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## “Private School Vouchers: Legal Challenges and Civil Rights Protections”

By Kevin G. Welner & Preston C. Green

### Introduction: Growth and Transformation

The expansive private school voucher landscape in the United States today bears little resemblance to the small set of boutique policies that existed less than two decades ago. The changes over this time evidence the success of a legal and policy strategy to move toward voucher laws with fewer regulations and a broader set of recipients. Along the way, these policies moved well beyond low-income students, students with special needs, and other students who initially were held up by voucher advocates as having a particular need for school choice. Some current voucher policies are best understood as general aid to private school families, the great bulk of whom are white and not poor, and a great many of whom are students who have never attended public schools.

We have also witnessed a corresponding evolution in rationale. Following the decision in *Brown v. Board of Education*, southern communities used vouchers as a tool to evade the Supreme Court’s desegregation edict. The Court eventually declared this practice unconstitutional in *Griffin v. County School Board of Prince Edward County*.<sup>1</sup> For the next quarter-century, voucher advocacy largely subsided. It re-emerged, ironically, with the sales pitch that private school education via vouchers would save low-income students of color from public schools with low test scores. Now, with studies showing those maligned public schools having better assessment outcomes than voucher-receiving private schools, new justifications have emerged. Voucher advocates insist that choice is an inherent good, that private schools are more safe, or that there are other ways to measure school success.

The final important shift over this time is simply growth. That is, in addition to moving the goalposts for what constitutes success and transforming the demographics of voucher recipients, the maturation of voucher policies has simply seen enormous expansion in the number of voucher recipients and the amount of public funds shifted to the support of private schools. Enrollment caps that were initially included to pacify wary legislators have been raised or eliminated when politics enabled such expansion.

These upheavals over a very short period of time have given the public and policy makers little time to reflect on the changes or corresponding programmatic concerns and needs. What regulations around issues like discrimination and denied access should accompany governmental support? How should concerns about quality and about impact on public schools be taken into account? How might unfettered voucher growth impact the states’ ability to satisfy their constitutional duty to provide systems of public education?

In this brief, we first explain past legal challenges, concluding that these challenges have had very limited success but that there likely remain some future legal impediments to voucher expansion. Next, we delve into some key policy issues that arise

*This brief examines different forms of vouchers, but it does not discuss another type of policy used by states to subsidize private school education: individual tax credits for private school expenses. Such tax credits are given in eight states, and are used by parents to help pay for tuition.*

from this shift toward greater public funding of private schools, with a particular focus on civil rights concerns. We conclude with a set of recommendations, again focused on civil rights protections.

I. Evolution of Voucher Policies

Following the Jim Crow Era use of vouchers as a tool for maintaining segregation and the Supreme Court’s rebuke of those policies in *Griffin*, two other rationales emerged. Milton Friedman’s 1955 conceptualization, largely picked up by Chubb and Moe in 1990, embraced public subsidies of private schooling as a way shift away from public governance and bureaucracy.<sup>2</sup> This free-market justification for vouchers merged with an advocacy campaign that forcefully argued for systemic reform of public schools located in big cities and serving students of color.<sup>3</sup> Vouchers thus became a free-market policy approach pitched as a way to rescue poor students and students of color from failing, urban public schools.

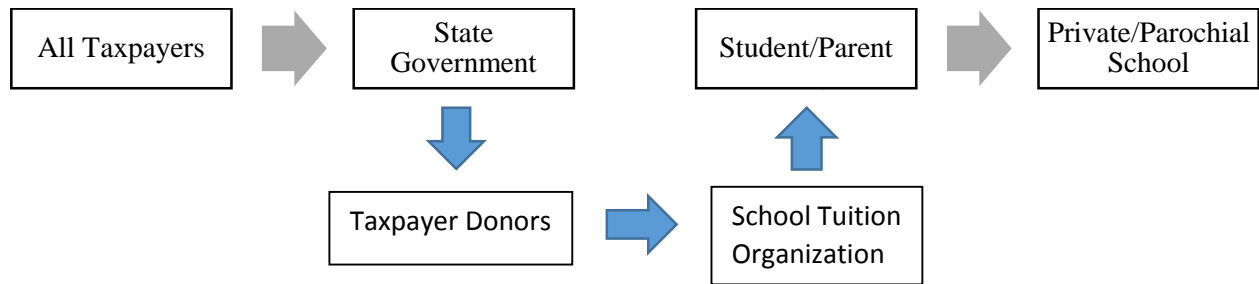
Three key events then punctuated the growth of private school voucher programs in the U.S. The first was the adoption of the first modern voucher program in Milwaukee in 1990, followed by Cleveland in 1995—both of which were sold as ways to help children of color. The second was the *Zelman v. Simmons-Harris* decision of the U.S. Supreme Court in 2002, largely removing the Establishment Clause obstacle—upholding the constitutionality of the Cleveland policy. As we discuss below, the Court emphasized the need to help disadvantaged children trapped in failing urban public schools. The third was the Republican electoral wave election in 2010, which precipitated the explosion of new voucher policies—but with a pronounced shift away from low-income children of color.<sup>4</sup> The result is now a dizzying array of policies. Ohio and Arizona, for instance, each have five different voucher programs.<sup>5</sup>

Along the way, the conventional voucher approaches represented by Milwaukee, Cleveland and Washington DC morphed into an assortment of different approaches for providing public financial support for private schooling. The conventional approach involves a straightforward legislative allocation of general fund money, collected from taxpayers, in the form of a check issued to a parent and then endorsed over to a private school (see Figure 1).

