

HOW SCHOOL PRIVATIZATION OPENS THE DOOR FOR DISCRIMINATION



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Executive Summary

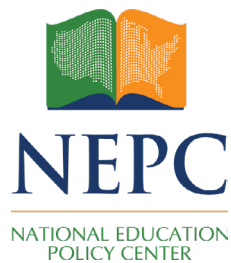
Recent reports on discrimination in private schools have highlighted the fact that in Indiana, a private religious school receiving over \$6.5 million in public funds via the state's voucher program placed an LGBT counselor on leave after school officials learned that she had married her same-sex partner. In Milwaukee, where students with disabilities constitute 12-20% of public school enrollments, they constitute only 2% of enrollments in private schools participating in the city's voucher program. At the same time, charter schools have also been found to enroll a lower percentage of students with disabilities and other special populations when compared to traditional public schools. These examples have led some observers to decry the fact that private schools and charter schools receiving public tax dollars selectively exclude some populations from both employment and enrollment; others, however, note that in these and similar instances the schools have broken no laws. Both may be right. How can this be? To answer that question, this policy brief analyzes discrimination in an era of education privatization.

Our review of relevant laws indicates that voucher and charter school programs open the door to discrimination because of three phenomena. First, federal law defines discrimination differently in public and private spaces. Second, state legislatures have largely ignored the issue of non-discrimination while constructing voucher laws and have created charter laws that fail to comprehensively address non-discrimination. And third, because private and charter schools have been given authority to determine what programs to offer, they have the ability to attract some populations while excluding others.

After briefly examining the history of discrimination in schools, we analyze each of the three enabling factors and then move on to outline recent developments. Finally, based on our analysis, we offer the following recommendations to help address the issue of publicly fund-

ed programs currently failing to serve all segments of the public.

1. Congress should amend federal anti-discrimination laws to clarify that states directly or indirectly channeling public funds to private schools through voucher, tax credit scholarship, or education savings account programs must ensure that those programs operate in non-discriminatory ways. Likewise, in order to remove any potential ambiguity, Congress should clarify that charter schools are fully bound by non-discrimination laws.
2. Federal agencies should explore whether governmental benefits should be withheld from private schools failing to meet non-discrimination standards. For example, the Internal Revenue Service should consider whether private schools that discriminate should be denied tax-exempt status—as is already the case for private religious schools that discriminate against African American students in admissions policies.
3. State legislatures should include explicit anti-discrimination language in their state voucher laws to ensure that private schools participating in publicly funded voucher programs do not discriminate against students and staff on the basis of race, color, sex, race, class, gender, gender identity, sexual orientation, disability, ethnicity, national origin, or primary language. These provisions should declare that non-discriminatory access is a condition of participation in any voucher, tax credit scholarship, or education savings account program.
4. State legislatures should adopt or amend charter school laws to ensure that policies and practices are reviewed throughout the charter school process (that is, during charter proposal, contract, oversight, revocation considerations, and renewal) to ensure non-discriminatory access for all students. Schools failing to attract and retain reasonably heterogeneous student populations should be directed to address the problem and should be considered for non-renewal if the problem is not corrected.



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Introduction

In September 2018, Shelley Fitzgerald was placed on paid administrative leave from her high school counseling position at a Catholic school.¹ She had worked at the school for fifteen years, but was placed on leave after a parishioner learned that in 2014 she married a woman with whom she had been in a relationship for over twenty years. Her school participates in Indiana's statewide voucher program and had received over \$6.5 million in public funds over the five preceding years.²

Wisconsin's Department of Public Instruction reported in 2011 that fewer than 2% of the children enrolled in the private schools participating in the Milwaukee Parental Choice Program (MPCP) had disabilities, while the public schools in the same city had student populations of nearly 20% children with disabilities.³ The private MPCP schools will receive more than \$221 million of state funds in the single academic year 2018-2019.⁴

At the same time, charter schools have also been found to enroll a lower percentage of students with disabilities and children whose first language is not English when compared to traditional public schools.⁵ In fact, research suggests that charter schools are also more racially homogeneous.⁶

These examples have led some observers to decry the fact that private schools and charter schools receiving public tax dollars selectively exclude some populations from both employment and enrollment; others, however, note that in these and similar instances the schools have broken no laws. Both may be right. How can this be? To sort out the situation, this policy brief examines discrimination and non-discrimination in an era of education privatization.

