NEPC Review: The Persistence of Religious Discrimination in Publicly Funded Pre-K Programs (Manhattan Institute, January 2025)

Reviewed by:

Joshua Weishart
Suffolk University Law School

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National Education Policy Center

School of Education
University of Colorado Boulder
nepc.colorado.edu

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Summary

A recent Manhattan Institute report claims that many religious pre-K providers are being totally or partially excluded from publicly funded education programs that are open to other private schools, despite recent Supreme Court decisions prohibiting such exclusions. Through keyword searches and online reviews of statutes, regulations, and websites, the report identifies written state and school district policies that it claims exclude religious pre-K providers because of their religious status or religious use of public funds. Based solely on these policies—as opposed to the enforcement of the policies—the report accuses many public programs of engaging in hostile religious discrimination. But there is another more plausible, benign explanation: These policies simply have not yet been updated to conform to the recent Supreme Court decisions. It is quite common for a law to remain "on the books" even after a judicial decision declares it invalid, which is something that could be addressed but is not evidence of widespread discrimination. The report inexplicably omits any surveys of religious pre-K providers or sampling from direct communications with school officials to verify whether such policies are being enforced. Yet even as it alleges discrimination against religious pre-K schools, who incidentally educate under one percent of all pre-K schoolchildren, the report omits any reflection about the openly discriminatory policies and practices of many religious schools enrolling students all the way through 12th grade, who educate far, far more. That is a reflection that will be sorely needed should the Supreme Court, later this term, insist that states must accept religious charter schools.

NEPC

NATIONAL EDUCATION POLICY CENTER

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I. Introduction

In just the past three years, there has been an unprecedented rise in the number of states that have adopted education programs that fund private schools. Currently, 13 states fund voucher programs, while 21 states fund neovouchers, e.g., tax credit programs.[1] At least 12 of these states have expanded, or are "on track" to expand, these programs universally to all students in the state.[2] Legislators in six states are considering adopting these programs and another six are contemplating expansion of existing programs.[3] For its part, Congress is weighing a nationwide tax credit program.[4]

Not coincidentally, this rapid expansion of public funds for private schools has coincided with the Supreme Court's rapid elevation of religious discrimination claims (infringing on the free exercise of religion) over religious establishment claims (breaching the separation of church and state). The First Amendment forbids both, but the Court's most recent decisions suggest that, where the two conflict, the Court will prioritize, if not preference, free exercise claims. In the education context, within which these Supreme Court cases arose, this means that states can no longer prohibit religious schools from participating in public programs (like vouchers) that are otherwise available to other eligible private schools.

On the heels of both developments, the Manhattan Institute has published *The Persistence of Religious Discrimination in Publicly Funded Pre-K Programs,* by Nicole Stelle Garnett, Tim Rosenberger, and J. Theodore Austin.[5] A similar December 2023 report focused on state programs generally, including health care, social services, K-12 and higher education.[6] This follow-up, January 2025, report directs attention to pre-K programs. It contends that many of their written policies still express religious exclusions despite the Supreme Court's

recent pronouncements. Based on these existing policies, it concludes that unconstitutional religious discrimination is likely occurring.

II. Findings and Conclusions of the Report

The report observes that 34 states, plus DC and Puerto Rico, allow parents to use public funds at religious schools for their children's K-12 education. In other words, 100% of the states and districts that have such *K-12* programs permit public funding of religious schools. Yet the report claims that "many dozens" possibly even "hundreds" of public programs still exclude religious *pre-K* providers.[7] That exclusion takes one of two forms: total exclusion from the program itself or partial exclusion of religious teaching or activities within the program. Both forms constitute religious discrimination, the report explains, according to the consolidated holdings of three, relatively recent Supreme Court decisions—*Trinity Lutheran Church, Inc. v. Comer* (2017), *Espinoza v. Montana Department of Revenue* (2020), and *Carson v. Makin* (2022).

The report identifies examples of state and school district policies that express total or partial exclusion of religious pre-K providers. It further highlights model policies in Florida, Indiana, and Alabama, which it encourages states and school districts to emulate in updating their policies to conform to Supreme Court precedent. Otherwise, the report warns that state and local school officials risk litigation for maintaining unconstitutional policies or practices. Such unconstitutional conduct, the report surmises, also limits parental choice and children's educational opportunities.

