

U.S. DISTRICT COURT  
DISTRICT OF VERMONT  
FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

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A.H., by and through her parents and natural guardians, James Hester and Darlene Hester; **JAMES HESTER**, individually; **DARLENE HESTER**, individually; and the **ROMAN CATHOLIC DIOCESE OF BURLINGTON, VERMONT**,

*Plaintiffs,*

v.

**DANIEL M. FRENCH**, in his official capacity as Secretary of the Vermont Agency of Education; **MICHAEL CLARK**, in his official capacity as Grand Isle Supervisory Union Superintendent; and the **SOUTH HERO BOARD OF SCHOOL DIRECTORS**,

*Defendants.*

Case No. 5:20-cv-151

**VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Vermont school districts engage in unconstitutional religious discrimination, depriving students, their families, and religious schools of a public benefit solely because they are religious. In Vermont, every town's school district has the responsibility to provide an education for resident children. Some, like Defendant South Hero Board of School Directors, meet this obligation by paying for the tuition costs for a private school of the family's choice. But if students or their families exercise their religion and choose a private, religious school, the local school boards routinely refuse to fund their education.

2. This is exactly what happened to the Hesters—a Catholic family that resides in and pays taxes to South Hero, Vermont. The Catholic faith sits at the center of life for the Hester family, and James and Darlene Hester have made sacrifices to send their children to Catholic schools to pass on that faith. Their daughter, A.H., attends Rice Memorial High School, a ministry of the Roman Catholic Diocese of Vermont. Rice’s mission is to help students realize their God-given potential.

3. Because the Hesters’ local school district does not maintain a public high school, they are entitled to receive reimbursement for tuition paid to a private high school of their choice. But when the Hesters requested reimbursement for A.H.’s Rice tuition, their school district denied the request because “Rice is a religious school.” In other words, because the Hesters exercise their faith and send their daughter to a Catholic school, their local school district bars them from a public benefit: tuition funds.

4. Denying a public benefit based on the religious status of a child’s school penalizes families who choose to exercise their faith by sending their children to religious schools. The school district’s denial also discriminates against religious private schools because although the school board categorically refuses to fund tuition to religious schools, it regularly provides such funds to secular private schools. This discrimination violates the Free Exercise Clause’s neutrality principle. *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020) (“[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.”). *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

### JURISDICTION AND VENUE

5. This action arises under the United States Constitution and federal law, particularly 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution.

6. This Court is vested with authority to grant the requested declaratory judgment by operation of 28 U.S.C. § 2201, *et seq.*

7. This Court has jurisdiction to award the requested injunctive relief under 28 U.S.C. § 1343.

8. This Court has jurisdiction to award nominal and compensatory damages under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

9. This Court has jurisdiction to award reasonable costs and attorney's fees under 42 U.S.C. § 1988.

10. Venue is proper in the United States District Court for the District of Vermont under 28 U.S.C. § 1391(b), because Defendants reside in the District of Vermont and the events giving rise to the claims occurred within the District of Vermont.

### PARTIES

11. Plaintiff Roman Catholic Diocese of Burlington, Vermont ("the Diocese") owns and operates Rice Memorial High School ("Rice"), a religious secondary school.

12. The Diocese sues on behalf of itself and on behalf of families who both are eligible to receive town tuition benefits from the Defendant South Hero Board of School Directors and who wish to attend Rice but cannot without the public benefit that is accorded other private schools.

13. Plaintiff A.H., a minor child, is a senior at Rice. She sues by and through her parents and natural guardians, Plaintiffs James and Darlene Hester.

14. James Hester is the father of Plaintiff A.H. He sues on behalf of himself and his daughter.

15. Darlene Hester is the mother of Plaintiff A.H. She sues on behalf of herself and her daughter.

16. The Hesters are residents of South Hero, Vermont. They live in the school district governed by the South Hero Board of School Directors and the Grand Isle Supervisory Union.

17. Defendant South Hero Board of School Directors (“South Hero School Board” or “school board”) is a local governmental entity under Vermont law. 16 V.S.A. §§ 421, 423(a).

18. Defendant South Hero School Board bears the responsibility for providing education for children who live within its district. 16 V.S.A. § 822(a)(1).

19. Defendant South Hero School Board bears the legal burden of furnishing a publicly funded education to Plaintiff A.H. and other resident children. 16 V.S.A. § 824(a).

20. The South Hero School Board denied the Hesters’ tuition request because Rice is a religious school.

21. Defendant Michael Clark is the Grand Isle Supervisory Union Superintendent, who implements the policies of the South Hero School Board. 16 V.S.A. § 242.

22. Superintendent Clark advised the school board to deny the Hesters’ tuition request because Rice is a religious school.

23. Defendant Daniel M. French is the Secretary of the Vermont Agency of Education.

24. Secretary French’s duties include supervising and directing the execution of the laws relating to the public schools and ensuring compliance. 16 V.S.A. § 212. Secretary French and the Agency of Education set policy and direct

local school districts to exclude religious schools and their students from the Town Tuition Program and therefore violate the Free Exercise Clause of the First Amendment to United States Constitution.

