



Client Alert

## SCOTUS Blocks Religious Charter School: Key Takeaways

On Thursday, May 22, 2025, the United States Supreme Court affirmed the Oklahoma State Supreme Court's order blocking the creation of what would have been the nation's first religious charter school. Because Justice Amy Coney Barrett recused herself from hearing the case, the Court split 4-4 in *Okla. Statewide Charter School Board v. Drummond* and left in place the state supreme court's ruling that publicly funding a religious charter school would violate the Establishment Clause of the United States Constitution and portions of the Oklahoma State Constitution. The order was not accompanied by an opinion.

The same week, on May 19, 2025, the California Department of Education ("CDE") entered into a Consent Judgment and Permanent Injunction to resolve *Loffman v. California Department of Education*, which challenged CDE's requirement that non-public schools ("NPS") and agencies ("NPA") be "nonsectarian" following a decision of the Ninth Circuit Court of Appeals holding that the "nonsectarian" requirement likely violated the Constitution's Free Exercise Clause.

At first glance, these developments seem inconsistent, since the CDE settlement appears to allow public funds to religious schools through NPS placements on Individualized Education Programs ("IEP") while at the same time the Supreme Court effectively upheld a state court decision blocking the creation of a religious charter school. However, there are key differences between the two cases for California Public Schools to understand.

### What are the Establishment and Free Exercise Clauses?

The First Amendment of the United States Constitution contains two clauses regarding religion: the Establishment Clause and the Free Exercise Clause. The first portion – the Establishment Clause – has been interpreted to prevent public funds from going directly to religious entities because doing so would be

an unconstitutional “law respecting the establishment of religion.” On the other hand, the United States Supreme Court has held that, under the “free exercise” clause, public funds cannot be withheld from religious entities solely because they are religious, because doing so would constitute unlawful discrimination.

### **What is the Difference Between an NPS and a Charter School?**

Key to the difference between the CDE settlement in *Loffman* and the Supreme Court’s ruling in *Drummond* is the difference between charter and nonpublic schools. An NPS is a private school that is certified by CDE to serve students with disabilities; they often provide specialized academic instruction and related services—such as speech and language therapy, occupational therapy, and other services—required for students with disabilities to access their education. Accordingly, NPSs are subject to certification requirements and must follow various statutory guidelines. When a student is placed at an NPS through an IEP, the school district pays for the cost of tuition because the IEP team has determined that the student requires the NPS placement to receive a free, appropriate public education (“FAPE”).

Charter schools, on the other hand, are a type of public school that operate independently from a traditional school district pursuant to a charter that must be approved by the governing board of a local school district, county board of education, or the State Board of Education. In California, like in Oklahoma, a charter school is considered a “public school” and eligible to receive state and federal funding to educate its students.

### **How Can We Reconcile the CDE Settlement with the Supreme Court Ruling?**

The CDE settlement can be reconciled with the Supreme Court’s ruling by looking to the nature of the education that the schools purport to provide. The challenge in *Loffman* involved potential school placements that offer both secular and religious education. The Ninth Circuit held that the “nonsectarian” requirement in California law for certification of NPS placements (as well as NPA services) was overbroad where the IDEA and federal regulations allow funding of secular organizations so long as the funding is “secular, neutral, and nonideological, and not used for “religious worship, instruction, or proselytization.” 20 U.S.C. § 1412(a)(10)(A)(vi); 34 C.F.R. § 76.52(c)(1), § 76.532; 2 C.F.R. § 3474.15(c)(1). The Ninth Circuit held that the parents had set forth a valid claim that prohibiting religious schools and agencies—here, those serving the Orthodox Jewish community—the ability to apply for NPS or NPA status likely violates the free exercise rights of students with disabilities whose only choice is either purely secular public services or private religiously-aligned education, even if that private education included both secular and religious instruction. The State, then, could not prohibit otherwise religiously-aligned schools and agencies from applying for and meeting requirements to be an NPS or NPA.

In contrast, the charter school in *Drummond* did not purport to offer any specialized, non-religious services. Instead, it offered a religious education that was infused with religious doctrine. While it is not certain how the Supreme Court would ultimately rule on this question in a future case, the charter school at



issue in *Drummond* did not purport to separate its “secular” and “religious” instruction and, instead, infused every subject with religious doctrine.

## What Does that Mean For California?

It is important to understand that *Loffman* does not open up the possibility of religiously-aligned public schools at issue in *Drummond*. *Loffman* does allow for new certification requests from religiously-aligned institutions and agencies who agree to abide by all other statutory requirements to be NPS placements or NPA services. It remains an open question as to how many such schools and agencies will apply for certification, whether they will meet requirements, and how those schools and agencies will ensure that religious instruction or activities are not funded by school district dollars. Finally, the question of what students might benefit from and should be placed in a religiously-aligned NPS that *does* include religious instruction is going to require deeper analysis if and when those IEP discussions start to take place.

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