In re: Appeal of Michael and Nancy Valente (Ludlow Mt. Holly UUSD, Respondent)	**State Board of Education**

In re: Appeal of Paul and Ingrid Gallo (Rutland Town School District, Respondent)	**State Board of Education**

In re: Appeal of Joanna and Stephen Buckley (Hartland School District, Respondent)	**State Board of Education**

In re: Appeal of Lucy and Michael Dunne (Mt. Ascutney School District, Respondent)	**State Board of Education**

INTRODUCTION

This decision addresses the separate appeals filed with the State Board of Education by Michael and Nancy Valente; Paul and Ingrid Gallo; Joanna and Stephen Buckley; and Lucy and Michael Dunne. In each of these cases, the appellants asked their respective school district to pay tuition for the 2020/21 school year to the school attended by their child. In each case, the tuition request was denied by the school district and the appellants paid out of pocket. Each family then filed a timely appeal to the State Board of Education. Each of these appeals involves the same legal issue: what are the constitutional parameters, both state and federal, that govern public tuition payments to religious schools?

The Valentes, the Gallos, and the Buckleys are represented by David Hodges, Esq. and Erica Smith, Esq. The four school districts are all represented by William Ellis, Esq. Lucy and Michael Dunne represent themselves.

The State Board of Education appointed Bridget Asay, Esq. to serve as hearing officer to handle prehearing matters. In each appeal, the parties agreed upon and filed certain stipulated facts and documents constituting the record below. The appellants waived any evidentiary hearing. The Valentes, Gallos, and Buckleys requested oral argument. The State Board held oral argument for those appeals on March 18, 2021.

For the reasons explained below, the Valentes' appeal is dismissed as moot. The Board directs that the tuition payments requested by the Gallos, Buckleys, and Dunnes for the 2020/21 school year be granted.

FINDINGS OF FACT

The facts set forth below are drawn from the parties' stipulated facts and from the documents submitted by the parties as the record below. To the extent the State Board has not included here specific provisions from the parties' stipulated facts, the State Board has concluded either that the matter is not material or the matter is not properly designated a "fact." The Board considered all facts stipulated to by the parties and the findings set forth below represent its rulings on those facts. *See* 3 V.S.A. § 812(a); *In re Chase*, 2009 VT 94, ¶ 11, 186 Vt. 355, 987 A.2d 924 ("administrative tribunal is not required to rule individually on each request for a proposed finding, but rather the record need indicate only that the tribunal considered and decided each proposed finding" (cleaned up)).

Valente Family

1. Michael and Nancy Valente and their child D.V. are residents of Mount Holly, Vermont. Their school district is the Ludlow Mount Holly Unified Union School District. It is a member of the Two Rivers Supervisory Union. Their school district does not have a designated public high school.

2. D.V. attends Mount St. Joseph Academy.

3. In September 2019, Michael Valente asked the Two Rivers Supervisory Union for tuition for the 2019-20 school year for D.V. to attend Mount St. Joseph Academy.

4. In October 2019, Union Superintendent Meg Alison Powden informed him that because Mount St. Joseph Academy is a religious school, the district could not send it tuition money:

> Our legal counsel has informed us that sending public funds to a religious school is a violation of Article 3 of the Vermont Constitution. This decision was made based on a court case from 1999, *Chittenden Town School District v. Department of Education*. In this case, the court found that if the Chittenden Town School District paid tuition to

Mount St. Joseph's it would violate Article 3 of the Vermont Constitution.

5. On July 20, 2020, Michael Valente requested that the Mount Holly Select Board pay for D.V.'s education at Mount St. Joseph Academy for the 2020-21 school year. He was told to contact Lauren Fierman, the new superintendent of schools for the Union.

6. On August 10, 2020, Lauren Fierman said in an e-mail that she would provide a response about tuition payments after checking with legal counsel.

7. On September 9, 2020, the Valentes filed a lawsuit against the supervisory union, among other parties, to receive the tuition. The lawsuit was commenced without Ms. Fierman responding to Michael Valente.

8. On November 6, 2020, the Valentes renewed their tuition request to both the Union and the Ludlow Mount Holly Unified Union School District.

9. On December 11, 2020, their request was formally denied by the school district. The letter states:

> On December 9, 2020, the Ludlow Mount Holly Unified Union School District (LMHUUSD) Board considered your request for tuition reimbursement for your child to attend Mount Saint Joseph Academy. After an executive session, the Board unanimously approved a motion to deny the tuition request, based on the advice of counsel, and to strongly encourage the Valentes to pursue their statutory right to appeal the Board's decision to the Vermont State Board of Education. The Board had hoped that, prior to their meeting last night, the Vermont Agency of Education would provide guidance on the question of tuition reimbursement requests such as yours, but such guidance was not forthcoming. The Board is hopeful you will take this opportunity to appeal its determination to the State Board of Education to bring some clarity to the question of whether or not adequate safeguards are available for public tuition payments to Mount Saint Joseph Academy.

10. No further information about the basis for the school board's decision to deny the Valentes' tuition request was presented.[1]

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[1] With respect to this finding 10 and findings 22, 34, and 42: the State Board acknowledges that the records include further information regarding communications between the appellants and school district/supervisory union staff, in some cases regarding the 2020/21 school year and in some cases regarding a prior year. The only decisions under review by the State Board are the decisions made by the school boards with respect to requests for the 2020/21 school year. The school boards did not provide explanations of the grounds for their decisions, citing only "the advice of counsel."