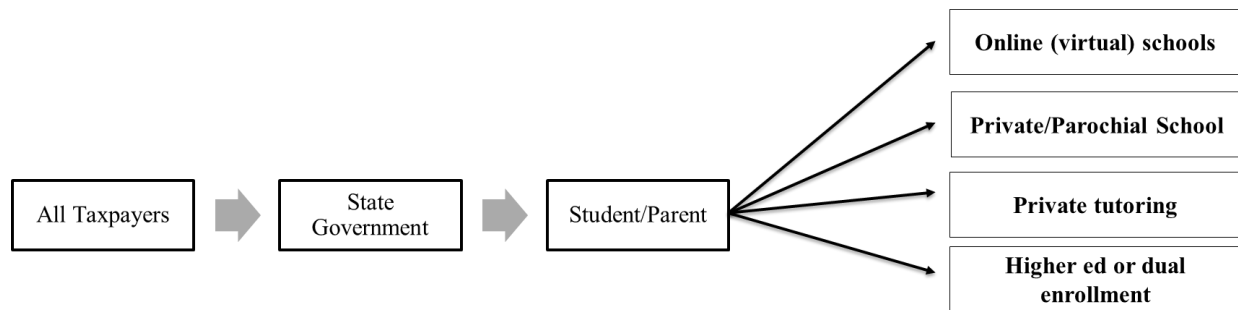


In 1997, Arizona adopted a variation of this conventional approach, inserting two new players into the process: taxpayer “donors” and “School Tuition Organizations” (STOs). In the Arizona process, a person owing taxes to the state can instead donate that amount (up to a set limit) to an STO. The STO then packages that donation (along with similar donations) into vouchers, again in the form of a check issued to a parent and then endorsed over to a private school. The state then uses a tax credit to reimburse the donor by forgiving the same amount owed to the state (see Figure 2). Because this approach (which we labeled “neovouchers” in a 2008 book) comes with potential legal, political and regulatory advantages, advocates have strongly promoted them as preferable to traditional vouchers.<sup>6</sup> As of 2017, the voucher-

advocacy group *EdChoice* counts 257,000 neovouchers handed out per year, versus only 178,000 conventional vouchers.



The most recent approach goes back to the legislative allocation, but instead of a voucher (check) being issued to the parent, the format of payment is through cash (e.g., a debit card), called a “savings account.” The parent also is authorized to use the funds for a wider variety of purposes, including homeschooling expenses (see Figure 3). Advocates of these approaches call them “Education Savings Accounts” or “Empowerment Scholarship Accounts” (ESAs).



Elements of these different approaches can also be combined, as represented by an Arkansas bill in 2017 that would have created tax-credit-funded ESAs.<sup>7</sup> Importantly, while these newer approaches for providing public subsidies for private education can be—and sometimes are—structured to target students in greater need, the trends are clearly toward non-targeting and toward the free market. As we discuss below, vouchers advocates are using these new approaches to promote policies that supplant public schools with subsidized private schools operating with few restrictions, regulations or civil rights protections.

## II. The Supreme Court’s Knock on the Wall of Separation between Church and State

Federal constitutional challenges to vouchers implicate the two religion clauses of the First Amendment. The Establishment Clause forbids the government from making any law “respecting the establishment of religion.” The Free Exercise Clause prohibits the government from making any law prohibiting individuals from engaging “in the free exercise thereof.”

In *Zelman v. Simmons-Harris*, the U.S. Supreme Court ruled in 2002 that an Ohio school-voucher program, which provided tuition assistance to Cleveland students to attend private schools in the city, did not violate the Establishment Clause.<sup>8</sup> The program satisfied the secular purpose of enabling the city's schoolchildren to escape from Cleveland's "demonstrably failing school system." The Court also found that the program did not have the effect of advancing religion even though 96% of the participating students enrolled in religiously affiliated schools. The Court reasoned that: (1) the voucher program was neutral with respect to religious versus non-religious private schools; (2) school choices available to Cleveland's students included many options other than private schools, such as magnet schools and traditional public schools; and (3) religious institutions received aid as the result of individual choices without the state endorsing or favoring the religious options.

Through the *Zelman* decision, the Court green-lighted states to adopt voucher policies—to provide state funding for private schools as well as public schools. But the Supreme Court soon decided, in a case called *Locke v. Davey* in 2004, that neutrality did not *require* states to provide the same benefits for religious institutions as for non-religious ones.<sup>9</sup> The Court ruled that the state of Washington did not violate the Free Exercise Clause by implementing a policy that denied a scholarship to a college student who wished to attain a theological degree. The decision observed that this case involved "a play in the joints" between the two religion clauses. While the Establishment Clause did not require the state to deny the scholarship to students who pursue religious study, the Free Exercise Clause did not require the state to let the scholarship be used in this fashion. The two clauses presented no mandates in this in-between area, so the states have discretion in how they choose to legislate. In this case, Washington state had a valid justification for denying the scholarship for religious study: a provision in the state's constitution that prohibited even the indirect funding of religious instruction.

The Court has yet to address whether states can justify the exclusion of religious institutions based on so-called Blaine amendments, which are provisions that forcefully prohibit the state from supporting religious institutions.<sup>10</sup> They get their name from James Blaine, a Congressman from Maine. In 1875, Blaine proposed a federal constitutional amendment that would have prohibited states from funding sectarian schools or institutions. Although Blaine's attempt failed to pass, individual states passed similar constitutional provisions. Critics have claimed that Blaine amendments were connected to anti-Catholic bigotry and are therefore unconstitutionally discriminatory.<sup>11</sup>

This discrimination argument may be tested in the next year or two. In *New Mexico Association of Non-public Schools v. Moses*, the U.S. Supreme Court in 2017 vacated a state court decision striking down a New Mexico school textbook loan program to private schools.<sup>12</sup> The New Mexico Supreme Court had ruled that the loan program violated the state's Blaine amendment, which prohibited the appropriation of funds to any private or sectarian school. The U.S. Supreme Court also remanded the case for further consideration in light of its 2017 ruling in *Trinity Lutheran Church v. Comer*, which held that a Missouri agency violated the Free Exercise Clause by relying on the state's Blaine amendment to bar a religiously affiliated daycare center from receiving funding from a state program providing playground surfacing.<sup>13</sup>

