

Privately Provided Equitable Services: Root Out Unconstitutional “Secular, Neutral, and Nonideological” Restrictions from Education Law

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Introduction

About Us

The Manhattan Institute is a community of scholars, journalists, activists, and civic leaders committed to advancing economic opportunity, individual liberty, and the rule of law in America and its great cities.

Several provisions of federal education law, including the Elementary and Secondary Education Act of 1965 (ESEA)¹ and the Individuals with Disabilities Education Act (IDEA),² require public school districts to provide certain educational services to students attending private schools on an “equitable” basis. ESEA, which is now codified as the Every Student Succeeds Act (ESSA),³ requires districts to provide supplemental educational services for low-income, low- and high-achieving students; professional development opportunities for teachers and school leaders; and programs that support English language acquisition for students enrolled in private schools.⁴ And IDEA requires districts to provide “special education and related services” to eligible children who are enrolled in private schools.⁵

Both ESEA and IDEA give districts the option of providing these services “directly” or by contracting with a public or private entity.⁶ Both further require federally funded educational services to students in private schools to be “secular, neutral, and nonideological,” even when they are provided by a private contractor.⁷



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In 2019, then–Secretary of Education Betsy DeVos led the way in ensuring that the religious-liberty rights of federally funded educational providers were protected to the full extent required by the Supreme Court’s Free Exercise decisions when she issued a letter informing Congress that the Department of Education would no longer enforce ESEA’s requirement that third-party providers of federally funded “equitable services” to private-school students be “independent of ... any religious organization.”⁸ She did so after concluding that this requirement was unconstitutional and unenforceable in light of the Supreme Court’s decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017),⁹ which clarified that the First Amendment prohibits the government from excluding private organizations from participating in public benefit programs based solely on their religious status.¹⁰ Secretary DeVos’s letter indicated that the department would continue to enforce the requirement that services funded under ESEA must be “secular, neutral, and non-ideological,” even when they are delivered by third-party private providers, including religious providers.

Secretary DeVos did not explain why the department would continue to enforce federal laws and regulations that require private providers to limit their activities to “secular” educational services. In all likelihood, she did so because *Trinity Lutheran* left open the question of whether the First Amendment’s religious nondiscrimination mandate applies to discrimination against religious conduct (such as religious instruction). Since her 2019 letter, however, the Court has made clear that it does. In *Carson v. Makin* (2022),¹¹ the Court held that the First Amendment’s prohibition on religious discrimination in public benefit programs applies with equal force to laws that exclude religious activities and instruction from public benefit programs as to laws that categorically exclude religious organizations from them altogether. That is, not only is discrimination on the basis of religious status—such as ESEA’s no-longer-enforced requirement that third-party providers be independent of religious organizations—unconstitutional; so, too, is discrimination on the basis of religious use or conduct. After *Carson*, any distinction between status-based and use-based religious discrimination “lacks meaningful application.”¹²

Taken together, three recent Free Exercise Clause decisions—*Trinity Lutheran*, *Carson*, and *Espinoza v. Montana Department of Revenue* (2020)¹³—establish that the government cannot exclude religious organizations from generally available public benefits because they are religiously affiliated; nor can it exclude them because they engage in religious conduct. It follows, therefore, that provisions of federal law requiring private providers of federally funded educational services to provide only “secular” services as a condition of participating in federal education programs violate the First Amendment.

Carson makes clear that prohibiting the funding of private educational services with religious content, when that funding is available for other privately provided secular educational services, unconstitutionally discriminates on the basis of religion. Importantly, *Carson* also all but closes one final legal loophole that might justify such discrimination: the Supreme Court’s 2004 opinion in *Locke v. Davey*. In that case, the Court rejected a First Amendment challenge to a Washington regulation that barred a recipient of a state-funded scholarship from pursuing a degree designed to “train a minister to lead a congregation.”¹⁴ The majority opinion in *Carson* rejected the argument that *Locke* could be used to justify rules prohibiting the expenditure of public funds on private religious instruction except in this narrow circumstance. “*Locke*’s reasoning expressly turned on what it identified as the ‘historic and substantial state interest’ against using ‘taxpayer funds to support church leaders;’” the Court observed, noting that “there is no ‘historic and substantial’ tradition against” funding private, K–12 religious instruction “comparable to the tradition against state-supported clergy invoked by *Locke*.” Therefore, the Court concluded, “*Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits.”¹⁵



On April 9, 2025, President Trump directed the heads of all federal agencies to identify and cease enforcing any regulations that run afoul of 10 recent U.S. Supreme Court decisions, including *Carson v. Makin*.¹⁶ In the spirit of this order, the Department of Education should take immediate action to clarify that the “secular, neutral, and nonideological” restriction on the services provided by private third-party providers under ESEA and IDEA is unconstitutional and will not be enforced. It should further undertake a comprehensive audit of all federal education laws and regulations to identify other rules that disfavor religion in contravention of *Carson v. Makin* and make clear that these requirements also will not be enforced. Congress should take immediate steps to remove them from federal law. This paper includes an appendix with model federal legislation language to accomplish this end.

