before the injunction is lifted, there is a strong possibility his administration will act to kill the new overtime rules. ☞

Cultural Shift Resources and Presentation

A presentation outlining the cultural shift and the unique opportunities the recent "cultural hurricane" brings can be found at www.acsi.org/culturalresources. This same presentation was made available at this year's district meetings and includes a long list of resources. ☞

Eight More States Legalize Marijuana

Eight more states (Arkansas, California, Florida, Massachusetts, Maine, Montana, Nevada, and North Dakota) legalized some form of marijuana use in November. If you operate in one of those states (or one of the other 27 states and provinces where marijuana use is legal), it would be wise to adopt policies to help deal with this change. An in-depth article on the subject, "Legalized Marijuana: No Longer Someone Else's Problem," is available at acsi.org. ☞

Employers Must Comply with DOL's Updated Posting Requirements

As of August 1, 2016, the U.S. Department of Labor (DOL) requires covered employers to update their Fair Labor Standards Act (FLSA) Minimum Wage posters and their federal Employee Polygraph Protection Act (EPPA) posters.

The changes to the minimum wage poster include updated information relating to the rights of nursing mothers in the workplace, the consequences of independent contractor misclassification tip credits, and DOL enforcement of FLSA violations. The federal minimum wage rate remains at \$7.25 per hour. For more information, read a DOL-approved copy of the updated minimum wage poster and instructions for posting at <https://www.dol.gov/whd/regs/compliance/posters/flsa.htm>.

The changes to the EPPA poster include updated contact information for the DOL and removal of the prior reference to the penalty amount for violators. For more information, read a DOL-approved copy of the updated EPPA poster and instructions for posting at <https://www.dol.gov/whd/regs/compliance/posters/eppa.htm>. ☞

U.S. Department of Education Announces Non-Regulatory Equitable Services Guidance

Last week, Assistant Deputy Secretary Nadya Dabby announced that the U.S. Department of Education will publish non-regulatory guidance on the equitable services provisions under the Elementary and Secondary Education Act (ESEA) as amended by the Every Student Succeeds Act (ESSA). The announcement was made during the Department's 2016 National Private School Leadership Conference in Washington, DC. The guidance is expected prior to the presidential transition in January 2017. ❧

New Title II, Part A Non-Regulatory Guidance Published

Last week, the U.S. Department of Education released new non-regulatory guidance: *Building Systems of Support for Excellent Teaching and Learning* (<http://www2.ed.gov/policy/elsec/leg/essa/essatitleiipartguidance.pdf>). The guidance encourages states and districts to prepare, train, and recruit high-quality teachers and principals to increase student academic achievement through Title II, Part A of the ESEA, as amended by the ESSA.

ESSA provides multiple opportunities to better innovate and build on evidence with Title II, Part A funds. This guidance highlights some of the key areas in which local leaders can invest these critical dollars to support the workforce through better preparation, mentorship and induction, increased diversity, and bolstering teacher leadership. The guidance focuses on the importance of aligning state strategies that support effective instruction with Title II, Part A investments to not only improve student outcomes, but sustain those improvements. The guidance also includes information on equitable services for private school teachers.

The following excerpt from the Title II guidance is of particular interest to the private school community:

Consultation to Strengthen Title II, Part A Investments

Consultation is a critical part of ensuring that Title II, Part A funds are used effectively and decisions about resource allocation are fully informed. SEAs and LEAs must engage in

meaningful consultation with a broad range of stakeholders from diverse backgrounds (e.g., families, students, educators, private school officials, community partners), as required by ESEA sections 2101(d)(3) and 2102(b)(3).

Under Title II, Part A and Title VIII, SEAs and LEAs are required to:

- *Provide for the equitable participation of private school teachers and other educational personnel in private schools and engage in timely and meaningful consultation with private school officials during the design and development of their Title II, Part A programs.¹⁴ (ESEA sections 8501). (pg. 27)*

¹⁴ *New or changed requirements that affect the equitable participation of private school teachers and other educational personnel under the ESEA will be addressed in forthcoming guidance. Except as otherwise provided in that guidance, the existing non-regulatory Title IX, Part E Uniform Provisions, Subpart 1 – Private Schools (Revised March 2009) will remain applicable.*

Additional Information

See the U.S. Department of Education fact sheet on the new Title II, Part A non-regulatory guidance. <http://www.ed.gov/news/press-releases/fact-sheet-education-department-encourages-support-educators-and-teaching-profession-through-title-ii-part>. ❧

New ESSA Guidance on Title IV, Part A: Student Support and Academic Enrichment Grants

Last week, the U.S. Department of Education (Department) released Non-Regulatory Guidance: Student Support and Academic Enrichment Grants (http://www2.ed.gov/policy/elsec/leg/essa/essassaegrantguid10212016.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=) to help states, districts, and schools implement effective programs through Title IV, Part A of the Elementary and Secondary Education Act (ESEA) as amended by the Every Student Succeeds Act (ESSA). Under Title IV, Part A, the ESSA authorizes new Student Support and Academic Enrichment grants and gives states and districts flexibility to tailor investments based on the unique needs of their student populations. Programs under Title IV, Part A can help provide all students with access to a well-rounded education (including the arts, music, social studies, environmental education, and civics), bolster school conditions for student learning, and improve the use of technology to expand academic achievement and digital

literacy. The guidance provides resources, tools, and examples of innovative strategies to support effective implementation of the grant program.

The following excerpt from the Title IV guidance is of particular interest to the private school community.

LEA or Consortium of LEAs Assurances

In accordance with ESEA section 4106(e)(2) and (f), an LEA or consortium of LEAs must assure in its application that it will:

- *Comply with section 8501-8504, regarding equitable participation of private school children and teachers. (ESEA section 4106(e)(2)(B)).¹³*

¹³ *Under sections 8501- 8504 of the ESEA, LEAs and SEAs receiving funds under Title IV, Part A must provide for the equitable participation of private school students, teachers and other educational personnel in private schools located in areas these agencies serve in Title IV, Part A-funded activities, including by engaging in timely and meaningful consultation with private school officials during the design and development of their Title IV, Part A programs. New or changed requirements that affect the equitable participation of private school students, teachers and other educational personnel under the ESEA will be addressed in forthcoming guidance. Except as otherwise provided in that guidance, the existing non-regulatory Title IX, Part E Uniform Provisions, Subpart 1 – Private Schools (Revised March 2009) will remain applicable.*

Additional Information

See the Department's press release for additional information on the newly released Title IV non-regulatory guidance (October 21, 2016): <http://www.ed.gov/news/press-releases/us-department-education-releases-guidance-encouraging-well-rounded-education>. ❧

Boards and State Law Requirements

Ever wondered what your state law requires for your board's operation and decision making? Board Effect has made available a 50-state survey of nonprofit board rules and regulations as required by state law. These are either the statutory requirements or the statutory defaults (allowing for nonprofits to draft their own standards if so desired). The report covers the following 13 topics:

- Board actions
- Conflicts of interest
- Board elections
- E-meetings and e-voting
- Meeting location
- Notice requirements of meetings
- Quorum definitions
- Removal of board members
- Residency requirements
- Resignations
- Terms and limits
- Vacancies
- Waivers of notice

The report can be found at <http://www.boardeffect.com/nonprofit-state-laws/>. Free registration is required to view the report. ❧

Choices

ACSI's Scholarship Granting Efforts

ACSI is operating a separate 501(c)(3), the ACSI Children's Education Fund, in five states (Virginia, Rhode Island, Pennsylvania, Nevada, and Alabama). The purpose of this entity is to provide scholarships and advocacy through the school choice tax credit

programs in those states. Last year, the fund awarded over \$3 million in scholarships. If you would like more information on how to participate or donate, please visit www.acsi.org/ctfedchoice.

Challenge to FL Tax Credit Scholarship Program Fails

In *McCall v. Scott*, Case No. 1D15-2752 (Fla. 1st DCA Aug. 16, 2016), the court ruled that the appellants lack standing to challenge the Florida Tax Credit Scholarship Program (FTCSP) because they failed to allege that they suffered any special injury and failed to establish that the legislature exceeded any constitutional limitation on its taxing and spending authority when it authorized the program. Appellants challenged the FTCSP under

Florida's Blaine amendment (Article I, Section 3 of the Florida Constitution) and Florida's requirement for uniform and adequate funding for school education (Article IX, Section 1(a) of the Florida Constitution). Under the FTCSP, taxpayers make voluntary contributions to scholarship funding organizations (SFOs) and receive a tax credit. Eligible parents and guardians apply to SFOs to secure a scholarship for their

student at a school of their choice, including religious and nonreligious schools. Eligibility hinges on low income level. ❧

ED Choice—2016 Schooling in America Survey

ED Choice (formerly the Friedman Foundation) has produced their annual survey on schooling in America. This year, the focus of the survey was Millennial perspectives on K–12 education and school choice.

Born between 1981 and 1997, Millennials are approximately 75 million strong (<http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/>), and the percentage of Millennials that make up America's school parent population is set to grow exponentially (<http://www.millennialmarketing.com/2013/07/new-research-the-millennial-generation-becomes-parents/>) over the next 10 years.

