Update on Governmental Regulation of Religious Education

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An Overview and Update on the Establishment Clause and the Blaine Amendment: State Aid To - and Regulation of - Religious Schools

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The First Amendment of the US Constitution contains two provisions aimed at securing religious liberty: the Establishment Clause and the Free Exercise Clause. The Establishment Clause prohibits Congress from making any law "respecting an establishment of religion." This clause prohibits the establishment of an official religion, the favoring of one religion over another or the support of non-religion over religion or vice versa. The Free Exercise Clause prohibits Congress from making any law "prohibiting the free exercise thereof." This clause operates to protect persons' religious beliefs and actions taken in pursuit of those beliefs. In Cantwell v. Connecticut, the Supreme Court held that the Bill of Rights applies to actions of state governments as well. See Cantwell v. Conn., 310 US 296, 303 (1940).

The New York State Constitution contains a parallel provision to the Free Exercise Clause. Section three of article one of the Bill of Rights of the New York State Constitution provides that "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state; and no persons shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." N.Y. State Constitution, Article I, section 3.

This discussion will provide an overview and an update of significant cases decided under the Establishment Clause that consider the provision of state aid to religious schools. After providing this review of case law, this discussion will examine one recent controversy in more depth – the extent of permissible governmental regulation of religious schools.

State Aid to Religious Schools

I. Federal Caselaw

One of the earliest Establishment Clause cases decided by the Supreme Court involved the lawfulness of reimbursement for transportation to parochial schools. Everson v. Board of Education, 330 U.S. 1 (1947). In Everson, a taxpayer challenged a New Jersey law that authorized the reimbursement of public funds to parents who paid bus fares for their children to use public buses to be transported to school. Some of the funds were used to reimburse funds expended by parents whose children attended Catholic schools. The crux of the challenge was that in reimbursing parents for the transportation of their children to religious schools, the State of New Jersey was ultimately supporting the Catholic religion in violation of the Establishment Clause. Id. at 8. In deciding that the Establishment Clause did not prohibit the use of tax-levy dollars to pay for the transportation of children to religious schools, the Supreme Court focused on the point that the statute was a general one – it reimbursed parents of students attending public, nonpublic, and parochial schools. Id. at 17. Justice Black argued that the purpose of the Establishment Clause was not to prevent religious schools from receiving general government support – whether police and fire protection, the connections to a municipal sewer system, or reimbursement for transportation expenses as part of a program for all school children. Id. at 18. Rather, the Establishment Clause was intended to prevent support for one religion over another or for non-religion over religion. Because the law at issue "[did] no more than provide a general program to help parents get their children, regardless of religion, safely and expeditiously to and from accredited schools", the Court held that this law did not violate the Establishment Clause. Id.

Twenty years later, in Board of Education v. Allen, the Supreme Court had another opportunity to consider a law that required governmental aid be provided to students in religious schools. 392 U.S. 236 (1968). In 1965, New York State amended section 701 of the Education Law to require school boards to provide textbooks free of charge to students in public and private schools. The plaintiff boards of education sought a declaratory judgment that this law violated both the Federal and State constitutions in that the provision of funds for the purchase of textbooks for religious schools constituted a law supporting the establishment of religion. The appellants argued that the use of tax-levy dollars to purchase books for use by sectarian schools would ultimately assist the schools' ability to propagate their religious mission. The trial court held that the law violated the Establishment Clause, the Appellate Division reversed, finding that the school boards lacked standing, and the New York Court of Appeals held that the boards had standing and that the law did not violate the Federal or State Constitution. 392 U.S. at 240.

In upholding the decision of the New York Court of Appeals, the Supreme Court found that the reasoning in Everson guided the result in this case. See 392 U.S. at 241-42. Similar to the law at issue in Everson, which provided a benefit to children attending public and nonpublic schools, section 701 provided textbooks free of charge to students studying in public and parochial, or other private, schools. Id. at 243. In analogizing to the reasoning in Everson, the Supreme Court distilled the test that it had used, and would continue to use, to differentiate permissible from impermissible government aid under the Establishment Clause. The test asked whether the purpose of the governmental action was a secular one and whether the effect of such action was intended to advance or inhibit religion. Id. The Court found that just as the law challenged in Everson had a secular purpose, to facilitate the transportation to school of students who attended all types of schools, section 701 of the Education Law had the secular purpose of

making textbooks available at no cost to all students. Similarly, just as the reimbursement of the costs of transportation to parents in Everson neither advanced nor inhibited religion, the Court found that the loaning of books to students in parochial schools, when no funds were provided to the religious schools, did not have the unlawful effect of advancing religion. The Court concluded that "[perhaps] free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution." Id. at 243.

In holding that section 701 did not constitute a violation of the Establishment Clause, the Supreme Court recognized that religious schools carried out two functions, the provision of both a secular and religious education, and that it was feasible for the state to support the secular function without also promoting the religious function. Id. at 248. This recognition – or this choice – in some ways marked a turning point in Establishment Clause jurisprudence because it meant that aid could support religious schools, provided that the aid had a secular purpose and was made available on neutral terms to students at all schools.

The Supreme Court's reasoning in Everson and in Allen created the parameters for the Court's decision in Mitchell v. Helms, a case about the provision of federal aid to parochial schools for the purchase of instructional materials and equipment. 530 U.S. 793 (2000) (plurality opinion). In Mitchell v. Helms, Justice O'Connor, whose concurrence constitutes the controlling opinion in the case, pointed out that the "general principles used to determine whether government aid violated the Establishment Clause have remained largely unchanged." Id. at 844. These two principles were: did the government act with the purpose of advancing or inhibiting religion; and did the aid have the effect of advancing or inhibiting religion. Id. at 845. By 2000, when Mitchell v. Helms was decided, the Supreme Court had developed a three-part

test to assess whether the aid the effect of advancing or inhibiting religion: first, did the aid result in governmental indoctrination; second, did the aid program define its recipients by reference to religion; and third, did the aid program create an excessive entanglement between government and religion? Id.