The Origins of the “Secular, Neutral, and Nonideological” Restriction

The phrase “secular, neutral, and nonideological” originated in the Supreme Court’s since-overturned decision in *Lemon v. Kurtzman* (1971). *Lemon* announced a three-part test for divining Establishment Clause violations, which asked courts to determine whether a challenged law had: (1) a “secular purpose”; (2) the primary effect of “advancing or inhibiting religion”; and (3) required “excessive entanglement” between government and religion.¹⁷ In 2022, in *Kennedy v. Bremerton School District*, the Supreme Court announced that it had “long ago abandoned *Lemon*,” characterizing it as an “abstract, and ahistorical approach to the Establishment Clause.”¹⁸ Yet the reasoning of *Lemon*—including the incorrect conclusion that the government must require private recipients of public education funds to limit their activities to “secular” ones—continues to pervade federal and state laws.¹⁹ The “secular, neutral, and nonideological” restriction on private providers of federally funded equitable services to private-school children is perhaps the most glaring example of *Lemon*’s long shadow.

Lemon concerned an Establishment Clause challenge to Pennsylvania and Rhode Island programs that provided financial support to private, including religiously affiliated, elementary and secondary schools. The Rhode Island statute provided a salary supplement to teachers of secular subjects in nonpublic schools, and the Pennsylvania statute allowed school districts to contract with nonpublic schools for secular education classes. The Court invalidated both programs on Establishment Clause grounds, explaining:

Our decisions ... have permitted the States to provide church-related schools with *secular, neutral, or nonideological services*, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause.²⁰

The majority in *Lemon* concluded that the provisions of state law designed to ensure that a teacher refrain from religious instruction in the classroom would require an impermissible level of state surveillance in contravention of the newly minted test’s “excessive entanglement” prong. The Court expressed (remarkably) that the danger of entanglement in the Rhode Island Catholic schools was unacceptably high because “[a]pproximately two-thirds of the teachers in these schools are nuns of various religious orders,” who would find it difficult to refrain from religious instruction.²¹ In other words, Catholic nuns weren’t trustworthy. Therefore, because this aid could not be given in a way that ensures that it remain “secular, neutral, or nonideological,” the Court determined it to be unconstitutional under the Establishment Clause.²²



Privately Provided Equitable Services: Root Out Unconstitutional “Secular, Neutral, and Nonideological” Restrictions from Education Law

Decided the same day as *Lemon, Tilton v. Richardson* (1971) upheld the federal Higher Education Facilities Act of 1963. This law authorized federal grants and loans for the construction of nonreligious academic facilities in public and private universities and colleges.²³ The Court repeated *Lemon*’s language that precedent “permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities, or materials.”²⁴ The Court applied the *Lemon* test and upheld the act partly because of the “nonideological character of the aid that the Government provides.” Contrasting the law with the one invalidated in *Lemon*, the Court said that the facilities provided here “are themselves religiously neutral,” so there is no risk of a “corresponding need for surveillance.”²⁵

Almost immediately, state legislatures started crafting or amending laws in response to these Court decisions, not necessarily because it was politically popular or what their constituents wanted. At the time, they presumably thought that they were doing what the Court required; but sometimes, states’ attempts to follow the dictates of the Court were seen as still too accommodating of religion and a violation of the Establishment Clause.

For example, in light of the lines drawn by *Lemon* and *Tilton* in 1971, the New York State Legislature amended its education laws to establish two financial-aid programs for private schools. The first program provided direct money grants for maintenance and repair of facilities and equipment for schools serving low-income students. The second program established a tuition-reimbursement plan for parents of students attending private elementary and secondary schools and granted tax relief to parents who did not qualify for tuition reimbursement. Seeking to immunize itself from Establishment Clause challenges, the New York State Legislature stated in its legislative findings for the first program that “the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral, and non-ideological in nature.” Taking this language as a safe harbor for private-school aid, New York reiterated it in the legislative findings for the second program, saying that its “assistance is clearly secular, neutral, *and* nonideological” (emphasis added). Note the change. Presumably seeking to cover all its bases, the New York State Legislature changed the original phrasing from *Lemon* and replaced the disjunctive “or” with the inclusive “and,” confirming that this aid conforms with all three requirements.²⁶

In *Committee for Public Education v. Nyquist* (1973), the Court disagreed with the state legislature and invalidated all the programs under the “effects test” from *Lemon*’s second prong.²⁷ Remember, the second prong asked courts to determine whether a challenged law had the primary effect of “advancing or inhibiting religion.” In summarizing the Court’s recent rulings, the majority opinion stated that “an indirect and incidental effect” that is beneficial to religious institutions is not sufficient grounds to invalidate a law if the state support is “neutral, nonideological aid, assisting only the secular functions of sectarian schools.” As a general matter, at least in the K–12 context, this meant that the government could provide religious schools only with in-kind, not monetary, benefits, which could not be diverted for religious purposes.