The *Trinity Lutheran* decision, however, also did not address the anti-Catholic-animus argument. Instead, the Court simply declined to extend *Locke* to the playground-surfacing program. The Missouri program did not fall into that in-between, play-in-the-joints area. While states can constitutionally treat the funding of a theological degree non-neutrally, they cannot treat a playground at a religiously affiliated daycare center non-neutrally. Tuition for religious schooling would seem to be more akin to

the theological education, but the Court has continued to move rightward since 2004, so it is possible that the *Locke* decision will not survive—meaning that state constitutional provisions (such as the one at issue in the New Mexico case if it makes its way back to the U.S. Supreme Court) might be found to violate the U.S. Constitution if they are interpreted to require non-neutral funding toward religious schooling.

One other decision from the U.S. Supreme Court will likely have continued impact in this area. In 2011, the Court ruled in *Arizona Christian School Tuition Organization v. Winn* that Arizona taxpayers lacked standing for an Establishment Clause challenge to the state’s private tax credit scholarship (neovoucher) program.<sup>14</sup> In order to bring any lawsuit, plaintiffs must have “standing,” meaning that they must have suffered a special injury, beyond what any other resident of the state might suffer. As described above, the Arizona law allows individuals to claim tax credits for contributions to student tuition organizations, which then use these contributions to provide “scholarships” for children attending religiously affiliated schools. The Court concluded that the taxpayers lacked standing because private individuals, not the state, made the contributions to the STOs; other taxpayers, who choose not to contribute, do not (the Court reasoned) suffer a personal harm.

In addition to the federal Establishment Clause, plaintiffs have claimed that voucher programs violate state constitutional religion clauses. Specifically, two types of religion clauses have been implicated: (1) the Blaine amendments discussed above, which prohibit state aid to religious institutions; and (2) compelled support clauses, which forbid individuals from being forced to support religious institutions.<sup>15</sup> The courts that have thus far heard challenges to voucher laws have generally refused to find that these state religion clauses are more restrictive than the U.S. Establishment Clause.<sup>16</sup> So they have followed the *Zelman* reasoning and conclusion: the programs are constitutionally permissible because they are neutral with respect to religion, and religious institutions receive funding because of the individual choices made by voucher-receiving families. Additionally, some courts have dismissed state religion clause challenges to neovoucher laws because of the plaintiffs’ lack of standing—akin to the argument that prevailed in *Winn*.<sup>17</sup>

Plaintiffs have also asserted that programs providing financial aid to private schools violate five different types state constitutional clauses that do not specifically address religious issues: (1) clauses that prohibit states from appropriating public funds to aid private institutions;<sup>18</sup> (2) public purpose clauses, which similarly places limits on state financial assistance to private entities;<sup>19</sup> (3) clauses that prohibit states from diverting funding to private schools if that funding has been constitutionally earmarked for public schools;<sup>20</sup> (4) local control provisions, which authorize school districts to supervise the schools within their boundaries;<sup>21</sup> and (5) clauses that require states to provide for public education. This last type of challenge is worth a deeper dive, because it may take on greater importance as voucher programs expand.

### III. What Is the Impact of Voucher Expansion on the States’ Constitutional Duty to Provide for Public Education?

As noted above, education clauses are state constitutional provisions that require states to provide for public education. These provisions require states to prioritize the support of public education over other educational initiatives, such as vouchers. In *Bush v. Holmes*, the Florida Supreme Court considered a

voucher program that enabled students attending unsatisfactory schools to attend private schools.<sup>22</sup> The court concluded that the program violated the state's education clause, which made it "a paramount duty of the state to make adequate provision for the education of all children residing within its borders." The court found that the voucher program was unconstitutional, in part because it diverted education funding to private schools.<sup>23</sup>

Other courts, however, have refused to follow the reasoning of the *Bush* court.<sup>24</sup> They have found that their education clauses allow funding to be diverted from public education as long as the state meets its constitutional duty to provide public education. The courts in these other cases agreed that the states' duty to provide for public education must take precedence over the creation of publicly funded voucher initiatives, but the laws at issue did not prevent the states from fulfilling this constitutional obligation to public schools.

In most states, voucher programs remain very small and remain largely targeted toward at-risk populations. As noted above, however, a few states recently expanded the scope of their voucher programs to provide generalized funding, reaching many students who decidedly not at risk—including those who are upper-income and have never attended public school. These changes can be rapid. Indiana's voucher policy began in 2011, targeted toward low-income students. In 2013, the state expanded this program to include middle- and upper-middle-class families. By 2017, more than half of the program's 34,000 students had never attended public schools.<sup>25</sup> Arizona's ESA program recently reached the \$1 billion mark in cumulative scholarships, which are financed by the state treasury.<sup>26</sup> In Florida, that's the annual amount; private schools received nearly \$1 billion in state funding in 2017 from Florida's various voucher-like programs.<sup>27</sup>

The expansion of these voucher programs might eventually compromise their states' ability to support their public schools in a constitutional manner to an extent that the previous, smaller-scale initiatives did not. Even those decisions upholding voucher programs from education clause challenges found that the states' duty to provide for public education took precedence over the creation of publicly funded voucher initiatives. States should be especially concerned about the potential impact of expansive private school choice programs on higher need districts.<sup>28</sup> Many of these districts already lack the necessary funding to satisfy their constitutional obligations.<sup>29</sup> This insufficiency is due, in large part, to state school finance systems that have failed to meet the educational needs of these high-poverty districts. Unfettered private school subsidy programs might exacerbate these financial problems by further draining resources from them.<sup>30</sup>