As there was no claim that purpose of the aid was to advance religion or that the aid program created an excessive entanglement between government and religion, Justice O'Connor focused on whether the aid program defined its recipients by reference to religion and whether the aid resulted in government indoctrination. The federal Department of Education distributed the federal aid at issue in Mitchell, funds authorized by Chapter 2 of the Education Consolidation and Improvement Act, on neutral grounds. The allocation took into account the relative enrollment of students whose educational needs imposed a higher than average cost and required that the federal aid be spent on students in public and nonpublic public schools. For these reasons, there was no viable argument that the program defined recipients of Chapter 2 by reference to their religion. Justice O'Connor found that "[as] these statutory provisions make clear, Chapter 2 uses wholly neutral and secular criteria to allocate aid to students enrolled in religious and secular schools alike." Id. at 846. Justice O'Connor also concluded that the program had sufficient safeguards to ensure that the aid would not result in governmental indoctrination. Some of these safeguards included a requirement that the funds supplement but not supplant non-federal funds, a commitment to use the materials for secular purposes, and a provision requiring that public agencies – rather than the schools – control the funds and retain title to the materials. Id. at 848-49.

In holding that the provision of instructional materials and equipment to parochial schools did not violate the Establishment Clause, Justice O'Connor rejected the holdings of two

earlier cases, Meek v. Pittenger, 421 U.S. 349 (1975) and Wolman v. Walter, 433 U.S. 229 (1977). In those cases, the Court had held that the provision of instructional materials and equipment to religious schools violated the Establishment Clause because "any assistance in support of the schools' educational missions would inevitably have the impermissible effect of advancing religion." Id. at 850. Justice O'Connor highlighted the inconsistency among the Court's previous holdings that textbooks could be loaned to religious schools while maps and computers could not be loaned, and concluded that the rationale for the inconsistent holdings – that a religious school could divert the latter for religious purposes but not the former – was not meaningful. Id. at 850-858. For Justice O'Connor the divertibility rationale proved too much because nearly every form of aid could arguably be used in support of religious education or practice.

Rather than focusing on the potential that aid could be diverted to a religious use, Justice O'Connor urged a rule that asked whether the aid at issue "is, or has been, used for religious purposes." Id. at 857 (citations omitted). In Mitchell v. Helms, Justice O'Connor found that the only evidence of actual diversion was *de minimis*, and as a result, considering the secular purpose of the Chapter 2 program, the fact that the aid was allocated on the basis of neutral criteria, that it could only supplement, and not supplant, non-federal funds and that there were safeguards in place to prevent funding of religious activity, Justice O'Connor concluded that there was no basis to find that Chapter 2 violated the Establishment Clause. Id. at 867.

Thus, across the span of fifty years, the Supreme Court had honed its inquiry into the lawfulness of support by the government for religious schools into two parts. The first examined the purpose of the support, thereby permitting support whose purpose is secular and prohibiting support when its purpose is to advance or inhibit religious education or practice. The second

focused on the effect of the support. In Mitchell v Helms, Justice O'Connor's holding emphasized the need to probe how a religious school used the governmental aid, especially given the parameters surrounding the provision of such aid, rather than how such school *could* use the governmental aid. At the same time that Justice O'Connor endorsed this analysis, she also cautioned against the provision of direct monetary support to religious schools, noting "that the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition. *See, e.g.*, Walz v. Tax Comm'n of City of New York, 397 U.S. 663, 668 (1970) ("For the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity")." In an area in which it is difficult to draw bright lines, this clear statement highlights an important one and one that has helped the courts differentiate permissible from non-permissible support.

The next major case to address direct funding of religious institutions is Trinity Lutheran Church v. Comer, which held that the Free Exercise Clause prohibited the government from categorically excluding religious organizations from a grant program. 137 S.Ct. 2012 (2017). The facts of the case are straightforward. Missouri's Department of Natural Resources established a grant program to help schools and daycare centers purchase rubber playground surfaces. Trinity Lutheran Church Child Learning Center applied for a grant to resurface its playground, but its application was rejected from the program because the Missouri State Constitution includes a provision that prohibits funds "be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion . . ." Id. at 2017 (citing Art. I, Section 7 of the Missouri Constitution). Trinity Lutheran sued the Department of Natural Resources on the ground that its rejection of the application of the Child Learning Center

violated the Free Exercise Clause. The District Court granted the Department's motion to dismiss and the Court of Appeals affirmed. The Court of Appeals held that the Free Exercise Clause did not require that Missouri disregard its state constitutional provision that prohibited the making of direct monetary grants to a religious institution.

Justice Roberts held that a law that denied a generally available benefit on account of religious identity would be subject to strict scrutiny and could only be justified based on a compelling state interest. Id. at 2019. Consistent with this rule, in McDaniel v Paty, 435 U.S. 618 (1978), the Supreme Court struck down a law that disqualified ministers from serving as delegates to the State's constitutional convention because it penalized the free exercise of the minister who had to choose between serving as delegate or exercising his religious beliefs. Id. Consistent with McDaniel, in Church of Lukumi Babalu Aye, Inc. v. Hialeah, the Supreme Court found that three ordinances that outlawed ritual slaughter were intended to discriminate against persons who practiced Santeria. 137 S.Ct. at 2021 (citing Lukumi Babalu Aye, 508 U.S. 520 (1993)).