The Court determined that the New York statutes failed this test. Because the aid was monetary, the Court determined that it was too difficult to guarantee that the funds would be used for their intended secular purposes without improper state oversight. Thus, while analyzing the tuition reimbursement program, the Court said: “In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.”²⁸

In 1974, the year after *Nyquist*, Congress amended ESEA to include new language clarifying that the federal government may provide “[private] schools secular, neutral, and nonideological services, materials, and equipment including the repair, minor remodeling, or construction of public school facilities as may be necessary for their provision.”²⁹ A quarter century later, President George W. Bush’s No Child Left Behind Act of 2001 dramatically expanded the reach of the “secular, neutral, and nonideological” restriction in federal education law, perhaps partly as an



effort to ensure conformity with the federal Establishment Clause, using the phrase six times to limit a variety of services such as funding for supplemental educational services, aid provided for private-school students with special needs, and items selected by the National Assessment Governing Board to be used in tests.³⁰

The Extent of the “Secular, Neutral, and Nonideological” Requirement

Ever since *No Child Left Behind*, the “secular, neutral, and nonideological” restriction on publicly funded services for children in private schools has become ubiquitous in federal and state education laws.³¹ Presumably, many legislators voted to codify this restriction, believing that it was constitutionally required. But the restriction lives on in statutes and regulations, despite the fact that the decision that led to this conclusion, *Lemon v. Kurtzman*, is now defunct and discredited and the fact that the Supreme Court has repeatedly concluded that the underlying premise—that the Constitution requires the government to refrain from funding religious institutions and conduct—is not only wrongheaded but reflects impermissible religious discrimination.

Currently, a version of the restriction appears at least 10 times in federal statutes and three times in federal regulations. All instances of the phrase occur in the context of education law, although the practice of restricting federally funded private services to “secular” activities, even when the services are provided by religious organizations, pervades federal laws and regulations. These restrictions, which govern a host of federally funded private conduct—including social services, health care, job training, and foreign aid—are equally unconstitutional after *Carson*.³²

Within federal education law, under IDEA, all federally funded services for private-school students with disabilities must be “secular, neutral, and nonideological,” even when privately provided.³³ Under ESEA, the supplemental educational programs for private-school students and staff must similarly be “secular, neutral, and nonideological,” even when delivered by private third-party providers.³⁴ These services include tutoring for low-income students, professional development for teachers and leaders, and services directed at English language acquisition.³⁵ The requirement also restricts the operating procedures, mission, and activities of the Institute of Education Sciences,³⁶ the National Center for Education Statistics,³⁷ the National Center for Special Education Research,³⁸ and the National Assessment Governing Board.³⁹

The Code of Federal Regulations contains implementing rules that similarly limit the services and benefits provided by local education agencies through private contracts under ESEA,⁴⁰ privately delivered equitable services provided to children with disabilities who were placed by their parents in private schools,⁴¹ and the services provided by a partnering organization or state to private schools under the Gaining Early Awareness and Readiness for Undergraduate Programs.⁴²

Variations of the “secular, neutral, and nonideological” requirement pervade state education laws as well. Across 24 states and the District of Columbia, at least 25 regulations and seven statutes use some permutation of the phrase.⁴³ Most of these appear to be driven by a single federal regulation, 34 C.F.R. § 300.138(c)(2), which mandates: “Special education and related services provided to parentally-placed private school children with disabilities, including material and equipment, must be secular, neutral, and nonideological.”⁴⁴ As in the New York State example mentioned in the previous section, it is reasonable to assume that, in many instances, state regulators’ motive for promulgating these regulations likely was a desire to conform to federal law rather than an affirmative desire to ensure that all services provided to disabled children in private schools are secular in nature.



Despite the number of uses of the phrase, few states provide any guidance as to what the phrase “secular, neutral, and nonideological” means—or whether the three terms carry three separate meanings or possess one meaning together. Given the origin of the phrase in *Lemon*, it seems likely that the Supreme Court understood them to collectively mean “not religious.” But some states have provided guidance suggesting that the terms have separate meanings.

Oregon’s Department of Education defines the three words separately, with “secular” meaning “[n]on-religious in nature”; “neutral” meaning “[d]oes not regard any particular message or substance over another”; and “nonideological” meaning “[d]oes not belong to a specific group or political party.”⁴⁵ Minnesota’s regulations define “secular, neutral, and nonideological” as “materials which are not regarded as religious, spiritual, or sacred, and present events, facts, and theories that pertain to religion or religious doctrine in an impartial manner.”⁴⁶ Most bizarrely, Pennsylvania regulations include various and sundry items such as books, periodicals, musical scores, games, meter sticks, safety goggles, and compasses as instructional materials that are sufficiently secular, neutral, and nonideological. However, “textbooks, chemicals, wall maps and charts, pencils, notebooks, chalk, erasers, duplicating fluids or paper, 16 mm films, unexposed film, blank cassettes, or other consumable supplies” cannot be provided as instructional materials.⁴⁷

It is impossible to gauge the extent of the financial effect of the “secular, neutral, and nonideological” restrictions on privately provided educational services for children enrolled in private schools. Both ESEA and IDEA require states to distribute federal education funding to school districts according to certain formulas and then require the districts, in turn, to provide private-school students with certain educational services, directly or through private contractors, on an “equitable” basis. Under ESEA, the extent of the services is to be determined by the districts after “meaningful consultation” with private schools.⁴⁸ IDEA requires “meaningful consultation” but also contains a “child find” requirement that places the obligation of identifying and serving eligible students on the districts. The failure of school districts to adequately comply with these requirements has been well documented;⁴⁹ even so, millions of dollars are affected by the restriction.