#### IV. Do Vouchers Improve the Quality of Education for Students of Color?

As noted above, a major rationale for the enactment of voucher programs is that they will improve the quality of education for students of color. As a prominent example, consider the Supreme Court's majority opinion in *Zelman*. The Court presents the challenged voucher policy as a logical, compassionate reaction from the state, to rescue Cleveland's children:

Few of [Cleveland's] families enjoy the means to send their children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In

1995, a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. ... Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education."... The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities. It is against this backdrop that Ohio enacted, among other initiatives, its Pilot Project Scholarship Program ... (p. 644).<sup>31</sup>

School choice advocates have offered a similar rationale for other voucher policies, which are often directed toward at-risk populations. The voucher laws in Louisiana, Ohio, Indiana and Washington DC, for example, prioritize families that are lower-income and where the child would otherwise attend a "lower-performing" public school (a school with lower test scores).<sup>32</sup> Again, the core assumption is that vouchers will allow these at-risk children to move to schools with better opportunities to learn—schools that will help the children thrive and result in higher test scores.

However, recent studies of all four of these voucher policies have reached the opposite conclusion: children actually do worse when they use the vouchers to move to private schools.<sup>33</sup> Studies of these four policies compared the academic performance of low-income students attending voucher and public schools on state standardized tests.<sup>34</sup> Each study found that voucher students had significantly lower scores in math, on average, after their first year participating in the program. The Ohio study also found negative effects in reading after one year.<sup>35</sup> The loss in math experienced by Louisiana voucher students was especially alarming.<sup>36</sup> A student who scored in the 50th percentile in math declined to the 34th percentile after only one year. In the case of the Louisiana and Indiana voucher programs, students who remained in the voucher program for three or more years eventually did catch up with their public-school peers.<sup>37</sup> By contrast, the negative effects for Ohio voucher students endured over time.<sup>38</sup>

The studies should make policymakers seriously question whether to enact or expand voucher programs. After all, the primary rationale for private school choice programs is heightened learning among vouchered students. Although it is somewhat reassuring that students who stayed in a couple of these programs eventually made up lost ground, this less troubling outcome must be considered in the context of larger costs to the educational system. Put in legal terms, does it provide a justification for expanding programs that may further disable the ability of poorly resourced school districts to satisfy their constitutional responsibilities?

Research focused just on the Cleveland program is not quite as bad. Regression models yield no statistically significant difference in test scores between voucher students and students from the public school control groups.<sup>39</sup> But consider again the language from *Zelman*, which portrays these comparison "inner city" Cleveland public schools as truly awful. If the voucher (private) schools do no better than these disastrous schools, what does this say about the quality of the private schools?



V. How can programs provide civil rights protections to voucher students?

1. The Current Landscape

Private schools that take no public funding are not subject to civil rights laws. However, the tax-exempt status of a non-profit private school (including a church-run school) can be revoked based on racial discrimination.<sup>40</sup> Further, a private, non-religious school is prohibited from racial discrimination in the “making and enforcing of contracts,” which includes denying admission based on a student’s race.<sup>41</sup>

When private schools do on occasion accept federal funding,<sup>42</sup> the situation changes. Using its authority under the Spending Clause of the U.S. Constitution,<sup>43</sup> the federal government can condition a school’s receipt of federal financial assistance on agreement to comply with civil rights laws.<sup>44</sup> The same conditions can, as discussed below, be placed on states themselves when those states create and run voucher policies.<sup>45</sup> These laws include Section 504 of the 1973 Rehabilitation Act, which prohibits discrimination based on disability;<sup>46</sup> Title IX of the Education Amendments of 1972, which (with some exceptions) prohibits discrimination based on sex;<sup>47</sup> and Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, or national origin.<sup>48</sup>

Other than Washington DC’s voucher program, which is funded by Congress, the nation’s many voucher and voucher-like policies do not rely on federal funding. They are created and funded by states. So unless the private school accepts federal money through, e.g., the federal lunch program, any conditions attached to the funding would be put in place by the relevant state.<sup>49</sup> To date, these state laws are a jumble, with some protections commonly put in place, some protections completely absent, and a great deal of variation from state to state.

In a study of conventional voucher policies (as opposed to tax-credit neovoucher policies), Suzanne Eckes and her colleagues in 2016 examined the 25 voucher laws then in effect, including the tuitioning policies in Maine and Vermont. They found only basic protections in some laws (e.g., Georgia’s law),<sup>50</sup> and no protections in others (e.g., Nevada); but in still others (e.g., Washington DC), the statutes prohibited the recipient private schools from discriminating on the basis of race, color, national origin, religion, and sex. Even the DC law, however, includes no protections against LGBTQ discrimination and no requirement of addressing the needs of students not fluent in English. The DC law also includes a provision to the effect that students waive their rights to services and protections under the Individuals with Disabilities Education Act.<sup>51</sup>

The gamut of approaches from Nevada to Georgia to DC reveals several important patterns and conclusions. Almost every state prohibits the recipient schools from engaging in racial discrimination. In contrast, only Wisconsin includes clear protections against discrimination based on students’ religion,<sup>52</sup> and no states have voucher laws that protect against LGBTQ discrimination. In fact, many states expressly confirmed the authority of the voucher-receiving schools to base admissions decisions on their religious beliefs, which often oppose homosexuality. The laws, even those expressly creating vouchers for students with special needs, are also very deferential to private schools regarding special education—often stating that parents’ choice to use a voucher entails a voluntary waiver of their children’s right to a free appropriate public education under the IDEA.

States, however, may be violating federal civil rights laws when they fail to put more protections in place. As Eckes and her colleagues point out, the states themselves are recipients of federal funding and

are obligated to comply with those civil rights statutes. For example, discussing students not yet fluent in English, they point out that Title VI—and, we would add, the Equal Education Opportunity Act of 1974—“requires recipients of federal funding to offer instruction to attend to students’ language learning needs.” They continue:

Typically, private schools do not receive federal funds and therefore would not usually be required to provide language instruction for children not fluent in English. The state, however, is a recipient of federal funds and is therefore obligated to ensure that all its programs are accessible to children requiring English instruction.

