



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION NO. 18-01

TO: The Honorable Rick D. Youngblood
Idaho State Representative
12612 Smith Avenue
Nampa, ID 83651

Per Request for Attorney General's Opinion

Pursuant to your request, the Office of the Attorney General has prepared the following opinion in response to the questions presented in your July 18, 2018 correspondence.

QUESTIONS PRESENTED

1. Does the decision in the *Trinity Lutheran* case alter in any way the meaning or application of Idaho's Blaine Amendment, and if so, how?
2. Idaho's Blaine Amendment appears to be inconsistent with the other three Constitutional Sections cited [Article I, Section 4, Article XXI, Section 19, and Article XXI, Section 20].¹ Do those other Sections limit or alter the meaning, construction or application of Idaho's Blaine Amendment in any way, and if so, how?
3. Does the decision in the *Trinity Lutheran* case alter in any way the meaning or application of past Idaho Attorney General Opinions involving Idaho's Blaine Amendment, and if so, how?
4. Do the other three Idaho Constitution Sections cited above alter in any way the meaning or application of past Idaho

¹ This statement was included as part of the question presented and is not meant to reflect the opinion of the Attorney General.

Attorney General Opinions involving Idaho's Blaine Amendment, and if so, how?

5. Considering the decision in the *Trinity Lutheran* case and the four Idaho Constitutional Sections cited, including but not limited to Idaho's Blaine Amendment, may "any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever," including Northwest Nazarene University, legally and constitutionally either participate in or be excluded from participation in, the following state activities: (1) on-campus Idaho work study programs, (2) the issuance of tax-free bonds through the Idaho Housing and Finance Association, (3) participation of their students in Title IV-E contracts and grants, and (4) any other activities involving state moneys that work to benefit students of the referenced institutions?

CONCLUSIONS

1. The decision in Trinity Lutheran Church of Columbia, Inc. v. Comer, — U.S. —, 137 S. Ct. 2012, 198 L.Ed.2d 551 (2017), will likely have some limiting effect on the application of article IX, section 4 of Idaho's Constitution (the "Blaine Amendment"). Like the Missouri Constitution, which was at issue in Trinity Lutheran, Idaho's Constitution provides for greater separation of church and state than what is already ensured by the Establishment Clause in the First Amendment of the United States Constitution, as it contains a so-called "no aid" provision which is commonly referred to as a Blaine Amendment.

In Trinity Lutheran, the United States Supreme Court found that Missouri's policy of strictly adhering to such an amendment – resulting in the denial of a grant to a church to make safety improvements to the playground of a preschool it operated – imposed a penalty on the free exercise of religion that triggered the strict scrutiny review. The Supreme Court found that Missouri's "policy preference for skating as far as possible from religious establishment concerns" did not meet that standard and that the exclusion of Trinity Lutheran from a public benefit for which it was otherwise qualified solely because it is a school affiliated with a church could not stand as it violated the right to the free exercise of religion.

In light of the Court's reasoning, the practice of outright denying an otherwise publicly available benefit to a religiously affiliated applicant solely because of who or what the applicant is (i.e., a church, religiously affiliated

university, etc.), as opposed to how the applicant will put the benefit to use (i.e., direct religious use versus resurfacing a playground to ensure safety of children), has been called into question. While this case confirms that “there is ‘play in the joints’ between what the Establishment Clause permits and the Free Exercise Clause compels,” the amount of “play” is still in question, especially given that the Supreme Court included language that suggests the opinion should be limited to the facts of the case.

2. A well-established canon of statutory construction is that statutes are to be construed together and harmonized to the extent possible. The constitutional provisions identified in your letter (Article IX, Section 5; Article I, Section 4; Article XXI, Section 19; and Article XXI, Section 20) are capable of being harmonized, as they generally are establishment and free exercise clauses, and such clauses have a long history of co-existing. However, such clauses do act as limits upon one another.

3. There are few prior opinions issued by the Attorney General involving the application of article IX, section 5 of the Idaho Constitution. One such Attorney General Guideline is from February 7, 1992 regarding “potential church/state constitutional issues associated with an income tax credit for tuition payments to private schools for children ages K-12.” That opinion found that tuition tax credits for private schools are probably unconstitutional under article IX, section 5 of the Idaho Constitution. 1992 Idaho Att’y Gen. Ann. Rpt. 54. The Trinity Lutheran decision likely supersedes the analysis in that Guideline.

4. Article I, section 4, article XXI, section 19, and article XXI, section 20 of the Idaho Constitution do not alter any past opinions of the Attorney General involving the Blaine Amendment.