Unconstitutional Discrimination Against Religious Conduct

As discussed previously, in the latter half of the twentieth century, the Supreme Court issued a number of opinions—including those discussed above—that suggested that the First Amendment’s Establishment Clause often prohibits the government from extending public benefits to religious institutions, especially religious elementary and secondary schools. Although the Court never imposed a categorical ban on such church–state cooperation, the constitutional scale tipped in favor of denying religious organizations access to benefits from public programs. This now-discredited doctrine was neither workable nor coherent. For example, at one point, the Supreme Court had decreed that the Establishment Clause permitted states to provide students in religious schools with books, but not maps, leading the late Senator Daniel Patrick Moynihan to quip, “What about atlases,” which are “books of maps?”⁵⁰

Over the last few decades, the Court has clarified that, read together, the Establishment Clause and the Free Exercise Clause require government neutrality, not hostility, toward religion. In *Zelman v. Simmons-Harris* (2002), the Court upheld a publicly funded private-school-choice program, even though 95% of participating students attended religious schools.⁵¹ *Zelman* made clear that the Establishment Clause did not require the exclusion of religious organizations from programs that extend benefits to private organizations on a religion-neutral basis. However, it was silent as to whether the Free Exercise Clause required their inclusion.



Privately Provided Equitable Services: Root Out Unconstitutional “Secular, Neutral, and Nonideological” Restrictions from Education Law

The answer to this question came in three parts. First, in *Trinity Lutheran Church v. Comer* (2017), the Court held that Missouri unconstitutionally excluded a faith-based preschool from receiving state-funded playground resurfacing. Chief Justice John Roberts concluded that Missouri’s policy gave Trinity Lutheran an impossible choice: “It may participate in an otherwise available benefit program or remain a religious institution.” Second, in *Espinoza v. Montana Department of Revenue* (2020), the Court similarly concluded that the Montana Supreme Court violated the Free Exercise Clause when it invalidated a private-school-choice program because the program included faith-based schools. Writing for the majority, Chief Justice Roberts observed: “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.”⁵²

The third part of the answer came in closing a potential loophole that *Trinity Lutheran* and *Espinoza* left open. Although both *Trinity Lutheran* and *Espinoza* concluded that the challenged policies discriminated against recipients based on their religious character (or status), they declined to say whether a state could refuse to provide funds that might be put to religious use (e.g., religious instruction). In *Carson v. Makin* (2022), however, the Court rejected the status/use distinction. The case concerned a Maine private-school-choice program that permitted students living in school districts without high schools to use the public funds allocated for their secondary education at any school, public or private, as long as the school was “nonsectarian.” Maine contended that the exclusion of “sectarian” schools was not religious discrimination but rather reflected a desire not to fund religious instruction. The majority rejected this argument, holding that the distinction between status-based and use-based religious discrimination “lacks meaningful application” and concluding that both were equally “offensive to the Free Exercise Clause.”⁵³

Read together, *Trinity Lutheran*, *Espinoza*, and *Carson* make clear that the government may not exclude private organizations from public benefit programs because they are religious or because they engage in religious conduct. Nor may it require them to refrain from engaging in religious conduct, such as religious instruction, as a condition of participating in a public benefit program. *Carson* makes clear that religious discrimination cannot be justified by a desire to “prevent . . . religious organizations from putting aid to religious uses.”⁵⁴ As Justice Gorsuch observed in the decision finally interring *Lemon*, the government cannot justify discrimination against religious conduct by invoking the “mistaken view that it ha[s] a duty to ferret out and suppress religious observances even as it allows comparable secular [ones]. The Constitution neither mandates nor tolerates that kind of discrimination.”⁵⁵

Yet that is exactly what the “secular, neutral, and nonideological” requirement does when applied to private provision of educational services for private-school students. The requirement, therefore, squarely conflicts with the First Amendment. As the Supreme Court itself acknowledges, religious organizations cannot *for religious reasons* segregate their conduct into the “secular” and “religious” because of the belief that secular and religious truths cannot be disentwined. In many faiths, to be a religious educator is to act on those beliefs by providing a religiously grounded education. As the Supreme Court has observed in a related context, “educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.”⁵⁶

For this reason, requiring private educational service providers to engage only in secular instruction not only violates the Free Exercise Clause by discriminating against religious conduct, which the Supreme Court has made clear is constitutionally impermissible, but instantiates interdenominational discrimination that also runs afoul of the Establishment Clause. As a unanimous Supreme Court observed earlier this year in *Catholic Charities Bureau v. Wisconsin*: “The clearest command of the Establishment Clause is that the government may not officially prefere[r] one religious denomination over another.”⁵⁷



Privately Provided Equitable Services: Root Out Unconstitutional “Secular, Neutral, and Nonideological” Restrictions from Education Law

This brief makes three final observations about the collision between the First Amendment’s religious nondiscrimination mandate and the “secular, neutral, and nonideological” restriction on publicly funded services to children in private schools.