In the context of these precedents, it seemed like a very logical step for the Court to conclude that the Department of Natural Resources' policy constituted a violation of the Free Exercise Clause. Justice Roberts explained that the Department gave Trinity Lutheran a choice – either the Church could participate in the grant program and cease operating as a church or it could give up its ability to participate in the grant program and continue operating as a church. Id. at 2022. For the majority in Trinity Lutheran, such a choice was not consistent with the Free Exercise Clause because it conditioned the church's ability to participate in the program on its identity as a church. In other words, "[in] this case, there is no dispute that Trinity Lutheran is put to the choice between being a church and receiving a government benefit. The rule is simple:

No churches need apply." Id. at 2023. Justice Roberts found that Missouri's proferred reason for this categorical exclusion – to avoid a violation of the Establishment Clause – was not the compelling interest necessary to justify the discrimination at issue. Id. at 2024.

Several justices emphasized that the holding turned on the fact that the Department of Natural Resources categorically denied the grants to any and all applicants owned or controlled by a religious entity by including a footnote that made this point explicit. The third footnote in Justice Roberts' opinion states: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." Id. at 2024, n.3. Although seven Justices supported the majority's holding, only four Justices (Chief Justice Roberts, Justices Alito, Kagan and Kennedy) joined in this footnote. Justices Gorsuch and Thomas expressed their inability to join the point made in this footnote because of the concern that it narrowed the holding to these precise facts. Id. at 2026 (Gorsuch, J., concurring). It seems very possible that the plurality included this footnote, however, to caution against reading this decision as a step moving the Court closer to approving monetary grants for religious schools.

Notwithstanding this footnote, Trinity Lutheran is a very significant decision in the Supreme Court's jurisprudence about the Religion Clauses. The first notable issue is that the majority's opinion barely engages with the Establishment Clause. After Justice Roberts noted that the Court of Appeals had found that the Department could provide the grant to the church without violating the Establishment Clause, he failed to explore this issue further. Id. at 2018. Perhaps Justice Roberts determined that the purpose and effect of a grant program to resurface playgrounds was, to such a large extent, secular that there was little reason to elaborate. But, the dissent did not view this question as a simple one at all and criticized the majority's failure to

analyze whether the provision of the grant to Trinity Lutheran violated the Establishment Clause. See e.g., id., at 2028 – 41 (Sotomayor, J., dissenting). Justice Sotomayor found that the state constitutional provision that prevented the provision of the grant to Trinity Lutheran to be consistent with the Court's Free Exercise and Establishment Clause jurisprudence. She wrote, "Missouri has recognized the simple truth that, even absent an Establishment Clause violation, the transfer of public funds to houses of worship raises concerns that sit exactly between the Religion Clauses. To avoid these concerns, and only those concerns, it has prohibited such funding . . . The Constitution permits this choice." Id. at 2038.

From the dissent's perspective, Justice O'Connor's concurrence in Mitchell v. Helms would have required an analysis of whether the provision of the grant to the Trinity Lutheran Church Child Learning Center would have the effect of advancing religion. That the Court never engaged in this analysis suggested to the dissent that the majority had adopted the plurality's approach in Mitchell rather than the one expressed by Justice O'Connor. Id. at 2030. This approach would inquire only whether the aid was secular in nature and whether it was distributed based on neutral criteria rather than whether the aid actually supported religious activity. For the dissent, "[such] a break with precedent would mark a radical mistake." Id. at 2031.

In addition to failing to analyze the provision of the grant to Trinity Lutheran under the Establishment Clause, as a doctrinal matter, Trinity Lutheran suggests that government aid to religious schools, in the form of a grant program like that of the Missouri's Department of Natural Resources, not only may be permissible but also may be required. The effect of this new rule was shown almost immediately. On the day following its decision, the Supreme Court vacated two state supreme court decisions and remanded both decisions for reconsideration in light of Trinity Lutheran. See Moses v. Skandera,367 P.3d 838 (N.M. 2015), *vacated sub nom.*

N.M. Ass'n of Nonpublic Schs. v. Moses, 137 S.Ct. 2325 (2017)(granting *cert.*, vacating judgment, and remanding to the Supreme Court of New Mexico for further consideration in light of Trinity Lutheran,137 S.Ct. 2012); Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015)(en banc), *vacated sub nom.*, Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ., 137 S.Ct. 2325 (2017)(granting *cert.*, vacating judgment, and remanding to the Colorado Supreme Court for reconsideration in light of Trinity Lutheran, 137 S.Ct. 2012).

In Moses v. Skandera, the New Mexico Supreme Court had prohibited the loaning of textbooks to students attending private schools based on a provision of the New Mexico constitution that prohibited the use of public funds to support any sectarian or private school. 367 P.3d 838. And in Taxpayers for Pub. Educ.v. Douglas Cty. Sch.Dist., the Colorado Supreme Court had invalidated a voucher program that Douglas County School District had established, which directed public funds to private and religious schools in payment for students' tuition at those schools. 351 P.3d 461 (2015). The Colorado Supreme Court held that the voucher program violated a state constitutional provision that expressly prohibited the payment of public monies to a school under the control of a church or sectarian denomination. Many states have constitutional provisions analogous to the provision at issue in Moses v. Skandera and Taxpayers for Pub. Educ., which prohibit the use of public funds to support religious schools. Trinity Lutheran calls into question the constitutionality of these provisions, oftentimes referred to as Blaine Amendments.

II. Blaine Amendments

In 1875, Congressman James Blaine proposed an amendment to the federal Constitution that would have prohibited the use of public funds in schools under the control of a religious denomination. This proposal was motivated by an interest in maintaining public education free

from sectarian influence and by hostility to the growing Roman Catholic population in the country. The proposed amendment did not pass the Senate by the required two-thirds vote. Subsequently, thirty-eight states adopted similar provisions in their state constitutions. New York State's Blaine Amendment is codified as section three of article XI of the State Constitution. It provides that "[n]either the state nor any subdivision thereof, shall use its property or credit or any public money . . . directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination . . . but the legislature may provide for the transportation of children to and from any school or institution of learning." N.Y. State Const. Art. XI, § 3.