25. Secretary French is responsible for supervising the expenditure and distribution of all money appropriated by the State for public schools under Title 16 of the Vermont Statutes. 16 V.S.A. § 212. Secretary French and the Agency of Education set policy and direct local school districts to discriminate against religious schools and those students in their distribution of town tuition funds and fully funding those districts.

26. Secretary French is responsible for informing citizens of opportunities within the public education system and providing other educational publicity for the enlightenment and well-being of the citizens of the State. 16 V.S.A. § 212. Secretary French and the Agency of Education refuse to inform Vermont citizens of their rights to equal access to benefits regardless of whether their children's schools are religious, and instead direct school districts and school boards to engage in unconstitutional religious discrimination by excluding religious schools.

27. Despite his legal responsibilities to ensure legal compliance, supervise education spending, and provide policies and information about educational programs, Secretary French, his predecessors, and his agents and employees have repeatedly stated publicly that religious schools are ineligible for publicly funded tuition under Vermont law. They have also advised school districts that tuition payments cannot be made to religious schools.

28. Defendant French has declared that approved independent schools—schools eligible to receive public funds—must be non-sectarian. Other Agency of Education officials have also declared that the Town Tuition Program excludes or does not include religious schools on multiple occasions.

29. The Vermont Agency of Education, formerly the Department of Education, and Secretary French have the authority to enforce compliance of the law by stripping public funding from school districts.

30. In the past, the Agency of Education has stripped public funding from a school district because they paid town tuition funds to a Catholic high school that is owned and operated by the Diocese.

31. The Agency of Education and Secretary French have not stripped funding from districts that unconstitutionally exclude religious schools and their students from the Town Tuition Program. Instead, they fully fund those districts and reward them. The Agency and Secretary French interpret and enforce the law as requiring religious schools to be excluded from the Town Tuition Program.

#### **STATEMENT OF FACTS**

##### **A. The Town Tuition Program**

###### **1. Program Basics**

32. In Vermont, each town has a school board responsible for the town's educational duties.

33. With approval of the Vermont State Board of Education, towns may join together to establish "supervisory unions," which provide collective administrative support for the towns' educational systems.

34. The State of Vermont has had a Town Tuition Program since 1869, *see* [https://www2.ed.gov/parents/schools/choice/educationoptions/report\\_pg21.html](https://www2.ed.gov/parents/schools/choice/educationoptions/report_pg21.html), which provides educational vouchers for students who live in towns without public schools, 16 V.S.A. § 821, *et seq.*

35. State statute, 16 V.S.A. § 822, provides that school districts must either maintain their own high school or "provide for the high school education of its students by paying tuition to a public high school, an approved independent high

school, or an independent school meeting education quality standards, to be selected by the parents or guardians of the student, within or outside the State.”

36. Towns that pay tuition for their students instead of maintaining a public high school are called “sending towns.”

37. Under the Town Tuition Program, sending towns directly pay the full amount of tuition, up to the town’s approved tuition rate, on behalf of their students to either a public school in another district or an approved private school. 16 V.S.A. § 824.

38. According to data from the Vermont Agency of Education’s website, 84 Vermont school districts did not operate a high school (grades 9–12) and were not members of a union high school in 2016.

39. In 2016, 79 of those school districts allowed school choice and paid tuition to the school chosen by the student’s parents.

40. “Approved independent schools” are private schools that meet certain educational quality and curriculum requirements established by the Vermont State Board of Education.

41. Approved independent schools meet the State of Vermont’s requirements for courses of study, facilities, financial capacity, and faculty training and experience.

42. Approved independent schools are eligible to receive local district tuition payments. 16 V.S.A. § 828.

43. The approved independent school designation is conferred by the State Board of Education and recognized by the Vermont Agency of Education.

44. According to the Fiscal Year 2019 Vermont Budget Book published by the Vermont Agency of Education, 5,655 Vermont students attended approved independent schools in fiscal year 2018.

45. According to the Fiscal Year 2019 Vermont Budget Book published by the Vermont Agency of Education, sending towns paid tuition to approved independent schools on behalf of 1,735 students in fiscal year 2018.

46. The average tuition rate announced for fiscal year 2021 for Vermont high school students is \$16,233.

47. The approved fiscal year 2021 tuition rate for the South Hero School District is \$17,539.00.

48. Tuition at Rice Memorial High School is currently \$11,600 per year.

49. Typically, a sending town will pay tuition directly to any public or private school that parents choose for their students.

50. South Hero School Board and the Grand Isle Supervisory Union regularly reimburse tuition for a private school of the student's or parents' choice.

51. The South Hero School Board and the Grand Isle Supervisory Union, however, deny tuition requests for students who attend religious schools because they are religious and have denied Plaintiffs because Rice is religious.

## **2. Religious Schools and the Town Tuition Program**

52. For many years, Vermont banned religious schools from receiving town tuition funds based on concerns about the Establishment Clause of the First Amendment to the United States Constitution.

53. The Vermont Supreme Court eventually determined that the Establishment Clause posed no barrier to religious schools' participation in the Town Tuition Program. *Campbell v. Manchester Bd. of Sch. Directors*, 641 A.2d 352 (1994).