As part of a 2016 *Schooling in America Survey*, they oversampled Millennials in an effort to better understand where this generation of current and future school parents compares with others (and the national average) on K–12 education policies. This is also the first year they asked parents specific questions about the lengths to which they've gone for their children's education.

You can find the complete results at <https://www.edchoice.org/blog/breaking-down-our-2016-schooling-in-america-survey/>. ❧

Nevada's Education Savings Account Program

In light of the Nevada Supreme Court's September 29 ruling that the legislature did not adequately appropriate funding for their best-in-the-nation education savings account (ESA) program, Attorney General Adam Laxalt, State Treasurer Dan Schwartz, Sen. Scott Hammond, state legislators, numerous state and community leaders, and hundreds of parents urged Gov. Brian Sandoval to include ESA funding in the October special session called to enable the building of an NFL stadium and expansive convention center in Las Vegas. Gov. Sandoval declined their request, citing uncertainties with the constitutionality of funding alternatives. However, the governor did ask Sen. Hammond to lead a small working group dedicated to creating a new funding solution for Nevada's ESA. The ESA funding solution the committee develops will be presented for inclusion in Gov. Sandoval's final budget recommendations for the legislature's 2017 general session. ❧

At Issue

Child-On-Child Sexual Abuse: The Often Forgotten Reportable Offense

Suzanne Bogdan Reprinted with permission from Fisher Phillips *Education Update* (No.4, October 2016).

Most states, including Florida, have updated their child abuse reporting requirements to include child-on-child sexual abuse, often referred to as juvenile abuse. Typically these provisions are fairly comprehensive and include any sexual behavior by a child toward another child which occurs without consent, without equality (lacking the same level of power in the relationship), or as a result of coercion.

This can include making obscene phone calls, the showing or taking of lewd photographs, or varying degrees of direct sexual contact, such as fondling, digital penetration, rape, and various other sexually aggressive acts. Sometimes the relative ages of the children are qualifiers.

Schools that do not regularly update their child abuse policies or train their employees may find their employee responsiveness to the reporting requirements is lacking. Many schools have found out through embarrassing media scrutiny that reportable events went unreported. In addition to the public relations concerns, employees who fail to report abuse can be criminally charged in most states.

Individual Obligation to Report

The other issue to be addressed, at least in annual training, is the employee's individual obligation to report abuse. In most states, a school can no longer require that the employee first report the abuse to the head of school or an administrator. Rather, today, most state laws make clear that the employee has an individual obligation as a mandatory reporter to report abuse by calling a hotline number or making an online report.

Schools can certainly remind employees that they are free to seek assistance through an appropriate administrator at the school. After all, the concept of reporting abuse to a governmental agency could be a daunting and downright scary experience, and schools should provide support for any employee who requests it.

Some schools also require action by any employee who initially considers a matter to be reportable as child abuse but then independently decides it is not. These employees are often instructed to seek out an

appropriate administrator or the head of school so upper administration can ensure their assessment was accurate. There have been many circumstances in which an employee erroneously believed, for example, that a nonschool event is not reportable, when in fact it was. Having this “failsafe” procedure may ensure that all such incidents are reported.

The 21st Century Scourge of Sexting

Finally, many employees and administrators do not always realize that sexting may constitute reportable abuse in certain circumstances. Under many state laws, a reportable incident may occur even if the photo does not fit into the definition of juvenile sexual abuse set forth above. In many states, any photograph, video, or image of a minor taken by another minor is reportable as child abuse if it evidences nudity, partial nudity, or lewd or sexual acts by minors; is then transmitted over the Internet; and the image reflects coercion or is transmitted to a large number of individuals.

Child abuse authorities have not clearly defined how many people constitute a “large number” of individuals. Our advice to school clients is that if the image is transmitted over the Internet to more than three people, the school should report it out of an abundance of caution. After all, a mere three people can transmit the image to many more recipients, and it may quickly fill the Internet.

Your obligation, at the end of the day, is to protect the child. When child abuse authorities receive reports

of sexting, they typically turn the matter over to law enforcement. In most cases, law enforcement approaches the situation with the intent to remove the images from the Internet. In the most egregious circumstances they charge students with crimes, but more often they take an educational approach. They may also confiscate the student’s electronic devices.

Conclusion

All of these issues are good reasons for you to regularly update your institution’s child abuse policies (the laws change frequently) and to repeatedly train your employees. We know that many administrators feel there are more important subjects to cover during teacher workweek or in-service days. However, it is far better to spend an hour or two at the beginning of each school year addressing these important issues (along with student-adult boundaries) than incorrectly believing that your community members understand their obligations and your school’s expectations.

For more information, contact the author at SBogdan@fisherphillips.com or 954.847.4705. Suzanne Bogdan is the managing partner in the Fort Lauderdale office. She handles all types of employment-related matters, including claims for age, race, sex, disability, religious, and national origin discrimination arising under the various civil rights laws, as well as claims involving family leave issues, wage hour matters, and breach of contract. Suzanne is also the chair of the firm’s Education Practice Group, actively representing more than 100 private educational institutions in employee, student, and board issues. ☞

Avoid Uber-Liability by Restricting Ridesharing Services on Campus

By Dana Chang Reprinted with permission from Fisher Phillips *Education Update* (No.4, October 2016).

It’s 4:30 p.m., school soccer practice has just ended, and 11-year-old Cynthia calls her mom to pick her up at school. Her mom tells Cynthia that she is busy at work, but has requested an Uber to pick her up. Just as she gets off the phone, a car with an Uber sticker on the window pulls up to your school’s pick-up area, and Cynthia enters the stranger’s car to be taken home. While the story may end with Cynthia arriving home safely, what if it does not? What responsibility, if any, might your school bear?

An increasing number of students and parents are abandoning yellow school buses and parent carpools for ridesharing services such as Uber and Lyft. While these methods of transportation may be a welcome alternative for parents, you should be aware of the potential liability associated with permitting your students to leave campus using such a service.

Schools Are Responsible for Student Safety

Under the doctrine of *in loco parentis*, schools are charged with the responsibility to provide care and safety for their students. The term “*in loco parentis*” literally means “in the place of the parent.” Because of this special relationship, schools have an affirmative duty to protect students from known and foreseeable dangers on school campuses during school hours.

This duty can extend outside school hours when students remain within the school’s charge and, in some circumstances, off school premises when the risk of harm is foreseeable. Many courts have determined that schools have a duty of reasonable care to ensure that a responsible person assumes the care and control of the student after dismissal.

Ridesharing Service Policies Prohibit Use by Minors

Ridesharing services, such as Uber and Lyft, are making their way into school carpool lanes. These companies provide 24/7 on-demand car services and allow customers to request private drivers from mobile device applications. The apps are advertised as safe, cost-efficient, and convenient transportation options. The drivers are background-tested and rated by users. There is no exchange of cash and the car's location can easily be tracked and shared with others.

These features have attracted millions of users, including a growing number of parents and students. However, Uber and Lyft have policies specifically prohibiting people under the age of 18 from using the apps or riding unaccompanied by an adult. Despite these policies, many parents continue to permit their children to use the apps and ride alone.

How Can You Mitigate Potential Liability?

Schools should be rightfully concerned that parents' and students' apathy to these policies may result in liability to your institution. You are duty-bound to ensure that students are discharged to the care of a responsible adult after the final bell rings.

There are numerous potential dangers associated with releasing students to unknown third parties. What can you do to protect your students from potential dangers and your institution from potential lawsuits?

Implement a Policy

You should consider implementing a policy that states your school does not condone students leaving campus in third-party car services and, specifically, ridesharing services whose own policies explicitly prohibit minors from using them. The policy should be printed in the parent/student handbook and require a signed receipt by a parent or guardian.

Obtain Waivers

In addition to drafting a clear policy, you may also consider having parents sign a waiver releasing your school from any liability that may result from students' use of ridesharing services. It should be noted, however, that several state courts have held that such pre-injury waivers violate public policy and are unenforceable.

You should consult with counsel to determine if the laws of your state permit this type of waiver. If your school decides to require parent waivers, the waiver should accompany a policy as described above. Absent such a policy, your school may be found to be complicit in the violation of the ridesharing services' policies.

Identify Authorized Persons

You may require parents to identify, by name, those persons permitted to pick up their children from school, and only release students to those designated individuals. Uber and Lyft drivers' identities are unknown until the driver accepts the user's request. Requiring only specifically identified people to pick up students eliminates the possibility that your school will release students to unknown third parties.

Remain Vigilant

School personnel responsible for supervising the pick-up line should be made aware of your policies regarding third parties. Often Uber and Lyft drivers have stickers identifying their vehicles. Personnel should keep an eye out for these cars and any unfamiliar people on campus.

Conclusion

As ridesharing services grow in popularity, you should be cognizant of your students' use of these services and the accompanying dangers. You should take steps to keep students safe and mitigate any potential liability to your institution. Having policies in place that prohibit unidentified third parties from picking up students and informing school personnel to watch for unfamiliar people on campus are just a few of the ways you can protect both students and your school.