Offering a voucher without making a provision for how this group of children will be able to meaningfully participate in the program would appear to be a violation of Title VI’s requirement that states “may not, directly or through *contractual or other arrangements* . . . [d]eny an individual any disposition, service, financial aid, or benefit” [28 C.F.R. § 42.104(b), emphasis added]. Clearly, approving private schools for participation in a publicly funded voucher program is a “contractual or other arrangement” that executes a state “benefit.” Accordingly, the state must take affirmative action to ensure that meaningful access is available for all students regardless of national origin. Once again, failure to do so results in a voucher of one quality for those who speak English and a voucher of a lesser quality for those who need English language instruction.<sup>53</sup>

Similar arguments could be made regarding Section 504, which arguably requires states’ voucher laws to avoid, in their implementation, discrimination based on students’ disabilities. Eckes and her colleagues point to a 2013 letter from the U.S. Department of Justice to the Wisconsin Department of Public Instruction, stating in part, “[t]he private or religious status of individual voucher schools does not absolve DPI of its obligation to assure that Wisconsin’s school choice programs do not discriminate against persons with disabilities” (citing Section 504, as well as the Americans with Disabilities Act).<sup>54</sup>

The limited nature of civil rights protections in these voucher laws suggests that those who passed these laws are adherents to the market-based model of school choice. Yet free-market purists see even these laws as overly regulated, and they hope that the newer breed of voucher policies—created through tax credits and “savings accounts”—will shed some or all of the existing voucher regulations.<sup>55</sup> In a nutshell, these advocates contend that, while states are legally able to attach the same sorts of conditions to these newer voucher approaches, such regulation is less likely with laws that provide subsidies that are more indirect. The first wave of such neovoucher laws would seem to bear this out.<sup>56</sup>

## 2. Recommended Civil Rights and Access Protections

If school choice is approached as a tool for accomplishing larger educational goals, then anti-discrimination policies make a great deal of sense. The federal Magnet Schools Assistance Program offers an exemplar of how a school choice policy can incorporate such protections. Applications for funding under the MSAP are required to include assurances that the applicant will:

(C) not engage in discrimination based on race, religion, color, national origin, sex, or disability in—

(i) the hiring, promotion, or assignment of employees of the applicant or other personnel for whom the applicant has any administrative responsibility;

- (ii) the assignment of students to schools, or to courses of instruction within the schools, of such applicant, except to carry out the approved plan; and
- (iii) designing or operating extracurricular activities for students.<sup>57</sup>

We interpret sex discrimination to include discrimination based on gender identity. And we read “national origin” to include discrimination because on language or English fluency. Further, given that the U.S. Supreme Court has determined that discrimination based on sexual orientation has no rational relationship to a legitimate governmental purpose,<sup>58</sup> we recommend that sexual orientation be added to race, religion, color, national origin, sex, or disability. With those qualifications, we suggest that this straightforward language be included in state voucher laws.

The IDEA is not a civil rights law, so we treat it separately here as an issue of access and services. Recall that students with special needs have been the main group included within voucher laws. Thirteen of the 25 voucher laws studied by Eckes and her colleagues are specifically targeted at children with disabilities. Neovouchers and ESAs have also disproportionately focused on these students. But as noted above, voucher laws involve a trade-off; in exchange for taking the voucher and renouncing public school attendance, students with special needs almost always give up the procedural and substantive protections of the IDEA. Private schools need not provide any particular services for these students. In fact, any given private school is under no legal obligation to even admit any given voucher-carrying student.

While the protections provided by Section 504 and the IDEA are far from robust, they provide an important foundation for the education and treatment of students with special needs. For this reason, we contend that voucher-accepting private schools should agree to comply with these standards and procedures.

Similarly, the minimal protections found in the Equal Education Opportunity Act of 1974 should be replicated in state voucher laws. The EEOA prohibits discrimination resulting from “the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”<sup>59</sup> The foundational protection of the EEOA is the straightforward requirement that schools not ignore or neglect language barriers, which should also be an element of non-discrimination based on national origin.

Three additional access issues should, we contend, be addressed state voucher laws: meals, transportation, and tuition. The School Breakfast Program and the National School Lunch Program, which provide subsidies to schools that provide free and healthy meals to eligible students, are open to non-profit private schools, yet many do not participate. This can be a barrier to lower-income families opting to move to a private school. Similarly, lower-income families are less likely to have access to the transportation necessary to access many private schools—particularly schools located outside lower-income communities. Finally, we note that while older voucher programs such as those in Milwaukee and Cleveland require receiving schools to accept the voucher as payment in full (at least for the lowest income families), some newer programs such as Indiana’s allow schools to demand tuition payments beyond the value of the voucher.

Each of these barriers—tied to meals, transportation (and location), and tuition—directly undermine the public-serving nature of a voucher law. They also undermine the rhetoric of voucher advocates, focused

on opening private-school access to the nation's low-income families. Even if voucher-receiving private schools are prevented from actively denying access or actively discriminating, meaningful access is denied by such obstacles.

## VI. Conclusion

After emerging in the post-*Brown* years as a tool for maintaining segregation, private school vouchers gained traction when advocates sold school choice as a way to greatly improve the education of low-income students of color. The sales pitched worked, as voucher policies were adopted throughout the United States. But in two key ways, this equity-focused pathway envisioned for vouchers has led in unexpected directions. First, research is now showing that students receiving vouchers are actually doing worse in their private schools than they would have done in their supposedly "failing" public schools. This has led voucher advocates to shift their justifications away from improved academic performance and toward a host of other purported benefits.