5. Determining whether it is legal and constitutional to either allow a religiously affiliated institution to participate in, or be excluded from, state programs likely depends on a few key factors, including but not limited to: (1) whether the program is publicly available; (2) whether a religiously affiliated applicant is being excluded categorically because of who or what they are, as opposed to how the funds will be used; (3) whether the program provides direct or indirect aid to the institution; and (4) whether the student is the primary intended beneficiary of the benefit provided by the program.

ANALYSIS

1. **Does the decision in the *Trinity Lutheran* case alter in any way the meaning or application of Idaho's Blaine Amendment, and if so, how?**

Article IX, section 5 of the Idaho Constitution provides in pertinent part as follows:

Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever

This type of provision is what is commonly referred to as a Blaine Amendment. The term Blaine Amendment dates back to the 1870s when a congressman named James Blaine sought to amend the United States Constitution to provide that no public funds should ever be distributed to any religious sects. That effort narrowly failed, however, a majority of states amended or drafted their constitutions to include variations of the Blaine Amendment.

Missouri also has a Blaine Amendment which provides as follows:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

V.A.M.S. Const., Art. I, § 7. In accordance with this provision, the Missouri Department of Natural Resources had a policy of categorically disqualifying churches and other religious organizations from receiving grants. Trinity Lutheran, 137 S. Ct. at 2017.

Trinity Lutheran Church runs a preschool and daycare called the Child Learning Center (the "Center") in Boone County, Missouri. *Id.* The Center has a playground that is used by its daycare students and by children of the surrounding community. *Id.*

In 2012, the Center applied to a program operated by Missouri's Department of Natural Resources for a grant to replace the gravel surface of its playground with a safer surface made from recycled tires. *Id.* The Center met the neutral requirements for obtaining a grant and scored well in comparison with other applicants, ranking 5th out of the 44 applicants. *Id.* at 2018. While the state awarded 14 grants, it denied the Center's application for a grant based on its policy of deeming religious institutions categorically ineligible to receive grants. *Id.* The Center filed suit claiming that Missouri's policy of denying a generally available public benefit to religious institutions solely on the basis of their status as a religious institution violated the Free Exercise Clause of the First Amendment of the United States Constitution. *Id.*

The Supreme Court found that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Id.* at 2019. The state interest asserted to justify the policy was achieving greater separation of church and state than what is already ensured by the Establishment Clause in the First Amendment of the United States Constitution. *Id.* at 2024. The Supreme Court found that such an interest was not sufficient to withstand the strictest scrutiny. *Id.*

In so finding, the Supreme Court distinguished prior precedent that permitted a state to withhold a benefit that was going to be put to religious use on the grounds that Trinity Lutheran was not being denied an otherwise publicly available benefit because of how it planned to use the grant, but rather because of what it was. *Id.* at 2023. More specifically, the Supreme Court distinguished this case from Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158 L.Ed.2d 1 (2004), on the grounds that the plaintiff there "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church." 137 S. Ct. at 2023 (emphasis in original).

The Supreme Court further distinguished Locke on the grounds that in that case the plaintiff sought the funding for an "essentially religious endeavor" and that the state had a strong "antiestablishment interest in not using taxpayer funds to pay for the training of clergy." *Id.* However, "nothing of the sort can be said about a program to use recycled tires to resurface playgrounds." *Id.*

In light of the Supreme Court's decision, the practice of outright denying an otherwise publicly available benefit to a religiously affiliated applicant solely because of who or what the applicant is, as opposed to how the applicant will put

the benefit to use, has been called into question. See, e.g., *The Hon. Michael P. Mullin*, 2018 WL 1127735 (Va. Att’y Gen. Op. February 15, 2018) (“In light of *Trinity Lutheran*, [Virginia Code] § 15.2-953 likely would run afoul of the Free Exercise Clause if it required a locality to deny generally available public benefits to qualifying churches or sectarian organizations solely upon the basis of religious status, when such benefits are expended for non-religious purposes.”).

Trinity Lutheran confirms that “there is ‘play in the joints’ between what the Establishment Clause permits and the Free Exercise Clause compels.” 137 S. Ct. at 2019. The amount of “play” is still in question given that the Supreme Court included language in a footnote that suggests the opinion should be limited to the facts of the case. 137 S. Ct. at 2024 n.3. However, multiple Justices did not join in that footnote, and Justice Gorsuch noted that such a limited reading of the opinion would be unreasonable. *Id.* at 2025-26. Moreover, other states have relied on the reasoning in Trinity Lutheran to assess whether their Blaine Amendments prevent sectarian institutions from enjoying publicly available benefits extending beyond playground resurfacing. See, e.g., *Steve Emmons*, 2018 WL 1663640 at *4-6 (Okla. Att’y Gen. Op. March 30, 2018) (discussing Trinity Lutheran in concluding that Oklahoma’s Blaine Amendment could not be held to prevent the state from providing free training to campus police commissioned by a private school solely on the basis that the commissioning entity is of a sectarian nature.).