11. The Valentes properly and timely appealed the denial of their 2020-2021 tuition request to the State Board of Education.

12. On March 12, 2021, the Valentes were notified that the school board reconsidered their request and decided to pay tuition to Mount Saint Joseph Academy for the 2020/21 school year. The letter to the Valentes stated in relevant part:

> At the LMHUUSD board meeting on March 10, 2021, the board reconsidered your request for tuition payment of $6500 for your son to attend Mount Saint Joseph this school year.
>
> The board concluded that, in light of the Vermont Agency of Education's recent rescission of its 'Best Practices' guidance on tuition payments to independent schools, coupled with recent federal court rulings, it will pay tuition to Mount Saint Joseph as you have requested. Please note that any payment of tuition will be without prejudice to the school district, which expressly reserves its right to request a certification concerning the use of public funds for religious instruction in the future as this area of the law continues to evolve.
>
> Please complete the attached proof of residency form and return it to the TRSU office. Upon receipt of that completed form, and receipt of an invoice from Mount Saint Joseph, we will pay the tuition.

13. The parties agreed that this March 12, 2021 letter could be considered as part of the record before the State Board of Education.

Gallo Family

14. Paul and Ingrid Gallo and their child L.G. are residents of Rutland Town, Vermont. Their school district is the Rutland Town School District. It is a member of the Greater Rutland County Supervisory Union. The Rutland Town School District does not have a designated public high school.

15. L.G. attends Mount St. Joseph Academy.

16. On August 24, 2020, Paul Gallo asked the Greater Rutland County Supervisory Union for tuition for the 2020-21 school year for L.G. to attend Mount St. Joseph Academy.

17. On August 25, 2020, the Supervisory Union Business Manager Louis Milazzo informed him that "Under Vermont's current laws regarding tuition we are not permitted to pay schools with a religious affiliation."

18. On August 27, 2020, Paul Gallo wrote to "again request payment of the invoice I provided." That same day, Louis Milazzo informed him that he was "not in a position to approve your request. I have checked with the Vermont Agency of Education, and per their legal guidance, this request is not permitted. Feel free to reach out to the Vermont Agency of Education directly." Included on this email was Christopher Sell, the union's superintendent.

19. On September 9, 2020, the Gallos filed a lawsuit against the Supervisory Union, among other parties, to receive the tuition.

20. On November 6, 2020, the Gallos renewed their tuition request to both the Supervisory Union and the Rutland Town School District.

21. On December 18, 2020, the Gallos' request was formally denied by the school district:

> The Rutland Town School Board took up the tuition reimbursement for your daughter to attend Mount Saint Joseph Academy at its meeting on December 14, 2020. Following an executive session, the Board unanimously approved the following motion: 'On advice of counsel, I move to deny the Gallo's renewed request for the Rutland Town School District to pay tuition for their child to attend Mount Saint Joseph, and that the Board strongly encourage the Gallo's to pursue their statutory right to appeal the Board's decision to the Vermont State Board of Education.' The Board was hopeful that the Vermont Agency of Education would provide guidance in advance of last night's meeting on the question of tuition reimbursement requests such as yours, but such guidance was not forthcoming. The Board is hopeful you will take this opportunity to appeal its determination to the State Board of Education to bring some clarity to the question of whether or not adequate safeguards are available for public tuition payments to Mount Saint Joseph Academy.

22. No further information about the basis for the school board's denial of the Gallos' tuition request was presented.

23. The Gallo family has had to pay tuition out-of-pocket.

24. The Gallos properly and timely appealed the denial of their tuition request for the 2020-2021 school year to the State Board of Education. The district, through counsel, has represented that the Gallos made a procedurally proper request that the district pay tuition for L.G. for the 2020-2021 school year to Mount St. Joseph Academy.

Buckley Family

25. Joanna and Stephen Buckley and their child C.B. are residents of Hartland, Vermont. Their school district is the Hartland School District. It is a member of the Windsor Southeast Supervisory Union. The Hartland School District does not have a designated public high school.

26. C.B. attends the New England Classical Academy (NECA).

27. On September 5, 2019, Joanna Buckley wrote, in part, to Windsor Southeast Supervisory Union Superintendent David Baker, "Just wondering who I can petition about getting NECA on the list of acceptable schools for Hartland School choice."

28. That same day, David Baker responded in part, "I'm not sure what NECA stands for, but I would be glad to visit their webpage and see if they could qualify for public school funding."

29. In October 2019, Baker told Joanna Buckley that because the school was "foundationally religious" the school could not receive public tuition payments.

30. In July 2020, Joanna Buckley requested the tuition benefit from the Hartland School District. She did not receive a response.

31. On September 9, 2020, the Buckleys filed a lawsuit against the Supervisory Union, among other parties, to receive the tuition.

32. On November 6, 2020, the Buckleys renewed their tuition request to both the Supervisory Union and the Hartland School District.

33. On December 18, 2020, their request was formally denied by the school district. David Baker wrote:

> The Hartland School Board took up the tuition reimbursement request for your son to attend New England Classical Academy ("NECA") at its meeting on December 21, 2020. Following an executive session, the Board voted unanimously to deny your tuition request on advice of counsel and to strongly encourage you to pursue your statutory right to appeal their decision to the Vermont State Board of Education. The Board was hopeful the Vermont Agency of Education ("AOE") would provide guidance in advance of last night's meeting on the question of tuition reimbursement requests for students to attend schools such as NECA. I have personally toured NECA and reviewed its curriculum, and found that religious instruction is interwoven throughout. Unfortunately, guidance from the AOE was not forthcoming. The Board is hopeful you will take this opportunity to appeal its determination to the State Board of Education to bring some clarity to the question of whether or not adequate safeguards are available for public tuition payments to NECA.

