

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket # 217-2020-CV-00480

Dennis Griffin and Catherine Griffin

v.

New Hampshire Department of Education

PLAINTIFFS' COMPLAINT

INTRODUCTION

1. This is a civil rights action to vindicate the rights guaranteed to a New Hampshire family by the First Amendment's Free Exercise, Establishment, and Free Speech Clauses, and the Fourteenth Amendment's Equal Protection and Due Process Clauses.

2. In New Hampshire, school districts that do not operate their own primary or secondary schools may pay tuition for resident students to attend either a private school or another district's public school selected by the resident student's parents. However, by statute, school districts may not pay tuition to otherwise qualified private schools if those schools are sectarian. RSA 193:3, VI ("The school board may execute a contract with an approved *nonsectarian* private school to provide for the education of a child who resides in the school district...") (emphasis added); RSA 193:3, VII(b) ("A private school that receives tuition program students shall . . . [b]e a nonsectarian school.") (together, the "Sectarian Exclusion").

3. Defendant New Hampshire Department of Education (“Department”), is responsible for enforcing New Hampshire’s statute prohibiting school districts from making tuition payments on behalf of children whose families or guardians choose to enroll them in otherwise qualified sectarian schools.

4. Plaintiffs reside within the boundaries of the Croydon School District, where they are raising their 12-year-old grandson, Clayton. The Croydon School Board pays tuition for students to attend secular private schools that are independently selected by parents. Plaintiffs, however, have decided to send Clayton to Mount Royal Academy, a Catholic school. Because Mount Royal Academy is a sectarian school, Plaintiffs are ineligible for tuition payments.

5. The Department’s denial of a generally available public benefit—tuition payments to private sectarian schools where tuition payments to private nonsectarian and public schools are available—to Plaintiffs because the school where they’ve enrolled their grandson is a sectarian school violates the principle that the government must not discriminate against, or impose legal difficulties on, religious individuals or institutions simply because they are religious.

6. The Department’s enforcement of the statutory prohibition against making tuition payments on behalf of families choosing an otherwise qualified sectarian school violates the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment to the U.S. Constitution as well as the Fourteenth Amendment’s Equal Protection and Due Process Clauses.

PARTIES, JURISDICTION, AND VENUE

7. Plaintiffs Dennis and Cathy Griffin are a married couple who reside at 228 Old Springfield Road, Croydon, New Hampshire. They are raising their 12-year-old grandson, Clayton. Clayton has attended Mount Royal Academy since the first grade. Dennis and Cathy chose Mount Royal Academy for Clayton because the school aligns with their sincerely held religious values and they feel it is the best fit for Clayton.

8. The Department is an agency of the State of New Hampshire, created and empowered under RSA 21-N:2 to, among other functions, “provide[] general supervision for elementary and secondary schools, teachers and administrators.” The Department is headquartered at 101 Pleasant Street, Concord, New Hampshire.

9. The Department has the primary responsibility and practical ability to enforce the legal and regulatory requirements for school districts, as well as the primary responsibility and practical ability to ensure that the Department’s regulations, policies, and powers are implemented in accordance with the U.S. Constitution.

10. Plaintiffs’ action, filed pursuant to 42 U.S.C. § 1983 and RSA 491:22, seeks a declaration that the Sectarian Exclusion found in RSA 193:3, VI and VII(b) is unconstitutional on its face and as applied to Plaintiffs, as well as an injunction enjoining the Department from enforcing the Sectarian Exclusion and enjoining the Department from otherwise denying tuition payments to tuition-eligible students

and their families on the sole basis that an otherwise eligible private school is sectarian.¹

11. This Court possesses jurisdiction over this action under RSA 491:22 because Plaintiffs seek declaratory relief.

12. Pursuant to RSA 507:9, venue is proper in this Court because the Department is headquartered in Merrimack County.

STATEMENT OF FACTS

13. The New Hampshire State Legislature (hereinafter “Legislature”) has imparted a duty on New Hampshire school boards to “provide, at district expense, elementary and secondary education to all pupils who reside in the district until such time as the pupil has acquired a high school diploma or has reached age 21, whichever occurs first.” RSA 189:1-a.

14. Accordingly, the Croydon School Board is required to provide for the education of children in the town through twelfth grade.