After briefly reviewing the history of discrimination in schools, we review laws relevant to

discrimination and school choice programs. Our review indicates that three factors allow voucher⁷ and charter school⁸ programs to open the door to discrimination. First, federal law defines discrimination differently in public and private spaces. Second, state legislatures have largely ignored the issue of non-discrimination while constructing voucher laws, and have created charter laws that fail to comprehensively address non-discrimination. And third, because private and charter schools have been given authority to determine what programs they offer, they have the ability to attract some populations while excluding others.

While these factors may not fully explain the link between privatization and discrimination, they provide both a glimpse into a growing problem and some ideas for changing direction. We first briefly review the history of discrimination in schools and then we detail each of the three factors before discussing their implications and outlining recent developments. Finally, based on our analyses, we offer recommendations that may help to address the issue of publicly funded programs that do not currently serve all segments of the public.

History of Discrimination in Schools

Whether and to what degree schools should be available to all children without regard to race, national origin, religion, immigration status, first language, sex, sexual orientation, gender identity, and disability has a long litigious history.⁹ While it is routine now to observe that public schools must enroll all students, that understanding evolved over time beginning with litigation in the 1950s. As illustrated by the decisions in *Brown v. the Board of Education*,¹⁰ *Lau v. Nichols*,¹¹ *Plyler v. Doe*,¹² and *Mills v. the Board of Education of the District of Columbia*,¹³ it took many brave plaintiffs and unflinching jurists to reach the conclusion that the term “public” excludes no one and that equal educational opportunity defines our collective obligation to our nation’s children. Congress reinforced those rulings by enacting a series of federal laws to emphasize that discrimination has no place in public education. As will be explained more fully later, Title VI, Title VII, Title IX, Section 504 of the Rehabilitation Act, the Equal Educational Opportunities Act (EEOA), the Individuals with Disabilities Education Act (IDEA), and the Americans with Disabilities Act (ADA) all exist to ensure that public schools operate in a non-discriminatory manner.

Despite such hard fought judicial and legislative battles, public schools still struggle to realize that aspirational ideal. Persistent achievement gaps, funding disparities, over-representation of students of color in special education, under-representation of students of color in advanced placement and honors programs, and the continued overuse of suspension and expulsion all suggest that public schools and the state and local officials who operate them have much work to do before equal educational opportunity is achieved. As states have created new forms of publicly funded educational options in the form of voucher programs and charter schools, issues of discrimination have surfaced in those programs as well.¹⁴ In fact, the first instances of publicly funded school choice were expressly designed to discriminate by closing public schools and providing tax-supported vouchers to private schools that enrolled only white children.¹⁵ This deliberate act of defiance of the Supreme Court’s order to desegregate schools after the decisions in *Brown v. the Board of Education* was eventually held to be unconstitutional.¹⁶ The reality is that educational privatization and discrimination

have always been entwined.¹⁷

The first modern voucher programs, developed in the early 1990s, gave eligible families public funds to attend private schools; the programs were upheld on the grounds that they served the legitimate purpose of addressing persistent concerns about poor public school performance.¹⁸ After the Supreme Court concluded in 2002 that the Establishment of Religion Clause permitted states to include religious schools in their voucher programs,¹⁹ those programs began to spread. Currently, 28 states have voucher or voucher-like programs²⁰ that permit taxpayer subsidies for private schools, with the majority enacted since 2010.

Charter schools, another form of school choice, also began in the 1990s. Charter schools are voluntary enrollment public schools directly funded by tax dollars. Although the exact provisions vary from state to state,²¹ charter schools are created when a state-approved authorizer enters into a performance contract (charter) with school operators. In exchange for being bound by that charter, the school is relieved from compliance with some state laws. Forty-four states and the District of Columbia have enacted charter school laws.²² Charter schools are considered part of a push toward school privatization because many charter school laws permit entities other than traditional K12 school districts (such as universities, charities, and non-profit organizations) to authorize charter schools, which may also be operated and managed by private non-profit or for-profit organizations.²³