34. No further information about the basis for the school board's decision to deny the Buckleys' tuition request was presented.

35. The Buckley family has had to pay tuition out-of-pocket.

36. The Buckleys properly and timely appealed the denial of their tuition request for the 2020-21 school to the State Board of Education. The district, through counsel, has represented that the Buckleys made a procedurally proper request that the district pay tuition for C.B. for the 2020-2021 school year to the New England Classical Academy.

Dunne Family

37. Lucy and Michael Dunne and their child B.D. are residents of the Mount Ascutney School District. The Mount Ascutney School District participates in town tuitioning for certain students pursuant to its Articles of Association.

38. B.D. attends the Kent School in Kent, Connecticut as a high school student.

39. In September 2020, Lucy Dunne asked the Windsor Southeast Supervisory Union for tuition for the 2020-21 school year for B.D. to attend Kent School.

40. In November 2020, Supervisory Union Superintendent David Baker informed Ms. Dunne that although the school board makes the final decision, he would not be able to recommend that tuition money be sent to Kent School because of its continued affiliation with the Episcopal Church.

41. At its meeting on December 9, 2020, the Mount Ascutney Board of School Directors denied the Dunnes' tuition payment request for Kent School, and on December 11, 2020, Superintendent Baker sent a letter to the Dunnes informing them of the Board's decision and strongly encouraged them to appeal that decision to the Vermont State Board of Education.

42. No further information about the basis for the school board's decision to deny the Dunnes' tuition request was presented.

43. The Dunnes properly and timely appealed the denial of their tuition request for the 2020/21 school year. The district has not disputed that the Dunnes made a procedurally proper request that the district pay tuition for B.D. to the Kent School for the 2020/21 school year.

The Schools

44. Mount St. Joseph Academy is a Catholic school in Rutland, Vermont.

45. Mount St. Joseph Academy is an approved independent school in Vermont.

46. There is no evidence in the record that Mount St. Joseph Academy was asked whether it could certify that public tuition payments would not be used for religious worship or instruction. There is no evidence in the record that Mount St. Joseph Academy was asked about any other safeguards to prevent the use of public tuition payments for religious worship or instruction.

47. In its mission statement, Mount St. Joseph Academy states that it is "centered in the religious education, spiritual development and faith formation of all students…all students will participate in Catholic faith experiences, including (but not limited to): liturgies, prayer services, retreats, ministry events, daily prayer and service experiences." Students are required to take religion classes.

48. The parties have stipulated that the State Board may consider Mount St. Joseph Academy's website, msjvermont.org.

49. New England Classical Academy is a Catholic school in Claremont, New Hampshire.

50. The parties have stipulated that New England Classical Academy is an approved independent school in New Hampshire.

51. "Rooted in the Catholic faith," New England Classical Academy provides students with a "classical education as preserved and furthered by the Catholic Church." Students learn about the Bible and are taught the school's distinctive religious views. In each classroom, there are crosses marking the crucifixion of Jesus Christ.

52. The parties have stipulated that the State Board may consider New England Classical Academy's website, newenglandclassicalacademy.com.

53. There is no evidence in the record that New England Classical Academy was asked whether it could certify that public tuition payments would not be used for religious worship or instruction. There is no evidence in the record that New England Classical Academy was asked about any other safeguards to prevent the use of public tuition payments for religious worship or instruction.

54. The Kent School is located in Kent, Connecticut. The parties have stipulated that the Kent School is an approved independent school in Connecticut.

55. The Kent School is affiliated with the Episcopal Church. Based on its website the curriculum includes 163 course offerings 18 of which are advanced placement in various disciplines and 8 of which are required courses in Theology titled: Theology, Psychology and Religion, Social Ethics, Dreams, Theology and Literature, World Religions, Philosophy, and Christian Spiritual Life. Chapel services are held once a week and focus on spiritual exploration as part of intellectual growth.

56. There is no evidence in the record that the Kent School was asked whether it could certify that public tuition payments would not be used for religious worship or instruction. There is no evidence in the record that the Kent School was asked about any other safeguards to prevent the use of public tuition payments for religious worship or instruction.

57. The parties have stipulated that the State Board may consider the Kent School's website, www.kent-school.edu.

58. There is hearsay evidence in the record that other school districts in Vermont have made tuition payments to the Kent School in recent years. The parties did not stipulate to this as a fact. The evidence consists of a memorandum filed by the Vermont Attorney General's Office in federal court litigation and an attached chart that appears to show tuition payments by school districts to schools with a religious affiliation, including the Kent School. These materials were

submitted by the Gallo, Buckley, and Valente appellants to their school district boards and the chart was also proffered by the Dunnes. In the absence of any objection by the respondents, and given the Attorney General's obligations with respect to accuracy in court filings, the State Board accepts the chart as reasonably reliable evidence of tuition payments by Vermont school districts in recent years. *See* 3 V.S.A. § 810(1). Although the State Board has considered the chart, the chart is not necessary or material to the Board's decision.