The Blaine Amendment has been the subject of extensive litigation in New York State. In 1938, in Judd v. Board of Education, residents of the Town of Hempstead in Nassau County challenged the Hempstead School District's decision to provide transportation to students attending parochial schools within the district as violating the Blaine Amendment as then codified. 278 N.Y. 200. In 1938, New York's Blaine Amendment contained no exception for the provision of transportation. The Court of Appeals held that a provision of the Education Law that required a school district to offer similar transportation options to children attending public and private or parochial schools violated the then-Blaine Amendment and was void. 278 N.Y. at 217. The Court of Appeals rejected the argument that the provision of transportation "is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils." Id. at 211. The Court reasoned that the prohibition against "direct or indirect" aid includes any aid that could benefit the school and that the provision of free transportation facilitates attendance at the school -- thereby providing indirect support to the school. The Blaine

Amendment was amended in the same year to expressly authorize the legislature to require the provision of transportation to schools under the control of religious denominations.

The Court of Appeals had a second opportunity to interpret the Blaine Amendment in Board of Education v. Allen, which involved the lawfulness of section 701 of the Education Law. 20 N.Y.2d 109 (N.Y. 1967), *aff'd*, 392 U.S. 236 (1968)(*see* infra, pps.2-4). As amended by the legislature in 1965, section 701 authorized school districts to purchase and loan textbooks to children in both public and private schools, provided that the textbooks were designated for use or approved by the boards of education. The Court of Appeals rejected the reasoning in Judd and held "that it should not be followed." Id. at 115. Departing from the logic in Judd, the Court held that while the goal of the Blaine Amendment was to proscribe the public support for religious schools, it did not mean that "every State action which might entail some ultimate benefit to parochial schools is proscribed." Id. at 115-16. For the Court of Appeals in Allen, "the words 'direct' and 'indirect' relate solely to the means of attaining the prohibited end of aiding religion as such." Id. at 116. Because the goal of the amendment to section 701 was not to aid religious schools but to provide an important benefit to children attending all types of schools, and the textbooks are ones that must be designated or approved by the boards of education, and therefore, must necessarily be secular rather than religious in nature, the Court held that the statute did not constitute the provision of aid to religious schools in violation of the Blaine Amendment. Id. at 117. [1]

Based on the reasoning in Allen, New York has imposed several obligations on boards of education to support students in nonpublic schools. Among other requirements, state law now requires that transportation, textbooks, and health services be provided to students in nonpublic

[1] The Court of Appeals also held that section 701 did not violate the Establishment Clause. Board of Education v. Allen, 20 N.Y.2d at 117. This decision was appealed to the Supreme Court, 392 U.S. 236 (1968), and, as discussed above, see supra at pps. 2-3, the Supreme Court upheld the decision of the Court of Appeals.

schools. Section 3635 of the Education Law requires that transportation services be provided on the same terms to students in public and nonpublic schools. See Educ. Law § 3635(1)(a) and (c). Section 701 requires that textbooks be provided to students in public and nonpublic schools. See Educ. Law § 701(3). Section 912 obliges boards of education to provide children attending nonpublic schools with the same health and welfare services that are made available to students in public schools. See Educ. Law § 912. These services can include "all services performed by a physician, physician assistant, dentist, dental hygienist, registered professional nurse . . . school psychologist, school social worker. . .and may also include vision and health screening tests . . ." Id.

In 2013, the state enacted a law that imposed a very prescriptive requirement on the way the New York City Department of Education (DOE) provides transportation for students whose school day extended until 4 pm or later. Laws of 2013, Chap. 57, Part A, § 23. Rather than rely on section 3635, which requires a school district to provide transportation on the same terms to students in public and nonpublic schools, section 3627 requires the DOE to provide the transportation for such students or to reimburse licensed transportation carriers (or the nonpublic schools that contract with such carriers) for the costs of such transportation. See Educ. Law § 3627 (1). The law specifies that children be dropped off a shorter distance from their homes than the distance required by the DOE's guidelines. Educ. Law § 3627(6). Although the purpose of this legislation was to meet the needs of students in religious schools whose school days can extend late in the day, the legislation was drafted, as Allen requires, to extend a benefit on equal terms to all students whose school day extended until 4 pm or later. That the beneficiaries of this legislation are primarily students who attend religious schools probably would not change the analysis applied by the Court of Appeals in Allen or the result – that the provision of

transportation to the population of students who attend a lengthy school day is a benefit to the student and not to the schools that they attend.

In 2016, the New York City Council authorized the Mayor to establish a program reimbursing nonpublic schools for expenses incurred in the provision of security services. See New Yok City Administrative Code § 10-172. Pursuant to this law, the City established a program that reimburses nonpublic schools – both private and parochial schools – for the costs of security guards whom they employ to provide security services to their students. Id. Relying upon a rationale similar to that for the provision of transportation, textbooks and health services, the City concluded that the provision of security services benefitted the students attending nonpublic schools, among which are many religious schools, and therefore, such support did not violate the Blaine Amendment.

III. Effect of Trinity Lutheran on Blaine Amendments

In the wake of the Supreme Court's remanding Moses v. Skandera to the New Mexico Supreme Court for reconsideration in light of Trinity Lutheran, the New Mexico Supreme Court re-evaluated its interpretation of the state's Blaine Amendment, which is codified as section three of article XII of the State Constitution. Moses v. Ruszkowski, 2018 N.M. Lexis 70.[2] Prior to Trinity Lutheran, the New Mexico Supreme Court had interpreted section three of article XII to prohibit the use of public funds for religious schools as an absolute matter. Id. at * 21.The Supreme Court had considered and rejected the approach endorsed by New York, which had allowed the provision of certain forms of assistance on the ground that such assistance supported students rather than the religious schools. Id. In Moses v. Ruszkowski, the New Mexico

[2] Section three of article XII of the New Mexico State Constitution provides: "The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university."