II. The Report's Rationale for Its Findings and Conclusions

The report proceeds from one principle and one assumption. What it calls the "*Carson* principle"—named after the last case in the Supreme Court trifecta from which it derives—says that public programs opened to private organizations may not exclude religious entities because they are religious or because they engage in religious conduct. This *Carson* principle only applies when the government "extends benefits to private sector organizations"—which government has no obligation to do in the first place.[8] Once it does, however, the government may not exclude organizations based on religious status or religious use of the public funds. Religious *status* or *use* discrimination offends the First Amendment's demand of "government neutrality toward religion."[9]

The report presumes many public pre-K programs engage in religious discrimination, despite the *Carson* principle, because they still have written policies that express religious status or use exclusions. The assumption, in other words, is that stated policies reflect actual practice, even though the report admits that these policies "may or may not be currently enforced."[10] The unstated reason for nonenforcement, of course, would be the recent Supreme Court precedent.

IV. The Report's Use of Research Literature

The report, limited in focus on religious pre-K providers, does not engage with the extensive literature on religion and education generally or publicly funded religious school programs in particular.[11] Rather, the report relies primarily on the Supreme Court decisions, framing their implications from the perspective of religious pre-K providers. The report also cites the allegedly discriminatory policies it reviewed but includes no empirical studies or other analysis of such policies. If, as the report implies, the relevant time frame is post 2022, when the *Carson* principle was purportedly established, that would constrain the availability and relevancy of research on these policies, assuming they are still enforced. But a thorough discussion should have at least noted that the recency of the decisions creates a lag in empirical research exploring whether discriminatory policies are actually being enforced.

Additionally, the report leverages the Supreme Court's decisions as though they are unassailable, yet they have generated emphatic criticism from several legal scholars.[12] While it may be unrealistic to expect the report to engage with most of these criticisms—relitigating, what has been decided in its view—the report's failure to address those critiques that relate to the scope and application of its own *Carson* principle cannot be excused so easily. In other words, the application of the *Carson* principle is not as neat as the report suggests.

For instance, as one legal scholar explains, this principle does not automatically entitle religious entities to public funding whenever it is made available to private organizations.[13] Rather, as the Court repeatedly emphasized, those religious entities must be "otherwise eligible," that is, qualified to achieve the public objective.[14] And, even if qualified, much depends on whether the public benefit is "otherwise available" to the religious entity—depending on the precise nature and character of that benefit, a religious entity could be lawfully excluded for non-religious reasons.[15]

The report does not consider these nuances but not because it is unaware of them:

> Some questions remain: Are there exceptions to this rule? Must the government fund religious organizations to the maximum extent permitted by the Constitution? Is there wiggle room between what the Establishment Clause prohibits and what the Free Exercise Clause requires? This report does not attempt to answer those questions.[16]

Given the extant scholarly discussion on these questions and gravity of the claims leveled by the report, policymakers and the public deserve a more complete research discussion.

V. Review of the Report's Methods

The methods of research consisted of (i) keyword searches of state statutes and regulations (using the terms "religious," "sectarian," "secular," "nonideological," and "faith-based") to identify any explicit religious status or use exclusion; (ii) a review of state education departments' websites for the most recent guidelines about pre-K programs; and (iii) a "far

from exhaustive" review of the websites of some of the most populated school districts for any pre-K policies.[17] It did not "examine, at a granular level, regulations governing religious participants" and confesses predictable difficulty in obtaining relevant information through the website research.[18]

Despite its acute methodological limitations, the report states, without explanation, it "tried to ensure" that the allegedly discriminatory policies remained "on the books." But it also repeatedly equivocates, acknowledging the possibility that such policies, not yet updated or removed post *Carson*, might not be currently enforced. Given the distinct possibility of nonenforcement, perhaps even high probability, it is curious that the report did not take the reasonable next step of communicating directly with the state education departments and select school districts to verify the status and enforcement of the allegedly discriminatory policies. Without that step, the report may be elevating a problem that does not exist.

Equally troubling, it makes no effort to survey religious pre-K providers and understand whether they are, in fact, being subjected to exclusionary policies and, if so, in what form, and to what degree. This absence is especially noticeable given the report's provocative contentions of the pervasiveness and hostility of the alleged religious discrimination. Its perfunctory methodology offers no reliable empirical support for such claims.

VI. Review of the Validity of the Findings and Conclusions

The report spills much ink to highlight a not uncommon (or controversial) issue: laws or policies remaining "on the books" even after a judicial decision declares them unconstitutional or otherwise invalid. The colloquial description of a court "striking down" an unconstitutional law should not be taken literally; a judicial decision does not, of course, physically strike through or erase an offending law. Erasure takes a subsequent act of a legislative body to clean up its statutes. Until then, these "zombie laws," as a former federal judge described them, remain in a sense "alive" on the books but "dead-on-arrival in court[s]," should anyone attempt to enforce them.[19]

That this legislative housekeeping step has not yet occurred in some instances does not mean that states and school districts are going rogue, engaged in rampant religious discrimination. More likely, they have adjusted their practices before the applicable legislative body has updated their policies.

