

# Supporting ACCESS



**NAHEFFA**  
National Association of  
Health and Educational  
Facilities Finance Authorities

Summer 2020





**NAHEFFA President’s Message**  
**by Dennis Reilly, Executive Director**  
**Wisconsin Health & Educational Facilities Authority**

I am honored to have been selected to follow in the footsteps of my six predecessors, most recently Harry Huntley who admirably filled the position of President for the past two years. This time last year, however, I never expected that my first message as NAHEFFA’s 7th President would be made at a time when we are all living through such unprecedented circumstances. Needless to say, I do hope that this message finds everyone in the NAHEFFA community safe and healthy. Hopefully in the near future, when we all look back at this significant historical time in our lives, our world will be a safer place in which to live.

Since the unfortunate cancellation of our in-person 2020 Spring Conference due to COVID-19, NAHEFFA has hosted a well-attended advocacy conference call, held the first telephonic NAHEFFA corporate meeting and, under the guidance of Mark Heller, CO, organized the first NAHEFFA webinar. Widely attended, the webinar was a successful initial step into the virtual world for NAHEFFA. I am extremely optimistic on what lies ahead for NAHEFFA.

One big reason for my optimism is the recent hiring of Sherrie Wise as NAHEFFA’s Operations Director. We are extremely excited to have her on board. Sherrie has hit the ground running and I have no doubt NAHEFFA will be a stronger organization with her involvement. A special thank you to the SIO Committee chaired by Maribeth Wright, IA for guiding us through the hiring process.

In other news, Corinne Johnson, CO has stepped down as Conference Committee Chair and Kim Mooers, RI has agreed to serve as the new Chair. We are sincerely grateful for the many years Corinne served as our Chair and we are very thankful to Kim for volunteering to fill the vacancy.

As you know, the NAHEFFA Board and Conference Committee made the difficult decision to forgo the in-person 2020 Fall Conference in Milwaukee, WI. In spite of this necessary decision, NAHEFFA remains committed to providing the best educational opportunities available to its Members, and it is incumbent upon all of us to innovate going forward in order to continue to fulfill this commitment. As such, plans are underway to provide educational and networking opportunities by means of a unique virtual experience this fall. Stay tuned for details.

Let us all rally together during this time to make NAHEFFA a stronger, more vibrant organization filled with renewed Member commitment and involvement. I invite each of you to become involved; I promise, you will not regret it!

Have a safe and enjoyable end to summer, and I look forward to seeing everyone virtually later this year.

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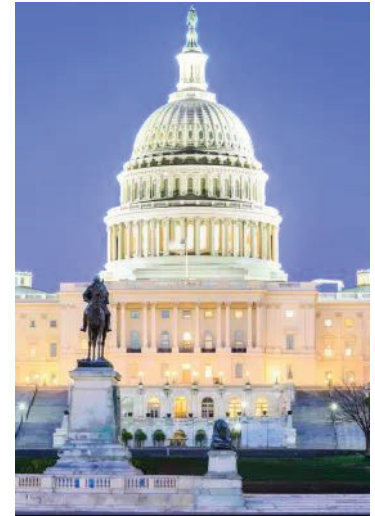
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**Washington, DC Update**  
**Charles A. Samuels**  
**ML Strategies, LLC**  
**Washington Advocate, NAHEFFA**



Due to timing of the federal legislative calendar, it would be premature to provide a report at this time. A full advocacy report will be sent separately to Membership in early August.

# NAHEFFA's Conference is going *VIRTUAL!*

OCTOBER 2020



During these unusual times, it's important to **STAY CONNECTED**  
WATCH for details and plan to PARTICIPATE  
in NAHEFFA's FIRST VIRTUAL CONFERENCE

Inspirational Speakers  
Informative Panels  
Value Packed Presentations  
NETWORKING  
and  
FUN!