For more information, contact the author at DChang@fisherphillips.com or 954.525.4800. Dana Chang is an associate in the firm's Fort Lauderdale office. Her practice includes representing management in all types of employment-related matters. She defends employers in all phases of litigation in state and federal courts and before various local, state, and national administrative agencies against claims of discrimination based on age, race, color, sex, disability, religion, and national origin arising under various civil rights laws, as well as claims involving family and medical leave, wage and hour disputes, breach of contract, and related torts. Dana frequently authors articles for employment-related publications. She is also a member of the firm's Education Practice Group. ♾

Religious Liberty—Where Does America Stand?

Religious Freedom Day (January 16) is celebrated in honor of the day in 1786 that the Virginia General Assembly passed Thomas Jefferson's Statute of Virginia for Religious Freedom. Modern restrictions on freedom of conscience contradict the spirit, and arguably the letter, of Jefferson's Statute. It is this principle which Rep. Steve Russell (R-Oklahoma) celebrates in the following speech, delivered on the floor of the U.S. House of Representatives on May 26, 2016. We reproduce portions of Rep. Russell's remarks here from the Congressional Record.

Madam Speaker, since December 15, 1791, nearly 225 years, our Congress has operated under the constitutional requirement to do the following. Amendment 1 of the Bill of Rights to the Constitution of the United States of America: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances."

I am saddened, Madam Speaker, that, in our current day, the greatest assault on the free exercise of religion is being perpetuated, seemingly, by those most responsible to protect it: those who are sworn to uphold the law. Worse still, we see our armed forces, whose singular purpose is to support and defend the Constitution, now perpetually being used as the vehicle to subvert the very document that they risked their lives to defend.

In a recent example, we have seen executive guidance with regard to religious corporations, religious associations, religious educational institutions, and religious societies placed in jeopardy.

More than 2,000 federal government contracts a year are awarded to religious organizations and contractors that provide essential services in many vital programs. Now, many of these services are being impacted due to conflicting, ambiguous executive guidance.

Here are some examples:

Chaplain services. Multiple organizations provide chaplains and related services to the military and other government agencies. Chaplains have faced significant religious liberty challenges in pursuing contracts with religious education directories, youth ministers, musicians, and other religious service providers who adhere to the teachings of their particular faith. Without protecting free exercise of religion, chaplains have been forced to hire people that work directly against their teachings, tenets, and faith. This is a clear violation of the First Amendment.

Here is another example: refugee service providers. The vast majority of refugee and suffering vulnerable population relief is done by religious service organizations. I have worked with many on battlefields in my time as a career soldier. Because of bad agency guidance, now these organizations are facing mounting liability related to their performance under grants, contracts, and cooperative agreements. Sadly, when these organizations cannot partner with the government, the relief of human suffering just goes away, seldom being replaced.

The groups under assault are often the best—if not the only—organizations able to offer the assistance they perform, doing invaluable work to relieve the suffering, aid the returning combat warrior, assist in the

rehabilitation of substance abuse for those not adjusting well, and many other such services that have been going on for many decades.

To curtail the blatant discrimination against these groups, I offered a simple amendment to protect them under existing law which passed in the National Defense Authorization, and that existing law upheld is the 1964 Civil Rights Act and the 1990 Americans with Disabilities Act.

You would have thought I had killed someone's mother. Instead of upholding the Free Exercise Clause of the First Amendment, we have now seen this body continue its assault on faith in America. It is not enough to level accusations of injustice by some. They will not be satisfied until their assaults of intolerance on people of faith in this country has produced an elimination of God in public life in America.

We are accused of hatred, called out as shameful on this floor, and enjoined to use the whole Constitution to support an opposing view that embodies behavior, mores, and outcomes that not only violate our conscience, but have been prohibited under the laws of nature and nature's God.

In the last 50 years, we have seen the Constitution used by these ideologues to kill American children in the womb, eliminate family structure, elevate behavior over belief, redefine marriage, and assault into silence and inaction any who may oppose them. Not satisfied, we see them without rest on their quest to eliminate free exercise of faith in the United States.

Do we really want a nation without God?

They would call it progress, yet our conscience knows differently. The apostle Paul explains why when he said this:

For the wrath of God is revealed from heaven against all ungodliness and unrighteousness of men who suppress the truth in unrighteousness, because what may be known of God is manifest in them, for God has shown it to them. For since the creation of the world, His invisible attributes are clearly seen, being understood by the things that are made, even His eternal power and Godhead, so that they are without excuse, because, although they knew God, they did not glorify Him as God, nor were thankful, but became futile in their thoughts, and their foolish hearts were darkened. Professing to be wise, they became fools. Therefore, God also gave them up to uncleanness, in the lusts of their hearts, to dishonor their bodies among themselves, who exchanged the truth of God for the lie, and worshiped and served the creature, rather than the Creator.

Our nation has always been anchored in the Creator, from its inception throughout our history. God has been the foundation of our republic as seen in the sweeping lines of the Declaration of Independence, when it drove our founders to proclaim "the separate and equal station to which the laws of nature and nature's God entitle

them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.”

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.”

That life, liberty, and pursuit of happiness could not be realized without God in our republic. George Washington spoke for all Americans in his first inaugural address, that “No people can be bound to acknowledge and adore the invisible hand which conducts the affairs of men more than . . . the United States.”

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.”

Our nation’s survival and prosperity in the future were understood to be dependent upon faith. When Washington left office in the most remarkable, peaceful transfer of power the world had seen, he warned of a future that somehow supposed that we could have order and prosperity without faith. In his last address to the nation, he declared:

Of all the dispositions and habits which lead to the political prosperity, religion and morality are indispensable supports. In vain would that men claim the tribute of patriotism, who would subvert the great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and cherish them. And let us with caution indulge in the supposition that morality can be maintained without religion.

None of the founders of this country believed that a governmental connection to religion was an evil in itself. They opposed the establishment of a national religion because it could prohibit the free exercise of faith but that faith would and should be freely exercised. This

same foundational belief extended to a prohibition of a national press so that . . . people could speak and assemble freely, and that their grievance would not only become known, but redressed. This was embodied in the First Amendment of the Bill of Rights.

The framers of our Constitution understood that restriction on religious conduct should not be from application of general laws but, rather, should be applied to those laws that target religion. Laws that “substantially burden” religion, even if they are generally applicable, must be justified as the “least restrictive means” of achieving a “compelling interest.”

The same day the Bill of Rights was introduced, July 13, 1787, this Congress also introduced the Northwest Ordinance that laid guidelines and instruction on new territory . . . Article 3 of that Ordinance stated: “Religion, and morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged.”

“Forever be encouraged.”

Some in this body today, Madam Speaker, would believe forever stops in 2016 and should have stopped much sooner. They claim that Congress grants these unalienable rights and uses the powers of the government, without the consent of the governed, to regulate and diminish faith and eliminate it from public life.

In 1798, in response to the claim that Congress could regulate First Amendment freedoms without abridging them, James Madison condemned it, saying: the liberty of conscience and the freedom of the press were completely exempted from all congressional authority whatever.

Every constitution of our thirteen original states, and all thereafter following their example, understood this and embodied such language in their State constitutions, which survive today. [Rep. Russell quotes from the Constitutions of New York, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, Pennsylvania, New Jersey, North Carolina, Maryland, Virginia, South Carolina, and Georgia.]

These constitutions are still in effect in each of these states today. All speak of the exceptions on maintaining the peace and safety of each state.

Forever—forever—be encouraged.

That is the way it was phrased. Is that where we stand today? Shall religious freedom, the hallmark of Columbia’s shores, continue to be forever encouraged or do we who are so humbly honored to serve in these chambers now just step aside and see the indispensable supports of religion and morality knocked from under our foundation?

Madam Speaker, I cannot be silent.

Since I was 18 years of age, I have pledged to support and defend the Constitution of this great republic. I have been moved by conscience and dictates to speak

out against the coercion of people of faith who are being discriminated against because they merely hold to the laws of nature and nature's God. Our institutions, once based on the Creator of life, have now appointed themselves to usurp the authority of God, who is the author of life, marriage, and family.

The most elemental sovereign unit, our families, has been destroyed by our foolish decisions. We are told instead by those of us sworn to uphold the law that murder is not murder, marriage is not marriage, and family is not family. We have allowed constitutional constructs to kill a child and call it a choice.

We have seen discreet behaviors and private sexual preferences promoted to public display while what is constitutionally guaranteed to be able to express—religion—is now being publicly prohibited. This nation, at its highest level, has taken a position against God. Is it possible, if that be the case, that we can form a more perfect union? Can we establish justice absent the giver of law? Can domestic tranquility be ensured when we abandon His precepts? Can we provide for a common defense absent a mighty fortress and an unfailing bulwark?

How do we promote the general welfare when every American is unanchored, adrift to do what seems right in his own eyes? Do we suppose that we can secure the blessings of liberty without Him? Can those of our posterity expect to obtain His blessing without acknowledging His existence?

So, Madam Speaker, like our forebears, I cannot be

silent. My faith directs that I act with love and civility in a gentlemanly manner. As a warrior on battlefields, I have seen the worst that human beings have to offer. But my optimism is secured by eternal hope and everlasting truth. My conscience speaks to God's eternal being. So I am without excuse. His love and mercy cannot be separated from those that answer His call....

Like the Founders of our nation and Framers of our great Constitution, I speak with many as a representative in this august body, "With a firm reliance on the protections of divine providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor."

