

Council for American Private Education

# CAPE outlook

Voice of America's private schools

## Tax Credit Scholarship Showdown in Big Sky Country

In a case carrying significant consequences for school choice, the Montana Supreme Court heard oral arguments April 6 on whether the state's tax credit scholarship program is permitted to exclude benefits for families choosing religious schools. The high-profile case involves a web of constitutional clauses, including the Free Exercise Clause of the U.S. Constitution and, of course, the state's Blaine Amendment.

### Background

Article X, Section 6 of the Montana Constitution states that the government "shall not make any direct or indirect appropriation or payment from any public fund or monies...for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." Similar language, named after James G. Blaine, a politician from Maine who ran for president against Grover Cleveland in 1884, may be found in the constitutions of 38 states.

Relying on that language, the Montana Department of Revenue refused to implement fully a tax-credit scholarship program that the state legislature had enacted in 2015. That program allowed taxpayers to receive up to \$150 in state tax credits for donations to organizations that offer scholarships to help families pay for religious and independent schools. Instead, the Revenue Department in effect unilaterally amended the legislation by promulgating what is known as Rule 1, an administrative measure that excludes religious schools as places where families may use the scholarships. The department argued that Article X, Section 6 left it no choice.

Others disagreed, and a lawsuit ensued. Three low-income mothers who wanted to use the scholarships in religious schools challenged Rule 1 as an administrative

overreach and as a violation of the state and federal constitutions. To their good fortune, the mothers were backed by the Institute for Justice (IJ), a law firm that has successfully litigated school choice cases across the country for decades.

After a trial court issued an injunction to stop the enforcement of Rule 1, the Department of Revenue appealed that judgment to the Montana Supreme Court, which heard the case last month.

### Arguments

Standing at the lectern before the justices, Richard "Dick" Komer, senior attorney at IJ, argued that "when the state allows tax credits for scholarships awarded to students attending secular private schools, it cannot deny tax credits for scholarships to students attending religious private schools." Indeed, such discrimination "cannot be justified under either the Montana or federal constitution."

Komer also argued that no public funds are transferred to religious institutions under the tax credit scholarship program because (a) tax credits are not public funds and (b) the program's beneficiaries are parents, not institutions.

A brief filed by IJ and Holland & Hart, a Montana law firm, explains that 10 appellate courts across the country, including the U.S. Supreme Court, have found that tax credits are not "a direct or indirect appropriation" of government funds. "A tax credit is never taken from the state treasury or any other public fund," states the brief, "nor does it 'repay' individuals for their donations; it is simply a mechanism to incentivize good behavior by allowing people to lower their tax liability." To consider a tax credit an appropriation banned by

Montana's Blaine language would establish Montana as a jurisprudential outlier and would even call into question the constitutionality of other longstanding tax benefits in the state, such as deductions for contributions to houses of worship.

Regarding Komer's second point, that tax credit scholarships do not provide aid to institutions, IJ's brief argues that just as housing subsidies do not aid landlords, and food stamps do not aid grocery stores, the scholarship program does not aid the schools that parents happens to select. Moreover, "The overwhelming majority of courts to have considered this issue agree that school choice programs aid families, not schools."

### Constitutional Collision Course

Finally, the IJ brief notes that by discriminating against families "solely on the basis of religion," Rule 1 is in direct violation of the Free Exercise and Establishment Clauses of the U.S. Constitution.

Drawing on the U.S. Supreme Court's recent *Trinity Lutheran* ruling, which disallowed a Missouri program that disqualified participants "solely because of their religious character," the IJ brief notes that Rule 1 does the exact same thing. "Rule 1 excludes religious schools from participating in the tax-credit program solely because of their religious status and identity." As such, the rule is "on a collision course with the U.S. Constitution."

An amicus brief filed by the U.S. Department of Justice on behalf of the United States similarly argues that by "targeting religious conduct for distinctive, and disadvantageous, treatment" without a "state interest of the highest order," Rule 1 violates the Free Exercise Clause.