It may seem odd that unconstitutional laws continue to appear in legislative text, but "that is the case for even the most plainly unconstitutional laws."[20] That includes some of the most egregious laws—for instance, 50 years after *Brown v. Board of Education*, eight states still had Jim Crow-era laws on their books.[21] Following the Supreme Court's overturning of *Roe v. Wade* and the constitutional right to abortion in 2022, at least nine states rediscovered anti-abortion zombie laws, which some tried to enforce.[22]

Carson was also decided in 2022, and it is just now 2025, so it is not surprising, much less alarming, by comparison that some state and school district policies might still express re-

ligious status or use exclusions. Indeed, a legal scholar in 2024 anticipated this very report, noting that any such exclusions might be "zombie provisions."[23]

But consider that such provisions had been constitutional under the Establishment Clause of the First Amendment for the better part of the past half century. Even by the report's own telling, from 1971 until 2022, Supreme Court precedent suggested that the policies at issue here were necessary or at least permissible.[24] Given that broader context, the mere fact that these policies have not yet been removed or revised hardly reflects the animus that the report ascribes to them—namely, "hostility toward religious institutions and believers" and a widespread intent that religion be "stamped out of public programs."[25]

If pervasive discriminatory treatment were the objective, then surely state or school districts would have continued or extended exclusionary policies against K-12 religious schools, not just pre-K providers. Yet, as the report declares, there are no exclusions for K-12 religious schools, which operate "without restriction on religious instruction."[26]

To be sure, religious pre-K providers have every right to demand clarity and predictability in the law. Yet, as most know, legislatures and regulatory agencies tend to move slowly and deliberately, for better or worse. Regardless, pre-K providers can petition the relevant legislative bodies to comport their policies with the current Supreme Court precedent. If that is the purpose of this report, to serve functionally as such a petition, it should raise few eyebrows. But its accusations of deliberate religious discrimination, coupled with its own apparent deliberate indifference about whether the policies are being enforced, suggest an ulterior purpose.

On the surface, the report erects a proverbial "glass house." It omits even a passing reference to the credible claims that many religious education providers themselves discriminate, expressly in their own policies or actually in their school practices.[27] It further ignores the exponential outsourcing of such discrimination, as publicly funded private school programs become more universal, subsidizing even affluent private school parents and thereby draining more from the state coffers, often at the expense of public schools.[28]

But the report claims that religious pre-K providers are needed because of the "lack of capacity in government institutions, including public schools."[29] This "you-need-us" appeal is tone deaf, lacking critical self-awareness that it is partly because states have chosen to fund private schools that they do not have enough to invest in public schools. This question of investment reminds us that, as the report readily admits, nothing compels governments to fund private schools in the first place. Not yet anyway.

The Supreme Court has agreed to consider an appeal that raises the issue of whether religious charter schools are constitutional, even when state law defines charter schools as public schools, and they otherwise function as state actors.[30] Should the Supreme Court decide that publicly funded religious charter schools are constitutional, we could, in the span of just a few years, "go from the Constitution saying that you cannot fund religious schools to the Constitution saying that you *must* fund religious schools."[31] In that event, there undoubtedly will be reports of more zombie laws.

VII. Usefulness of the Report for Guidance of Policy and Practice

This report concerns a nonunique issue implicating a rather small subset of the school-age population, thus limiting its value to policymakers. Of the 7,550 religiously sponsored education providers, only about 6.2% serve pre-K children, totaling 432,000 children—less than one percent of the millions of preschool-aged children attending a non-religious preschool.[32] Despite their numbers, these religious pre-K providers are presumptively entitled to policies that do not exclude them. But zombie policies that have yet to be updated considering recent precedent do not expose hostile discrimination—quite the opposite, it suggests that governments are treating these policies like so many others that remain on the books despite their invalidity.

At best, the report is a reminder for legislative and administrative bodies to ensure current policies align with recent Court decisions—and update them accordingly. But whether religious pre-K providers are being excluded we cannot say from this report because, despite the certitude of its title, it does not include the minimally acceptable research to answer that question. And while the report advocates for writing policies *out of* the law books to protect religious schools from discrimination, it elides the need for writing policies *into* the law books to protect against publicly funded religious schools that discriminate.

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Need [more] examples? To start, the United States Constitution still contains a provision relating to Congress's power to regulate the slave trade—specifically, limiting Congress's ability to restrict the importation of slaves.

Twenty-nine state constitutions define marriage in a manner that restricts it to relationships between one man and one woman. Multiple state constitutions continue to prohibit atheists from holding office or testifying as witnesses. And several state constitutions continue to require literacy tests for voters, even though these provisions are impermissible in the wake of the Voting Rights Act. If we were to take the gendered language of the U.S. and most state constitutions seriously, women would be precluded from enjoying many individual rights as well as from holding office.

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