Research has demonstrated that the student demographics of voucher and charter schools do not always mirror their communities. Private schools participating in voucher programs tend to be racially and socioeconomically concentrated and to enroll fewer children with disabilities or English language learners.²⁴ Moreover, some religious schools participating in voucher programs exclude students and families from other religions, and/or they may exclude LGBT employees and students as well as students from LGBT families.²⁵ Research has also shown that charter schools, although a form of public school and bound by federal law, tend to enroll more homogenous populations and smaller populations of students with disabilities and children learning English than traditional public schools.²⁶

These patterns lead to the question explored in this brief. Why does privatization appear to foster discrimination? This question is especially timely as the Trump administration supports repurposing federal education funding to create a nationwide voucher program²⁷ and expanding charter school programs.²⁸

Laws Relevant to Discrimination in Schools

As noted above, there is evidence demonstrating that voucher programs and charter schools can and do exclude certain student populations and employees as well. A close analysis of relevant laws indicates that the door to discrimination is open because of three factors in legal frameworks: the definition of discrimination in federal law; the lack of attention to non-discrimination in state law; and, the legal authority to determine programming granted to charter schools and schools participating in voucher programs.

Discrimination and Federal Law

A traditional public school must comply with all federal constitutional provisions and anti-discrimination laws. Table 1 briefly outlines those protections that apply to public schools and shows whether they likewise apply to charter schools and private schools (whether or not the private schools participate in a state's voucher program). As the table illustrates, federal law may apply differently or not at all in these privatized systems. We briefly review each of these legal guarantees and explain those differences.

Table 1: Application of Federal Nondiscrimination Provisions to Charter Schools and Private Schools

	Purpose	Application to Charter Schools	Application to Private Schools
U.S. Constitution, 14th Amendment, Equal Protection	Ensures that individuals (students and staff) are treated equitably and that the state (school authorities) has a justifiable rationale for any difference in treatment (including differences on the basis of race, class, sex, gender, gender identity, sexual orientation, disability, ethnicity, national origin, primary language, age, etc.).	+/-	-
Americans with Disabilities Act	Ensures that individuals with disabilities (students or staff) receive comparable benefits (education or employment).	+	+/-
Section 504 of the Rehabilitation Act	Applies to recipients of federal funds. Ensures that individuals with disabilities (students or staff) receive comparable benefits (education or employment).	+	+/-
Individuals with Disabilities Education Act	Provides funds to states to ensure that students with disabilities have a free appropriate public education (FAPE).	+	-
Title VI of the Civil Rights Act	Applies to recipients of federal funds. Protects students and staff from discrimination on the basis of race, color, or national origin.	+	-
Title VII of the Civil Rights Act	Protects all employees from discrimination on the basis of race, color, religion, sex, or national origin.	+	+/-
Title IX of the Education Amendments of 1972	Applies to recipients of federal funds. Protects students and staff from discrimination on the basis of sex.	+	-
Equal Educational Opportunity Act	Requires states and local school districts to ensure equal opportunity on the basis of race, color, sex, or national origin.	+	-
KEY: + applies +/- applies in part, or application has been called into question - does not apply			

Constitutional Protections Against Discrimination

The foundation for our conceptions of discrimination and non-discrimination is the Equal Protection Clause of the Fourteenth Amendment, which states “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.”²⁹ This clause requires that similarly situated students and school staff be treated the same. Thus, when students or staff are classified by race, disability or sex (or some other characteristic) and one group is treated differently than others, the different treatment must be justified.³⁰ When a court finds that the difference experienced by one person or group cannot be justified, it concludes that discrimination has occurred. Conversely, if the differential treatment can be justified, no discrimination has happened. However, the Fourteenth Amendment applies only to schools where a “state actor” is present. Governmental employees, including public school employees, are considered state actors, while those who work for private, non-governmental organizations generally are not.