54. Sending towns briefly paid for tuition to religious schools, including Catholic parochial schools, after *Campbell*.



55. The Chittenden Town school district, for example, authorized payments for students who attended Mount Saint Joseph Academy, a Catholic parochial school owned and operated by the Diocese.

56. The Vermont Department of Education, however, determined that the Chittenden Town school board's tuition payments for students attending religious schools violated the Compelled Support Clause of Vermont's state constitution, Vt. Const. ch. I, art. 3, and revoked the school district's state aid.

57. The Vermont Department of Education has since been renamed as the Vermont Agency of Education, which Defendant French oversees.

58. The relevant portion of Vermont's Compelled Support Clause, Vt. Const. ch. I, art. 3, states:

no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculia[r] mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship.

59. The school district sued the Vermont Department of Education, seeking to reestablish state aid.

60. Ultimately, the Vermont Supreme Court held that allowing towns to reimburse parents for tuition to religious private schools through the Town Tuition Program violated Article 3 of Vermont's state constitution. *See Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999).

61. The Vermont Supreme Court's opinion equated religious instruction with religious worship.

62. The Vermont Supreme Court concluded that "a school district violates Chapter I, Article 3 when it reimburses tuition for a sectarian school under § 822 in

the absence of adequate safeguards against the use of such funds for religious worship.” *Chittenden Town Sch. Dist.*, 738 A.2d at 541–42.

63. But Defendants never issued any “adequate safeguards” or changed the Town Tuition Program after *Chittenden* to allow religious schools to participate on an equal basis with secular private schools.

64. As a result, students have to choose a secular private school or a public school in a different district if they want to participate in the Town Tuition Program.

### **3. The State of Vermont’s Treatment of Religious Schools After *Chittenden*.**

65. After the Vermont Supreme Court’s *Chittenden* decision, Defendants never adopted the “adequate safeguards” that the Vermont Supreme Court said were necessary to allow religious private schools to participate in the Town Tuition Program alongside secular private schools.

66. In the years since *Chittenden*, Defendant French and other state officials at the Vermont Agency of Education regularly and consistently declared that religious schools were ineligible for the State’s publicly funded programs, including Town Tuition.

67. Because Defendant French is responsible for developing policy and informing citizens of opportunities within the public education system and providing other educational publicity for the enlightenment and well-being of Vermont citizens, 16 V.S.A. § 212, Defendant French and the Agency of Education have promulgated guidance stating that religious schools cannot participate in Vermont’s school choice programs, including the Town Tuition Program.

68. In 2010, more than a decade after the *Chittenden* decision, the Vermont Agency of Education issued a white paper stating that the State’s school choice programs, including Town Tuition, exclude religious schools.

69. The Agency of Education white paper explained, “For towns without schools at grades 7-12 (which aren’t members of a public school supervisory union), school boards pay tuition to public or approved independent schools that parents choose, within or outside Vermont, not including religious schools. See **Title 16, Sections 821 and 822** of the Vermont Statutes Annotated.” (original emphasis).

70. On December 27, 2010, an Agency of Education official informed a local school district official that when participating in the Town Tuition Program, “parents and students may choose any approved public high school or approved independent school, though not a religious school.”

71. In 2012, the Agency of Education again issued guidance explaining that religious schools were ineligible for the State’s school choice programs, including Town Tuition.

72. The 2012 guidance explained, “**Title 16, Sec. 822** authorizes districts that don’t operate high schools (grades 7-12) to pay tuition – for schools chosen by the parents – to other public high schools in Vermont or in other states, or to approved independent schools in Vermont (not including religious schools) or other states, if schools in other states are approved there.” (emphasis in original).

73. In 2014, Agency of Education Secretary Rebecca Holcombe considered issuing guidance that would model how local school districts could implement “adequate safeguards” that would allow religious schools to participate equally in Vermont’s programs with secular private schools.

74. In 2014, attorneys for the State of Vermont knew that school districts continued to evaluate tuition requests by testing whether schools were “sectarian.”

75. The Agency of Education, and Secretary French, never issued guidance to school districts on how to allow religious private schools to participate equally in the Town Tuition Program with secular private schools.

76. Because Vermont law, 16 V.S.A. § 212, makes the Vermont Secretary of Education (French) responsible for supervising the expenditure and distribution of all money appropriated by the State for public schools under Title 16 of the Vermont Statutes, the Agency of Education has provided guidance to local school districts to prohibit religious schools from receiving Town Tuition Program distributions.

77. On December 14, 2015, Defendant French, who was then a local school district superintendent, wrote to the State of Vermont seeking guidance on a tuition request from a parent who sent her child to a local Episcopalian school.

78. French explained that he employed a tripartite test to determine whether schools are “pervasively sectarian,” which asked “1) is the school affiliated with a sect, 2) does the school require students to participate in sectarian activities, and 3) does the school require education in specific sectarian courses or other curriculum activities.”

79. The attorney, who advised the Agency of Education and the State Board of Education, confirmed French’s tripartite test approach and French’s conclusion that the request must be denied because the child’s school was “pervasively sectarian.”