REASONING AND CONCLUSIONS OF LAW

I. Legal Framework

A. Public Tuition Payments to Independent Schools

Some Vermont school districts provide for the secondary education of resident students by paying tuition on behalf of those students to other public schools or to independent schools. These tuition programs are governed by Sections 822 and 824-828 of Title 16 of the Vermont Statutes. To generalize, a Vermont school district must either: maintain a public high school; designate up to 3 public high schools or approved independent schools for their district and pay tuition for its students to attend those schools; or pay tuition for its students to attend a public high school or a qualifying independent school chosen by the students' families.[2]

Vermont statutes and rules typically use the term "independent school" rather than "private" school, so this decision likewise uses the term "independent school" to refer generally to schools that are not government-run.

A district that tuitions its students must comply with Section 828 of Title 16, which provides as follows:

> A school district shall not pay the tuition of a student except to a public school, an approved independent school, an independent school meeting education quality standards, a tutorial program approved by the State Board, an approved education program, or an independent school in another state or country approved under the laws of that state or country, nor shall payment of tuition on behalf of a person be denied on account of age. Unless otherwise provided, a person who is aggrieved by a decision of a school board relating to eligibility for

[2] This is a generalization and not a comprehensive description of every circumstance in which tuition payments are made to independent schools. For example, an Act 46 merger agreement may require grandfathered tuition payments for certain students even though the new district operates a high school. This general description is sufficient for purposes of deciding these appeals.

> tuition payments, the amount of tuition payable, or the school he or she may attend, may appeal to the State Board and its decision shall be final.

16 V.S.A. § 828. For schools located in Vermont, an "approved independent school" is a school other than a public school that meets the criteria for approval set forth in 16 V.S.A. § 166 and relevant rules of the State Board of Education. For schools outside Vermont, the district must also comply with State Board Rule 2224.3. Pursuant to that rule, an independent school in another state must be properly accredited or approved to receive Vermont tuition payments.[3]

School districts that pay tuition to independent schools are not necessarily obligated to pay the full tuition rates charged; by statute, the districts pay "an amount not to exceed the average announced tuition of Vermont union high schools for the year of attendance for its students enrolled in an approved independent school . . . or any higher amount approved by the electorate at an annual or special meeting warned for that purpose." 16 V.S.A. § 824(c). If a family chooses a school that charges more than the amount the district is obligated to pay, the family must pay the rest of the tuition.

As these appeals come to the State Board, the parties agree that each of the families is otherwise eligible for tuition payments for the 2020/21 school year pursuant to 16 V.S.A. § 828.

No Vermont statute or rule limits the payment of tuition to independent schools based on the schools' religious affiliation, programming, or instruction. Nothing prevents religious schools in Vermont from qualifying as approved independent schools; one of the schools at issue here, Mount St. Joseph Academy, is an approved independent school in Vermont.

B. State Board's Authority to Decide the Appeals

The appellants in these four cases ask the State Board of Education to reverse the decisions of their local school districts and direct that the districts pay tuition for the 2020/21 school year to the schools their children attend. The appeals are brought pursuant to the last sentence of 16 V.S.A. § 828, which states: "Unless otherwise provided, a person who is aggrieved by a decision of a school board relating to eligibility for tuition payments, the amount of tuition payable, or the school he or she may attend, may appeal to the State Board and its decision shall be final."

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[3] Two of the schools at issue in these appeals are located in other states. Solely for purposes of these appeals for the 2020/21 school year, the State Board accepts the parties' stipulation that these schools are "approved" as required by statute and rule. The Board reiterates, however, that districts must conduct a sufficient inquiry to determine that *any* independent school located within or outside Vermont meets the legal requirements to receive Vermont tuition payments.

The tuition payment requests in each case were initially made to, and denied by, district administrators. After noticing appeals to the State Board, the appellants renewed their requests with the school districts and those requests were then formally denied, in each case, by the respective school board. The districts do not dispute that the appellants made procedurally proper requests for the tuition payments. The districts encouraged the appellants to appeal to the State Board and do not dispute that the appeals were properly taken.

Based on these facts and the position taken by the respondent school districts, the Board concludes that the appellants in these cases timely and properly appealed the denial of tuition payment requests for the 2020/21 school year and the Board has authority to decide the appeals under § 828. The Board has no need to address, and does not decide, what time limits and other procedural requirements a district could impose for tuition payment requests for a given school year; nor does the Board address the time limits for appeals under § 828.

The only decisions under review by the Board are the decisions of the respective school boards denying tuition requests by these four families for the 2020/21 school year.

II. The Valentes' Appeal is Moot

The Board concludes that the appeal brought by the Valentes is now moot because their school district has agreed to pay tuition to Mount St. Joseph Academy for the 2020/21 school year. "In general, a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Houston v. Town of Waitsfield*, 2007 VT 135, ¶ 5, 183 Vt. 543, 944 A.2d 260 (cleaned up). Because the tuition payment has been approved, there is no effective relief that the Board can grant. *See id.* (where changed circumstances mean that court can no longer grant effective relief, case is moot).

At oral argument, the Valentes' counsel argued that the school board's decision does not resolve tuition requests for future years, pointing to language in the district's letter that "expressly reserves its right to request a certification concerning the use of public funds for religious instruction *in the future* as this area of the law continues to evolve." (Emphasis added.) That does not change the mootness analysis. The only issue that the school board could decide and did decide was the payment of tuition for the 2020/21 school year. That is the only issue on appeal to the State Board. Neither the district nor this Board can decide in advance to grant a tuition request for future years. Numerous factors can affect eligibility for tuition payments, including: the family's residence; the family's choice of school; the school's continued operation, regulatory approval, and willingness to accept the student; a district's decision regarding a designated high school; district mergers; and state education funding requirements and other requirements of state and federal law.