The first observation ought to be obvious, but we state it here for clarity about our view. The requirement that these services be “secular” is unconstitutional only as it applies to private contractors providing these services to private-school students. The requirement that educational services provided by school districts and other government agencies be secular is not only constitutionally permissible; it is constitutionally required under current doctrine.⁵⁸ The Free Exercise Clause’s nondiscrimination principle is triggered only when the government extends benefits to private secular organizations. However, once the government does so, it must extend those benefits to qualifying religious organizations and must permit them to remain religious.

The second observation is that we have no idea what the words “neutral and nonideological” mean. As noted above, it seems likely that when the Supreme Court invented the “secular, neutral, and nonideological” restriction as a rule of constitutional law half a century ago, it meant the phrase to be synonymous with “not religious.” We leave aside the question of whether the terms “neutral” and “nonideological” have independent meanings, although we note that many such attempts to define them would raise concerns under the First Amendment’s Free Speech Clause as applied to private entities.

Our third observation is that some scholars and advocates continue to argue that the Establishment Clause requires the government to refrain from *directly* funding religious conduct. They argue that the government may fund religious conduct and instruction only *indirectly*, as the result of an intervening private choice. A number of federal regulations reflect this understanding of the law, which traces its roots—again—to the *Lemon* line of cases.⁵⁹

For example, a Department of Education regulation governing *all* recipients of *direct* financial assistance provides that “a private organization that applies for and receives a subgrant under a program of the Department and engages in explicitly religious activities, such as worship, religious instruction, or proselytization, must offer those activities separately in time or location from any programs or services funded by a subgrant from a State under a State-administered formula grant program of the Department.”⁶⁰ The regulation contains an exception to this requirement for programs that provide “indirect financial assistance,” which is defined as “financial assistance received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other means of government-funded payment provided to a beneficiary who is able to make a choice of service provider.”⁶¹

The Biden administration adopted regulations—which themselves contravene the clear holding in *Zelman v. Simmons-Harris*—that narrowed the number of programs that qualify as “indirect” by stating that “availability of adequate secular alternatives is a significant factor in determining whether a program affords a genuinely independent and private choice.”⁶²

Scholars and activists who argue this point have an incorrect reading of the law. The First Amendment requires government neutrality toward religion; that command applies in both direct-aid and indirect-aid programs. While the Supreme Court has in numerous cases, including *Zelman*, pointed to the fact of an intervening private choice as one factor for rejecting an Establishment Clause challenge to a public benefit program, the lack of an independent decision-maker neither precludes the government from supporting religious providers in a public benefit program nor justifies their exclusion. In fact, the program at issue in *Trinity Lutheran* was a direct funding program, and, more recently, billions of dollars in Covid relief funds flowed to religious organizations through a variety of state and federal programs. Furthermore, a reading of the Establishment Clause that results in the government funding religious institutions, but not religious conduct, is directly contradicted by *Carson*’s rejection of the status-use distinction as a justification for religious discrimination.



Therefore, legal rules—including the secular, neutral, and nonideological restriction as it applies to private education contractors and schools—that require recipients of public funds to refrain from religious conduct or segregate the secular and religious aspects of their programming as a condition of participating in a public program are unconstitutional.

Conclusion: The Way Forward

Fortunately, there are several relatively easy fixes to the “secular, neutral, and nonideological” problem. As a first and immediate step, Education Secretary Linda McMahon should issue a letter updating Secretary DeVos’s 2019 letter clarifying that the “secular, neutral, and nonideological” requirement is unconstitutional as applied to privately provided, federally funded, educational services for private-school students and stating that the department will no longer enforce the restriction in this context.⁶³

Additionally, President Trump has directed all federal agencies to identify and cease enforcing regulations that violate several recent decisions, including *Carson v. Makin*. In the spirit of this directive, the Department of Education should undertake a comprehensive review of all restrictions on private grant recipients to identify and cease the enforcement of statutes and regulations that unconstitutionally discriminate against religion. Secretary McMahon should also issue a regulatory guidance directing states and school districts to refrain from enforcing these requirements in their contracts with private service providers serving students in private schools. This guidance should make clear that states are not permitted to invoke state laws incorporating them as a justification for continued religious discrimination.