80. Daniel French is now the Secretary of the Vermont Agency of Education and a Defendant here.

81. Defendant French and Vermont Agency of Education officials have continued to inform people that “sectarian” schools are ineligible for publicly funded programs, including Town Tuition.

82. As recently as January 23, 2019, Secretary French wrote, “In order to be an approved independent school, the school must be [ ] non-sectarian.”

83. Because Defendant French’s duties include supervising and directing the execution of the laws relating to the public schools and ensuring compliance, 16

V.S.A. § 212, the Agency of Education may penalize local school districts that pay Town Tuition Program funds in a manner inconsistent with the Agency of Education's interpretation of Vermont law and has done so in the past to school districts that fund religious schools.

**4. Local School Districts Refuse to Fund Religious Schools After *Chittenden*.**

84. After the *Chittenden* decision, most town school districts stopped making tuition payments for students who chose to attend religious schools.

85. Vermont school districts often categorically deny tuition requests from students who attend religious schools.

86. Multiple school boards have recently refused to grant Town Tuition Program requests for students at religious schools.

87. Upon information and belief, some school districts continue to employ the "pervasively sectarian" test to determine whether a child's chosen school is "too religious" to participate in the town tuition public benefit.

88. The Agency of Education permits school districts to continue to employ the obsolete "pervasively sectarian" test for Town Tuition Program funding determinations.

89. The Agency of Education and Secretary French have directed, encouraged, and advised local school districts and others to exclude religious schools and their students from public funding.

90. The Agency of Education and Secretary French not only permit school districts to categorically exclude students at religious schools from the Town Tuition Program, but they have also directed and encouraged local school districts to exclude religious schools and their students.

91. The Agency of Education and Secretary French have never intervened, corrected the local school districts, or issued guidance to the local school districts to

avoid the unconstitutional deprivation of a neutral benefit based on religious discrimination.

92. The Vermont Agency of Education and French have not stripped funding from school districts that unconstitutionally exclude students at religious schools from the Town Tuition Program.

93. Defendant South Hero School Board and the Grand Isle Supervisory Union automatically deny tuition requests from families whose children attend religious schools and have denied Plaintiffs' request.

94. The Agency of Education and Defendant French know that the Grand Isle Supervisory Union categorically denies tuition requests from families whose children attend religious schools and have directed that they do so.

## **B. The Plaintiffs**

### **1. The Hester Family**

95. Plaintiffs James and Darlene Hester are Plaintiff A.H.'s parents.

96. The Hester family resides in South Hero, Vermont.

97. South Hero is part of the Grand Isle Supervisory Union.

98. The Hesters pay property taxes that fund the South Hero and Grand Isle Supervisory Union school districts.

99. South Hero's school district, the Grand Isle Supervisory Union, does not have a public high school.

100. South Hero must therefore provide tuition for its resident students to attend other high schools under 16 V.S.A. § 822.

101. As South Hero residents, the Hesters are eligible to participate in the Town Tuition Program for the 2020–2021 school year.

102. As South Hero residents, the Hesters were eligible to participate in the Town Tuition Program for the 2019–2020 school year.

103. Plaintiff A.H. is a senior at Rice Memorial High School, a private Catholic high school.

104. James and Darlene Hester send A.H. to Rice because of the academic challenge, supportive community, individual attention, and integration of faith and learning that Rice provides.

105. James and Darlene Hester and their family, including A.H., are Catholic.

106. James and Darlene Hester exercise their Catholic faith by sending A.H. to Rice.

107. A.H. exercises her Catholic faith by attending Rice.

108. The Hesters make significant sacrifices to fund A.H.'s Rice tuition.

109. The Hesters paid \$10,860 for A.H.'s 2019–2020 Rice Tuition.

110. The Hesters paid \$11,600 for A.H.'s 2020–2021 Rice Tuition.

111. The Hesters seek reimbursement for A.H.'s Rice tuition.

112. If A.H. attended a secular private school, the South Hero school district would reimburse the Hesters for A.H.'s high school tuition.

113. The only reason the Hesters cannot obtain a voucher for A.H.'s high school tuition is because she attends a private, religious high school.

## **2. Rice Memorial High School**

114. Rice Memorial High School is a ministry of Plaintiff Roman Catholic Diocese of Burlington, Vermont (“the Diocese”).

115. Rice is a Catholic high school that guides its students toward the realization of their God-given potential.

116. Rice teaches students to recognize and develop their gifts by inspiring them to love learning, to serve others, and to seek God through Jesus Christ and his Church.

117. The Diocese exercises its religion by operating Rice.

118. The Diocese exercises its religion by ministering to each student in its schools, including Rice.

119. Rice's mission of forming students focuses on four pillars: faith, academic excellence, service, and community.

120. The Vermont State Board of Education and Agency of Education recognize Rice as an approved independent school.

121. Rice students from sending towns would be eligible to receive tuition vouchers for their tuition if Rice was not a religious school.

122. Rice would be eligible to receive town tuition payments if it was not a religious school.

123. Upon information and belief, other students from sending towns, including South Hero, wish to attend Rice but currently cannot because their towns refuse to allow the students to use their Town Tuition Program benefits at Rice.