The Board recognizes that uncertainty about legal requirements is difficult for families trying to plan for their children's education. School districts, however,

do not control those requirements. In the Board's view, the district's letter merely acknowledges that the district must make future decisions based on the legal requirements in place at that time. The district has not placed any condition on the payment of tuition for the 2020/21 school year. There is no further action that the State Board can take in this matter.

The Board accordingly dismisses the appeal of Michael and Nancy Valente as moot.

III. Gallo, Buckley, and Dunne Appeals

The Gallo, Buckley, and Dunne families ask the Board to reverse the actions taken by the school districts and approve their tuition payment requests for the 2020/21 school year. As explained below, the Board concludes that their tuition payment requests for the 2020/21 school year should be granted.

A. Relevant Law

These appeals require the Board to harmonize, to the best of its ability, the U.S. Supreme Court's interpretations of the First Amendment and the Vermont Supreme Court's interpretation of the Compelled Support Clause in Chapter 1, Article 3 of the Vermont Constitution. To the extent there is a conflict, the Board must ensure that the requirements of the First Amendment are met.

The key ruling from the Vermont Supreme Court is *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 169 Vt. 310, 343, 738 A.2d 539, 562 (1999). In that case, the Chittenden Town School District (then a tuition-paying district) had decided to make tuition payments on behalf of its students who attended Mount St. Joseph Academy. In fact, as the Court observed, the district "intend[ed] to pay tuition to any qualifying secondary school, sectarian or secular, selected by the students and parents." *Id.* at 318, 738 A.2d at 546. The Court reasoned that the district's system "can, and presumably will, expend public money on religious education" because "the public and private sources of revenue are commingled so that each supports religious education." *Id.*

The Court considered whether these unrestricted payments to religious schools, which would to some degree fund religious education, were permissible under the Vermont Constitution. Chapter 1, Article 3 of the Vermont Constitution provides:

> That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience . . . .

This provision is referred to (in part) as the Compelled Support Clause.

The Vermont Supreme Court held in *Chittenden* that the Compelled Support Clause barred the use of public tuition payments to support religious worship, which includes religious education. Thus, the Court held that the Chittenden School District's plan to pay tuition to Mount St. Joseph Academy and other sectarian schools, with no restrictions on funding religious education, violated the Compelled Support Clause. The Court held that this unrestricted system lacked adequate safeguards to prevent the use of public funds to support religious instruction and worship. The *Chittenden* decision did not explain what safeguards would suffice to permit tuition payments to religious schools.

Importantly, the Vermont Supreme Court did not hold that any tuition payments to religious schools would violate the Compelled Support Clause. The Court rejected the plaintiffs' Free Exercise Clause challenge for just this reason:

> The Free Exercise argument is premised on plaintiff's assumption that we would conclude that children who attend religious schools may not receive public educational funding, while children who attend public schools may. This is not our ruling. We have determined only that public funds may not pay for religious worship within the meaning of Article 3, wherever it occurs.

Chittenden, 169 Vt. at 344, 738 A.2d at 563. A more recent decision of the Vermont Supreme Court confirms this reading of *Chittenden*, explaining that *Chittenden* "emphasized that the major deficiency in the tuition-payment system was the lack of restrictions that prevented the use of public money to fund religious education, and that it was not ruling more generally that children who attend religious schools may not receive public educational funding." *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 23, 205 Vt. 586, 178 A.3d 313 (describing *Chittenden* ruling as "narrow").

The Vermont Supreme Court decided the *Chittenden* case in 1999. The U.S. Supreme Court's interpretation of the First Amendment (both the Free Exercise Clause and the Establishment Clause) has evolved since then. Two recent cases are particularly relevant to this decision: *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) and *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020). Both cases involved state programs that restricted access to public funds because of state constitutional provisions that bar the use of public monies to support churches. These provisions are sometimes called "no-aid" provisions.

In *Trinity Lutheran*, Missouri refused to allow a church school to participate in a public grant program that funded safer playground surfaces. 137 S. Ct. at 2017. The Supreme Court held that this exclusion violated the Free Exercise Clause. The Court explained that:

> The Free Exercise Clause protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status. Applying that basic principle, this Court has repeatedly

> confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order.

Id. at 2019 (cleaned up). The exclusion of Trinity Lutheran from the playground grant program "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 2021. The Court viewed the exclusion as a "penalty" and held that the state's interest in "skating as far as possible from religious establishment concerns" was not enough to justify its policy. *Id.* at 2024. "The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far." *Id.*

The *Trinity Lutheran* decision notes that the case involved "express discrimination based on religious identity with respect to playground resurfacing." The Court explained that it "d[id] not address religious uses of funding or other forms of discrimination." *Id.* at 2024 n.3 (plurality op.).[4] Moreover, the Court repeatedly noted that Trinity Lutheran otherwise qualified for the grant program and was excluded "solely" because of its religious character. *See supra; see also id.* at 2025 ("the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution").

Last year, the Supreme Court extended its reasoning in *Trinity Lutheran* to invalidate Montana's "no-aid" provision, which "exclude[d] schools from government aid solely because of religious status." *Espinoza*, 140 S. Ct. at 2255. *Espinoza* did not involve a direct tuition payment, but a rather a state-sponsored scholarship opportunity funded through state tax credits. The Montana Supreme Court held that the program violated the no-aid provision because the scholarship funds were available to students attending private religious schools. *See id.* at 2252-53.