So, Madam Speaker, I will stand with Joshua when he said: "And if it seems evil to you to serve the Lord, choose for yourselves this day whom you will serve . . . But as for me and my house, we will serve the Lord."

I stand with the apostle Paul when he said: "Putting away falsehood, let each one of you speak truth with his neighbor, for we are members of one another. For we do not wrestle against flesh and blood, but against principalities, against powers, against the rulers of the darkness of this age, against spiritual hosts of wickedness in the heavenly places. Therefore take up the whole armor of God, that you may be able to withstand in the evil day, and having done all, to stand."

So I ask America: Who will stand with me?

Madam Speaker, I yield back the balance of my time. ❧

Protecting Against the Dangers of Playtime

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It is difficult to think of a playground as a place of danger. Yet, too often, it is. According to the Centers for Disease Control and Prevention, over 200,000 playground accidents cause children to be transported to the emergency room each year. That means 548 children are significantly injured every day on a playground. Unfortunately, these often turn fatal. On average, 15 children die every year from playground-related injuries. Most deaths are due to strangulation or falls.

- Recently, a three-year-old girl accidentally hanged herself on a playground climbing frame. She was unsupervised at the time.
- A two-year-old girl was hospitalized with a fractured skull and broken back after she fell and an improperly anchored swing set toppled onto her.

Both of these accidents were preventable if proper safety measures were followed.

Inspect Playgrounds on a Regular Basis

Playgrounds should be inspected on a regular basis. If any of the following conditions are noted, they should be removed, corrected, or repaired immediately to prevent injuries.

1. Landing areas—Provide a landing surface under and around equipment that has at least 12 inches of soft material for landing. Grass and asphalt lack true shock-absorbing properties. Some acceptable materials include sand, mulch, wood chips, or safety-tested rubber.
2. Proper coverage—The proper protective surface around the equipment should extend at least 6 feet in all directions. For swings, the protective surface should extend twice the height of the suspending bar to the front and back.
3. Proper spacing—Play structures more than 30 inches high need to be spaced at least nine feet apart.
4. Sharp edges—Check for sharp edges and protrusions. Hardware most likely to be hazardous is open "S"

- hooks and protruding bolts.
5. Entrapment—Look for spaces that could entrap children, such as openings in guardrails or between ladder rungs and climbing ropes. Openings must measure less than 3.5 inches or more than 9 inches.
 6. Trip hazards—Remove trip hazards, such as tree stumps and rocks. Cover exposed concrete footings.
 7. Guardrails—Ensure that any elevated surface, such as platforms and ramps, has guardrails to prevent falls.
 8. Check for wear—Check that the equipment is not becoming loose, damaged or worn.
 9. Proper anchoring—All equipment needs to be properly anchored to the ground.
 10. Suffocation hazards—Do not allow loose hanging ropes on equipment. A jump rope attached to play equipment can entangle a child and cause the child to suffocate.
 11. Supervise—Children must be supervised at all times on the playground to ensure they are safe. The younger the children are, the higher the adult-to-child supervision ratio should be. Never leave children alone on play equipment.

Promote Playground Safety

Bumps and bruises are part of every child's life. The last thing that anyone wants is for one of those bumps and bruises to be from a life-threatening playground injury. Inspecting the playground and equipment and immediately correcting any adverse condition can mean a giant step toward a safe playtime. ♣

Charitable Giving Reaches \$373.25 Billion in 2015

Janet Stump, MA CFRE

Charitable giving in the United States has reached \$375 billion a year, of which total contributions by individuals constituted 80% of all donations (including bequests), or about \$298 billion, according to a report by Giving U.S.A. 2016. In 2015, giving by foundations and corporations—nearly \$75 billion—matched or exceeded their previous inflation-adjusted highs. The charitable sectors of religion and education account for 47% of all giving—approximately \$176 billion: encouraging news for Christian schools dependent on contributed support to augment tuition income. According to Giving U.S.A., “With the exception of the S&P 500, most key economic factors associated with charitable giving grew in 2015. However, these indicators were generally not quite as strong as in 2014.”

Individual giving remains the backbone of American philanthropy, and 2015's increase is related to the following key factors: 1) per capita giving by U.S. adults increased to \$1,101 in 2015 and 2) average U.S. household giving reached \$2,124. The Giving U.S.A. Report estimates that giving by nonitemizing individuals grew 2.5% and giving by itemizing individuals grew 4.1%.

Year over year, U.S. philanthropic giving statistics confirm that the majority of charitable contributions are given by individuals. It can be argued that an additional 15% of contributions from foundations are facilitated and designated by individuals and/or board trustees. Christian school boards and heads of school should understand that, generally, contributions to their schools will follow this pattern. An effective fund development effort deploys varied strategies to cultivate both individual and corporate donors, such as foundations, churches, and businesses. However,

the majority of fund-raising time and effort should be invested in identifying, cultivating, soliciting, and stewarding individuals in support of the school's mission and the service it provides to the local community.

Building a sustainable base of engaged donors takes time and perseverance; thus, nurturing and maintaining healthy relationships with the school's constituency—school families, extended families, alumni, local businesses, and church and community members—becomes a high priority. Donor retention and loyalty can be a challenge because of increasing competition among nonprofit organizations for contributions, as well as growing pressure for fiscal accountability both by donors and by the federal and state governments. Yet, retaining donors year after year is worth the hard work, as they also bring significant nonmonetary resources to the school. An engaged constituency prays for the school, volunteers consistently, and speaks positively about the program to the larger community. The mission of the school is advanced and sustained in ways far beyond what is achieved through fund-raising projects and events.

The fund-raising profession has gained credibility and professionalism in the last 30 years through the strong effort of organizations such as the Association of Fund-raising Professionals, Evangelical Council for Financial Accountability, and CFRE International. Christian schools should rise to the highest level of accountability, putting policies and procedures into place that abide by biblical, legal, and professional standards. These include, but are not limited to, donor rights standards, fiduciary and gift stewarding policies, and biblical stewardship standards.

Christian schools have a greater responsibility to meet or exceed federal and state requirements as well as professional best practices. Since we affirm that everything we have is owned by God, we can trust Him to both provide for our schools and move individual and corporate resources to accomplish His purposes. Thus, our fiscal practices must be open to scrutiny,

and our integrity in relationships guided by love and trust. Resources to guide your school in implementing or retooling your mission-driven fund development program will be provided in future issues of *LLU*. Our goal is to assist you in establishing a vibrant fund development program that is effective, transparent, accountable, and pleasing to God. 卍

Early Education in the National Spotlight

D. Merle Skinner, EdD

Early education has moved from being controversial in its own infancy to being widely accepted, from being only for needy families to being a privilege and blessing. It is now a top priority for families wanting to find the right early education program for their children. Although early education was slow to develop in the Christian school community, it is now a well-established component in many of our Christian schools and centers. As the movement has matured, so have the services and the desire for those services to honor Christ with a high level of quality.

A Changing Landscape

Why are so many Christian early education policy gurus very concerned as they watch the current and rapidly changing landscape? There is a much bigger picture at stake in this story—bigger than kids, families, and politicians. The landscape of early education is changing rapidly. Not all of this change is in favor of families who would desire distinctly Christian services.

Those in the public sector continue to become more interested in the early education market. A broader segment of public officials are seeing early education as valuable and deserving of additional funding. Poorly run centers get attention when things go wrong. Declining numbers of children in some areas have pushed public school educators to become involved in early education. Displaced teachers and unions looking to expand membership are examining the area of early education for opportunities. Younger parents have begun to view early education as an entitlement, not just something they want to work hard to provide for their children.

As these change agents (such as public funding of early education, a desire to upgrade the quality of programs, or the entrance of the market of a larger player such as a public school system or a larger provider) emerge in local communities, some Christian centers that once had long waiting lists are finding themselves out of business due to these changes.

The Problem

What's not to agree with the ideal of providing pre-K for all? If one has not been a part of understanding and experiencing quality early education, it sounds like more funding would be a better thing—but there are significant complications.

Aside from the question of who foots the bill, funding also often comes with strings—at worst, it's a poison pill. It is always cleaner if funds for education can be given to parents to be used at the program of their choice; however, this is not a popular model with many government agencies. The Child Care and Development Block Grant (referenced in a previous issue of *LLU*) allows for some funding to be governed by parental choice. It is, however, an ongoing fight to keep states from imposing limitations and participation in the funding options. This severely restricts a family's access to private Christian early education.

Accepting state and federal funding is one of the most hotly debated policy issues on a variety of levels in the private school sector. It is a consideration that each ministry needs to evaluate carefully. Why not just let our churches and parents pay for our early education services and let the public sector have its free services? Some Christian early education centers are thriving and have long waiting lists. Why consider funding if classrooms are full? Although that model will work for a period of time, there are several longer term considerations which should not be ignored or taken lightly.

1. It is tough to compete with free. Regardless of what our parents say now, paying for services despite a free early education program option down the street may not be an attractive long-term option. This is one of the most common anecdotal scenarios of concern.
2. Do early education programs have a calling to serve families who cannot afford full pricing? This question should be asked even if there are enough resources for paying families to fill our programs.
3. Do early educators want to see the private early education sector begin to reflect the rest of the K–12 sector, in which private schools hold 9–11% of the market? In the current early education market, the private sector serves the vast majority of early education students.
4. How will teachers respond when public programs across town offer significantly improved benefits and wages?
5. Do Christian early education programs have an obligation to protect an environment that allows Christian ministries to serve the families and communities beyond the program's immediate scope?