124. Each student who cannot attend Rice because of Town Tuition Program ineligibility is a lost ministry opportunity for the Diocese.

125. Rice instructs students in a robust and diverse curriculum.

126. Rice offers its students 15 honors courses and 12 Advanced Placement courses.

127. Rice has one of only two AP Capstone Diploma programs in the State of Vermont.

128. Rice offers foreign language courses in Latin, French, and Spanish.

129. Rice offers its students course opportunities in the fine and performing arts.

130. Rice is noted for its academic excellence—over 90% of its students go on to pursue higher education, which is 18% higher than the Chittenden County student average.



131. Rice is also known for its excellent athletic programs: its sports teams often win Vermont state championships.

132. More than 85% of Rice's students participate in its athletic programs.

133. Rice also instructs students in the teachings of the Catholic faith, especially through the school's religion classes.

134. Inspired by the Gospel's command to serve others, Rice encourages students to engage in community service.

135. Rice requires its students to complete at least 80 hours of community service before graduation.

136. Rice provides students other opportunities for spiritual growth, including retreats.

137. More than one-third of Rice's students are not members of the Catholic Church.

138. Rice's student body includes students from other faith backgrounds—including non-Christian faiths—and students who do not hold or exercise a religious faith.

139. Many families choose to send their students to Rice, even though those families are not Catholic or do not share Rice's religious beliefs.

140. Rice's current student body includes 345 students from 40 Vermont towns.

141. Rice students come from families of all economic backgrounds.

142. Rice's current tuition price is \$11,600 per year.

143. Rice's tuition is more affordable than the tuition of most competing private schools, including secular private schools.

144. Rice provides tuition assistance to more than 45% of its students to make their attendance possible.

145. Rice's tuition assistance is made possible by its donors' generosity and by diocesan support.

146. The Diocese provides financial support to Rice, including through collections at local parishes.

147. Rice would provide more students with tuition assistance if it were possible.

148. Rice could provide tuition assistance and other ministry opportunities to other students if students from sending towns could receive Town Tuition Program funds.

149. Upon information and belief, more families from sending towns would send their students to diocesan schools if they could access Town Tuition Program funds.

150. Private donations and contributions from the Diocese cover the expenses of Masses held at Rice, the school's religious worship events.

151. The total cost to maintain supplies for Rice's Chapel and its public Masses is only \$200-\$300 per year.

152. Rice's chaplains are not paid a salary from Rice Memorial High School.

153. Rice's worship activities are not funded by student tuition.

## **C. The Hester Family's Requests for Tuition Reimbursement**

### **1. The First Request**

154. *Trinity Lutheran Church of Columbia, Inc. v. Comer* was decided in 2017, putting government officials on notice that they cannot exclude religious schools from neutral public benefits. 137 S. Ct. 2012 (2017).

155. On February 6, 2020, James Hester submitted a tuition voucher for A.H.'s Rice tuition to David Mills, the Grand Isle Supervisory Union Parent Liaison.

156. On February 10, 2020, David Mills acknowledged the school district's receipt of the Hesters' request.

157. On February 25, 2020, James Hester sent a follow-up email to David Mills, inquiring into the status of his request.

158. In a February 26, 2020 email, David Mills notified James that the school district would deny the Hesters' request for reimbursement for A.H.'s tuition because Rice Memorial High School is religious.

159. David Mills' email explained, "Rice is a religious school for which we do not pay tuition."

160. David Mills' email also contained a block quote of information from a linked website. The quote explained:

Vermont's Town Tuitioning Program was launched in 1869, making it the oldest school choice program. The school voucher program provides educational options for students whose towns do not have public schools. The sending town pays school tuition directly to the "receiving" school, which can be any public or private, nonreligious school in or outside Vermont.

161. The Vermont Agency of Education and Secretary French know that the Hesters' first request for tuition reimbursement was denied because Rice is religious.

## **2. The Second Request**

162. Months after the school district denied the Hesters' initial tuition request, Grand Isle Supervisory Union Superintendent Michael Clark sent a letter to all families on behalf of the GISU school district and the member towns of Alburgh, Grand Isle, Isle La Motte, North Hero, and South Hero, explaining the process for residency verification and tuition reimbursement.

163. In Vermont, a school superintendent is the chief executive officer for his or her supervisory union board and for each school board within the supervisory union. 16 V.S.A. § 242.

164. School superintendents carry out the policies adopted by the school boards relating to the educational or business affairs of the school district or supervisory union. 16 V.S.A. § 242.

165. Superintendent Clark's letter, dated June 17, 2020, requested that families return the necessary forms by September 1, 2020, and instructed parents to contact David Mills or Clark with questions.

166. On June 27, 2020, the Hesters received Superintendent Clark's letter.

167. On June 30, 2020, the United States Supreme Court issued its opinion in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

168. In *Espinoza*, the Supreme Court explained that States cannot deny students public educational benefits—including benefits that fund private school tuition—purely based on their school being religious.

169. The Supreme Court explained that denying public benefits because of religion violates the First Amendment's Free Exercise Clause because it unconstitutionally forces families to choose between exercising their religion or enjoying a public benefit.

170. The Supreme Court applied the principles established in *Trinity Lutheran* to a school funding program, holding that "[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." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020).