This distinction between state actors and private actors led the Supreme Court in 2002 to uphold a voucher program that permitted state funds to support students enrolled in religious schools when the program was challenged as a violation of the Establishment of Religion Clause of the First Amendment.³¹ The Supreme Court has long held that states must comply with the provisions found in the Bill of Rights (the first ten amendments to the constitution) and that it is the Fourteenth Amendment’s limitation on state action that makes those provisions applicable to all governmental units that derive their authority from the state.³² The Court reasoned that since parents (private individuals and not state actors) select a voucher school from among religious and nonreligious options, the state could not be said to have endorsed or supported religion—even if a taxpayer-funded voucher paid for enrollment. While public monies may flow to a private religious school, that does not make the school public, nor are its employees state actors bound by the Constitution’s restrictions. Rather, as will be discussed in more detail below, to the extent that private actors must behave in non-discriminatory ways, the requirement is a result of federal and state statutes, not an application of the Constitution.

Interestingly, the presence or absence of state actors in charter schools has become a contentious issue. Because charter schools are a form of public schools, it was presumed that state actors were present and subject to the same expectations as those in place for traditional public schools. However, some court decisions have raised questions about whether charters are indeed public.³³ In Arizona, a teacher’s contract was not renewed without the school conducting a hearing or other due process. The teacher sued the charter school, arguing that his liberty interests in the ability to find and obtain work were violated.³⁴ The court addressed the question of whether or not the charter school was a state actor because a private, non-profit management company ran the school. Affirming the district court’s decision to dismiss the case, the Ninth Circuit found that while a private entity might be considered a state actor for some purposes, it is still possible to function as a private actor in other ways. In other words, the constitutional protection of due process was unavailable to this public charter school teacher because a private company—not a governmental unit—employed him. Likewise, a California state appellate court reasoned that charter schools are exempt from many laws that govern school districts. In this case, a student who was dis-

missed from a charter school for bringing a knife to campus argued that he was entitled to due process. However, the court held that charter schools are exempt from the state law governing student disciplinary matters.³⁵ Other relevant findings have come from the National Labor Relations Board (NLRB). In 2013, it found a Chicago charter school to be a private institution,³⁶ and in two separate 2016 decisions it also found charter schools in New York and Pennsylvania to be private corporations rather than public schools.³⁷

However, the issue is not settled as other courts have found the opposite—that charter schools are indeed public schools with state actors.³⁸ Some scholars have begun questioning whether charter schools are trying to avoid some of the requirements placed on traditional public schools³⁹ or should more accurately be considered to be publicly funded private schools.⁴⁰ If subsequent courts continue to treat charter schools as private entities, it may require legislative action to ensure that charter schools are held to the same standards for non-discrimination as are other public schools.

Protection against Discrimination on the Basis of Race and National Origin

In addition to the protections afforded by the Fourteenth Amendment, three federal statutes prohibit public schools from discriminating on the basis of race or national origin: Title VI of the Civil Rights Act,⁴¹ the Equal Educational Opportunities Act (EEOA),⁴² and Title VII of the Civil Rights Act,⁴³ which protects employees (See Table 1). Title VI and the EEOA are particularly important for students whose first language is not English.⁴⁴ The Supreme Court held in 1974 that Title VI requires public schools to provide meaningful programmatic access to English language learners in order to achieve non-discrimination.⁴⁵ Although the Court did not direct school officials to adopt any particular pedagogical approach, they ordered that the school system take “affirmative steps” to address language learning needs.⁴⁶ That same year Congress passed the EEOA, which declared that one denial of equal educational opportunity is “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.”⁴⁷ Subsequently, the Fifth Circuit Court of Appeals ruled that “appropriate action” should be judged on three criteria: (1) that the program is based on sound educational theory; (2) that practices and resources are “reasonably calculated” to implement the selected theory; and (3) that after a reasonable period of implementation, the program produces positive results.⁴⁸ Accordingly, all public schools—including charter schools—must ensure that programs exist to help all students develop English fluency.