# Conduit Revenue Bond Financings for Religious Elementary and Pre-Kindergarten Schools Following the U.S. Supreme Court’s Decision in *Espinoza v. Montana Department of Revenue*



by Scott P. Waller – Gilmore & Bell, P.C.  
July 2020

Following the U.S. Supreme Court’s June 2020 decision in *Espinoza v. Montana Department of Revenue* and its 2017 decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, as further described below, the weight of the U.S. Supreme Court religious freedom decisions provide greater comfort for bond counsel to provide unqualified opinions for conduit revenue bond financings for church-related and other religiously affiliated pre-kindergarten and elementary school financings. Public aid (in the form of serving as the conduit issuer) that is provided to private pre-kindergarten and elementary educational institutions without discriminating on the basis of religious status, as part of a neutral government program, should now survive Federal Constitutional religious freedom challenges. The legally permissible exclusions have been narrowed to uses that are “essentially religious endeavors,” such as training for the ministry. A neutral government program should not exclude participants based on whether a certain religious elementary school may be part of a church (as was the school in *Trinity Lutheran*) or may have the significant mission of teaching religious values (as did the elementary school in *Espinoza*).



Bond counsels’ prior reservations about conduit financings for elementary schools stemmed from the Supreme Court’s 1973 decision in *Hunt v. McNair*. The Court in *Hunt* distinguished its approval of the South Carolina Health Facilities Authority’s college financing from church-based elementary schools that had been discussed in the Court’s prior Establishment Clause cases. Those prior cases considered whether an elementary school was “pervasively sectarian” for Establishment Clause purposes, with the tenet that government aid to a church-related elementary school was more likely to result in an Establishment Clause violation than aid to colleges because in the elementary school setting the religious mission was more likely to permeate, and religious indoctrination was more likely a substantial purpose, than in the college setting. Importantly for bond counsel, the *Hunt* decision also included a key footnote positing other grounds for upholding the South Carolina funding on the basis that the Authority was a “mere conduit” / “governmental service” with minimal state aid and did not involve the expenditure of public funds.

Over the many decades that have passed since the *Hunt* case, Establishment Clause analysis has shifted away from the “pervasively sectarian” inquiry, to an evaluation of whether government programs are “neutral” in providing their benefits to eligible recipients.

In *Trinity Lutheran*, the U.S. Supreme Court held the exclusion of a church’s pre-kindergarten school from receiving a shredded-tire playground grant through a Missouri state program, on the basis of the school’s religious status, was unconstitutional under the Free Exercise Clause of the U.S. Constitution. The Court reiterated that denying a generally available benefit

solely on account of religious identity imposes a penalty on the free exercise of religion. The Court distinguished its 2004 holding in *Locke v. Davey* which upheld as constitutional the State of Washington's decision not to fund degrees in devotional theology as part of a scholarship program. The key distinction was that Davey was denied the scholarship because of what he proposed to do (training a minister to lead a congregation being an essentially religious endeavor); not because of who he was. In *Trinity Lutheran*, the school was denied the shredded-tire playground grant because of what it was (a church) even though its intended use of the playground was the same secular purpose as the other applicants.



In *Espinoza*, the Montana Legislature established a tax credit program for those making donations to a scholarship fund under which the scholarships could be used by students for private school tuition. The Montana Department of Revenue promulgated a rule, based on anti-sectarian aid language in the Montana Constitution, that prohibited families from using the scholarships at religious schools. The Supreme Court held the no-aid clause violated the Free Exercise clause of the Federal Constitution. Building upon its decision from *Trinity Lutheran*, the Court provided: "A State need not subsidize private education, but once it decides to do so, it cannot disqualify some private schools solely because they are religious."

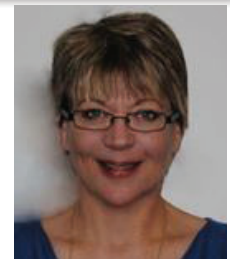
*Trinity Lutheran* and *Espinoza* have shifted the legal inquiry from "Does providing public aid to a religiously affiliated entity violate the Establishment Clause?" and "Is this elementary

school pervasively sectarian?" toward "Would excluding an entity from receiving this public aid solely on religious status violate the Free Exercise Clause?" and "Is the public aid provided as part of a 'neutral government program?'"

The timing of this decision may be helpful as many parents struggle to find the right early childhood development and schooling alternatives for their children and schools scramble to finance the modified facilities, equipment and technology needed to enable children to safely return to school and to best learn remotely when physical return to the classroom is not possible. A local church's school will have available to it the conduit revenue bond financing programs available to other private schools.