Supreme Court held that although its Blaine Amendment differed from the state constitutional provision in Trinity Lutheran in that its provision prohibits support of any private or religious school and does not disqualify only religious entities from receiving public monies, it should interpret section three of article XII in a manner that avoids the Free Exercise concerns that Justice Roberts identified in Trinity Lutheran. Id. at *45. To avoid an interpretation that resulted in treating religious schools and non-religious schools differently, the Supreme Court held that the law at issue – which allows the Department of Education to loan textbooks to students in public and private schools – does not support private or religious schools in violation of section three of article XII of the New Mexico State Constitution. Id. at *46. "We conclude that the IML [the law that was challenged] provides a public benefit to students and a resulting benefit to the state. Any benefit to private schools is purely incidental and does not constitute 'support' within the meaning of Article XII, Section 3." Id.

For some commentators, the holding by the New Mexico Supreme Court was not surprising. See, e.g., McCarthy, Martha M., *Trinity Lutheran Church v. Comer: A New Church/State Standard with Far-Reaching Implications*, 352 Ed Law. Rep. 425 (2018). While the New Mexico Supreme Court did not hold that the Free Exercise Clause required that the law at issue make textbooks available to students in religious schools, it did adopt a reading of its Blaine Amendment that will allow – as the New York Court of Appeals did in Board of Education v. Allen, 20 N.Y.2d 109 (1967), aff'd, 392 U.S. 236 (1968) – support for students in religious schools. More generally, the effect of the Trinity Lutheran decision, as evidenced by the holding in Moses v. Ruszkowski, suggests that "the federal Free Exercise Clause overrides antiestablishment provisions that most states have adopted . . ." See 352 Ed. Law Rep. at 431. In addition to having significant ramifications on the extent to which government supports religious

schools, therefore, Trinity Lutheran could shift the balance in our federalist system away from state sovereignty.

As noted above, the Supreme Court also remanded a decision of the Colorado Supreme Court that had invalidated a voucher program of the Douglas County School District, which had permitted the payment of public funds to religious schools. Taxpayers for Pub. Educ. v. Douglas Cty Sch. Dist., 351 P.3d 537 (Colo. 2015) (en banc), *vacated sub nom.* Colo. State Bd. of Educ. v. Taxpayers for Publ. Educ., 137 S.Ct. 2325(2017)(granting *cert.*, vacating judgment, and remanding to the Colorado Supreme Court for reconsideration in light of Trinity Lutheran). The Colorado Supreme Court found that the voucher program provided aid to religious schools in violation of its Blaine Amendment, codified as section seven of article IX of the Colorado Constitution. After the Colorado Supreme Court's decision, the composition of the Douglas County school board shifted and the new school board voted in December 2017 to terminate the voucher program. In January 2018, the Colorado Supreme Court granted the parties' motion to dismiss the decision as moot. See Taxpayers for Pub. Educ. v. Douglas County Sch. Dist., 2018 Colo. LEXIS 195.

While the dismissal of the case involving the voucher program established by the Douglas County School Board did not give the Colorado Supreme Court an opportunity to analyze its Blaine Amendment in light of Trinity Lutheran, in December 2018 Montana's Supreme Court invalidated a tax credit program that would have allowed taxpayers to be reimbursed for their donations to organizations that fund religious schools. See Espinoza v. Montana Department of Revenue, 435 P.3d 603 (2018). The Montana Supreme Court based its decision on its analogue to the Blaine Amendment, which is codified as section six of article X of the Montana Constitution. It provides that "[the] legislature, counties, cities, towns, school

districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies . . . to aid any . . . . school, academy, seminary, college, university . . . controlled in whole or in part by any church, sect, or denomination." The Supreme Court found that the tax credit program permitted "the [l]egislature to subsidize tuition payments at religiously-affiliated private schools" and that this type of support for religious schools "is precisely what the Delegates intended Article X, Section 6 to prohibit." 435 P.3d at 613. Because the Supreme Court held that the tax credit program violated section six, the Court did not analyze the constitutionality of a rule promulgated by the Montana Department of Revenue that excluded all religious schools from participation in the tax credit program. Id. at 614. The Court also concluded that no separate analysis under the Establishment Clause was necessary. Id. And although the Court noted that a broad reading of section six of article X could implicate the Free Exercise Clause, the Supreme Court concluded that "this is not one of those cases." Id. Two justices dissented, questioning the Court's decision as violating the Free Exercise Clause. For the dissenting justices, the decision that section six of article X barred religious schools from participating in the tax credit program raised questions about students' rights under the Free Exercise Clause. The Supreme Court granted certiorari on June 28, 2018. This case presents the question whether the Free Exercise Clause requires the government to support religious schools notwithstanding state constitutional provisions prohibiting such support. The Supreme Court's decision in this case will guide the longevity – or lack thereof – of the state constitutional provisions that prohibit aid in support of schools under the control of religious denominations.

Governmental Regulation of Religious Schools

New York's Education Law requires that children ages six to sixteen attend school on a full-time basis. See Educ. Law, § 3205. State law and regulation closely regulate the provision of instruction in public schools. For example, state law and regulation require the provision of instruction for certain subjects at specific grade levels and in specialized topics as well. See Educ. Law § 3204(3)(a); 8 NYCRR §§100.2-100.5. As a statutory matter, the regulation of instruction in nonpublic schools is less comprehensive. The Education Law provides that students in nonpublic schools, which include religious schools, receive instruction that is "at least substantially equivalent" to the instruction given in public schools in the same district. See Educ. Law § 3204.

