

Best Practices for Districts That Pay Tuition to Approved Independent Schools

Purpose

This communication provides nonmandatory guidance about payment of tuition to approved independent schools and independent schools meeting education quality standards. The best practices included in this document reflect U.S. Supreme Court caselaw from 2020 and supersedes all prior communication from the Agency of Education on this topic.

Introduction

Recently, the U.S. Supreme Court held that a government program “cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason” violated the Free Exercise Clause of the U.S. Constitution. *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020).

Under the U.S. Constitution, Vermont school districts may pay tuition to religiously affiliated schools and may not discriminate against an organization on the basis of religion or the organization's religious character or affiliation.

Compliance with Vermont’s Constitution requires that the district adopt adequate safeguards to ensure tuition payment is not used to “erect or support any place of worship or maintain any minister.” Vermont Constitution Chapter I, Article 3. See *Chittenden Town Sch. Dist. v. Dep’t of Educ.*, 169 Vt. 310, 312, 738 A.2d 539, 541–42 (1999) (holding “a school district violates” the Vermont Constitution “when it reimburses tuition for a [a resident student’s attendance at a] sectarian school under § 822 in the absence of adequate safeguards against the use of such funds for religious worship”); *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 23, 205 Vt. 586, 178 A.3d 313 (noting that “the fact that the recipient of government support is a religious organization is not itself determinative” under the Vermont Constitution; “whether the funds are used to support religious worship is the critical question”).

Scope of Guidance

These best practices are recommended for districts that, pursuant to 16 V.S.A. § 821 and § 822, pay tuition to an approved independent school or independent school meeting education quality standards upon the request of a student and/or parent(s).

The guidelines described below are intended to assist districts in implementing adequate safeguards to ensure tuition payment is not used to “erect or support any place of worship or maintain any minister.” Vermont Constitution Chapter I, Article 3.

Nothing in this document shall restrict the ability of the State or a school district from applying to religiously affiliated schools the same eligibility conditions or education quality standards as

are applied to any other nonprofit approved independent schools and independent schools meeting education quality standards.

Definitions

“Approved Independent school” means an independent school approved by the State Board of Education according to 16 V.S.A. § 166. It includes but is not limited to an approved independent school associated with, supported by, or under the governance of a religious organization.

“Tuition” or “public funding” means funding that is provided to an approved independent school directly by a school district pursuant to 16 V.S.A. § 821 and § 822.

Adequate Safeguards

The following best practices are offered to districts as potential adequate safeguards for the payment of tuition to approved independent schools. Districts are also encouraged to consult with their own legal counsel. The Agency has no authority to direct a district to pay tuition in a particular case, and appeals of district tuition decisions are made to the State Board of Education. 16 V.S.A. § 828. However, in the Agency’s opinion, the best practices outlined below are consistent with governing statute and caselaw.

Under state and federal law, Vermont school districts may pay tuition to approved independent schools, including schools that are supported by, associated with, or under the governance of a religious organization. However, the district may require observance of the following safeguards on the part of the approved independent school:

1. No public funding may be expended for worship, religious instruction, or proselytization.
2. An independent school that accepts direct funding will retain its independence from the State and the school district and may continue to carry out its mission, including the definition, practice and expression of its religious beliefs, if applicable. Among other things, schools that are associated with, supported by, or under the governance of a religious organization may use space in their facilities to provide educational programs without removing religious art, icons, scriptures, or other symbols.
3. An independent school that accepts tuition retains the authority over its internal governance, and it may, as applicable, retain religious terms in its school’s name, select its board members on a religious basis, and include religious references in its mission statements and other governing documents.
4. Nothing in these safeguards shall be construed to:
 - a. modify or affect the requirements of 21 V.S.A. Chapter 5, Subchapter 6, relating to fair employment practices;
 - b. modify or affect any state law or rule that relates to approval of independent schools, 16 V.S.A. § 166;
 - c. modify or affect any state law or rule that relates to the amount of tuition paid by a district pursuant to 16 V.S.A. §§ 823-824; or
 - d. modify any other applicable anti-discrimination state or federal law.

5. In order to ensure that all approved independent schools that accept tuition comply with these guidelines, school districts may require a written certification from each approved independent school that accepts tuition to the effect that public funding will not be expended for worship, religious instruction, or proselytization.
 - a. If the approved independent school **does not** conduct worship, religious instruction, or proselytization, it may so certify.
 - b. If the approved independent school **does** conduct worship, religious instruction, or proselytization, it may choose how to make a certification.
 - i. The school may make a certification stating that it segregates the funding of worship, religious instruction, or proselytization from the tuition provided to the school by the district; or
 - ii. The school may make a certification stating that its activities involving worship, religious instruction, or proselytization are offered separately, in time or location, from the educational programs or services for which it receives public funding and student participation in those activities is voluntary; or
 - iii. The school may make a certification stating that a certain percentage or amount of tuition at the school supports worship, religious instruction, and/or proselytization, and that it will reduce the amount charged to the district by that percentage or amount.

After receiving the applicable certification, the district would pay tuition according to the provisions of 16 V.S.A. § 823 (elementary tuition) or § 824 (high school tuition) minus the dollar amount of tuition indicated by a school's certification, to the extent applicable.

Additional Authorities and Resources

These best practices relate to an evolving area of law. In addition to this document, school districts, supervisory unions, and other interested parties are advised to follow evolving caselaw, including but not limited to cases pending in the U.S. District Court for the District of Vermont. At this time, case name and docket numbers for such cases include *A.M. v. French, et al.*, Civil Action No. 2:19-cv-15 (D. Vt.), *A.H., et al. v. French, et al.*, Civil Action No. 2:20-cv-151 (D. Vt.), and *Valente, et al. v. French, et al.*, Civil Action No. 2:20-cv-135 (D. Vt.).