Second, and perhaps more importantly, the voucher landscape that has now emerged is much less targeted. After initially proposing vouchers as needed for at-risk populations, advocates have re-visited those laws and urged expansion. Low-income students of color merely provided the opening—the camel's nose under the tent. Once the policy window opened, voucher advocates have pushed for a widened path toward general aid to private-school families. The great bulk of these private-school students are white and not poor, and a great many of them have never attended public schools. Accordingly, voucher subsidies have become little more than transfer payments for those more advantaged families.

With this expansion of scope and overall growth, key details of voucher policies should be revisited. Public funding for public schools comes with accountability rules and with civil rights protections. When this public funding is diverted to subsidizing private schools, which of these rules and protections should follow? In states like Arizona, Florida, Louisiana and Indiana, vouchers have become much more than a pilot program or a small niche serving relatively few students. What responsibilities do such states have to protect the rights of students with disabilities, those who are not fluent in English, and those belonging to groups that have suffered from discrimination? In places where private schools share in governmental funding of schooling, should they be permitted to operate in ways generally disallowed for public schools, such as denying access based on characteristics like religious beliefs and academic performance?

Finally, given provisions in many state constitutions that require the state to provide for public education or even to prioritize public education, what protections might be necessary as vouchers expand? If rules regarding civil rights protections, transparency, accountability and access are unequal between the two types of government-supported institutions, the public-schooling sector may have a hard time competing—particularly for the enrollment of children in more advantaged families. State courts may need to intervene if the public-schooling sector is placed at a disadvantage or otherwise is starved of the resources necessary for success.

The fundamental needs and values that gave life to American schooling will remain in place, no matter the recipients of governmental support. Whether publicly governed or privately operated, schools must still prepare students for life, for jobs, and for participation in our democracy. They must also serve all students, not just the easiest or least expensive to educate. They must abide by core ideas of fairness,

protecting children against bigotry and discrimination—and certainly not actively subjecting children to these harms. And they must meet basic standards of accountability and performance. Voucher policies have grown up and now, in many states, share the public support formerly reserved for public schools; it is imperative that they also now share the responsibilities formerly placed on public schools.

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<sup>1</sup> 377 U.S. 218 (1964).

<sup>2</sup> See Friedman, M. (1955). The role of government in education. In Solo, R. (Ed.). *Economics and the Public Interest*. Rutgers University Press. See also Chubb, J. E. and Moe, T. M. (1990). *Politics, Markets and America's Schools*. Washington, DC: Brookings Institution.

<sup>3</sup> The Commonweal Institute (in a report titled, “Responding to the Attack on Public Education and Teacher Unions”) analyzed the phrase: “trapped in failing schools” and found its origins in think tanks and politicians in the mid- to late-1990s. The first use was in November 1994, in a publication from the Michigan-based Mackinac Institute, advocating for school choice. (See [democracyandcommunity.org/InThisTogether/Responding\\_Ed\\_Report.pdf](http://democracyandcommunity.org/InThisTogether/Responding_Ed_Report.pdf).)

<sup>4</sup> Looking at the landscape as of 2015, Julie Mead noted, “twenty-four states now have some type of voucher program or voucher-like program, but only seven programs are more than a decade old, and fifteen programs have been enacted since just 2013” (p. 707; internal citations omitted). Mead, Julie F. (2016). “The right to an education or the right to shop for schooling: Examining voucher programs in relation to state constitutional guarantees.” *Fordham Urban Law Journal*, 42(3), pp. 703-743. Several new programs have been added since 2015.

<sup>5</sup> Voucher advocacy groups like EdChoice (formerly the Friedman Foundation) regularly update the counts (see <https://www.edchoice.org/school-choice/types-of-school-choice/>).

<sup>6</sup> See Welner, K. G. (2008). *NeoVouchers: The emergence of tuition tax credits for private schooling*. New York: Rowman & Littlefield. The legal advantages are discussed in this brief. The political advantages primarily arise because tax-credit policies receive less scrutiny and are less well understood than voucher policies. The regulatory advantages arise because fewer strings are likely to be attached to a tax credit than to a direct expenditure.

<sup>7</sup> The bill, SB 746, made its way in 2016-2017 through the full state senate and then house education committee before falling to a negative vote in the full state house. See <https://www.arktimes.com/ArkansasBlog/archives/2017/03/31/school-voucher-bill-defeated-on-43-50-vote>.

<sup>8</sup> 536 U.S. 639.

<sup>9</sup> *Locke v. Davey*, 540 U.S. 712 (2004).

<sup>10</sup> Thirty-six state constitutions include a Blaine-like provision. See Welner, K. G. (2008). *NeoVouchers: The emergence of tuition tax credits for private schooling*. New York: Rowman & Littlefield (pg. 67). For example, Colorado’s constitution states, “Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.” Colorado Const. Art. IX, § 7.

<sup>11</sup> In *Locke*, the Court sidestepped the question on the ground that the constitutional provision cited by the state of Washington was not a Blaine amendment.

<sup>12</sup> *New Mexico Ass’n of Non-public Schools v. Moses*, 137 S.Ct. 2325 (2017).

<sup>13</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017).

<sup>14</sup> *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011).

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<sup>15</sup> McCarthy, M. (2016). Religious challenges to school voucher and tax benefit/scholarship programs. *Peabody Journal of Education*, 91(4), 473-89.

<sup>16</sup> *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d. 602 (Wisc. 1998); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

<sup>17</sup> *Duncan v. State*, 102 A.3d 913 (N.H. 2014); *Gaddy v. Georgia Dep't of Revenue*, 802 S.E.2d 225 (Ga. 2017); *Independent School District No. 5 v. Spry*, 292 P.3d 19 (Okla. 2012).

<sup>18</sup> This argument was successful in *Almond v. Day*, 89 S.E.2d 851 (Va. 1955) and *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009); it was unsuccessful in *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015).