15. The Croydon School District operates an elementary school that serves students kindergarten through fourth grade, but it does not operate any schools for students beyond the fourth grade.

16. In districts without secondary schools, pursuant to RSA 193:3, VI, the school board may pay the tuition on behalf of any student to the school selected by

¹ Plaintiffs do not challenge the reference to “nonsectarian private school[s]” found in the first sentence of RSA 193:3, VI. Where a school district assigns students to a private school absent family choice, it may be prohibited from assigning students to a religious school.

the student's parent or guardian. That school can be either a secondary school in another district or any private school that is "approved as a school tuition program."

17. To be "approved as a school tuition program" pursuant to RSA 193:3, VII, a private school must:

- a. Comply with statutes and regulations relating to agency approvals such as health, fire safety, and sanitation;
- b. Be a nonsectarian school;
- c. Be incorporated under the laws of New Hampshire or the United States; and
- d. Administer an annual assessment in reading and language arts, mathematics, and science

18. Districts without secondary schools may allow each family to choose the school that best fits its needs, and then separately contract with any parentally selected private school that satisfies the criteria to be "approved as a school tuition program." RSA 193:3, VI.

19. Districts without secondary schools may also choose instead to send all secondary school students to the same public school or approved private school.

20. The Croydon School Board has decided to allow families to choose the best public or private school for their children and pays tuition to a variety of secondary schools as chosen by Croydon families. Croydon families bear sole responsibility for selecting the school their children will attend.

21. Under the Sectarian Exclusion, a private school may not be approved for tuition purposes unless it is “a nonsectarian school.” Accordingly, the Department does not permit local school boards to pay tuition on behalf of families of otherwise tuition-eligible students if those families choose sectarian schools for their children.

22. As residents of the Town of Croydon, Plaintiffs Dennis and Cathy Griffin are entitled to have the Croydon School Board provide a secondary education for their grandson, Clayton, who is entering seventh grade. However, because they send Clayton to Mount Royal Academy—a Catholic school—they do not receive any tuition assistance from the Croydon School Board.

23. Mount Royal Academy is a private sectarian school located in Sunapee, New Hampshire that educates children at the pre-kindergarten through 12th-grade levels. It is fully accredited by the National Association of Private and Independent Catholic Schools. Mount Royal is less than 10 minutes away from the Griffins’ home.

24. On information and belief, Mount Royal Academy complies with New Hampshire statutes and regulations relating to agency approvals such as health, fire safety, and sanitation as is required to be approved as a school tuition program.

25. Mount Royal Academy is incorporated under the laws of New Hampshire as is required to be approved as a school tuition program.

26. On information and belief, Mount Royal Academy administers annual assessments in reading and language arts, mathematics, and science as is required to be approved as a school tuition program.

27. However, even though Mount Royal meets these criteria to be approved as a school tuition program, it is ineligible to receive tuition payments pursuant to the Sectarian Exclusion for the sole reason that the school is sectarian.

28. Upon information and belief, but for the Sectarian Exclusion, Mount Royal Academy would accept tuition payments from the Croydon School Board.

29. Because of the Sectarian Exclusion, Dennis and Cathy Griffin cannot have tuition paid to Mount Royal Academy by the Croydon School Board on behalf of their grandson, Clayton.

30. But for the Sectarian Exclusion, Plaintiffs would have asked the Croydon School Board to pay the tuition at Mount Royal Academy.

31. On information and belief, but for the Sectarian Exclusion, the Croydon School Board would have paid Clayton's tuition at Mount Royal Academy.

32. Plaintiffs have not requested that the Croydon School Board pay Clayton's tuition to Mount Royal Academy because such a request would be futile.

33. Consequently, Dennis and Cathy Griffin have paid, and must continue to pay, tuition for Clayton to attend Mount Royal Academy.

34. If Plaintiffs prevail in this case, they will request tuition for Clayton's education at Mount Royal Academy. And, on information and belief, the Croydon School Board will pay such tuition.

COUNT I: FREE EXERCISE OF RELIGION

35. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1 through [] of this Complaint as though fully set forth herein.

36. The Free Exercise Clause of the First Amendment to the U.S. Constitution provides, in relevant part, that “Congress shall make no law . . . prohibiting the free exercise” of religion.