However, Title VI applies only to “recipients” of federal funds, and the EEOA only applies to states and their public schools. Accordingly, the protections these two laws provide do not extend to private schools, even those that participate in voucher programs. While private schools may not be directly bound by Title VI requirements, however, it is clear that states are. As we argued elsewhere:

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.⁴⁹

Protections against Discrimination on the Basis of Sex

Two federal laws prohibit discrimination on the basis of sex. Title IX⁵⁰ applies to students while Title VII⁵¹ applies to employees (see Table 1). Both case law and the Office for Civil Rights have long concluded that Title IX also protects students on the basis of sexual orientation, even though Title IX does not explicitly say so.⁵² Extending this thinking, the Obama administration issued guidance in May 2016 highlighting school districts’ responsibilities to provide equal access to transgender students.⁵³ In this “Dear Colleague” letter, the Departments of Justice and Education interpreted Title IX regulations to require schools to treat transgender students consistent with their gender identity. However, the Trump administration rescinded the letter in February 2017.⁵⁴

Like Title VI, Title IX applies only to recipients of federal funds and therefore would only apply to private schools that receive federal monies. But even if a private school does receive such support, it may be exempt from compliance: the law explicitly grants religious schools an exemption.⁵⁵ In effect, Congress has defined sex discrimination differently as a matter of law for private religious schools that receive federal funds.

This statutory exemption, religious schools’ participation in publicly funded voucher programs, and unequal access for LGBT students in religious schools has raised particular concerns about discrimination in voucher programs. Media reports suggest that some private, religious schools reject LGBT students. For example, the *New York Times* revealed that schools participating in Georgia’s voucher program are able to expel openly gay students.⁵⁶ A recent study documented that in Indiana’s voucher program, a large number of participating schools deny entry to LGBT students, some following the advice of a religious school accrediting group.⁵⁷ Another study found that 14 percent of religious schools allow discrimination against LGBT students and staff.⁵⁸ It was also discovered that one in ten schools receiving voucher students explicitly discriminate against LGBT students; last year, these schools netted \$16 million in state funding.⁵⁹

These exclusionary practices also extend to LGBT employees, individuals who would be protected under Title VII in traditional public and charter schools. Like Title IX, this law also does not *explicitly* prohibit discrimination based on sexual orientation or gender identity, but some courts have found that Title VII applies in these situations.⁶⁰ Like Title IX, Title VII has been interpreted to include a religious organization exception. This exception allows

religious organizations to give employment preference to members of their own religion; however, it does not allow the organization to discriminate on the basis of race, national origin, color, sex, age, or disability.⁶¹ And, the exception applies only to those institutions whose “purpose and character are primarily religious.” There is also a ministerial exemption in religious organizations, which allows more latitude to regulate employees who serve a ministerial role.⁶² However, who is considered a “minister” continues to be addressed by courts and whether a teacher would fall under the exception would depend on the nature of the teaching assignment in relation to the propagation of the faith.⁶³ Thus, there is the potential for teachers to be held to standards in voucher schools that would be prohibited in public schools. According to media reports, several educators in private religious schools have been dismissed because they decided to marry their same-sex partners.⁶⁴ Fifteen lawsuits have resulted from private school educators being fired for marrying or planning to marry their same-sex partners.⁶⁵

Historically, there is a parallel here to earlier racial discrimination. Religion was used to justify differential treatment of individuals during the 1950s desegregation movement, when some southern schools relied on religious arguments to keep black students and teachers segregated from whites.⁶⁶ Interestingly, the U.S. Supreme Court did not find the reasoning persuasive in matters involving racial equality,⁶⁷ and it remains unclear whether courts will consider it a legitimate assertion in matters involving sexual orientation.⁶⁸

Protections against Discrimination on the Basis of Disability

As Table 1 indicates, three federal laws protect individuals with disabilities: Section 504 of the Rehabilitation Act,⁶⁹ the Americans with Disabilities Act (ADA),⁷⁰ and the Individuals with Disabilities Education Act (IDEA).⁷¹ Section 504 and the ADA prohibit discrimination on the basis of disability and establish mechanisms for individuals to challenge any such discrimination. Title II of the ADA prohibits discrimination in “public services,” which includes public schools, while Title III of the ADA applies to entities that provide “public accommodations,” and applies to private schools. Section 504 applies only to recipients of federal dollars, and it provides for loss of federal funds as a penalty. States, local school districts, and charter schools are all considered recipients for Section 504 purposes. IDEA is a funding statute that provides states agreeing to follow its procedural requirements with funds for special education and related services.⁷² IDEA requires that local educational agencies (including charter schools) provide services necessary for a child to receive a free appropriate public education (FAPE), no matter how costly the provisions and regardless of whether the school offers the needed services when a student enrolls.⁷³ The FAPE standard means that the educational program provided must confer meaningful academic and functional benefit in light of the child’s unique circumstances.⁷⁴