<sup>19</sup> This argument was unsuccessful in both *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d. 602 (Wisc. 1998) and *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992).

<sup>20</sup> This argument was successful in both *Schwartz v. Lopez*, 382 P.3d 886 (Nev. 2016) and *Louisiana Federation of Teachers v. Louisiana*, 118 So.3d 1033 (La. 2013); but it was unsuccessful in *Hart v. State of North Carolina*, 774 S.E.2d 281 (N.C. 2015) since the funding for that program came from general revenues instead of the school fund.

<sup>21</sup> This argument was successful in *Owens v. Colorado Congress of Parents, Teachers and Students*, 92 P.3d 933 (Colo. 2004).

<sup>22</sup> *Bush v. Holmes*, 919 So.2d 392 (Fla., 2006).

<sup>23</sup> The court also found the program to violate article IX, section 1(a) of the state constitution: "Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools." The majority reasoned:

[The voucher program] diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida's children. This diversion not only reduces money available to the free schools, but also funds private schools that are not "uniform" when compared with each other or the public system. Many standards imposed by law on the public schools are inapplicable to the private schools receiving public monies. . . . [T]hrough the OSP the state is fostering plural, nonuniform systems of education in direct violation of the constitutional mandate for a uniform system of free public schools.

<sup>24</sup> *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

<sup>25</sup> Turner, C. (2017, May 12). The promise and peril of school vouchers. *NPR*. Retrieved January 11, 2018 from <https://www.npr.org/sections/ed/2017/05/12/520111511/the-promise-and-peril-of-school-vouchers>.

<sup>26</sup> Rau, A. (2017, August 18). Controversial Arizona tax-credit scholarship program grants \$1B to students. *Arizona Central*. Retrieved January 11, 2018 from <https://www.azcentral.com/story/news/politics/arizona-education/2017/08/18/controversial-arizona-education-tax-credit-scholarship-program-gives-students-1-billion/554058001/>.

<sup>27</sup> Postal, L., Kassab, B., & Martin, A. (2017). Schools without rules: An Orlando Sentinel Investigation. *Orlando Sentinel*. Retrieved January 11, 2018 from <http://www.orlandosentinel.com/features/education/os-florida-school-voucher-investigation-1018-htmlstory.html>.

<sup>28</sup> Black, D. (forthcoming). Preferencing educational choice: The constitutional limits. *Cornell Law Review*. Retrieved January 11, 2018 from [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3058266](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058266).

<sup>29</sup> Baker, B., Luhm, T., Johnson, M., & Sciarra, D. (2017, February). Is school funding fair?: America's most fiscally disadvantaged school districts (Second Edition). *Education Law Center*. Retrieved January 11, 2018 from [http://edlawcenter.org/assets/files/pdfs/Newsblasts/Disadvantaged\\_Districts\\_Report.pdf](http://edlawcenter.org/assets/files/pdfs/Newsblasts/Disadvantaged_Districts_Report.pdf).

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<sup>30</sup> The results of charter school expansion provide some support for this concern. Charter schools receive public funding but are operated by independent boards. In Cleveland, Columbia, Newark, and Detroit the dramatic increase of charter schools has corresponded with a similar decrease in funding for public schools. If private school choice programs expand in a similar fashion, they might also drain the public till, thus making it impossible for these districts to provide a constitutional public-school education to their students.

<sup>31</sup> In fact, Justice Souter's *Zelman* dissent begins with this passage: "The occasion for the [voucher legislation] is the condition of public education in the city of Cleveland. The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here" (p. 686).

<sup>32</sup> National Conference of State Legislatures. *School Voucher Laws: State-by-State Comparison*. Online at <http://www.ncsl.org/research/education/voucher-law-comparison.aspx>

<sup>33</sup> Mills, J.N., & Wolf, P.J. (2017, February 17). Vouchers in the bayou: The effects of the Louisiana scholarship program on student achievement after two years. *Education Evaluation and Policy Analysis*, 39(3), pp. 464–484, online at <http://journals.sagepub.com/stoken/default+domain/rny5Jru8VdKdTrgeRBkd/full>; Figlio, D., & Karbownik, K. (2016). Evaluation of Ohio's EdChoice Scholarship Program: Selection, Competition, and Performance Effects. Fordham Institute. Online at <https://edexcellence.net/publications/evaluation-of-ohio%E2%80%99s-edchoice-scholarship-program-selection-competition-and-performance>; Dynarski, M., Rui, N., Webber, A., & Gutmann, B. (2017). Evaluation of the DC Opportunity Scholarship Program: Impacts after One Year. NCEE 2017-4022. *National Center for Education Evaluation and Regional Assistance*. Online at <https://ies.ed.gov/ncee/pubs/20174022/pdf/20174022.pdf>. The fourth study, from Indiana, is currently under peer review. The preliminary findings of the statewide four-year study of 34,000 students showed losses in math while English scores were unchanged. Waddington, R. J. & Berends, M. (2017). Impact of the Indiana Choice Scholarship Program: Achievement effects for students in upper elementary and middle school. Online at [http://creo.nd.edu/images/people/Waddington\\_Berends Indiana Voucher Impacts 06.24.17.pdf](http://creo.nd.edu/images/people/Waddington_Berends Indiana Voucher Impacts 06.24.17.pdf)

<sup>34</sup> Previous studies on the academic effects of voucher programs have generally shown no difference between voucher and public-school students. Some found small benefits for some groups, some years, in some programs – such as for African Americans in high school in an older, privately funded voucher program in Washington DC. None of the earlier studies found a strong negative correlation between voucher participation and academic achievement.