Other federal agencies should issue similar guidance and review their internal restrictions, as should states’ attorneys general and governors’ counsels. As revealed by a website⁶⁴ developed by the Notre Dame Law School’s Religious Liberty Clinic and Education Law Project, the Orthodox Union’s Teach Coalition, and the EPIC Coalition, religious discrimination pervades state and federal laws. Hundreds, perhaps thousands, of statutes and regulations unconstitutionally discriminate against religious organizations and religious conduct.⁶⁵ A useful model for this action is Oklahoma Governor Kevin Stitt’s recent executive order directing all state agencies to identify and cease enforcing “laws, regulations, and policies that exclude religious individuals or institutions from public programs, funds, or benefits.”⁶⁶

Because the “secular, neutral, and nonideological” requirement pervades federal law, Congress should act to excise it from the U.S. Code, along with many dozens, if not hundreds, of instances of unconstitutional religious discrimination. There are relatively straightforward ways to do this. The appendix of this paper includes model federal legislation language that lists provisions of the U.S. Code where the unconstitutional language must be struck.

Along with eliminating the phrase “secular, neutral, and nonideological” from federal education law, Congress can pass legislation that addresses religious discrimination in public programs in a more comprehensive way. Congress should reiterate that, when read together, the Free Exercise and Establishment Clauses require government neutrality toward religion in both direct-aid and indirect-aid programs. Congress should clarify that discrimination on the basis of religious status and discrimination on the basis of religious use or conduct are both unconstitutional. State legislatures should, again, do the same.



Appendix: Model Legislation

A Bill to enforce the Constitution’s requirement of neutrality towards religion in government assistance.

Sec. 1: Short Title

This act may be cited as the Government Assistance Religious Neutrality Enforcement Throughout (GARNET) Act

Sec. 2: Purpose

To give effect to the First Amendment’s requirement of government neutrality towards religion by adopting a policy of nondiscrimination towards religious status and conduct, including instruction, when federally funded services, including but not limited to educational services, are delivered by private individuals and institutions. This nondiscrimination mandate applies regardless of whether the government is assisting religious institutions engaging in secular conduct, or whether the recipient of federal assistance engages in religious conduct, including religious instruction.

Sec. 3: Definitions

As used in this section:

“Assistance” shall mean any benefit provided by the government, whether money, goods, use of facilities, or other services, to non-government entities;

“Nondiscriminatory with regard to religion” shall mean a policy of equal treatment of private recipients of government assistance with regard to their religious character or the religious content of their conduct.

Sec. 4: Statutory Amendments

Provisions requiring “secular, neutral, and nonideological” shall be removed from [or replaced with “nondiscriminatory with regard to religion” in] the following laws:

20 U.S.C. § 1412(a)(10)(A)(vi)(II)

20 U.S.C. § 7881(a)(2)

20 U.S.C. § 6320(a)(2)

20 U.S.C. § 6303b(e)(2)(D)(iii)

20 U.S.C. § 9511(b)(2)(B)

20 U.S.C. § 9514(f)(7)

20 U.S.C. § 9516(b)(8)

20 U.S.C. § 9541(b)(3)(A)



20 U.S.C. § 9567b(b)(3)

20 U.S.C. § 9621(e)(4)

Sec. 5: Regulatory Review

All federal agencies are directed to

- a. Review regulations they have promulgated or enforced, and determine which have been shaped by previous requirements to comply with “secular, neutral, and nonideological” requirements, and
- b. Replace those regulations and enforcement policies, as appropriate, with regulations and enforcement policies that do not discriminate on the basis of religious use, status, or conduct in provision of privately provided goods and services.



Endnotes

- ¹ Pub. L. No. 89-10 (1965), 20 U.S.C. § 6301 et seq.
- ² 20 U.S.C. §1400 (1990).
- ³ Pub. L. No. 114-95, 129 Stat. 1802 (2015).
- ⁴ Pub. L. No 107-110, “The Elementary and Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA): A Primer”; U.S. Dept. of Education, “Title VIII, Part F of the Elementary and Secondary Education Act of 1965: Equitable Services for Eligible Private School Children, Teachers, and Other Educational Personnel, Non-Regulatory Guidance,” July 17, 2023; “Every Student Succeeds Act (ESSA): A Comprehensive Guide,” §§ 1101, 4644, 8501.
- ⁵ IDEA, § 1412. State eligibility.
- ⁶ The exact language of IDEA and ESEA differs slightly, but the meaning is the same. ESEA states that districts may provide the required services “directly or through contracts with public and private agencies, organizations, and institutions”; 20 U.S.C. § 6320(a)(5). IDEA states: “The provision of services pursuant to this subparagraph shall be provided ... by employees of a public agency; or ... through contract by the public agency with an individual, association, agency, organization, or other entity”; 20 U.S.C. § 1412 (vi). Private schools are ineligible to receive federal financial assistance to provide these services themselves. See, e.g., Rebecca Skinner, “Equitable Services for Private School Students and Staff and the Elementary and Secondary Education Act,” Congressional Research Service, Sept. 13, 2021; “Title VIII, Part F of the Elementary and Secondary Education Act of 1965: Equitable Services for Eligible Private School Children, Teachers, and Other Educational Personnel: Non-Regulatory Guidance,” U.S. Dept. of Education, July 17, 2023.
- ⁷ U.S.C. § 6320(a)(2): (“Such educational services or other benefits, including materials and equipment, shall be secular, neutral, and nonideological”; 20 U.S.C. § 1412 (vi) (I), (II): Services may be provided “through contract by the public agency with an individual, association, agency, organization, or other entity” and services “including materials and equipment, shall be secular, neutral, and nonideological.”)
- ⁸ U.S. Dept. of Education, letter from Betsy DeVos, Secretary of Education, to Hon. Nancy Pelosi, Speaker of the House of Representatives, “Secretary’s Letter to Congress Regarding ESEA Provisions Restricting Religious Organizations as Contract Providers of Equitable Services Are Unconstitutional,” Mar. 11, 2019; 20 U.S.C. §§ 6320(d)(2)(B), 7881(d)(2)(B).
- ⁹ 582 U.S. 449, 137 S. Ct. 2012 (2017).
- ¹⁰ “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 all the same, and cannot stand.” *Trinity Lutheran*, 137 S. Ct. 2012, 2025 (2017).
- ¹¹ *Carson v. Makin*, 596 U.S. 767 (2022).
- ¹² *Ibid.*, 781, 787–88.