171. After the Supreme Court once again clarified that religious adherents enjoy the same right to public benefits as their neighbors, the Hesters decided to submit a new request for tuition reimbursement to their school district.

172. On August 14, 2020, James Hester wrote to Superintendent Clark and identified himself as a South Hero resident, requested tuition reimbursement for his daughter's Rice tuition, and asked that the South Hero School Board consider the request at its August meeting.

173. On August 16, 2020, Superintendent Clark replied to James Hester's email and confirmed that the Board would consider the Hesters' tuition reimbursement request.

174. The South Hero School Board met on August 20, 2020 and considered the Hesters' tuition request at the meeting.

175. Superintendent Clark recommended that the Board deny the Hesters' tuition request.

176. Without deliberation, the Board's chair, Bob Chutter, moved to adopt the Superintendent's recommendation.

177. Another board member immediately seconded the chair's motion.

178. The Board began to vote on the measure, but teacher Julie Pidgeon, who took the meeting's minutes, interrupted for a clarification.

179. Ms. Pidgeon evoked laughter from the Board's members and Superintendent Clark when she joked, "just in case it goes to the Supreme Court, in case they're trying it up the chains."

180. The South Hero School Board unanimously voted to deny the Hesters' request for tuition reimbursement.

181. A video of the Board's meeting is available at <https://leatv.org/south-hero-school-board-2020-08-20>. The relevant portion begins at 1:48:15.

182. On August 21, 2020, Superintendent Clark sent an email message to James Hester and informed him that the South Hero School Board denied his family's tuition request.

183. Superintendent Clark's email included the portion of the school board's meeting minutes that memorialized their consideration and denial of the Hesters' request:

B. Chutter said the board has received a request from Mr. and Mrs. Hester for the district to pay tuition to Rice Memorial High School. M. Clark said the district has communicated to the family that this is contradictory to the Vermont Constitution. He shared advice from lawyer Pietro Lynn that the district not pay tuition to a religious school. B. Chutter moved the board follow the advice of legal counsel and support the superintendent's denial of Jim and Darlene Hester's tuition reimbursement request for Rice Memorial High School. B. Vaughan seconded the motion. Approved unanimously on a voice vote.

184. A copy of the minutes from the August 20, 2020 Board meeting can be found online at

<http://www.gisu.org/uploads/1/1/1/6/111679509/08202020minutessh.pdf>.

185. The school board denied the Hester's tuition request solely because Rice Memorial High School is religious.

**COUNT I:  
VIOLATION OF PLAINTIFFS' FIRST AMENDMENT  
FREE EXERCISE RIGHTS**

186. Plaintiffs repeat and reallege each allegation in ¶¶ 1–185 of this Complaint.

187. Based upon the allegations set forth above, Defendants deprived Plaintiffs of their right to free exercise of religion in violation of the First Amendment as applied to the states, their officials, and their political subdivisions under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

188. Defendants denied the Hesters' request for a public benefit—a tuition voucher—simply because A.H.'s school, Rice Memorial High School, is religious.

189. Defendants' denial on the basis of religion forces the Hesters to choose between exercising their Catholic faith by forming their child through a Catholic education on the one hand and receiving a public benefit that they are entitled to on the other.

190. Defendants penalize the Hesters' religious exercise by depriving them of a public benefit when they exercise their faith.

191. If A.H. attended a secular private school, Defendants would grant the Hesters' tuition request.

192. Defendants, by denying the Hesters a public benefit simply because they would choose to use that benefit at a school that provides A.H. a Catholic education, violated the Hesters' right to freely exercise their religion as guaranteed by the First Amendment to the United States Constitution and incorporated against the States and state officials through the Fourteenth Amendment.

193. If Rice were a secular private school, Defendants would pay or reimburse tuition for South Hero residents who attend Rice.

194. Defendants refuse to pay or reimburse tuition at religious private schools solely based on religion.

195. Defendants' exclusion demonstrates hostility toward religion.

196. Defendants' exclusion demonstrates hostility because:

- a. South Hero taxpayers would save thousands of dollars for each student who went to Rice instead of a competing private school;
- b. The State Board of Education and the Agency of Education recognize that Rice meets Vermont's educational quality requirements;
- c. Rice's religious worship activities are not funded by student tuition;
- d. Defendants refuse to establish any "safeguards" that would allow Rice to participate.

197. Defendants disadvantage Rice Memorial High School against its secular competitors by refusing to allow its students equal access to a public benefit.

198. Defendants' denial of funding to Rice Memorial High School based solely on religion is not narrowly tailored to advance a compelling governmental interest.

199. Defendants have no legitimate interest in enacting a greater separation of Church and State than is provided by the Establishment Clause of the First Amendment to the United States Constitution.

200. Given that States have no legitimate or compelling interest in providing a greater separation of Church and State than is provided by the Establishment Clause, Defendants' exclusion of religious schools from the Town Tuition Program can only be explained by an irrational animus against, hostility toward, and targeting of religion.