37. The Free Exercise Clause applies to states and their subdivisions and municipalities through the Fourteenth Amendment to the U.S. Constitution.

38. The Free Exercise Clause protects against governmental hostility toward religion and requires neutrality toward religion.

39. The Free Exercise Clause prohibits discrimination against religious schools through exclusion from educational choice programs. *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246 (2020).

40. The Sectarian Exclusion is not neutral with respect to religion and is thus not a law of general applicability. Rather, it discriminates against religion on its face and as applied in that it allows a family whose school district does not operate its own secondary school, and instead pays tuition for students residing in the district to attend the public or private secondary school of the families’ choice, to direct their children’s tuition payments to private secular schools, but not to private sectarian schools.

41. On its face and as applied to Plaintiffs, the Sectarian Exclusion conditions the receipt of a public benefit on the forgoing of religious convictions and free exercise rights.

42. By denying tuition payments for children whose families choose to send them to sectarian schools, the Sectarian Exclusion forces families either to forgo the receipt of an otherwise generally available benefit or to forgo their right and conviction to educate their children in a sectarian school.

43. On its face and as applied to Plaintiffs, the Sectarian Exclusion discriminates and imposes special disabilities based on the religious status of: (a) the schools it bars from receiving tuition payments; and (b) the families who choose sectarian schools for their otherwise tuition-eligible children.

44. On its face and as applied to Plaintiffs, the Sectarian Exclusion discriminates and imposes special disabilities based on the religious use of tuition funds by families who choose sectarian schools for their otherwise tuition-eligible children.

45. On its face and as applied to Plaintiffs, the Sectarian Exclusion substantially burdens the free exercise rights of families whose conviction is to educate their child in a sectarian school.

46. Defendant has no compelling, substantial, or even legitimate interest in denying tuition-eligible families private sectarian options while allowing them private secular options.

47. The Sectarian Exclusion is not narrowly tailored to achieve, nor is it rationally related to, any governmental interest Defendant purports to have.

48. The Establishment Clause of the U.S. Constitution does not prohibit a school board from making tuition payments to private sectarian schools chosen by Plaintiffs for their grandson, or by the families of other tuition-eligible students for their own children.

49. A desire to achieve greater separation of church and state than is already ensured under the Establishment Clause of the U.S. Constitution cannot justify the exclusion of sectarian options in districts that pay tuition for students who attend secular private schools.

50. On its face and as applied to Plaintiffs, the Sectarian Exclusion violates the Free Exercise Clause of the First Amendment to the U.S. Constitution insofar as it denies sectarian options to tuition-eligible students and their families.

COUNT II: ESTABLISHMENT OF RELIGION

51. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1 through [] of this Complaint as though fully set forth herein.

52. The Establishment Clause of the First Amendment to the U.S. Constitution provides, “Congress shall make no law respecting an establishment of religion.”

53. The Establishment Clause applies to states and their subdivisions and municipalities through the Fourteenth Amendment to the U.S. Constitution.

54. The Establishment Clause requires neutrality toward religion.

55. Accordingly, government may neither favor, nor disfavor, religion over non-religion or one religion over another.

56. By denying tuition-eligible students and their families sectarian options while allowing private secular options, the Sectarian Exclusion is, on its face and as applied to Plaintiffs, hostile toward and disapproving of religion.

57. Defendant does not have a valid secular governmental purpose for denying tuition-eligible families sectarian options.

58. On its face and as applied to Plaintiffs, the Sectarian Exclusion has the principal and primary effect of inhibiting religion, in that it denies tuition to children whose families wish to send them to a sectarian school. In this regard, it conditions receipt of an otherwise available public benefit on families' willingness to forgo their religious convictions and their right to educate their children in a sectarian school. It thereby creates a substantial disincentive for families to enroll their children in sectarian schools.

59. On its face and as applied to Plaintiffs, the Sectarian Exclusion violates the Establishment Clause of the First Amendment to the U.S. Constitution insofar as it denies sectarian options to tuition-eligible students and their families.

COUNT III: FREEDOM OF SPEECH

60. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1 through [] of this Complaint as though fully set forth herein.