Advocacy

The early education landscape will be changed through public policy. The Christian community must be salt and light in our local and national government. There are several things an early education leader can do to increase effectiveness in public policy.

1. Become a part of the grassroots process for effecting this change!
2. Learn how to get help to your staff and families.
3. Find a leader in your organization who can be a part of understanding the important distinctions of public policy. Every ministry must have someone to go to at the local level when change happens.
4. Get involved with Christian and private school advocacy teams.

Key Policy Points and Battlegrounds

As the culture in the United States moves further and further away from its Judeo-Christian roots, many will try to remove faith from Christian early education programs. They are often motivated by an incorrect understanding of the separation of church and state—a misguided belief that faith does not belong in early education, that faith is destructive, or that early education has to be like public secular education. Early educators must protect religious early education options as part of the wide array of diverse educational opportunities.

1. In attempts to change early education, fight to keep biblically based programs on par with programs with a secular worldview.
2. Recognize the value of ACSI accreditation. This includes:
 - a. Encouraging early education centers to become accredited and to advance accreditation as a way of identifying quality.
 - b. Promoting ACSI accreditation as a model of quality advancement.
 - c. Resisting the temptation to advance other accreditation models that do not allow for a distinctly Christian curriculum and culture.
3. Be aware of your state's requirements for operation, and ensure that those requirements (licensing, registration, etc.) do not create barriers for faith-based


early education. If such barriers do exist, pray and look for opportunities to discuss policy changes that will allow Christian centers to participate.

4. Oppose policies that would prevent faith-based programs from receiving funding or enrolling parents who have been granted funding. Make connections with state leaders in CAPE or ACSI who can help.
5. Volunteer! Offer to provide a faith-based perspective wherever there seems to be an opportunity.
6. Remember that each advocacy group represents a perspective. Be careful to join advocacy groups that reflect or openly accept a distinctly Christian worldview. Some of the largest and most recognized early education advocacy organizations privately oppose faith-based education.

Take Part in New Initiatives

As difficult as it is to balance leading an early education program and watching new developments, everyone should find ways to get information from appropriate sources and stay informed about current policy and funding trends. Acting and reacting aggressively to potential changes will be key. Early educators have significant expertise and calling—a wealth of potential resources.

All early educators are needed to help in this changing landscape. For more information, contact:

- Dr. Merle Skinner: merle_skinner@champion.org
- Your ACSI Regional Director: www.acsi.org
- The ACSI Early Education Resources Department: www.earlyeducation@acsi.org
- Mr. George Tryfiates, ACSI National Legislative Director: george_tryfiates@acsi.org
- Your state CAPE (Council for American Private Education) affiliate 

Dr. Merle Skinner has his undergraduate degree in child development from the University of Pittsburgh, his masters in organizational leadership from Geneva College, and his doctorate in counseling psychology from Argosy University. He has worked in the field since 1980 as a program supervisor for infant toddler programming, preschool director, Christian school administrator, adjunct professor, and clinical counselor. He has been the chair of the CAPE Early Education Task Force, works regularly in public advocacy for Christian education, and served on a Pennsylvania governor's task force on early education.

In & Out of Committee

What Happens at the Fall ACSI National Legislative Conference in DC?

Matt Gaines

On the evening of Monday, September 12, 2016, 20 heads of ACSI schools met near our nation's capital in

Arlington, Virginia. We met to begin the important 2016 ACSI National Legislative Conference meetings. The

level of resistance received in a matter can emphasize its importance. In the days leading up to the conference, “You don’t belong here!” were the words offered to me by the enemy. However, the overpowering voice of the Spirit responded with, “You expect your staff, teachers, and students to step out of their comfort zones, don’t you? You are powerful through Me!”

The heads of school who attended the conference were purposefully picked from across the country to better represent all ACSI schools at our nation’s capital. In the weeks leading up to the conference, Tom Cathey, ACSI’s Director of Legal Legislative Affairs, encouraged the 20 ACSI heads of school to set appointment times with their respective senators and representatives. These face-to-face meetings were to take place on the final day of the conference.

George Tryfiates, ACSI’s Director for Government Affairs, scheduled a great line-up of speakers for Tuesday’s briefing meetings on Capitol Hill. Conference heads of school heard from Representative Vicky Hartzler (R-MO), Representative Steve Russell (R-OK), and Senator James Lankford (R-OK) in the Cannon House Office Building. These elected officials and other special speakers informed attendees of current legislative topics concerning our schools and encouraged the attendees in the importance of their work.

Wednesday morning arrived with the reality that on this day, these 20 heads of school would be representing

ACSI member-schools in the nation’s capital. Conference attendees met with Congressional legislative aides and shared the legislative matters that are currently priorities for ACSI schools. They shared stories of the work you do each day. They shared how our Christian schools need protection to continue operating with faith-based principles in this great nation of ours.

Did the words spoken to legislators and legislative aides impact policy? We may never know. But I can say with certainty that if no one goes and shares our concerns with elected legislators, they cannot know the great work we do in our communities and our need for continued freedom to teach as we choose. In addition, the legislators who are fighting for our concerns need encouragement to continue the fight for our religious freedom.

I learned we have some incredible elected officials serving us. We need to pray for them and not be afraid to reach out to them. If we can get them to visit our campuses, maybe they will see our good work and we will be able to glorify our Father, which is in Heaven.

Matt Gaines is director of Southern Maryland Christian Academy in White Plains, Maryland. He is an active participant in the state-level ACSIMD and attended his first ACSI National Legislative Conference in September 2016. This article was first published in the ACSIMD electronic newsletter October 28, 2016. ☩

Jury Box See *The Verdict* on page 47.

Dealing with Discipline and School Policy

H. K. was an eighth grade student at Noor-Ul-Iman School in New Jersey. H. K. had achieved great academic success at the school. However, in May of that school year, H. K. was questioned by the staff regarding allegations that he violated the school’s “Harassment, Intimidation, and Bullying Policy” (HIB Policy). During the interrogation of H. K., the staff “called H. K. a liar” and “repeatedly told him to admit that he was involved in the incidents” alleged by other students. The staff also “instructed H. K. to write a statement” in response to the allegations of misconduct without ever identifying the exact nature of the allegations. H. K. was questioned for two to three hours before calling his parents. When the parents finally met with school officials later that day, they were instructed to keep H. K. home until the school completed its investigation into the allegations.

The school’s “Behavioral Code,” contained in its Parent/Student Handbook (Handbook), incorporated the HIB policy (collectively, the “policies”) and provided nearly identical provisions regarding what conduct is subject to discipline and how disciplinary matters were to be handled. The policies called for an escalating disciplinary process for the handling of student behavioral issues. The Handbook provided:

The teacher will handle most disciplinary actions within the classroom. The teacher will inform the parent verbally and/or in writing if a student’s misbehavior needs to be addressed [at home]. . . . [If] the behavior of the student continues to be inappropriate, a conference may be requested with the parents and teacher(s) to determine how to rectify the situation. In unresolved or severe cases, a conference of the parents, teacher(s), and the Head of School or a School Administrative Council [(SAC)] Member will be requested.

In the event that the student’s misbehavior is repeated or severe, (as determined by the [SAC], it may lead to any of the following:

1. After-school detention with parent notification
2. Out-of-[]school suspension with parent conference
3. Expulsion of student . . .

The HIB policy further specified how complaints of harassment, intimidation, or bullying would be investigated:

[T]he teacher(s), principal or School Executive Committee will conduct a prompt, thorough and complete investigation of each alleged incident. . . . At the conclusion of an investigation, the [investigating party] will submit a confidential written report with the findings of the investigation. If a finding of harassment, intimidation or bullying is substantiated, the [investigating party] will recommend appropriate corrective action.

However, the policy did not specify to whom the confidential report was to be submitted or whether a copy has to be provided to the student accused of wrongdoing or the family.

As a result of its investigation, the school notified H. K.'s parents that it was barring their son from returning to school and requiring that he be evaluated by a mental health professional. The school agreed, however, to allow H. K. to complete his assignments from home for the remainder of the school year, without in-home instruction, but reserved its right to allow him to return in the fall until the school received the results of the evaluation.

In response, H. K.'s parents disputed whether "the investigation was conducted with complete thoroughness," and suggested the situation "require[d] a more thorough investigation to uncover the complete timeline and facts." They also complained that H. K. was not given "a fair opportunity to defend himself against the charges," that the school's HIB policy "had not been communicated," and that "they did not have fair and proper notice of that policy." They proposed the school reopen the investigation to be "conducted by three independent and respected community members," who would have full access to the evidence and be permitted to question those involved.