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- Agudath Israel of America
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- Association Montessori International—USA
- Association of Christian Schools International
- Association of Christian Teachers and Schools
- Association of Waldorf Schools of N.A.
- Christian Schools International
- Council of Islamic Schools in North America
- Council on Educational Standards and Accountability
- Evangelical Lutheran Church in America
- Friends Council on Education
- Islamic Schools League of America
- Jesuit Schools Network
- Lutheran Church—Missouri Synod
- National Association of Episcopal Schools
- National Association of Independent Schools
- National Catholic Educational Association
- National Christian School Association
- Oral Roberts University Educational Fellowship
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- United States Conference of Catholic Bishops
- Wisconsin Evangelical Lutheran Synod Schools

**Affiliated State Organizations**

a coalition of national associations serving private schools K-12  
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## NAEP Reading and Math Results Are Generally Flat

Certain eduwonks across the country were feverishly anticipating last month's release of results in reading and math from the 2017 National Assessment of Educational Progress (NAEP). Would their favorite reforms be vindicated? Were national trends about to take a noticeable turn? Would states or sectors that previously had shown promising performance remain in the spotlight? While NAEP is certainly the most reliable indicator of overall student performance on the skills and concepts it was designed to measure, the anticipatory hype this year still seemed, shall we say, a bit overdone, even for folks who make their living looking at test results.

### Lackluster

The truth is that those results were, generally speaking, lackluster, with trends mostly staying flat. As one wonk put it, "There's no way to sugarcoat these scores; they are extremely disappointing."

The news release from the National Assessment Governing Board (NAGB), which oversees NAEP, summarized the results this way: "The average reading score for the nation's eighth-graders increased compared with 2015, but there were no changes for reading at fourth grade or for mathematics at either grade." Moreover, "mathematics and reading scores reflected a growing gap between the highest- and lowest-scoring students when compared to 2015."

"I'm pleased that eighth-grade reading scores improved slightly but remain disappointed that only about one-third of America's fourth- and eighth-grade students read at the NAEP proficient level," said Gov. John Engler, who chairs the National Assessment Governing Board. "We are seeing troubling gaps between the highest- and lowest-performing students," he added. "We must do better for all children."

At the state level, the NAGB news release noted that average scores in Florida increased in fourth and eighth grades compared to 2015.

U.S. Secretary of Education Betsy DeVos, picking up on Florida's status as a NAEP bright spot, said the state "has been at the forefront of bold, comprehensive education reform for decades. From accountability, to literacy, to teacher certification and recognition, to providing par-

ents more freedom to select the learning environment that best fits their students' needs, Florida is rethinking education."

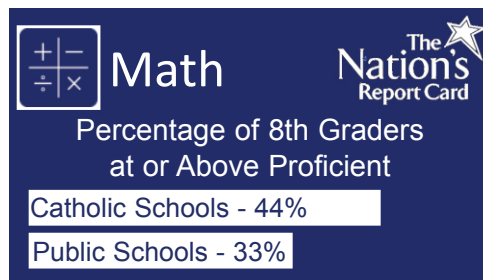
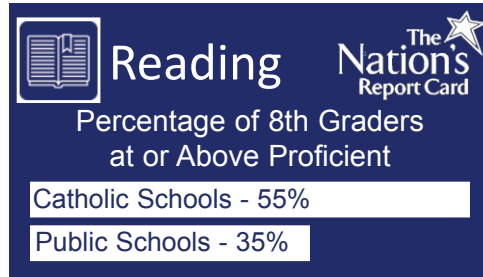
### No Private School Results

As was the case in 2015, overall results for students in private schools were not available because the participation rate fell short of the minimum threshold. NAEP requires "that participation rates for original school samples be 70 percent or higher to report national results separately for public and private schools." According to NCES, the weighted national school participation rate for the 2017 assessments in reading and mathematics was 97 percent for grade 4, with 100 percent for public schools, 61 percent for private (including Catholic) schools, and 89 percent for Catholic schools alone. At grade eight, the school response rate was 96 percent, including 100 percent for public schools, 60 percent for private schools, and 86 percent for Catholic schools. Because overall participation rates for private schools did not meet the 70 percent standard, results could not be reported.

Catholic schools, however, a subset of private schools, well exceeded the 70 percent response rate. The average reading scale score for eighth-graders attending Catholic schools (283)

was 18 points higher than the score for students attending public schools (265). In fourth grade, the public/Catholic difference in reading was 14 points (235 vs. 221). And in math, the Catholic school advantage was 12 points in grade 8 (294/282) and 6 points in grade 4 (245/239).

The National Center for Education Statistics (NCES), which oversees the administration of the tests, also presents results as percentages of students meeting various achievement levels. As the accompanying charts demonstrate, a significantly higher percentage of Catholic school students scored at or above the proficient level than public school students. Fifty-five percent of Catholic school eighth-graders reached that mark in reading, compared to 35 percent of eighth-grade students in public schools. In eighth-grade math, 44 percent of Catholic school students and 33 percent of public school students reached or exceeded the proficient level.



## Levels of Student Victimization Decline in Schools

The latest look at crime and safety in schools offers some encouraging news. Student victimization at school is down dramatically in the past two decades, according to the 2017 edition of *Indicators of School Crime and Safety*, released March 29, 2018, by the National Center for Education Statistics (NCES) in the U.S. Department of Education, and the Bureau of Justice Statistics (BJS) in the U.S. Department of Justice.