61. The Free Speech Clause of the First Amendment to the U.S. Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech.”

62. The Free Speech Clause applies to states and their subdivisions and municipalities through the Fourteenth Amendment to the U.S. Constitution.

63. The Free Speech Clause prohibits restrictions of speech that are based on content or viewpoint.

64. Plaintiffs’ decisions concerning, and making provisions for, the education of their grandson are a form of expression and speech protected by the Free Speech Clause.

65. On its face and as applied to Plaintiffs, the Sectarian Exclusion restricts expression and speech based on content and viewpoint because it denies tuition payments only for those children whose families wish to send them to a sectarian school.

66. Defendant has no compelling, substantial, or even legitimate interest in denying tuition-eligible families sectarian options while allowing private secular options.

67. The Sectarian Exclusion is not narrowly tailored to achieve, nor is it rationally related to, any governmental interest Defendant purports to have.

68. On its face and as applied to Plaintiffs, the Sectarian Exclusion violates the Free Speech Clause of the First Amendment to the U.S. Constitution insofar as it denies sectarian options to tuition-eligible students and their families.

COUNT IV: EQUAL PROTECTION OF THE LAWS

69. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1 through [] of this Complaint as though fully set forth herein.

70. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

71. The Equal Protection Clause applies to states and their subdivisions and municipalities.

72. The Equal Protection Clause prohibits the government from discriminating on the basis of religion, which is a suspect classification for equal protection purposes.

73. By denying tuition-eligible students and their families sectarian options while allowing private secular options, the Sectarian Exclusion discriminates, facially and as applied to Plaintiffs, on the basis of religion.

74. Defendant has no compelling, substantial, or even legitimate interest in denying tuition-eligible students and their families sectarian options while allowing private secular options.

75. The Sectarian Exclusion is not narrowly tailored to achieve, nor is it rationally related to, any governmental interest Defendant purports to have.

76. By excluding sectarian options, the Sectarian Exclusion makes it more difficult for one group of citizens than for all others to seek aid from the government.

77. On its face and as applied to Plaintiffs, the Sectarian Exclusion discriminates on the basis of religion and therefore violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution insofar as it denies sectarian options to tuition-eligible students and their families.

COUNT V: DUE PROCESS

78. By this reference, Plaintiffs incorporate each and every allegation set forth in paragraphs 1 through [] of this Complaint as though fully set forth herein.

79. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that “No State shall . . . deprive any person of life, liberty, or property, without due process of law.”

80. The Due Process Clause applies to states and their subdivisions and municipalities.

81. Among the liberties protected by the Due Process Clause is the liberty of families to control and direct the education and upbringing of the children under their control. This liberty is fundamental.

82. On its face and as applied to Plaintiffs, the Sectarian Exclusion conditions receipt of a public benefit on the forbearance of the Plaintiffs’ liberty to control and direct the education and upbringing of children. By prohibiting tuition payments for children whose families choose to send them to sectarian schools, it forces families to either forgo the benefit of tuition funds for their child or forgo their right to send their child to the school of their choice.

83. Defendant has no compelling, substantial, or even legitimate interest in denying tuition-eligible students and their families sectarian options while allowing private secular options.

84. The Sectarian Exclusion is not narrowly tailored to achieve, nor is it rationally related to, any governmental interest Defendant purports to have.

85. On its face and as applied to Plaintiffs, the Sectarian Exclusion violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution insofar as it denies sectarian options to tuition-eligible students and their families.

PRAYER FOR RELIEF

Plaintiffs respectfully request the following relief:

A. A declaratory judgment by the Court that the Sectarian Exclusion, on its face and as applied to Plaintiffs, violates the Free Exercise, Establishment, Free Speech, Equal Protection, and Due Process Clauses of First and Fourteenth Amendments to the U.S. Constitution insofar as its excludes sectarian options from New Hampshire's system of paying tuition for students to attend private and public schools in towns whose school districts do not operate a secondary school of their own;

B. A preliminary and permanent injunction prohibiting Defendant from enforcing the Sectarian Exclusion or otherwise denying sectarian options to tuition-eligible students and their families;

C. An award of attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988; and

D. Any other legal and equitable relief the Court may deem appropriate and just.

Respectfully submitted,

Date: September 2, 2020

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**Application for admission
pro hac vice to be filed*