Despite their objections, H. K.'s parents permitted their son to be evaluated by a psychologist selected by school. The doctor evaluated H. K. in May and issued an initial report with his findings and an updated report for "clarification" in July. According to the psychologist, while H. K. admitted to some of the misconduct of which he was accused, he "denied misbehavior of a sexual nature," and, although the psychologist concluded the boy violated the school's code of conduct, he "did not see signs of significant psychopathology or significant risks for violent behavior." The doctor recommended counseling through the school, professional therapy, and "open discussions" between H. K. and his parents regarding acceptable behavior. In his follow-up report, the doctor clarified that his recommendations were not intended as punishment, and observed that, while the school had not provided the recommended counseling, H. K.'s parents had followed his recommendations, engaged their son in therapy, and provided him the suggested guidance. After speaking with the child again, the psychologist concluded the boy did "not warrant a mood disorder diagnosis and has shown an ability to effectively utilize help from his parents and myself."

At the end of May, the school responded to the parents' concerns regarding the investigation by stating that it "was conducted in a fair, objective, and thorough manner in accordance with" the school's policies, but did not give any details as to the process it followed or what

information was obtained in the investigation. It also told the parents "a final decision on [H. K.'s] status . . . [would] be made in accordance with the school's written administrative procedures, and will abide by the evidence gathered during [its] extensive investigation."

In June, the parent's attorney sent a written demand for clarification regarding H. K.'s enrollment and the details of the purported violation, including the specific conduct H. K. engaged in, what provisions of the HIB policy were violated, and a copy of the investigative report. They also wanted an opportunity to discuss what would be included in H. K.'s permanent record and requested that H. K. be allowed to participate in the upcoming school trip and eighth grade graduation ceremony. They felt they had done their part, but the school had failed to do their part by restoring H. K. to the school's student body.

The school responded a week later, indicating that it had conducted a further evaluation of H. K.'s situation—informed by its previous investigation, the psychologist's report, and the continued lack of acceptance of responsibility despite the specific conclusions and recommendations included in the doctor's report—and citing several portions of the report that it found particularly troubling. The school explained that, after extensive deliberation, it had determined H. K. would not be permitted to return to school or participate in school events for the remainder of the year, but would be permitted to complete the current school year under the existing special arrangements. It also noted it could have suspended and/or expelled H. K. and expressly reserved the right to do so.

The parents filed a lawsuit alleging that the school's disciplinary procedure was fundamentally unfair because:

H. K. was not provided a fair opportunity to respond to the charges; he was presumed guilty and told to acknowledge and admit what he did; the School's determinations are inconsistent with the psychological evaluation required by the School; the investigation was conducted by people who had a personal and biased interest in the outcome instead of neutral and unbiased decision makers without any conflict of interest that could hamper their judgment; H.K. was also detained for excessive periods of time and interrogated; and the same people who conducted the original investigation made the decision as to whether the investigation was conducted in a proper manner.

The school filed a motion to dismiss the case, claiming the parents failed to state a claim. The judge, after accepting motion and hearing oral arguments, granted the school's motion and dismissed the case.

The parents appealed. Was there a claim of unfairness as stated by the parents? You be the judge.

B.S. v. Noor-Ul-Iman School, 2016 WL 4145921

FASB Issues Accounting Standards Update on Financial Statements for Not-for-Profit Entities

Sheree Brugmann, Partner, National Director for Quality Assurance Reprinted with permission from a CapinCrouse E-mail Alert. For more information, go to www.capincrouse.com.

The Financial Accounting Standards Board (FASB) has issued Accounting Standards Update (ASU) 2016-14, *Not-for-Profit Entities (Topic 958): Presentation of Financial Statements of Not-for-Profit Entities* (http://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176168381847&acceptedDisclaimer=true). This completes Phase 1 of the most significant project addressing not-for-profit (NFP) financial reporting since the 1993 issuance of FASB Statement of Financial Accounting Standards Nos. 116 and 117.

The key requirements of the new ASU are:

- **Net Assets**
 - Required to be reported in two categories, *net assets with donor restrictions* and *net assets without donor restrictions*, replacing the current *unrestricted*, *temporarily restricted*, and *permanently restricted* categories
 - Permitted to be disaggregated further
 - Continued requirement to disclose the nature and amount of donor restrictions, such as time, purpose, and perpetuity
 - New disclosure requirement to communicate the amount, purpose, and type of board designations
 - Absent explicit restrictions, *net assets with donor restrictions* that are for the acquisition or construction of long-lived assets will be required to be released when the asset is placed in service, eliminating the alternative of recognizing the expiration of donor restrictions over time
- **“Underwater” Endowments**
 - Will now be included in *net assets with donor restrictions* rather than in *net assets without donor restrictions*
 - In addition to aggregate amounts by which funds are underwater (current GAAP), new required disclosure of the aggregate of original gift amounts (or level required by donor or law), fair value, and any governing board policy, or actions taken, concerning appropriation from such funds
- **Cash Flow Statement**
 - NFPs will be allowed to choose between the *direct method* and the *indirect method* in presenting operating cash flows
 - If the *direct method* is presented, an indirect reconciliation is no longer required
- **Liquidity and Availability of Resources**
 - Required footnote disclosure of *qualitative* information on how an NFP manages its liquid available resources and its liquidity risk
 - Required *quantitative* disclosure on the face of the financial statements and/or in the footnotes communicating the availability of an NFP’s financial assets at the statement of financial position date to meet cash needs for general expenditures within one year
 - Examples illustrating different ways entities might report such information have been included in the ASU
- **Expense Reporting**
 - Required reporting of expenses by function and by natural classification, either on the face of the financial statements or in the footnotes
 - Required qualitative disclosures about methods used to allocate costs among program and support functions
 - Enhanced guidance provided related to allocations from management and general expenses
- **Investment Return**
 - Required to be reported net of external and direct internal investment expenses (implementation guidance is provided to illustrate activities which constitute direct internal investing activities)
 - Permitted but no longer required to disclose any investment expenses that are netted against investment return
 - Investment return components are no longer required to be disaggregated in the endowment net asset roll forward
 - NFPs are precluded from including external and direct internal investment expenses that have been netted against investment return in the functional expense analysis
- **Disclosures About Operating Measures by Those NFPs That Choose to Present Such a Measure**
 - To the extent an operating measure is affected by internal board designations, appropriations, and similar actions, NFPs choosing to present an operating measure would be required to disaggregate and describe by type these internal transfers, either on the face of the financial statements or in the notes

—Examples illustrating different ways entities might report such information are included in the ASU

With limited exceptions for certain disclosures, the amendments are required to be applied on a retrospective basis for all years reported. Amendments will be effective for annual financial statements for fiscal years beginning after December 15, 2017, and for interim periods within fiscal years beginning after December 15, 2018. Early adoption is permitted.

Concurrent with the issuance of the standard, FASB issued an *In Focus* summary, a *FASB: Understanding Costs and Benefits* document, and a video: *Why a New Not-for-Profit Financial Reporting Standard?**

Phase 2 of FASB's NFP Entity Financial Statement project is expected to address intermediate operating measures based on mission and availability, presentation of internal transfers on the statement of activities, and alignment

of the statement of cash flows with the statement of activities. In addition, the Board is considering whether to address segment reporting for business-oriented health care and other "business-like" NFPs in conjunction with this project, or as a separate project.

*These resources can be found at the following sites.

http://www.fasb.org/cs/ContentServer?c=Document_C&pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176168379971

http://www.fasb.org/cs/ContentServer?c=Document_C&pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176168379996

http://players.brightcove.net/2205030511001/default_default/index.html?videoId=5081273341001 📺

Before the Bench

The Ministerial Exception: A Tool to Wield Cautiously

Practical Tips in Defining Ministers

Nicholas R. Morgan, Esq. Reprinted with permission from Telios Law PLLC. <http://telioslaw.com/member-care-info/1325-the-ministerial-exception-a-tool-to-wield-cautiously>.

What Is the Ministerial Exception and Where Does It Come From?

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." ¹ This two-part amendment applies to the federal government directly and the states through the Due Process Clause of the 14th Amendment. The two parts, establishment and free exercise, are the Constitutional teeth for the separation of church and state, a historic principle dating back to the first clause of the Magna Carta. That principle applied to church conflicts (particularly property disputes) through *Watson v. Jones* ² and following ³, which circumscribed the State's ability to adjudicate religious doctrinal disputes.

The concept that courts shouldn't adjudicate doctrinal disputes, called the "ecclesiastical exemption," or "ecclesiastical abstention," was applied to employment law beginning in 1929 through a series of cases holding that courts do not have the authority to determine who is qualified to be a minister ⁴, and thus created the "ministerial exception." Accordingly, even before the landmark opinion in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* ⁵, all federal circuits and many states had a version of the ministerial exception, which described the government's inability to interfere with the employment decisions of a church in regards to its ministerial employees, and specifically refused to apply antidiscrimination laws such as the Americans With

Disabilities Act and Title VII of the Civil Rights Act of 1964 to these situations.

When the *Hosanna-Tabor* case was heard in 2012, therefore, it represented the U.S. Supreme Court's first opportunity to legitimate the already ubiquitous concept of the ministerial exception to antidiscrimination legislation in regard to employment decisions between a religious organization and its ministers. The Court did indeed legitimize the concept. More importantly, however, the Court offered instruction on the unsettled concept of how to determine whether an individual employee is indeed a minister. Despite the Court's reluctance to provide a rigid formula for this determination, the Court provided useful information instructive both for future court analysis, and for religious orgs to utilize in ensuring that those in their employ, which they may consider ministers, are conveyed and constructed as such.

How Do We Show Which Employees Are Ministers?