“Between 1992 and 2016, total victimization rates for students ages 12–18 declined both at school and away from school,” according to the report. Specifically, the rate of nonfatal victimizations at school against students fell from 182 per 1,000 students in 1992 to 29 per 1,000 in 2016, a significant drop indeed.

Education Secretary Betsy DeVos acknowledged the improvement while noting there is still room for more: “While there are positive trends in the annual report... we know—and tragically have been reminded in recent weeks—there is much more to be done to keep our nation’s students and teachers safe at school.”

### Safety Commission

DeVos said the Federal Commission on School Safety was working quickly “to identify and highlight best practices and solutions that state and local leaders can implement to improve school safety.” The secretary convened the commission for the first time March 28 to discuss staffing, timelines, outreach, and scope of work. In addition to Secretary DeVos, who chairs the group, the commission includes Attorney General Jeff Sessions, Secretary of Health and Human Services Alex Azar, and Secretary of Homeland Security Kirstjen Nielsen.

### Various Data Sources

The annual report on crime and safety relies on a variety of data sources to cover “violent deaths; nonfatal student and teacher victimization; school environment; fights, weapons, and illegal substances; fear and avoidance; discipline, safety, and security measures; and campus safety and security.” The most recent edition also highlights several special areas, including “security staff in K–12 public schools, teacher train-

ing on school safety and discipline, and school environment and student learning.”

### Private Schools

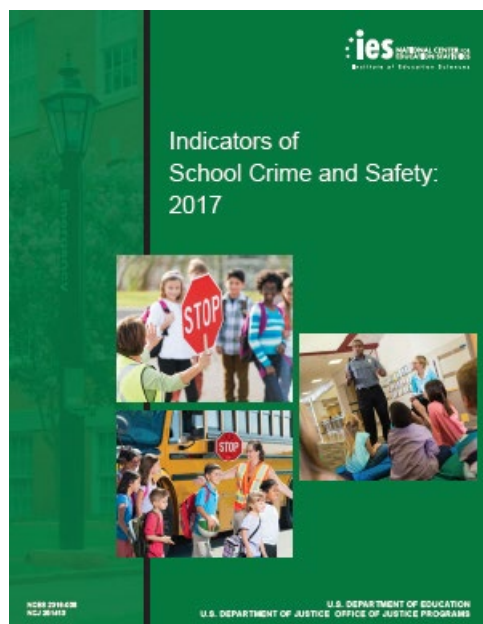
A few of the indicators in the report extend to private schools. Indicator 8, for example, addresses the presence of gangs at schools. According to the report, “a higher percentage of students attending public schools (11 percent) than of students attending private schools (2 percent) reported that gangs were present at their school in 2015.”

The extent to which students report “being called hate-related words and seeing hate-related graffiti” is measured in Indicator 10. The report states: “In each data collection year between 1999 and 2015, a higher percentage of public school students than of private school students reported seeing hate-related graffiti at school. For instance, in 2015, approximately 28 percent of public school students reported seeing hate-related graffiti at school, compared with 12 percent of private school students. The percentage of public school students who reported being called a hate-related word in 2015 was also higher than the percentage of private school students who reported so (8 vs. 3 percent).”

By contrast, the section on bullying notes: “No measurable differences were observed in the percentage of students who reported being bullied at school by urbanicity or between those in public and private schools.”

Indicator 18 measures the extent to which students avoid certain activities or places in school because “they thought someone might attack or harm them.” The report notes: “In 2015, higher percentages of students in urban (5 percent) and suburban areas (4 percent) reported avoiding one or more places in school than did students in rural areas (2 percent). In addition, a higher percentage of public school students than of private school students reported avoiding one or more places in school.”

*Indicators of School Crime and Safety 2017*, the 20th in a series of yearly publications on the topic, is available for download from NCES at <<https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2018036>>.



## Miss Virginia

Hollywood is masterful at making small-scale movements into big-screen successes. All it needs is a stirring story and an inspiring protagonist pursuing a heroic quest against all odds.

Well, those ingredients are available in plentiful supply for the forthcoming movie *Miss Virginia*, which went into production last month in Los Angeles and will film in Washington, DC, in May.

The inspiring protagonist is Virginia Walden Ford, legendary advocate for parent choice in the District of Columbia, who founded Parents for School Choice and worked tirelessly for the passage by Congress of the Opportunity Scholarship Program, the first federally funded K-12 school voucher program in the country. Her moving story as a single mom single-mindedly committed to securing a decent education for her child and helping other parents do the same is captured in the screenplay.