201. Defendants—by denying Rice's students and their parents a public benefit simply because they exercise their religion and seek to use that benefit at a religious school—violate the students' and parents' religious free exercise rights, as guaranteed by the First Amendment to the United States Constitution and incorporated against the States and state officials through the Fourteenth Amendment.

202. Defendants deny Rice Memorial High School equal access to a public benefit solely because it is religious and because it exercises its religion by teaching the Catholic faith to its students. The Diocese loses invaluable ministry opportunities with each student who cannot attend Rice because of Town Tuition Program ineligibility. This violates the Diocese's right to freely exercise its religion, as guaranteed by the First Amendment to the United States Constitution and incorporated against the States and state officials through the Fourteenth Amendment.



203. The Agency of Education and Secretary French, who is responsible for providing the public information and school district policy about educational opportunities in Vermont, publicly communicated that religious schools and their students are ineligible for Vermont's Town Tuition Program.

204. The Agency of Education and Secretary French, who is responsible for overseeing compliance with education laws and distribution of school funding, directed and advised school districts in sending towns that religious schools and their students are ineligible to participate in Vermont's programs, including the Town Tuition Program, thereby leading school districts to deprive religious schools and their students of neutral public benefits.

205. The Agency of Education and Secretary French, who is responsible for ensuring that Vermont school districts comply with the law, have directed and advised school districts to deny religious schools and their students access to neutral public benefits, including town tuition funds, in violation of the Free Exercise Clause of the First Amendment to the United States Constitution.

206. The Agency of Education and Secretary French, who is responsible for overseeing compliance with education laws and distribution of school funding, have instructed local districts to not accommodate equal participation of religious schools and their students in the Town Tuition Program.

207. The Agency of Education and Defendant Secretary French violate Plaintiffs' First Amendment Free Exercise rights by instructing local school districts to deny public funding to religious schools and their students.

208. Defendant Secretary French violates Plaintiffs' First Amendment Free Exercise rights by spreading misinformation about Vermont's public education benefits, which discourages families from exercising their religion by using public benefits at the Diocese's schools, including Rice.

209. The Agency of Education and Defendant Secretary French violate Plaintiffs' First Amendment Free Exercise rights by directing, encouraging, and endorsing unconstitutional religious discrimination and by providing funding to school districts that discriminate.

**COUNT II:  
VIOLATION OF THE DIOCESE'S FIRST AMENDMENT  
FREE SPEECH RIGHTS**

210. Plaintiffs repeat and reallege each allegation in ¶¶1–209 of this Complaint.

211. Based upon the allegations set forth above, Defendants deprived Plaintiffs of their right to freedom of speech in violation of the First Amendment as applied to the states, their officials, and their political subdivisions under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

212. The Diocese exercises its rights to free speech and expression through its ministry at its schools, including at Rice Memorial High School.

213. The Diocese exercises its rights to free speech and expression by communicating its religious beliefs and convictions through its curriculum and programs at its schools, including Rice Memorial High School.

214. The Diocese's religious speech is constitutionally protected.

215. The Town Tuition Program gives government officials unbridled discretion to penalize schools for religious speech.

216. Defendants exclude the Diocese's schools, including Rice Memorial High School, from participating in the Town Tuition Program, which is a content and viewpoint-based violation of its speech.

217. Defendants exclude the Diocese's schools, including Rice Memorial High School, from participating in the Town Tuition Program because they disfavor the religious content or viewpoint of the Diocese's speech.

218. Defendants do not exclude approved independent schools that do not engage in religious speech and expression from the Town Tuition Program.

219. Defendants' deprivation of public benefits from religious schools because of their religious speech chills such speech among other private schools.

220. Defendants' deprivation of public benefits, namely tuition funds, forces students to attend non-religious schools and hampers the Diocese's ability to communicate its religious message.

221. Defendants' actions injure the Diocese by causing it to lose students, each of whom is an invaluable ministry opportunity, and by losing access to public funding available to private schools that do not engage in religious speech.

**COUNT III:  
VIOLATION OF PLAINTIFFS' FOURTEENTH AMENDMENT  
EQUAL PROTECTION RIGHTS**

222. Plaintiffs repeat and reallege each allegation in ¶¶1–221 of this Complaint.

223. The Hesters are similarly situated to other residents of South Hero, Vermont.

224. A.H. is similarly situated to other high school students from South Hero.

225. Defendants refuse to award the Hesters a public benefit because A.H. exercises her religion and attends a religious high school.

226. The Hesters are harmed by the loss of town tuition funds.

227. Defendants refuse to award the Hesters a public benefit because A.H.'s parents exercised their religion and sent their daughter to a religious high school.

228. Defendants regularly award the disputed public benefit to families who choose to send their children to secular private schools.

229. If the Hesters had chosen to send A.H. to a secular private school, Defendants would have granted the Hesters the disputed public benefit.

230. Students at Rice Memorial High School are similarly situated to students at secular private schools.

231. Rice Memorial High School is similarly situated to other approved independent schools, including secular private schools.

232. Defendants refuse to distribute tuition funds to Rice solely because it is religious.

233. Defendants refuse to allow families in their district to participate in the Town Tuition Program purely because Rice is religious.

234. If Rice were a secular private school, Defendants would not refuse to distribute tuition funds to Rice.

235. Because it is religious, Rice Memorial High School cannot receive town tuition funds for its students and their families.