Again, according to the Court's totality-of-the-circumstances analysis, there is no rigid test nor ability for religious orgs to be absolutely confident of their determination of their employees' statuses. However, in consultation with an experienced religious nonprofit attorney, religious orgs may bolster their confidence of a court's concurrence with the org's determination that an employee is a minister by structuring employment relationships in accordance with some or all of the following:

1. The religious organization should “hold out” its ministerial employees as being ministers. This is an overarching concept with component parts described below. Primarily, though, holding an employee out as a minister refers to the org’s communication (both internal and external). Consistent communication is key and can be achieved in part through organizational newsletters, staff listings on websites, and all other private and public written and spoken communications making reference to staff.
2. The role of the minister should be distinct from the role of nonministers within the organization. The more distinct, the better the argument that these are a special class of employee and should be subject to different standards.
3. The job duties of the minister should include responsibilities that are unambiguously religious. Consider including in the minister’s written job description responsibilities such as: discipling those under the minister’s management; annual spiritual retreats or days of prayer and vision with corresponding spiritual growth plans submitted to supervisors or boards; and/or scriptural or religious principle teaching responsibilities.
4. To the extent reasonable, the job qualifications of the minister should include qualifications that are unambiguously religious. Consider employment qualifications for your ministers such as proven track record of religious service, spiritual character and maturity references from religious leaders, ecclesiastical certifications, etc.
5. Then, of equal importance, perform and keep records of annual performance evaluations for these employees, including evaluations of their performance on the religious responsibilities.
6. Consider providing an internal, or seeking an external, certification of the ministerial status of the employee.
7. Provide a religious job title. It may seem a bit contrived to bestow upon your VP of Communications the title of “Ambassador of the Religious Message of XYZ Ministry” or “Minister of Communication,” but this relates directly to the first factor mentioned: how you hold out your employees matters to the Court. Additionally, the Court in *Hosanna-Tabor* placed as much importance on the minister-in-question’s job title as any other indicator of her role as a minister.
8. Provide scriptural support for the responsibilities and qualifications of the position.
9. Provide opportunities for continuing education and training for the ministerial responsibilities and document how these opportunities enhance the ministerial effectiveness of employees.
10. Pray, as an organization, for the employee’s effectiveness in her/his religious responsibilities.

11. In both the job description/application and the interview, make explicit that the religious qualifications are of paramount importance for this role.
12. Clearly communicate to the employee before extending a job offer, in onboarding documentation (employee handbook and/or training materials), and through regular performance evaluations that the organization considers the employee to be a minister.
13. Through the help of your attorney, consider communicating explicitly to the candidate (pre-employee) the differences between ministerial and nonministerial employment relationships and the legislative protections the candidate may be forfeiting by accepting a ministerial job.

Are There Hazards in Claiming the Ministerial Exception?

Religious nonprofits’ evaluation of the ministerial exception to their workforce has increased substantially in recent years, both because of the new guidance of *Hosanna-Tabor* and because of new compliance challenges like the increased salary threshold for exemptions under FLSA. The ministerial exception may apply for certain religious organization to exempt certain employees from ADA, ADEA, Title VII, certain state antidiscrimination legislation, and possibly both the FLSA and FMLA ⁶. Religious organizations, however, must not be cavalier in their reliance upon the exception.

Religious organizations need to use caution in determining to what extent they will rely upon the ministerial exception for a number of reasons. First, the application of the exception needs to be an employee-by-employee (case-by-case) review. Blanket application will not serve the org well. Second, religious orgs need to consult with experienced religious nonprofit counsel to determine how the ministerial exception has been applied in the jurisdictions in which they operate. It is inaccurate to say that the ministerial exception applies to all federal employment statutes at this time. Third, religious orgs need to weigh carefully the branding for their organization or cause in regards to a lawsuit, where the press may pick up a theme of “XYZ Temple is claiming that they can simply refuse to hire the disabled on the sole basis that XYZ is religious and can therefore operate outside of the laws that protect citizens from discrimination.” Fourth, religious orgs who have not experienced the ordeal of litigating an affirmative constitutional defense should discuss with their religious nonprofit attorney exactly what such a defense would entail. The defense’s ultimate cost, including ministry disruption, press and public scrutiny, and legal fees may be enough to encourage the religious org that it would be easier in many cases to subject itself to FLSA, FMLA, or other requirements, rather than “win” a legal case on a constitutional matter. Fifth, and last, there is always potential that the next legal opinion on the ministerial

exception will be the one that strips the exception of some of its current value and makes a major negative impact on religious liberty going forward.

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Footnotes

1 U.S. CONST. amend. I.

2 *Watson v. Jones*, 80 U.S. 679.

3 For example; *KEDROFF et al. v. ST. NICHOLAS CATHEDRAL OF RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA*, 344 U.S. 94.

4 *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 1050 (1972); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

5 565 US ____ (1972).

6 The District Court in *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, (E.D. Pa. 2005) held that the ministerial exception applies to all federal employment statutes. Higher courts have not yet decided.

Telios Law serves businesses, individuals, ministries, and churches, representing them in litigation, appeals, and alternatives to litigation, as well as giving legal advice on a variety of issues. Preventive planning or negotiating can often avoid lawsuits. And if you are going to be in a legal proceeding, you should have excellent legal support. Find out more at www.telioslaw.com. ☞

National Notes

George Tryfiates, ACSI Director for Government Affairs

Washington Updates

- The National Defense Authorization Act (NDAA) includes language by Rep. Steve Russell (R-Oklahoma) restating protections in religious hiring from the Civil Rights Act of 1964 and the Americans with Disabilities Act. The Senate version does not include this language, so a House-Senate Conference Committee must reconcile the two. The November 2016 lame duck session of Congress will resolve the question. In October, 42 Democratic Senators issued a letter to Armed Services Committee leaders insisting the Russell language be deleted. Our hope is that Russell will prevail.
- In the same session, Congress is also expected to deal with the reauthorization of the District of Columbia Opportunity Scholarship Program (OSP). A popular school choice program, the OSP provides scholarships to low-income families in D.C. All ACSI member-schools in D.C. participate. ACSI supports the measure.
- In April 2016, ACSI joined its second amicus brief in support of Missouri's Trinity Lutheran Church in its case against the state. Missouri excluded the church's daycare from a state playground resurfacing program solely because it is church-related. The Supreme Court agreed to take up *Trinity Lutheran Church vs. Pauley* and is expected to hear the case before June 2017. ACSI joined with the Lutheran Church—Missouri Synod (LCMS) to argue that it is inappropriate to exclude the daycare from the program. It is possible the case could be held until October 2017. Since the passing of Justice Antonin Scalia, the Supreme Court is one justice short of the nine authorized in law; this creates uncertainty about the Court's case schedule.

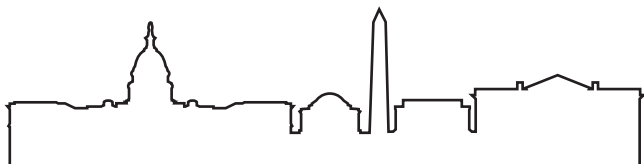
Final Regulations Issued for Child Care Development Fund

On September 30, 2016, the Administration for Children and Families (ACF) of the U.S. Department of Health and Human Services (HHS) published its final regulations to govern the Child Care Development Fund (CCDF) created by the Child Care and Development Block Grant Act (CCDBG).

The original proposed regulations were highly controversial. ACSI submitted its public comment in response on February 22, 2016. We strongly objected to ACF's proposed requirement that states fund *some* grants or contracts rather than allowing the states full freedom to fund *either* grants/contracts *or* certificates (vouchers) *or* both. Faith-based early education cannot receive grants or contracts without giving up their unique faith-based mission. Certificates allow much greater freedom. Because of the objections, ACF ultimately deleted the offensive requirement in its final regulations.

This episode illustrates the importance of watching not just legislation, but also the regulations the Executive Branch issues. The ACF attempted this same maneuver—explicitly promoting grants and contracts over certificates—when it moved to rewrite the regulations *before* Congress passed its reauthorization of the CCDBG. ACSI objected at that time, and the ACF dropped that effort when Congress took up the reauthorization bill.

Congress ultimately *ensured* the Administration would not try again to cut back the use of certificates by specifying in the final CCDBG bill that “nothing in this subchapter shall be construed in a manner to favor or promote the use of grants and contracts for the receipt of child care services . . . over the use of child care certificates; or to disfavor or discourage the use of such certificates for the purchase of child care services, including those services



provided by private or nonprofit entities, such as faith-based providers” (42 USC §9858o(b)).

The proposed regulations specified that “funding methods provided for in §98.30 . . . *must include* some use of grants or contracts for the provision of direct services” [emphasis added].

ACSI responded: “To require that funding methods ‘must include’ grants or contracts clearly violates Congressional intent and the plain language of the statute.”

We further noted:

It is hard to conceive that the NPRM [Notice of Proposed Rulemaking] accidentally includes proposed regulatory language which so clearly violates the statute. First, the NPRM discusses the very statutory text quoted above, but dismisses it. Let us be clear: nothing in the statute mandates the use of grants or contracts—they are an option. On the contrary, the statute specifically forbids promoting grants/contracts or disfavoring or discouraging the use of certificates. Certainly, to mandate grants/contracts favors their use and disfavors or discourages the use of certificates. This is not appropriate. Nor is it appropriate for the NPRM to refer to this as “a straightforward interpretation of language in the CCDBG statute” (pg. 80518).