*Miss Virginia* is played by Emmy-winning actress Uzo Aduba (*Orange Is the New Black*), supported by an all-star cast, including Matthew Modine (*Stranger Things*), Aunjanue Ellis (*The Help*), Niles Fitch (*This Is Us*), and Vanessa Williams (*Ugly Betty*). The movie is directed by R. J. Daniel Hanna (*Shelter*).

IMDb describes the storyline this way: “A struggling inner-city single mother sacrifices everything to remove her son from his dangerous public school.”

Commenting on the project, the real Miss Virginia wrote, “This is way too exciting.” She quickly added, “But as we embark on this adventure, my heart and thoughts are with the thousands of parents whose courage over the years, all around the country, inspired me.” Virginia especially thanked the parents in DC with whom she fought for passage of the DCOSP. Without them, “none of this would be happening,” she said. “God blessed me then, and He blesses me now!”



## CAPE notes

★ The Rev. Daniel R. Heischman, immediate past president of CAPE and executive director of the National Association of Episcopal Schools, has a knack for capturing the essence of a private school and conveying it in captivating prose. His classic study, *What Schools Teach Us About Religious Life*, examines a host of religious and independent schools from the standpoint of how they foster faith and enrich the spirit. Now in its just-published second edition, the book adds two new studies of schools to the first edition's eight.

St. Marcus Lutheran School in Milwaukee, WI, is affiliated with the Wisconsin Evangelical Lutheran Synod, whose schools division is a member of CAPE. As Heischman explains, the school, whose student body is over 90 percent African American, grew from an enrollment of 60 students in the early 1980s to over 900 today. The growth was due in part to the state's voucher program but also to the school's visionary leaders, culture of caring, and record of success.

"Like so many private schools based in urban and underserved areas, there is a pervasive sense of mission and urgency to daily life and work at St. Marcus," writes Heischman. Exuding "an all-encompassing sense of vocation," the school community attempts to respond with compassion and love to the pressing needs of its students and community.

Yavneh Day School, located in California's Silicon Valley, presents a study in contrasts: a faith-based school in a region not

known for religion, and a tradition-based school in a region driven by innovation.

Still, Yavneh provides a bridge, serving the many Israeli families attracted to high-tech work in the Valley while wishing to maintain a connection to their Jewish heritage. Its mission is well suited to its surroundings: "fostering curiosity, encouraging risk taking, and ingraining a love of learning," while thoroughly integrating the Jewish-identity component.

Heischman provides vivid descriptions of both schools as well as the eight schools covered in the original. As we wrote about the first edition, "Page after page provides fresh insight and rich narrative on how schools foster a life of faith, develop a sense of service, and enrich the spirit."

★ John Elcesser, executive director of the Indiana CAPE (officially the Indiana Non-Public Education Association), was awarded the Leonard F. DeFiore Parental Choice Advocate Award at the National Catholic Educational Association's annual convention last month in Cincinnati.

According to NCEA, the award honors "a person or organization that has demonstrated outstanding leadership in promoting full and fair parental choice in education." John was recognized for his role as "a leader in the coalition that successfully passed tax-credit scholarship and voucher legislation" in Indiana.

In other CAPE connections at the NCEA convention, Sr. Dale McDonald, PBVM, Ph.D, who has ably served for

decades as a member of a public policy advisory group that CAPE convenes each month, was honored with the prestigious F. Sadlier Dinger Award. Sr. Dale is in charge of public policy and educational research at NCEA.

Raymond Fagan, president and CEO of William H. Sadlier, Inc., a corporate sponsor of CAPE, said, Sadlier recognized Sr. Dale "for a lifetime of dedication to children in Catholic schools."

Another NCEA awardee was Dr. Merylann "Mimi" Schuttloffel, professor of educational administration and policy studies at The Catholic University of America, who received the C. Albert Koob Merit Award for her outstanding work in helping to form leaders of Catholic schools.

In the "small world" department, Rev. C. Albert Koob was a founding member of CAPE and its first treasurer back in 1971, and Mimi is the mother of Michael Schuttloffel, CAPE's next executive director starting July 1.

★ The Federal Reserve Bank of New York has published a new comic book series for middle school and high school students called *The Story of the Federal Reserve System*. According to the New York Fed, the series "provides educators with a resource to teach students about basic economic principles and the Federal Reserve System's role in the economy. Classroom copies and lesson plans are available at [www.newyorkfed.org/outreach-and-education/comic-books](http://www.newyorkfed.org/outreach-and-education/comic-books).