However, these federal laws do not hold private schools to the same standards as public schools. First, Section 504 does not apply to a private school at all unless it receives federal funds. Even then, private schools receiving federal funds need only provide “minor adjustments” to existing programs in order to satisfy the law’s non-discrimination mandate.⁷⁵ If the school does not already provide a particular special education service a child requires,

it may deny the service or deny the child enrollment without penalty. While Title III of the ADA applies to all private schools, like Section 504 it requires only reasonable modifications to existing programs; and, it exempts religious schools. As a result, private schools participating in state voucher programs do not have to accept children with disabilities whose needs would not be met by existing programs: as a matter of federal law, excluding them does not constitute “discrimination.”

While IDEA places no obligations on private schools, it requires local school districts to provide services to children with disabilities who are enrolled in private schools. This provision, typically referred to as the “equitable participation” or “equitable services” provision,⁷⁶ requires school districts to spend a proportional amount of their federal IDEA funds to students in private schools. For example, if a school district has 100 children with disabilities enrolled in schools in the community and 10 of them (10%) are enrolled in private schools, then the school district must spend 10% of its federal funds on special education and related services for those children. This obligation exists without exception even if the state has established a voucher program, or even a special needs voucher program.⁷⁷ However, the requirement for equitable participation does not guarantee the FAPE standard; local school districts need only satisfy the proportional funding requirement.⁷⁸ Children with disabilities must be enrolled in a traditional or charter public school to receive FAPE.⁷⁹

Discrimination and State Law

The above discussion demonstrates that federal law holds public and private schools to different standards of non-discrimination and that a law may also apply slightly differently to charter schools. In addition, state law affects non-discrimination in choice programs. Both charter school and voucher programs are creatures of the state legislatures that drafted their enabling laws. What a charter school is and what it can and cannot do depends on precisely what that state’s charter school law dictates.⁸⁰ Likewise, the requirements for a voucher program are defined by that state’s legislature. In both instances, a legislature can set whatever standards and conditions for participation it sees fit, as long as those requirements are consistent with the state’s constitution and violate no federal constitutional provision or laws.

As discussed earlier, although there have been debates about how “public” charter schools actually are, the majority of federal requirements (at least, those pertaining to students) do apply to charter schools.⁸¹ And yet, research frequently documents that charter schools enroll more homogeneous populations and tend to have fewer children with special needs.⁸² Why? One reason is that while charter school laws may include non-discrimination declarations, they may not include any requirement for authorizers to examine schools’ policies and practices around recruitment, enrollment, and expulsion, nor to review student attrition data.⁸³ To ameliorate these problems and ensure that charter schools further equal educational opportunity, some scholars have suggested that states amend their charter school laws to be much more explicit about charter schools’ obligations⁸⁴ and have suggested model language for charter school proposals, contract development, charter revocation, and charter renewal.⁸⁵

State voucher laws have even fewer non-discrimination provisions than state charter school laws. In an earlier study, we found that most state voucher laws provided protection against discrimination only on the grounds of race and ethnicity; we found no state laws providing explicit protections for *all* historically marginalized populations (those discriminated against on grounds minimally including religion, race, national origin/ethnicity, disability, sex, and sexual orientation).⁸⁶ Overall, few safeguards exist in state statutes governing vouchers to ensure that this benefit is offered in a non-discriminatory fashion. As noted earlier, states could make non-discriminatory access and operation a condition private schools must meet in order to participate in the voucher program and the funding it supplies; but so far, legislators have not elected to do so.

Discrimination via Programming Authority

A third factor enabling discrimination in schools outside the traditional public school system is that private and charter schools have the authority to determine their educational programs. As noted earlier, traditional public schools must accept all students—regardless of need or ability—and must develop programs responsive to all students’ needs. Private school officials have far more discretion. Coupled with federal and state laws that often demand no more of private schools than the services they already offer, such discretion means that schools can use programming to influence who chooses to apply. For example, if private schools do not have to—and do not—provide special programming for children learning English, it would be no surprise that few English language learners apply or enroll there. The same is true for children with disabilities.