The Supreme Court reversed, holding that "Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools" and thus violated the Free Exercise Clause. 140 S. Ct. at 2255. The Court explained that *Trinity Lutheran* and other precedent can be "distilled . . . into the 'unremarkable' conclusion that disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'" *Id.* at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). Montana's no-aid provision violates the First Amendment because it "plainly excludes schools from government aid solely because of religious status." *Id*.

Montana tried to defend its no-aid provision, and the scholarship program, by arguing that "the no-aid provision applies not because of the religious character of the recipients, but because of how the funds would be used—for 'religious

[4] Not all of the justices who joined the majority opinion in *Trinity Lutheran* joined in this footnote.

education.'" *See id.* at 2255. But the Supreme Court rejected that defense, explaining that the no-aid provision in fact discriminated based on status, not use: "This case also turns expressly on religious status and not religious use. The Montana Supreme Court applied the no-aid provision solely by reference to religious status." *Id.* at 2256. That is, any sectarian school or school controlled by or affiliated with a church was excluded. *Id.* "Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses." *Id.*

The Supreme Court expressly left unresolved whether a restriction specifically on the religious use of public funds would be permissible. *Id.* Noting disagreement among members of the Court on this issue, the Court said only: "We acknowledge the point but need not examine it here. It is enough in this case to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status." *Id.* at 2257.

A recent decision from the First Circuit Court of Appeals that applied *Espinoza* to Maine's school tuition program focused on the distinction between religious status and religious use. *Carson v. Makin*, 979 F.3d 21, 40-45 (1st Cir. 2020). Maine's tuition option bears some similarities to Vermont's, in that public tuition assistance is available to families who do not have access to a public school. The First Circuit held that Maine's tuition program does not exclude religious schools based on their status, but does bar payments to certain schools "based on the religious use that they would make of it in instructing children in the tuition assistance program." *Id.* at 40. Relying on this distinction between religious status and religious use, the First Circuit held that Maine's program does not violate the Free Exercise Clause of the First Amendment. *Id.* at 46. The unsuccessful plaintiffs in that case are seeking review by the U.S. Supreme Court.

The Second Circuit Court of Appeals has issued rulings in two Vermont cases post-*Espinoza*. In the first ruling, the Second Circuit granted a preliminary injunction requiring the state to allow a student who attended a religious school at private expense to participate in the dual enrollment program ("DEP") at the University of Vermont. *A.H. v. French*, 985 F.3d 165, 183-84 (2d Cir. 2021). A student is only eligible for dual enrollment if their high school education is publicly funded. This student lived in a district that tuitions its students and had requested tuition payments from their district. The district refused on the basis that the school (Rice Memorial) was "a religious school for which we do not pay tuition." *Id.* at 173.

The Second Circuit considered *Chittenden's* "adequate safeguards" standard but did not address whether that standard can co-exist with current First Amendment law. Instead, the court held that, based on the record before it, the district had refused to pay tuition to the student's high school solely "based on her school's religious status." *Id.* at 183. The defendants "ha[d] not pointed to any direct evidence showing that 'adequate safeguards' (or, more precisely, their absence) were considered here." *Id.* The student's exclusion from dual enrollment was thus an

unconstitutional penalty imposed based on the religious status of her school. *Id.* at 179.

The Second Circuit further observed that "public funds allocated to the DEP . . . never go to religious high schools; the State finances dual-enrollment by paying tuition directly to approved Vermont colleges." *Id.* Thus, the court reasoned, even if Vermont may apply the "adequate safeguards" test in the context of direct tuition payments, it may not be able to do so with respect to eligibility for dual enrollment, where there is "no risk of religious use." *Id.*[5]

The Second Circuit has also granted emergency relief (in the form of mandamus) to several families who sued after their districts refused to pay tuition to religious schools. In that case, the trial court found that the school districts "excluded the appellants from Vermont's Town Tuition Program ("TTP") 'solely because of [the] religious affiliation' of the appellants' chosen school." *In re A.H.*, No. 21-87, slip op. at 1 (2d Cir. Feb. 3, 2021). The trial court held that this exclusion violated the First Amendment, but declined to order full preliminary relief "in deference to the appellees' desire to develop new criteria for TTP eligibility that would satisfy Vermont's constitution." *Id.* The Second Circuit ordered the trial court "to amend its preliminary injunction to prohibit the appellees from continuing to deny the appellants' requests for tuition reimbursement under the TTP, regardless of the appellants' chosen school's religious affiliation or activities." *Id.* That ruling is contained within an unpublished entry order that says "[a]n opinion will be forthcoming." *Id.* The opinion has not yet issued.

The Buckley and Gallo appellants place substantial weight on the ruling issued in the second *A.H.* case. Until the Second Circuit issues its written opinion, however, the unpublished entry order has limited precedential value.

As this brief summary shows, the constitutional principles that govern the Gallo, Buckley, and Dunne appeals are complicated and not fully settled. It is not the role of this Board to interpret the federal or state constitution; nor is it the role of this Board to predict future decisions of either the Vermont Supreme Court or the U.S. Supreme Court. Rather, the only issue before the State Board is whether these three tuition requests for the 2020/21 school year were properly denied. In rendering its decision, the Board must attempt to faithfully apply the decisions of those courts to the facts of these cases; to harmonize federal and state requirements if possible; and to give priority to First Amendment requirements if there is a conflict.