*Scott Waller is a shareholder and director of the law firm Gilmore & Bell, P.C. His practice focuses on tax-exempt financing transactions for health and educational institutions and other nonprofits. <https://www.gilmorebell.com/project/scott-p-waller/>. The views expressed in this article are views of Mr. Waller and may not be views of Gilmore & Bell, P.C. generally.*

## NAHEFFA HIRES NEW OPERATIONS DIRECTOR

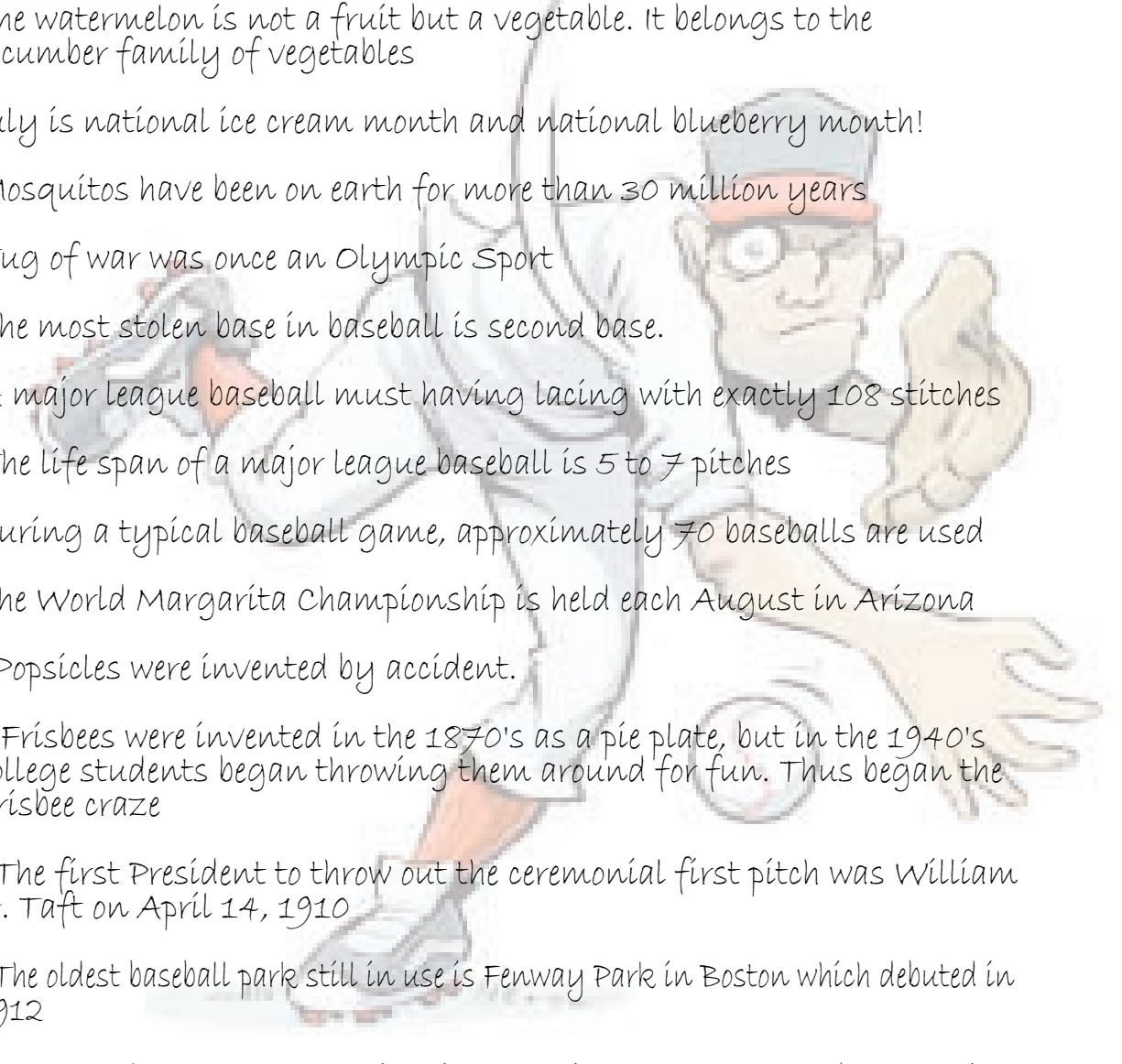


Sherrie Wise joins NAHEFFA with a background in association management, conference planning and execution, and public finance governmental relations.