The State Education Department (SED) has long provided guidance to nonpublic schools regarding required subjects, specialized topics of instruction, and administrative requirements. See New York State Education Department Guidelines for Determining Equivalency of Instruction in Nonpublic Schools ("Guidelines"), found at http://www.p12.nysed.gov/nonpub/guidelinesequivofinstruction.html These Guidelines indicate that the determination whether students receive a "substantially equivalent" education should be made by the local school district and that the focus of any inquiry by the local school district is on the instruction being provided to the student in its district. In fact, the Guidelines note "the board's [the board of education of the school district in which the child resides] responsibility is to the children living in the district; it has no direct authority over a nonpublic school." Id. While the Guidelines set forth formal requirements with regard to opening new nonpublic schools, for established schools, the Guidelines do not establish a formal schedule for review of the

instruction provided. Rather, the Guidelines provide that if "a serious concern arises about equivalency of instruction in an established school", the superintendent of schools in the local school district should inform the nonpublic school, discuss the reason for the inquiry with the nonpublic school, and if necessary, visit the school "to check on the information which led to the assertion of lack of equivalency." Id. The superintendent should try to work with the nonpublic school to develop a plan of improvement so that the nonpublic school can remedy the deficiencies identified. However, if the superintendent determines that after efforts have been made, an improvement plan has not been designed or the instructional program continues to be inadequate, the superintendent is required to notify the board of education of the district that of the lack of substantial equivalency. Once the board approves a resolution that a nonpublic school is not equivalent, the board must notify the nonpublic school and the students attending such nonpublic school that the children would be considered truant if they continued to attend that school. Id. The Guidelines provide that if parents continue to send their children to a school that has been determined to be not equivalent, the parents should be notified that petitions will be filed in Family Court that their children are truant. There is an appeals process from the determination that a school's program is not equivalent. This process authorizes a school official or a parent to file an appeal with the Commissioner of the SED within 30 days of the local board's decision.

I. Recent Events

In the wake of a complaint made by Young Advocates for Fair Education ("YAFFED") with the New York City Department of Education (NYC DOE) about the adequacy of the secular instruction provided at certain religious schools, in 2015, the NYC DOE commenced an investigation into the adequacy of the instruction at those schools. The focus of YAFFED's

complaint were religious schools called yeshivas, which are schools whose mission is to convey the learning of Jewish texts and values to its students. Significantly, YAFFED's complaint was aimed at a subset of between 30 – 40 yeshivas out of larger group of 80-90 yeshivas located in New York City. The NYC DOE proceeded in accordance with the Guidelines to meet with representatives from the yeshivas and to visit the yeshivas that permitted access to DOE. The efforts of the NYC DOE are fully documented in a letter from the Chancellor of the NYC DOE to the Commissioner of the SED dated August 2018. See https://int.nyt.com/data/documenthelper/164-chancellor-letter-to-sed-8-15/1bb49eafd0d208cd1088/optimized/full.pdf#page=1

A. Felder Amendment

In the spring of 2018, the state legislature amended section 3204 of the Education Law to provide additional guidance regarding how to evaluate whether instruction offered at a nonpublic school was substantially equivalent to that provided in a public school. See Educ. Law § 3204 (2)(ii) – (v). This amendment is referred to as the Felder Amendment because it was introduced by State Senator Simcha Felder. Governor Cuomo signed this amendment into law on April 12, 2018, and it took effect immediately.

The Felder Amendment makes a number of significant changes in the application of the substantial equivalence standard for a targeted set of nonpublic schools. The Felder Amendment defines the set of schools to which these changes should apply with reference to criteria for elementary and middle schools that are distinct from the criteria for high schools. To be a covered elementary or middle school, schools must: "(1) [be] non-profit corporations, (2) have a bi-lingual program, and (3) have an educational program that extends from no later than nine a.m until no earlier than four p.m. for grades one through three, and no earlier than five thirty p.m.

for grades four through eight, on the majority of weekdays . . ." Id. 3204 § (2)(ii). To be a covered high school, schools must: "(1) [be] established for pupils in high school who have graduated from an elementary school that provides instruction as described in this section, (2) are a non-profit corporation, (3) have a bi-lingual program, and (4) have an educational program that extends from no later than nine a.m. until no later than six p.m. on the majority of weekdays . . ." Id. 3204 § (2)(iii). These criteria very generally describe the yeshivas that are the focus of the complaint by YAFFED. These schools are incorporated as not-for-profit corporations, educate their students in both English and Yiddish or English and Hebrew and have lengthy school hours, which become longer as the students get older.

For elementary, middle and high schools that satisfy the criteria described in paragraphs (ii) and (iii) of subdivision two, the Felder Amendment provides that the Commissioner of the SED determines substantial equivalence. Educ. Law § 3204 (2)(v). Therefore, one of the effects of the Felder Amendment is to establish an alternate procedure for the determination of whether the instruction provided at certain religious schools was substantially equivalent to the instruction provided at public schools in the same district. While the responsibility for making the determination for religious schools that met the criteria outlined above shifted to the Commissioner of the SED, the responsibility for making the determination of substantial equivalence for all other nonpublic schools in a district remained with the local board of education.

In addition to making a procedural change, the Felder Amendment also makes a substantive one. For elementary and middle nonpublic schools that satisfy these criteria, the Felder Amendment re-directs the consideration of substantial equivalence from a comparison of the instruction provided in nonpublic schools to that in public ones to an inquiry into whether

"the curriculum provides academically rigorous instruction that develops critical thinking skills in the school's students, taking into account the entirety of the curriculum, over the course of elementary and middle school . . . ." Educ. Law § 3204 (2)(ii). The Amendment further specifies that the inquiry should include an examination of the school's instruction in English, mathematics, history, and science, but describing the nature of the instruction with a focus on skills rather than particular content. Id. For example, instruction in mathematics is described as "instruction . . . that will prepare pupils to solve real world problems using both number sense and fluency with mathematical functions and operations." Id. The emphasis on skills becomes even more pronounced for nonpublic high schools that satisfy the criteria described in paragraph (iii) of subdivision two. The Felder Amendment directs the substantial equivalence inquiry to consider whether "the curriculum provides academically rigorous instruction that develops critical thinking skills in the school's students, the outcomes of which, taking into account the entirety of the curriculum, result in a sound basic education." Educ. Law § 3204 (2)(iii). In contrast to the recitation of the particular areas of study provided for nonpublic elementary and middle schools, the inquiry for nonpublic high schools contains none.