B. Conclusions of Law for the Gallo, Buckley, and Dunne Appeals

Based on the limited record before the Board, and the U.S. Supreme Court's controlling decision in *Espinoza*, the tuition denials in the Gallo, Buckley, and Dunne appeals must be reversed. On this record, the Board is unable to conclude

[5] This decision only applies to students who live in districts that fund public education by paying tuition to qualified public or independent schools.

that the denial of the tuition payments satisfied the First Amendment standards set forth in *Trinity Lutheran* and *Espinoza*. The decisions under review are the decisions made by the school boards. *See* 16 V.S.A. § 828. With respect to those decisions, the limited record available to the Board shows only that the requests were denied by the school boards, upon the advice of counsel. The record does not establish that the tuition requests were denied because the schools at issue would use public funds for religious worship or instruction. Nothing in the record suggests that the schools were asked whether they could certify that public tuition dollars would not be used to fund religious worship or religious instruction.

The record includes communications involving school district/supervisory union staff, in some cases regarding the 2020/21 school year and in some cases regarding a prior year. Although not directly relevant to the school board decisions that form the basis of the appeals brought by the Gallo, Buckley, and Dunne families, the Board has considered the stipulated facts that pertain to the 2019/2020 school year as well. That evidence does not alter the Board's conclusion.

Espinoza's holding is clear: appellants cannot be excluded from access to tuition payments based solely on the religious affiliations of the schools their children attend. Much as the Second Circuit held in *A.H.*, the Board is unable to find in the record here a basis for the denial other than religious status.[6]

In reaching this decision, the Board does not hold—nor could it—that the Vermont Supreme Court's interpretation of the Compelled Support Clause in *Chittenden* conflicts with *Espinoza*. *Chittenden* holds, in essence, that the Compelled Support Clause requires a use-based limitation on public tuition payments. It does not prohibit tuition payments to religious schools generally or to any category of religious schools. It only requires sufficient safeguards to ensure that public funds are not used to support religious worship or religious instruction. *Chittenden*, 169 Vt. at 344, 738 A.2d at 563; *Taylor*, 2017 VT 92, ¶ 23.

The problem here is that the record does not show that these tuition requests were denied because the schools at issue would have used public dollars to fund religious worship or religious instruction. The State Board assumes that the school boards were motivated by this concern in attempting to applying *Chittenden*. But *Espinoza* makes clear that religious status cannot be used as a stand-in for religious use. *See* 140 S. Ct. at 2256. "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 2261. Given the "strictest scrutiny" that *Espinoza*

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[6] The Board acknowledges that there is evidence in the record that some of the schools at issue provide a course of instruction that could be referred to as "pervasively sectarian"—meaning that precepts of faith are integrated into the curriculum. What is relevant for purposes of the constitutional analysis, however, is not how otherwise-qualified schools provide instruction, but how public funds would be used. On that point, the record is silent.

requires, the Board concludes that the tuition denials in the Gallo, Buckley, and Dunne appeals must be reversed, and the school districts ordered to make the tuition payments.

The Board is cognizant that school districts and local school boards have been placed in a difficult position with respect to tuition requests for religious schools. By statute, the districts must decide whether or not to grant a request for a particular school. The *Chittenden* ruling itself, however, left unclear what safeguards were necessary under the Vermont Constitution. The State did not adopt legislation or rules to implement *Chittenden*—either before or after the U.S. Supreme Court's decisions in *Trinity Lutheran* and *Espinoza.* Further, because the school boards issued no written decisions, and decided these requests on the advice of counsel provided in executive session, the State Board is effectively not privy to the reasoning underlying the boards' decisions.[7] This decision is thus narrow and its language carefully chosen: the State Board is unable to conclude on this limited record that the tuition denials satisfied the First Amendment standards set forth in *Trinity Lutheran* and *Espinoza.*

In keeping with *Chittenden's* direction to adopt adequate safeguards, the Board considered remanding these matters to the school boards to review and adopt potential restrictions on the use of these tuition payments that could be applied consistent with First Amendment requirements. In other words, the Board considered whether to apply a use restriction in these three cases. The 2020/21 school year is nearly over, however, and the families have paid tuition out of pocket. The families raise serious constitutional questions regarding the denial of their requests. A remand could significantly delay resolution of their claims. Further, it is not possible to "unring the bell" and start this process over for 2020/21. These districts have granted tuition requests to some schools and denied them to others. There is no evidence that these or any schools were asked to make a certification regarding their use of funds or to attest to any other safeguards. Requiring only these three schools to make a retroactive certification regarding the use of public funds for the 2020/21 school year could be viewed as discriminatory. The Board's order in these cases is therefore narrow: that the tuition denials be reversed and the tuition payments made.

The Board observes, however, that federal law currently imposes a "use" restriction of its own for education aid. Specifically, Chapter 70 of Title 20 of the United States Code, called "Strengthening and Improvement of Elementary and

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[7] The State Board is not suggesting that the lack of a written decision was improper. Nothing in the record indicates that any party asked the local boards for a written decision. *See* 16 V.S.A. § 554(b) ("A school board shall afford a reasonable opportunity to any person in the school district to appear and express views in regard to any matter considered by the school board and, if requested to do so, give reasons for its action in writing.").