Privately Provided Equitable Services: Root Out Unconstitutional “Secular, Neutral, and Nonideological” Restrictions from Education Law

- ¹³ 591 U.S. 464 (2020).
- ¹⁴ 540 U.S. 712, 721 (2004).
- ¹⁵ *Ibid.*
- ¹⁶ Presidential memorandum, “Directing the Repeal of Unlawful Regulations,” Apr. 9, 2025.
- ¹⁷ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
- ¹⁸ *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022).
- ¹⁹ Nicole Stelle Garnett and John Meiser, “Trump Can End Religious Discrimination,” *Wall Street Journal*, Nov. 21, 2004; Nicole Stelle Garnett and Tim Rosenberger, “Unconstitutional Religious Discrimination Runs Rampant in State Programs,” Manhattan Institute, Dec. 14, 2023.
- ²⁰ *Lemon*, 616–17.
- ²¹ *Ibid.*, 625.
- ²² *Ibid.*
- ²³ *Tilton v. Richardson*, 403 U.S. 672 (1971).
- ²⁴ *Ibid.*, 687.
- ²⁵ *Ibid.*, 688.
- ²⁶ *Committee for Public Education v. Nyquist*, 413 U.S. 756, 764–65 (1973).
- ²⁷ *Ibid.*, 775.
- ²⁸ *Ibid.*, 780.
- ²⁹ Education Amendments of 1974, Pub. L. No. 93–380, § 406(a), 88 Stat. 541 (1974).
- ³⁰ No Child Left Behind Act of 2001, Pub. L. No. 107–110, §§ 1116(e)(5)(D), 1120(a)(2), 412(e)(4).
- ³¹ Six permutations of this phrase appear in federal and state laws and regulations: “secular, neutral, and nonideological”; “secular, neutral, and non-ideological”; “secular, neutral, or nonideological”; “secular, neutral, or non-ideological”; “secular, neutral, nonideological”; and “secular, neutral, non-ideological.” These permutations appear to be treated synonymously by government regulators and courts. See <https://religiousequality.net/>
- ³² “Protecting Religious Organizations from Discrimination,” www.religiousequality.net.
- ³³ 20 U.S.C.A. § 1412(a)(10)(A)(vi)(II); 20 U.S.C.A. § 7881(a)(2).
- ³⁴ 20 U.S.C.A. § 6320(a)(2).
- ³⁵ 20 U.S.C.A. § 6303b(e)(2)(D)(iii).



Privately Provided Equitable Services: Root Out Unconstitutional “Secular, Neutral, and Nonideological” Restrictions from Education Law

³⁶ 20 U.S.C.A. § 9511(b)(2)(B); 20 U.S.C.A. § 9514(f)(7); 20 U.S.C.A. § 9516(b)(8).

³⁷ 20 U.S.C.A. § 9541(b)(3)(A).

³⁸ 20 U.S.C.A. § 9567b(b)(3).

³⁹ 20 U.S.C.A. § 9621(e)(4).

⁴⁰ 34 C.F.R. § 200.62(c).

⁴¹ 34 C.F.R. § 300.138(c)(2).

⁴² 34 C.F.R. § 694.5(a).