The effect of the Felder Amendment is to establish a different approach for the consideration of substantial equivalence for yeshivas. It moves the locus of decision-making from the local board of education to the Commissioner of SED and it shifts the inquiry from one based on aligning curricula to analyzing the development of skills in the students of a particular school.

B. SED Guidance and Regulations

Over a two year period preceding the enactment of the Felder Amendment, the SED had been working on updating the guidance regarding substantial equivalence. The SED explained

that this "consultative process" was commenced "[i]n response to questions from the field". http://www.nysed.gov/news/2019/state-education-department-proposes-regulations-substantially-equivalent-instruction#comment On November 20, 2018, the SED issued its revised guidelines, which were intended to assist local boards of education in their efforts to assess equivalency. In Young Advocates for Fair Education v. Cuomo, 359 F.Supp.3d 215 (E.D.N.Y. 2019), which involved a challenge to the Felder Amendment, Judge Glasser described the revised guidelines as follows:

> With minor exceptions, the Revised Guidelines incorporate the curricular standards contained in the Education Law and its implementing regulations, and apply them to all private schools. (citations omitted). In this sense, the Revised Guidelines are largely a continuation of the Prior Guidelines, albeit with some changes and clarifications. The Revised Guidelines come with "Toolkits," which are simply checklists of factors that will be reviewed by education officials when making their determination, and each factor corresponds to a specific provision of the Education Law or the regulations promulgated thereunder. The Toolkits are accompanied by an appendix, which sets forth a detailed list of course requirements for private schools at various grade levels and, for some grades, the number of hours per week that must be devoted to each subject. Core subjects such as mathematics, science, English, social studies, art and health must be taught throughout elementary, middle and high schools. In grades 7 and 8, the Revised Guidelines require approximately 3 ½ hours of secular studies per day. For high schools, the Revised Guidelines incorporate by reference Section 100.5 of the Commissioner's regulations, which also generally require more than three

> hours per days of secular studies. (citations omitted). These course requirements "may be met by incorporating, or integrating, the State learning standards" into other courses. Although the Revised Guidelines do not say so explicitly, this would permit private schools to integrate secular subjects into religious classes, provided that the school meets all unit of study requirements and provides students with instruction that enables to achieve State learning standards.

In addition to imposing new substantive requirements on nonpublic schools, the revised guidelines created a formal structure for reviewing the substantial equivalence determination. Under the current guidelines, a local board of education was authorized to take action to the extent a concern has been raised about the equivalency of instruction in a particular school; the guidelines imposed no requirement that local boards of education regularly evaluated the nonpublic schools to ensure that they were providing substantially equivalent instruction. The revised guidelines required local boards of education to review nonpublic schools in their district in the 2018-19 school year and expected those reviews to be completed by the end of the 2020-21 school year. It also anticipated that reviews of nonpublic schools would continue on a five-year cycle.

In the wake of the issuance of the revised guidelines, three associations representing Catholic schools, yeshivas, and independent schools commenced separate proceedings pursuant to Article 78 to challenge the guidelines. Each association also brought a preliminary injunction to prohibit the respondents from taking any action to implement the revised guidelines. The petition brought on behalf of the New York State Council of Catholic School Superintendents and Catholic schools throughout the State raised federal and state constitutional violations as well as numerous challenges under state law. The Catholic schools argued that the revised

guidelines impermissibly entangle the government with religious schools in violation of the Free Exercise Clause and the Establishment Clause, and infringe on petitioners' rights to free exercise and liberty of conscience as protected by the State Constitution. In Matter of Application of New York State Council of Catholic School Superintendents, et al v. Maryellen Elia, Commissioner of Education et al , Verified Petition, ¶ ¶ 174- 183. Petitioners also argued that the guidelines violate parents' right to make their own choices regarding their children's education in violation of the Due Process Clause. Id. ¶¶ 210-216. Among the many state claims, petitioners argued that the SED lacks the statutory authority to require local boards of education to conduct the reviews of substantial equivalence required by the revised regulations, id. ¶ 80- 107, that the revised guidelines violate the State Administrative Procedure Act (SAPA), id. ¶¶ 151 –168, and that the revised guidelines are vague. Id. ¶¶ 108 – 150.

The petition commenced on behalf of several yeshivas throughout the state, Parents for Educational and Religious Liberty in Schools ("PEARLS"), Agudath Israel of America, a national Orthodox Jewish organization, and a number of parents of children in yeshivas sought a declaratory judgment. Similar to the petition brought on behalf of Catholic schools, this petition alleged federal constitutional and state law violations. The federal law claims contend that the revised guidelines impede the religious schools' right to the free exercise of religion and their free speech rights and frustrate the parents' due process right to control the education of their children. Parents for Educational and Religious Liberty in Schools ("PEARL"), Agudath Israel of America, et al v. Betty Rosa, Chancellor of the Board of Regents; and Maryellen Elia, Commissioner of the NYSED, Verified Petition, ¶¶ 110-126. The petitioners also argued that the revised guidelines amount to a licensing requirement for nonpublic schools and that state law provides no authority for the SED to impose such a requirement. Id., ¶¶ 74-84. Similar to the

arguments raised by the Catholic schools, the yeshiva petitioners claimed that state law gives no authority to SED to establish uniform standards for nonpublic schools, that the guidelines should have been promulgated pursuant to SAPA, and that they are vague. Id. ¶¶ 85-96 and 97-106.