2. Idaho’s Blaine Amendment appears to be inconsistent with the other three Constitutional Sections cited [Article I, Section 4, Article XXI, Section 19, and Article XXI, Section 20]. Do those other Sections limit or alter the meaning, construction or application of Idaho’s Blaine Amendment in any way, and if so, how?

“[A]s a general rule, the usual principles governing the construction of statutes apply also to the construction of constitutions.” 16 C.J.S. Constitutional Law § 82 (Westlaw 2018). “Statutes that relate to the same subject matter ‘are to be construed in harmony, if reasonably possible.’” State v. Thiel, 158 Idaho 103, 109, 343 P.3d 1110, 1116 (2015); State v. Seamons, 126 Idaho 809, 811-12, 892 P.2d 484, 486-87 (Ct. App. 1995) (“When construing two separate statutes that deal with the same subject matter, the statutes should be construed harmoniously, if at all possible, so as to further the legislative intent.”).

Article IX, section 5 of the Idaho Constitution can and should be interpreted in a manner that does not render it inconsistent with other provisions of the Idaho Constitution. Article IX, section 5 prohibits specified governmental entities from making any appropriation of public funds to religious institutions and their affiliates.

It is essentially a no establishment of religion clause, but is stricter than what is provided in the First Amendment of the United States Constitution. Article I, section 4 and article XXI, section 19 of the Idaho Constitution guarantee religious liberty and prohibit the denial of personal rights and privileges based on one's religious beliefs. They are essentially clauses designed to ensure the free exercise of religion.

Establishment and free exercise clauses have co-existed throughout this nation's history. As was noted by the United States Supreme Court, "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." Trinity Lutheran, 137 S. Ct. at 2019. So such clauses co-exist, but also act as limits upon one another.

With respect to article XXI, section 20, it simply confirms that Idaho adopts the United States Constitution.

3. Does the decision in the *Trinity Lutheran* case alter in any way the meaning or application of past Idaho Attorney General Opinions involving Idaho's Blaine Amendment, and if so, how?

There are few prior opinions issued by the Attorney General involving the application of article IX, section 5 of the Idaho Constitution. One such opinion is from February 7, 1992 regarding "potential church/state constitutional issues associated with an income tax credit for tuition payments to private schools for children ages K-12." That opinion found that tuition tax credits for private schools are probably unconstitutional under article IX, section 5 of the Idaho Constitution. The Trinity Lutheran decision supersedes the analysis in that opinion. This office will review and recommends that other entities review application of article IX, section 5 based upon the reasoning of the Trinity Lutheran decision and any additional interpretative case law moving forward.

Under such a tax credit system, any aid to religiously affiliated schools would be indirect as the benefit would go to the parents of the children attending such schools. Accordingly, it would likely be permitted under the United States Constitution in light of Zelman v. Simmons-Harris, 536 U.S. 639, 652, 122 S. Ct. 2460, 2467, 153 L.Ed.2d 604 (2002) ("where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause."). So, the question becomes whether those who attend religiously affiliated schools can be excluded from such a program based on Idaho's Blaine Amendment. Based on the Supreme Court's

reasoning in Trinity Lutheran, if those who attended private religiously affiliated schools were not allowed to participate in that program, such an exclusion would need to be evaluated to determine if it was being excluded for “who” is participating (religious school students) versus the purpose of the assistance, student education. Based upon the reasoning in Trinity Lutheran, it is likely that absent a finding that the purpose of the benefit was the furtherance of religion, the exclusion would be constitutionally suspect.

A recent case from Colorado presents an analogous situation. In Taxpayers for Pub. Educ. v. Douglass Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015), the Colorado Supreme Court found that a scholarship program that provided tax-payer funded scholarships to qualifying elementary, middle and high schools students to attend private schools, including religiously affiliated schools, violated the Blaine Amendment in Colorado’s Constitution. *Id.* at 470-75. The United States Supreme Court granted certiorari and, the day after the Trinity Lutheran decision, the Supreme Court vacated the judgment and remanded the case to the Colorado Supreme Court for further consideration in light of Trinity Lutheran. Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ., — U. S. —, 137 S. Ct. 2325, 198 L.Ed.2d 753 (2017). A new school board rescinded the program so the case was dismissed as moot. However, given that the Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of the Trinity Lutheran decision, it seems the Supreme Court is signaling that Trinity Lutheran might apply to these types of programs.