<sup>35</sup> "The students who use vouchers to attend private schools have fared worse academically compared to their closely matched peers attending public schools. The study finds negative effects that are greater in math than in English language arts. Such impacts also appear to persist over time, suggesting that the results are not driven simply by the setbacks that typically accompany any change of school" (p.2). Figlio, D., & Karbownik, K. (2016). Evaluation of Ohio's EdChoice Scholarship Program: Selection, Competition, and Performance Effects. Fordham Institute. <https://edexcellence.net/publications/evaluation-of-ohio%E2%80%99s-edchoice-scholarship-program-selection-competition-and-performance>

<sup>36</sup> "When controlling for baseline achievement, we find [voucher] users are 18% of a standard deviation behind in [English Language Arts] and 34% of a standard deviation behind on mathematics compared with their control group peers after attending their most preferred private school for 2 years" (pp. 464-465). Mills, J.N., & Wolf, P.J. (2017, February 17). Vouchers in the bayou: The effects of the Louisiana scholarship program on student achievement after two years. *Education Evaluation and Policy Analysis*, 39(3), pp. 464–484. <http://journals.sagepub.com/stoken/default+domain/rny5Jru8VdKdTrgeRBkd/full>

<sup>37</sup> One concern about the usefulness of this second finding concerns the “attrition bias” that arises once students start leaving the voucher schools, since decisions to leave are non-random. Those leaving are probably on average less successful, or less well suited for the particular private school, than those remaining.

<sup>38</sup> Private school choice advocates have argued that over-regulation might have caused the initial poor performance of Louisiana voucher students. This over-regulation theory posits that high-quality private schools refused to participate in the voucher program because of the state assessment requirement. As evidence, supporters of this over-regulation theory note that over 70% of Louisiana’s private schools chose not to accept voucher students. The argument here is that only desperate schools with declining enrollments agreed to participate—and that these schools are of lower quality. Thus, the argument continues, if the state assessment were lifted, more high-quality private schools would participate in the voucher program. Instead of using state assessments, one alternative would be to allow private schools to use the results of norm-referenced tests.

Yet two deficiencies in this argument weaken its explanatory power. First, the law forbids the private school from charging tuition that is more 90 percent of the per-student funding in the student’s home school district. Many higher-quality private schools charge tuition rates that are higher than this, so their disinterest in the program could be straightforwardly linked to finances. Second, this argument fails to account for the history of racial segregation in education. Many private schools in the South came into existence as a vehicle for enabling white parents to escape from court ordered desegregation decrees. These schools are more segregated than their public-school counterparts, which suggests that white flight is still a factor driving private-school enrollment. Because four-fifths of Louisiana voucher students are African American, a number of the state’s private schools might still eschew the voucher program even if the state testing requirement were lifted.

<sup>39</sup> Jonathan A. Plucker, Patricia Muller, John Hansen, Russ Ravert, & Matthew Makel, (2006). *Evaluation of the Cleveland Scholarship and Tutoring Program: Summary Report 1998-2004*. Bloomington, Ind.: Center for Evaluation and Education Policy, Indiana University.

<sup>40</sup> *Bob Jones University v. United States*, 461 U.S. 574 (1983).

<sup>41</sup> *Runyon v. McCrary*, 427 U.S. 160 (1976). A religious school may nonetheless be allowed to engage in racial discrimination if based on the religious beliefs.

<sup>42</sup> For a list of programs under the Elementary and Secondary Education Act that private school can participate in, see <https://www2.ed.gov/about/offices/list/oii/nonpublic/faqgeneral.html>. In addition, private schools can participate in the federal school breakfast and lunch programs administered by the Department of Agriculture.

<sup>43</sup> Article I, §8, cl. 1 of the United States Constitution provides as follows, “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”

<sup>44</sup> *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>45</sup> Eckes, Suzanne E., Julie Mead, and Jessica Ulm. (2016). Dollars to Discriminate: The (Un) intended Consequences of School Vouchers. *Peabody Journal of Education*, 91(4), pp. 537-558.

<sup>46</sup> 29 U.S.C. § 794.

<sup>47</sup> 20 U.S.C. §§ 1681-1688 (private religious schools can engage in sex discrimination if grounded in their religious beliefs).

<sup>48</sup> 42 U.S.C. § 2000d et seq.

<sup>49</sup> Eckes, et al., supra. See also Arianna Prothero and Andrew Ujifusa (June 6, 2017). In States' Private-School Vouchers, Few Safeguards against Discrimination Concerns over how a federal program would protect students. *Education Week*. Vol. 36, Issue 34, Pages 1, 19.



<https://www.edweek.org/ew/articles/2017/06/07/in-states-private-school-vouchers-few-safeguards-against.html>

<sup>50</sup> The Georgia law, like most, includes a prohibition against discrimination based on race, color, and national origin. Ga. Code Ann. 20-2-2115(a)(3).

<sup>51</sup> DC Code § 38-1853.08.

<sup>52</sup> See Eckes, et al., pg. 548.

<sup>53</sup> Eckes, et al., pg. 552.

<sup>54</sup> U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section. (2013, April 9). Letter from Anurima Bhargava et al. to Tony Evers, State Superintendent, Wisconsin Department of Public Instruction. Available upon request from the authors.

<sup>55</sup> See Coulson, *supra*. See also Lindsey Burke and Jason Bedrick (2016). *Recalibrating Accountability: Education Savings Accounts as Vehicles of Choice and Innovation*. Washington DC: Heritage Foundation. <http://www.heritage.org/education/report/recalibrating-accountability-education-savings-accounts-vehicles-choice-and>

<sup>56</sup> Welner, K. G. (2008). *NeoVouchers: The emergence of tuition tax credits for private schooling*. New York: Rowman & Littlefield.

<sup>57</sup> The Magnet Schools Assistance Program is authorized under Title IV, *Part D of the* Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act (ESSA). The quoted portion is § 4405(b)(2)(C).

<sup>58</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>59</sup> 20 U.S.C. § 1703(f).