In its public comment, the Council for American Private Education (CAPE) pointed out:

Plainly, the proposed paragraph “promotes the use of grants and contracts” in that it *requires* their use. Clearly, the proposed regulation “disfavors or discourages the use of certificates” in that every dollar used for the newly mandated grants and contracts would mean a dollar less for certificates.

Thus, quite astoundingly, the proposed paragraph not only lacks authority in statute, it actually violates the statute, both in spirit and in letter. Further, and equally astounding, the proposed paragraph not only ignores the will of states on this matter, it actually thwarts that will by requiring all states to do something that most of them so far have chosen not to do.

Other suggestions for changes to the proposed regulations were less controversial. ACSI agreed in its public comment with a series of recommendations made by CAPE. In the end, the final regulations accord with the law by allowing states full freedom to use certificates as much—or as little—as they choose. The latest figures show that the majority of states choose to use only certificates.

Annual Legislative Conference a Success!

Every year, ACSI Regional Directors encourage heads of school to attend ACSI’s September D.C. Legislative Conference. In 2016, the conference featured 20 attendees who learned about ACSI’s legislative priorities and presented the issues to their members of Congress or their staff. ACSI member schools enjoy critically important year-round, full-time representation in

Washington, D.C., but there is nothing like a constituent from back home to have a major impact upon a member of Congress. It is powerfully compelling when a voter takes the trouble to come all the way to D.C. to see them.

This year’s conference theme was religious liberty. After a Monday evening welcome on arrival, the attendees spent Tuesday focusing on briefings from elected officials and experts. They heard from a wide range of speakers, including Rep. Vicky Hartzler (R-Missouri), who championed a measure to restore protections to faith-based schools in the District of Columbia. Rep. Steve Russell (R-Oklahoma) spoke about amending a defense bill to include important language restating the rights of faith-based institutions to hire according to their faith, a concept that is facing stiff challenges on the Hill. Sen. James Lankford (R-Oklahoma), former director of the largest Christian youth camp in the U.S., detailed his work to push back on the Department of Education’s novel redefinition of “sex” in its guidance on transgender issues. In addition to these popular speakers, the conference featured experts on school choice, the newly-passed Every Student Succeeds Act, and much more. The briefing day ended with an inspirational visit in the Capitol with Erica Soares, an alumna of ACSI member-school Lakeland (Florida) Christian School and now policy advisor to Senate Majority Leader Mitch McConnell (R-Kentucky).

Wednesday was dedicated to visiting members of Congress or their staff. Conference attendees were fully equipped thanks to their briefing day. The conference ended with lunchtime reports on the results of the meetings. Attendees asked their members of Congress to support Rep. Russell’s measure to restate the law’s faith-based protections and to sign an amicus brief, spearheaded by Sen. Lankford and Rep. Hartzler, in support of Gloucester County, Virginia’s, reasonable approach to resolving transgender issues. The results of Rep. Russell’s important effort won’t be known until after Congress’s post-election lame duck session. Over 100 members of Congress signed on to the Gloucester amicus brief on September 28, 2016, including six Senators and 106 Representatives.

ACSI thanks this year’s Legislative Conference attendees for their time and commitment. They represented 11 states and a wide range of schools. To join us in 2017, contact your Regional Director. We hope to see you in Washington!

Looking Ahead with a New President and Congress

Throughout the election, numerous political prophets predicted that Donald Trump could not win—so a Republican sweep of the White House, the U.S. House, and the U.S. Senate took just about everyone by surprise.

Aside from the off-kilter polling in the presidential race, the U.S. Senate race was stacked against the chances of a continued Republican majority: 24 of the 34 seats up for election were in Republican hands and Congress had historically low approval ratings. In the end, both the House and Senate maintained their Republican majorities and Donald Trump won the White House.

A unified Executive and Legislative branch means that President-elect Trump's agenda will have a strong chance of success over the next two years. That's not to say it will be easy. Of the President-elect's goals for his first 100 days, some key priorities for Christian schools are:

- A promise to “fully repeal” the Affordable Care Act and replace it with health savings accounts. This would presumably resolve the conflict for Christians who object to government compulsion to provide abortifacient contraception in health insurance plans.

- A school choice bill that “redirects education dollars to give parents the right to send their kid to the public, private, charter, magnet, religious, or home school of their choice.”
- A promise to “cancel every unconstitutional executive action, memorandum, and order issued by President Obama.”
- A promise to “begin the process of selecting a replacement for Justice Scalia from one of the 20 judges on my list.”

Whatever may happen, and no matter who holds the office of president, our responsibility as Christians is to pray for those in authority “that we may live peaceful and quiet lives in all godliness and holiness” (1 Timothy 2:2). Congratulations to America's newest public servants. May the Lord give them wisdom. 卐

The Verdict

Continued from *Jury Box* on pages 40–41.

Dealing with Discipline and School Policy

The appeals judge in his opinion wrote:

In order to state a claim against a private school for improperly exercising a disciplinary policy, a plaintiff must allege the school either failed to “adhere to its own established [disciplinary] procedures” or, in carrying out the discipline, failed to “follow a procedure that is fundamentally fair.” *Hernandez v. Don Bosco Preparatory High*, 322 N.J. Super. 1, 21 (App. Div.), cert. denied, 162 N.J. 196 (1999). However, not all failures to abide by internal procedures violate fundamental fairness. See *id.* at 21–22.

When a private association fails to adhere to its own procedures, the court will “balance the organization's interest in autonomy and its reason for straying from its rules against the magnitude of interference with the member's interest in the organization and the likelihood that the established procedures would safeguard that interest.” *Hernandez, supra*, 322 N.J. Super. at 19 (quoting *Rutledge v. Gulian*, 93 N.J. 113, 123 (1983)). Ultimately, “[w]hether the procedure is fundamentally fair will depend on the circumstances.” *Id.* at 22.

The appeals judge stated:

We conclude from our review that plaintiffs' allegations pertaining to bias, the manner in which H. K. was questioned, the lack of a fair opportunity to respond to the charges, and the failure of defendant to disclose any information about its investigation, if true, suggest defendant's process was fundamentally unfair.

Moreover, in light of the somewhat vague nature of the procedures set forth in the HIB policy, defendant's failures to provide a copy of the investigation report and to specify the offending conduct suggest defendant failed to follow its established procedures when disciplining H. K. and acted in an unfair manner.

The appeals court reversed the decision and sent it back to the trial court.

What Can Christian Schools Learn from This Case?

It is important for Christian schools to have a clear and understandable policy regarding investigations into alleged harassment, discrimination, or bullying. Those procedures should clarify who does the investigation, what procedures must be followed, what kind of written report is done, and who receives the report.

Second, the policy must be followed consistently and fairly. When schools are inconsistent in policies and procedures, the courts will consider it to be unfair and liability will then exist.

Courts rarely get into interpreting whether a policy is fair or not. However, they want to see that policies have been followed in a fair and consistent manner.

Investigations should be carried out in a timely manner, and the resulting decisions must then be communicated to the student and parents. In this case, it seemed that the school prolonged the investigation and its decision as to the future of the student.

The parents in this case also claimed they were not well advised of the policies. It is important to make sure parents and students receive a handbook and sign an acknowledgment that they understand and submit to the policies and procedures of the school. 卐



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Closing Arguments

Mediation Clauses in Enrollment Contracts

Q: *Our school has a Christian mediation/arbitration clause in our employment contracts and in the staff handbook. Even non-contracted employees sign an agreement for Christian conciliation. The school board is considering a Christian mediation/arbitration clause in student enrollment materials. What issues should the school consider in this?*

A: There are a number of reasons to adopt alternative dispute resolution clauses (“ADR”). These generally reduce the adversarial nature of legal claims, lessen litigation costs, simplify and speed up the process, and are private. The most significant reason for Christian schools to include Christian ADR clauses is the biblical basis, which should apply equally to employees, students, and parents.

In considering whether to adopt a parental ADR clause, the school should evaluate several practical aspects. First, the school should determine if its insurance carrier is in agreement with required ADR. If the insurance company is not in agreement, it could affect the school’s liability coverage. Additionally, the school should make sure the wording of its insurance policy does not exclude coverage for a contract requiring ADR. Next, parents need to be educated on the principle and process of Christian ADR. An enrollment form with ADR requirements, without a proper context, can be intimidating to parents; they might

balk and decline to enroll their child. Parents need to understand that ADR does not limit the right to present or pursue a claim, but changes the forum in which the claim is adjudicated.

The school should also consider legal requirements. For example, simply placing the ADR clause in the student handbook is likely insufficient; the ADR clause should be in a separate document. The school will also need to consider state statutory or common law requirements applicable to this type of contract, which may include size of type, explanation of procedure, identification of rules governing arbitration, and payment of costs associated with administration of the process and the mediator/arbitrator. Though courts have upheld ADR clauses, there have been concerns regarding the extent of limitations on awards, impartiality of administrators and arbitrators, and other types of waivers.

Lastly, consult legal counsel before implementing a parental and student Christian ADR clause. ❧