Secondary Schools," authorizes state and local education agencies to use federal financial assistance to provide certain educational services to children attending private schools. *See* 20 U.S.C. § 7881(a)(1). Several statutory provisions impose use restrictions on that assistance:

- "Educational services or other benefits, including materials and equipment, provided under this section, shall be secular, neutral, and nonideological." 20 U.S.C. § 7881(a)(2).
- "Nothing contained in this chapter shall be construed to authorize the making of any payment under this chapter for religious worship or instruction." 20 U.S.C. § 7885.
- The U.S. Secretary of Education, in exercising waiver authority, may not waive prohibitions regarding use of funds for religious worship or instruction. 20 U.S.C. § 7861(c)(9)(B).

Similar language prohibiting the use of federal education aid for religious worship or instruction dates back over 50 years. *See* Elementary and Secondary Education Act of 1965, Pub. L. 89-10, Section 605 ("Nothing contained in this Act shall be construed to authorize the making of any payment under this Act, or under any Act amended by this Act, for religious worship or instruction."). It was readopted and recodified in the No Child Left Behind Act of 2001 (Pub. L. 107-110, Title IX, § 9505) and the Every Student Succeeds Act of 2015 (Pub. L. 114-95, 129 Stat 1802, Sec. 8505).

The U.S. Supreme Court previously considered a legal challenge to federal aid provided to religious schools under these programs. *Mitchell v. Helms*, 530 U.S. 793, 801-03 (2000). Although there is no controlling majority opinion in *Mitchell*, through separate plurality opinions, the Court held that the aid program did not violate the Establishment Clause. Both opinions stressed that the aid provided under the program was secular. *See, e.g., id.* at 822, 825 (plurality op. of Thomas, J.) ("Where the aid would be suitable for use in a public school, it is also suitable for use in any private school."; "program of aid to schools [must] not provide improper content"); *id.* at 859, 867 (plurality opinion of O'Connor, J.) ("When a religious school receives textbooks or instructional materials and equipment lent with secular restrictions, the school's teachers need not refrain from teaching religion altogether. Rather, the instructors need only ensure that any such religious teaching is done without the instructional aids provided by the government."; "the aid must be secular").

Justice O'Connor's plurality opinion in *Mitchell* expressly considered the "safeguards employed by the program" to prevent the use of federally funded aid for religious instruction. *Id.* at 861. In addition to citing the statutory language, Justice O'Connor explained that the state "require[d] all nonpublic schools to submit signed assurances that they will use Chapter 2 aid only to supplement and not to supplant

non-Federal funds, and that the instructional materials and equipment 'will only be used for secular, neutral and nonideological purposes.'" *Id.* at 862. The state program director testified that "all of the State's nonpublic schools had thus far been willing to sign the assurances, and that the State retained the power to cut off aid to any school that breached an assurance." *Id.*

The type of use restriction and certification discussed in *Mitchell* may provide a reasonable option going forward for harmonizing the state and federal constitutional requirements. School districts that pay tuition to independent schools could ask all such schools to certify that public tuition payments will not be used to fund religious instruction or religious worship. Such an approach would place all independent schools on an equal footing; regardless of perceived or actual religious affiliation, all independent schools would be asked to provide the same assurance regarding the use of public tuition payments. No school would be excluded based solely on its religious affiliation. And no school would be required to "refrain from teaching religion." *Mitchell*, 530 U.S. at 859 (plurality op.). Schools themselves would be left to decide whether to accept public tuition payments that could not be used to fund religious worship or religious instruction.

The Board offers these observations with the caveat that this is not a rulemaking proceeding and it cannot, in this context, provide any binding direction to school districts. Further, as explained above, constitutional questions remain unsettled. As litigation moves through the courts, the permissible legal parameters may become clearer. Ultimately the courts will have to resolve whether the use restriction that *Chittenden* requires can co-exist with First Amendment requirements.

ORDER

The appeal of Michael and Nancy Valente is dismissed as moot.

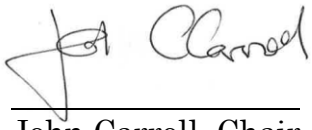
In the appeal of Paul and Ingrid Gallo from the decision of the Rutland Town School Board, the State Board of Education enters the following order:
The December 2020 decision of the Rutland Town School Board to deny the Gallos' tuition request for the 2020/21 school year is reversed. The Rutland Town School District is ordered to pay tuition at the allowable rate for the 2020/21 school year for L.G.'s attendance at Mount St. Joseph Academy.

In the appeal of Joanna and Stephen Buckley, the State Board of Education enters the following order:
The December 2020 decision of the Hartland School Board to deny the Buckleys' tuition request for the 2020/21 school year is reversed. The Hartland School District is ordered to pay tuition at the allowable rate for the 2020/21 school year for C.B.'s attendance at New England Classical Academy.

In the appeal of Lucy and Michael Dunne, the State Board of Education enters the following order:
The December 2020 decision of the Mount Ascutney Board of School Directors denying the Dunnes' tuition request for the 2020/21 school year is reversed. The Mount Ascutney School District is ordered to pay tuition at the allowable rate for the 2020/21 school year for B.D.'s attendance at the Kent School.

Copies of the decision to be provided to the parties on this date.

Approved and entered by the State Board of Education on April 21, 2021.



John Carroll, Chair

Concurring:

Sabina Brochu
Kim Gleason
Lyle Jepson
Jenna O'Farrell
Oliver Olsen
Jennifer Samuelson