4. Do the other three Idaho Constitution Sections cited above alter in any way the meaning or application of past Idaho Attorney General Opinions involving Idaho’s Blaine Amendment, and if so, how?

Article I, section 4, article XXI, section 19, and article XXI, section 20 of the Idaho Constitution do not alter any past opinions of the Attorney General involving the Blaine Amendment.

5. Considering the decision in the *Trinity Lutheran* case and the four Idaho Constitutional Sections cited, including but not limited to Idaho’s Blaine Amendment, may “any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever,” including Northwest Nazarene University, legally and constitutionally either participate in or be excluded from participation in, the following state activities: (1) on-campus Idaho work study programs, (2)

the issuance of tax-free bonds through the Idaho Housing and Finance Association, (3) participation of their students in Title IV-E contracts and grants, and (4) any other activities involving state moneys that work to benefit students of the referenced institutions?

Determining whether it is legal and constitutional to either allow a religiously affiliated institution to participate in, or be excluded from, state programs likely depends on a few key factors, including but not limited to: (1) whether the program is publicly available; (2) whether a religiously affiliated applicant is being excluded categorically because of who or what they are, as opposed to how the funds will be used; (3) whether the program provides direct or indirect aid to the institution; and (4) whether the student is the primary intended beneficiary of the benefit provided by the program.

With respect to work study programs, there are generally available programs that are meant to assist students in obtaining jobs they can work to assist them in paying their educational expenses. Such programs are meant to benefit the student and any benefit to a religiously affiliated institution is indirect. Excluding religiously affiliated institutions from such programs would likely be seen as a punishment based on what the institution is and not on what it plans to do with the benefit. Accordingly, religiously affiliated institutions would likely be permitted to participate in such programs.

With respect to tax-free bond programs, they would provide a direct benefit to a religiously affiliated institution and would be meant to primarily benefit the institution, as opposed to the students. The aid provided could be used to further the religious objectives of the institution. In light of the foregoing, it is likely both legal and constitutional to exclude religiously affiliated institutions from participating in such programs, especially if such grants appear to further the institution's religious mission. See Freedom From Religion Found. v. Morris Cty. Bd. of Chosen Freeholders, 181 A.3d 992, 1009-012 (N.J. 2018) (finding that county's award of historic preservation grants to churches with active congregations to fund repairs to facilities used to hold religious services violated the Religious Aid Clause of New Jersey's Constitution, and that excluding churches from that program did not violate the Free Exercise Clause of the United States Constitution because of what the churches planned to do with the funds: "use public funds to repair church buildings so that religious worship services can be held there").

With respect to participation in Title IV-E contracts and grants, these are generally for programs that provide stipends to social work students committed to

practicing in the field of child welfare. To the extent that religiously affiliated institutions are being denied the opportunity to apply to participate in such programs *solely* because they are religiously affiliated, an argument can be made that such a blanket exclusion of religiously affiliated institutions violates their right to the free exercise of religion given that: the exclusion is based on what the institution is as opposed to how the funds will be used; the funds are likely not being used to further any religious mission of the institution; and the stipends primarily benefit the students as opposed to the institution.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. I, § 4.
Art. IX, § 5.
Art. XXI, § 19.
Art. XXI, § 20.

2. U.S. Supreme Court Cases:

Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ., — U. S. —, 137 S. Ct. 2325, 198 L.Ed.2d 753 (2017).
Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158 L.Ed.2d 1 (2004).
Trinity Lutheran Church of Columbia, Inc. v. Comer, — U.S. —, 137 S. Ct. 2012, 198 L.Ed.2d 551 (2017).
Zelman v. Simmons-Harris, 536 U.S. 639, 122 S. Ct. 2460, 153 L.Ed.2d 604 (2002).

3. Idaho Cases:

State v. Seamons, 126 Idaho 809, 892 P.2d 484, (Ct. App. 1995).
State v. Thiel, 158 Idaho 103, 343 P.3d 1110, (2015).

4. Other Cases:

Freedom From Religion Found. v. Morris Cty. Bd. of Chosen Freeholders, 181 A.3d 992 (N.J. 2018).
Taxpayers for Pub. Educ. v. Douglass Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015).

5. Other State Constitutions:

V.A.M.S. Const., Art. I, § 7 (Mo. Const.).

6. Other Authorities:

1992 Idaho Att'y Gen. Ann. Rpt. 54.

Steve Emmons, 2018 WL 1663640 at *4-6 (Okla. Att'y Gen. Op. March 30, 2018).

The Hon. Michael P. Mullin, 2018 WL 1127735 (Va. Att'y Gen. Op. February 15, 2018).

16 C.J.S. Constitutional Law § 82 (Westlaw 2018).

Dated this 12th day of September, 2018.



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