In April 2019, Justice Christina Ryba of New York State Supreme Court held that the revised guidelines constituted rules and therefore should have been promulgated pursuant to SAPA. PEARL et al v. Rosa et al, Index No. 901354-19 (Albany Co. April 17, 2019). Justice Ryba found that the revised guidelines created fixed standards and required that local school authorities take specific actions. Because the guidelines were not promulgated pursuant to SAPA, Justice Ryba nullified the rules and did not reach any other objections that petitioners raised.

Following the court's decision, the SED, pursuant to SAPA, proposed regulations regarding substantial equivalency; the proposed regulations, while updated, largely incorporate the standards developed in the guidance issued in November 2018. See Memo re Proposed Addition of Part 130 of the Regulations of the Commissioner of Education Relating to Substantially Equivalent Instruction for Nonpublic School Students, dated May 30, 2019. These proposed rules were published in the State Register on July 3, 2019. Notice of Proposed Rulemaking, Substantially Equivalent Instruction for Nonpublic School Students, N.Y. State Register, Vol. XLI, Issue 27 (July 3, 2019) . The public comment period ended on September 3rd. News reports have indicated that SED received over 140,000 comments – generally in opposition – to the rules.

Based on the petitions that were filed in response to the November 2018 issuance of the revised guidelines by SED, it is extremely likely that, if the proposed regulations are adopted by the Board of Regents, some, if not all, of the parties that challenged the revised guidance will

challenge the regulations on the same grounds that they challenged the revised guidance. Among the many grounds that the parties may assert, there will likely be a claim that the regulations burden the free exercise of religion of the parents whose children attend the nonpublic schools covered by these regulations.

In Blackwelder v. Safnauer, parents who were home-schooling their children brought an action to prevent the superintendents of a number of school districts, the Cato-Meridian Central School District, the Oswego School District, and Waterloo School District, from reviewing the homeschooling program and conducting an on-site inspection. Blackwelder v. Safnauer, 689 F.Supp. 106 (N.D.N.Y. 1988), aff'd on other grounds, 866 F.2d 548 (2d Cir. 1989). Among other claims, parents argued that the state's compulsory education laws, including the requirement that a child in an educational setting outside of a public school receive substantially equivalent instruction to that offered to public school students, "[burdened] their faith because the state retains the power to approve or disapprove the manner in which they accomplish what they view as a religious command, that is, the manner in which they educate their children." Id. at 128. The District Court rejected plaintiffs' Free Exercise challenge to the substantial equivalency requirement, holding that the state's interests in educating minors were compelling and that the substantially equivalent standard was the least restrictive means to achieve the state's interest in ensuring that minors received an education that met certain minimum standards. Id. at 135.

In reaching this holding the District Court reinforced that only compelling state interests justified the burdening of an individual's religious practices. Id. at 130 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)), but see Leebaert v. Harrington, 332 F.3d 134, 139 (2d Cir. 2003) (holding that rational basis review applies to a "hybrid" claim based on the Free Exercise Clause and the right of a parent to direct the rearing of his child under the Due Process Clause). The

District Court found that New York had compelling interests in requiring substantial equivalency. Id. The Court found that New York had an interest in preparing young children to participate in the democratic political system as well as an interest in preparing children to become self-sufficient members of society. Id. The Court also recognized New York's interest in exposing children to a wide range of ideas in order to prepare them to become functioning members of society, and how this interest potentially conflicts with parents' interest in preventing exposure to certain ideas – whether for religious or other reasons. While the Court noted that in Wisconsin v. Yoder, the Supreme Court upheld the Amish parents' right to direct their children's education, consistent with their religious beliefs, by withdrawing their children from school when they were 14 years old, the District Court found that the facts in Yoder were sufficiently distinct from the facts at issue to govern the outcome. The District Court found that the unique circumstances of the Amish, whose children attended school until eighth grade and who then were expected to live relatively isolated from mainstream American society, did not compel the same result in situations like the one presented in Blackwelder. The District Court wrote, "[u]nless a child is a member of an identifiable religious sect with a long history of maintaining a successful community separate and apart from American society in general, it must be assumed that that child must be intellectually, socially, and psychologically prepared to interact with others who may not share the views of the parents in the case at bar." Id. at 135; see also Leebaert v. Harrington, 332 F.3d at 144-45 (distinguishing a parent's objections to the health curriculum in his son's middle school based on his interests as a parent and on his religion from the Amish community's interests in maintaining their identity and way of life).

Against these interests, the District Court found that the substantially equivalent standard was the least restrictive means to satisfying the state's interest in ensuring that its students

received an education that met some minimum standards. Significantly, the Court observed that "[the] 'substantially equivalent' standard is flexible enough to allow local school officials sufficient leeway to accommodate the special requirements of diverse religious groups without sacrificing the vital state interests at issue." Id.

In 1990, two years after the District Court's decision in Blackwelder, the Supreme Court held that the First Amendment does not bar application of a "neutral, generally applicable law to religiously motivated action." Employment Div. v. Smith, 494 U.S. 872, 881 (1990). Pursuant to this holding, a challenge brought against the substantial equivalence standard, or the regulations promulgated under this standard, would only have to satisfy rational basis review rather than the strict scrutiny standard applied in Blackwelder. However, if the regulations are adopted by the Board of Regents, there will likely be arguments made that, notwithstanding Smith, the communities affected are more akin to the Amish community in Yoder, and therefore that the applicable standard ought to be strict scrutiny rather than rational basis. Assessing the appropriate standard and determining the impact of the regulations on the schools' ability to pursue their religious mission – which must be a highly factual inquiry – in light of the state's interest in ensuring that its residents receive an education that meets some minimum criteria will be a complex but extraordinarily important undertaking.