As Operations Director, Sherrie will coordinate NAHEFFA's conferences and sponsor program; prepare and distribute our communications including newsletters, website updates, surveys and webinars; and maintain Member relations with committee involvement and membership outreach.

Contact Sherrie at [info@naheffa.com](mailto:info@naheffa.com)  
(833) NAHEFFA / (833) 6243332

# Fun Facts about Summer and Baseball

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1. The watermelon is not a fruit but a vegetable. It belongs to the cucumber family of vegetables
  2. July is national ice cream month and national blueberry month!
  3. Mosquitos have been on earth for more than 30 million years
  4. Tug of war was once an Olympic Sport
  5. The most stolen base in baseball is second base.
  6. A major league baseball must having lacing with exactly 108 stitches
  7. The life span of a major league baseball is 5 to 7 pitches
  8. During a typical baseball game, approximately 70 baseballs are used
  9. The World Margarita Championship is held each August in Arizona
  10. Popsicles were invented by accident.
  11. Frisbees were invented in the 1870's as a pie plate, but in the 1940's college students began throwing them around for fun. Thus began the Frisbee craze
  12. The first President to throw out the ceremonial first pitch was William H. Taft on April 14, 1910
  13. The oldest baseball park still in use is Fenway Park in Boston which debuted in 1912
  14. The world's longest lazy river is 3/4 mile loop at BSR Cable Park in Waco, Texas
  15. Hot dogs are the most popular food item at baseball games followed by beer and peanuts!

## NAHEFFA Focus

**The Association promotes the common interests of organizations which have the authority to provide capital financing for not-for-profit healthcare and higher education institutions and facilitates national advocacy, support, networking and education on behalf of its members. NAHEFFA focuses its efforts on issues which directly influence the availability of, or access to, tax exempt financing for healthcare and higher educational institutions.**

## Debt Service Deferral and Other Modifications of Tax-Exempt Obligations



The economic impact of COVID-19 has caused financial stress to many 501(c)(3) borrowers of tax-exempt obligations. As a result, some lenders may agree to modify, either on a temporary or permanent basis, certain terms and provisions of outstanding tax-exempt obligations. Examples of such modifications include modification of the interest rate or interest rate formula applicable to such obligations, modification of financial covenant requirements, modification of debt service schedules, temporary deferral of debt service payments, re-amortization of principal payments and establishment of temporary interest-only periods on existing obligations.

It is important to note that any temporary or permanent modification to or with respect to the provisions of an outstanding tax-exempt obligation should be reviewed by bond counsel to determine if such modification results in a “reissuance” of the obligation for federal tax purposes. A “reissuance” would result in the outstanding tax-exempt obligation being deemed refinanced (or refunded) by a new debt instrument for federal tax purposes. In order for a debt instrument that is “reissued” for federal tax purposes as a result of a modification to maintain its tax-exempt status, the borrower, with the assistance of the issuer, must take certain steps in connection with the implementation of the modification, including, without limitation, completion of appropriate tax compliance documentation and obtaining a bond counsel opinion with respect to the modified tax-exempt obligation.

Under certain circumstances, a temporary or permanent modification may not result in a “reissuance” for federal tax purposes if it is determined that the modification is not a “significant modification” within the meaning of the federal tax code. In addition, certain temporary forbearances or deferrals of debt service payments may be determined not to be a “modification” of the instrument for federal tax purposes if the terms of such temporary forbearance or deferral satisfy certain requirements of the federal tax code.

Issuers and borrowers should consult with their bond counsel prior to entering into any agreements to defer or suspend debt service payments or to otherwise temporarily or permanently modify the terms of a tax-exempt obligation. The foregoing is intended as general information and is not intended to be, and should not be construed as, legal advice or a legal opinion.

### Hawkins Delafield & Wood LLP

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# GREETINGS FROM THE NAHEFFA SPONSORSHIP COMMITTEE

The NAHEFFA Sponsorship Committee would like to thank our 2020 Spring sponsors for their support during these unusual times. The continuing support of our sponsors is appreciated and allows us to explore alternative platforms for sharing information among NAHEFFA members until the time we can meet together again.

THANK YOU

**\*INTERESTED IN BECOMING A SPONSOR OF OUR 2020 FALL VIRTUAL CONFERENCE? CONTACT SHERRIE AT [INFO@NAHEFFA.COM](mailto:INFO@NAHEFFA.COM)**