236. Denying religious schools access to the Town Tuition Program harms the Diocese because it loses invaluable ministry opportunities with each student who chooses secular private schools instead and loses access to town tuition funds.

237. The State Board of Education and the Vermont Agency of Education recognize Rice as an approved independent school, which means it meets all educational quality standards to receive public funding.

238. The classification of private schools into “sectarian” and “non-sectarian” classes does not advance the purposes of the Town Tuition Program.

239. The classification of schools into “religious” and “not religious” classes does not advance the purposes of the Town Tuition Program.

240. These classifications are irrational and arbitrary given that the State Board of Education and the Agency of Education recognize Rice Memorial High

School and other Diocesan schools as “approved independent schools” that meet the State’s educational standards.

241. These classifications are not related to a legitimate state interest, nor are they substantially related to any compelling state interest.

242. These classifications violate the Fourteenth Amendment Equal Protection Clause rights of the Hesters and of the Diocese.

243. The Vermont Agency of Education and Secretary French classify Rice and other religious approved independent schools as “sectarian.”

244. The Vermont Agency of Education and Secretary French’s classification of Rice and other religious schools as “sectarian” harms the schools because it directs and encourages local school districts to refuse to admit them to public benefits, including town tuition funds.

245. The Vermont Agency of Education and Secretary French’s classification harms Rice and other religious schools because the loss of access to public benefits incentivizes families to send their students to non-sectarian schools.

246. The Vermont Agency of Education and Secretary French’s classification of Rice and religious schools as “sectarian” violates Plaintiffs’ Fourteenth Amendment Equal Protection Rights because the classification distinguishes between the religious and non-religious and does not further any legitimate government interest or the purposes of the Town Tuition Program.

247. Defendant Secretary French violated Plaintiffs’ Fourteenth Amendment Equal Protection rights by directing and encouraging the unconstitutional deprivation.

248. Defendant Secretary French also violated Plaintiffs’ Fourteenth Amendment Equal Protection rights by failing to stop the unconstitutional deprivation, despite the legal ability and responsibility to do so.

249. Defendants' classification of Rice and religious schools as "religious" or "sectarian" violates Plaintiffs' Equal Protection rights because it singles Plaintiffs out for worse treatment based on their status as members of a protected class.

**PRAYER FOR RELIEF**

Plaintiffs pray this court for judgment as follows:

1. That this Court enter a preliminary and permanent injunction restraining Defendants, their officers, agents, employees, and all others acting in concert with them, from denying Plaintiffs the town tuition benefit based on their religious exercise, speech, and status;

2. That this Court enter a declaratory judgment declaring that Defendants' application of the Vermont Constitution's Compelled Support Clause violates the First and Fourteenth Amendments of the United States Constitution, as applied to Plaintiffs and other South Hero students who attend religious schools;

3. That this Court enter a declaratory judgment that applying the Vermont Constitution's Compelled Support Clause to exclude students from the Town Tuition Program based on the religious exercise, speech, and status of their schools violates the First and Fourteenth Amendments of the United States Constitution;

4. That this Court issue the requested injunctive relief without a condition of bond or other security being required of Plaintiffs;

5. That this Court award Plaintiffs nominal and compensatory damages;

6. That this Court include \$10,860 in damages to reimburse the Hesters for tuition denied for the 2019–2020 school year;

7. That this Court include \$11,600 in damages to reimburse the Hesters for tuition denied for the 2020–2021 school year;

8. That this Court award Plaintiffs' costs and expenses, including attorney's fees, pursuant to 42 U.S.C. § 1988; and

9. For such other relief as the Court deems just and equitable.

Respectfully submitted this <sup>28</sup>~~25~~th day of September, 2020.



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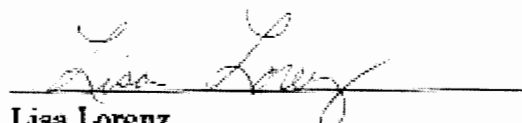
*\* Pro Hac Vice applications forthcoming*

*Counsel for Plaintiffs*

**VERIFICATION**

I, Lisa Lorenz, a citizen of the United States and a resident of the State of Vermont, acting on behalf of the Roman Catholic Diocese of Burlington, Vermont, in my capacity as Principal of Rice Memorial High School, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that I have read the foregoing Verified Complaint for Declaratory and Injunctive Relief and that the statements contained therein are true and correct.

Dated this 23 day of September, 2020, at S. Burlington, Vermont.

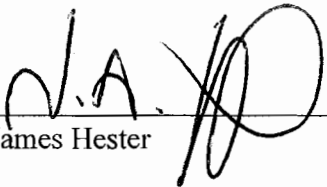
  
\_\_\_\_\_  
Lisa Lorenz  
Rice Memorial High School



**VERIFICATION**

I, James Hester, a citizen of the United States and a resident of the State of Vermont, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that I have read the foregoing Verified Complaint for Declaratory and Injunctive Relief and that the statements contained therein are true and correct.

Dated this 23rd day of September, 2020, at SOUTH HERO, Vermont.

  
James Hester