⁴³ These states are Alabama, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, Virginia, and Washington. See, e.g., Cal. Educ. Code §§ 56172 (2024); Or. Admin. R. § 581-015-2455 (2025); Tex. Admin. Code § 809.16 (2023); Fla. Stat. § 1003.499 (3)(a)(1) (2023); Mo. Rev. Stat. § 173.355 (2022); Mo. Rev. Stat. § 167.280(5); Or. Rev. Stat. § 340.005(4)(a) (2022); Haw. Code R. § 8-60-24 (2009); 5 Ind. Admin. Code 511 IAC 7-34-8 (2019); Iowa Admin. Code r. 281-41.413; La. Admin. Code tit. 28, § XLIII-138 (2008); Tex. Educ. Code §§ 56.074–56.076; 19 Tex. Admin. Code § 21.705 (2020); Ind. Code § 21-16-2-4(4) (2022); Idaho Stat. § 33-4403 (2023); Mont. Code Ann. § 20-25-706 (2021); Ala. Code §§ 16-33A-1, 16-33A-7 (2023); Or. Rev. Stat. §§ 350.640, 350.645 (2021); S.D. Admin. R. 24:05:32:03.02 (2020); Tex. Gov’t Code § 1434.002 (2000); Mo. Rev. Stat. § 360.015(3), (5) (2022); Ala. Code § 16-18A-2 (2023); Minn. R. ch. 3540, pt. 3540.0200.

⁴⁴ 34 C.F.R. § 300.138(c)(2). Of the seven statutes and 25 regulations that we identified with the requirements in the states, one statute and 18 regulations are verbatim copies or slightly modified versions of this regulation.

⁴⁵ Oregon Dept. of Education, “Equitable Services: Secular, Neutral, and Non-Ideological,” Nov. 15, 2022.

⁴⁶ Minn. R. 3540.0200.

⁴⁷ 22 Pa. Code § 115.1.

⁴⁸ 34 C.F.R. § 299.7(b)(3).

⁴⁹ See, e.g., Kathleen Cawley, “The Dark Underbelly of Your American School District, part 5: The Failure of Child Find,” *Medium*, Jul. 23, 2024; “Systemic Failure in IDEA Implementation for Private School Students with Disabilities in Additional States,” Pioneer Institute Public Policy Research, Apr. 8, 2021; Brenda Álvarez, “Disproportionality in Special Education Fueled by Implicit Bias,” *neaToday*, Apr. 16, 2024; Sarah D. Sparks, “One Group of Teachers Is Less Likely to Identify Black Students for Special Ed. Why That Matters,” *EducationWeek*, Mar. 6, 2024; Christina A. Samuels, “Minority Students Still Missing Out on Special Education, New Analysis Says,” *EducationWeek*, Aug. 28, 2017.

⁵⁰ Richard Garnett, “Symposium: The End of a Walking Dead Doctrine?” *SCOTUSblog*, Dec. 11, 2018.

⁵¹ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).



Privately Provided Equitable Services: Root Out Unconstitutional “Secular, Neutral, and Nonideological” Restrictions from Education Law

- ⁵² *Espinoza*, 2261–62.
- ⁵³ *Carson v. Makin*, 596 U.S. 767, 787–88 (2022).
- ⁵⁴ *Ibid.*, 787.
- ⁵⁵ 597 U.S. 507, 536–37.
- ⁵⁶ *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732, 753–54 (2020).
- ⁵⁷ *Catholic Charities Bureau v. Wisconsin*, 605 U.S. ___, 145 S. Ct. 1583, 1585 (2025) (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)).
- ⁵⁸ Districts may also limit privately provided services to “secular” ones when delivered to students attending district schools.
- ⁵⁹ “What Are the Rules on Funding Religious Activity with Federal Money?” U.S. Dept. of Health and Human Services (HHS); “Partnerships with Faith-Based and Neighborhood Organizations,” *Federal Register* 88, no. 9 (Jan. 13, 2023): 2395; Nicole Stelle Garnett and Meredith Holland Kessler, “Biden Boils the Religious Liberty Frog,” *Wall Street Journal*, Apr. 13, 2023.
- ⁶⁰ 34 C.F.R. § 76.52(c)(1).
- ⁶¹ *Ibid.*, § 76.52(c)(3)(ii).
- ⁶² *Ibid.*; “Partnerships with Faith-Based and Neighborhood Organizations,” *Federal Register* 88, no. 9 (Jan. 13, 2023): 2395; Garnett and Kessler, “Biden Boils the Religious Liberty Frog”; 34 C.F.R. § 76.52(c)(3)(ii)(B).
- ⁶³ Secretary DeVos’s letter invoked a federal statute that requires the attorney general to report to Congress when she determines that “any Federal statute, rule, regulation, program, policy ... is unconstitutional.” This mechanism can be used to address the unconstitutionality of the requirement. See <https://religiousequality.net/>
- ⁶⁴ www.religiousequality.net.
- ⁶⁵ “Protecting Religious Organizations from Discrimination.”
- ⁶⁶ Office of the Governor J. Kevin Stitt, Executive Dept.: Executive Order 2025-08, Mar. 31, 2025; “Governor Stitt Issues Executive Order to Make Oklahoma the Strongest Defender of Religious Liberty in the Nation,” Oklahoma Gov. J. Kevin Stitt press office, Apr. 1, 2025; Nicole Stelle Garnett and Tim Rosenberger, “Oklahoma’s Governor Is Taking the Lead on Religious Liberty,” *City Journal*, June 5, 2025.