Charter schools may also benefit from this phenomenon. That is, programming authority may allow schools to exclude some populations by gearing their curricula toward high ability or other student niches.⁸⁷ Or, a gap in programming may affect enrollment even if school officials acknowledge the gap and are willing to acquire the needed expertise or other supports. For example, a charter school may not have the personnel to serve a child with autism, but officials might assure an inquiring parent that if the child enrolls, the necessary services will be provided. The parent, understandably, might prefer to choose a school with existing expertise instead of relying on a promise. In such cases, the school official would not have discriminated, but the result—a school that serves fewer students with disabilities—occurs just the same. The fact that some charter schools are operated on a for-profit basis exacerbates the potential for this issue to be exploited in order for schools to avoid the expenses associated with programming for special student populations.⁸⁸

Recent Developments

A push for still more school choice has been coming from President Trump and Secretary DeVos but to date neither has expressed a commitment to ensuring non-discrimination in choice schools. In 2017, the Secretary of Education testified before the Senate Appropriations Committee about the fiscal year 2018 budget request from the Department of Education, which included proposals for increased federal funding for both vouchers and charters.⁸⁹

Secretary DeVos was asked whether she would prohibit private schools from discriminating against LGBTQ students and students with disabilities in a federal voucher program. She repeatedly stated that “schools that receive federal funds must follow federal law.”⁹⁰ Pressing the issue further, the following exchange between DeVos and Massachusetts Representative Katherine Clark illustrates the tension between privatization and non-discrimination:

Clark: “Do you see any circumstance where the federal Department of Education under your leadership would say that a school was not qualified? What if they said ‘we are not accepting African American students,’ but that was OK within the state? Do you see any situation where you would step in?”

DeVos: “Well, again, the Office of [sic] Civil Rights and our Title IX protections are broadly applicable across the board, but when it comes to parents making choices on behalf of their students ...”

Clark: This isn’t about parents making choices, this is about the use of federal dollars. Is there any situation? Would you say to Indiana, ‘that school cannot discriminate against LGBT students if you want to receive federal dollars?’”

DeVos: “I believe states should continue to have flexibility to putting together programs...”⁹¹

The secretary’s responses seem to place a higher value on parental choice than anti-discrimination. They also demonstrate some congressional interest in ensuring that public accountability for non-discriminatory access accompanies public funding. Congress did not support the voucher proposals under discussion,⁹² and it has not signaled any interest in doing so in the near future. Still, given the current administration’s expressed support of voucher programs, it is likely these debates will continue.

Another recent development is that states have been shifting toward indirect subsidies for private education. Throughout this brief, we have used the term “voucher program” to encompass three types of subsidies for private education: vouchers, taxpayer scholarship programs, and education savings accounts. Taxpayer scholarships and education savings accounts are newer voucher-like programs that involve indirect methods for state subsidies of private education⁹³; that is, new strategies that subsidize private education differently and often involve a more circuitous funding route. Such programs have been growing and now outnumber more traditional voucher programs.⁹⁴ Some scholars have observed that newer voucher-like programs seem to be even more shielded from civil rights laws and that legislatures may be even less inclined to impose conditions on private school participation in those programs than in more traditional voucher programs.⁹⁵

Discussion and Analysis

Three primary issues contribute to the potential for discrimination in programs that privatize education: different definitions in federal law of what constitutes discrimination in public, charter, and voucher schools; the limited explicit and comprehensive attention to

non-discrimination in state charter and voucher laws; and the ways in which charter and voucher schools can control their programming. Attention to all three issues will be necessary if policy-makers wish to ensure that publicly funded education is offered on a non-discriminatory basis.

The federal laws that bind public schools were developed when charter and voucher programs did not exist. It seems apparent that Congress must review those provisions so that they better reflect the ways states now use public dollars to support charter and voucher schools. Congress did just that in 1997 when it amended IDEA to clarify that states' obligations for FAPE applied with equal force in charter schools.⁹⁶ The need for revisiting federal non-discrimination guarantees is particularly necessary as more states adopt voucher laws and some places, like New Orleans, move toward "portfolio" approaches to educational delivery that rely heavily on charter schools.⁹⁷ If these laws are not revised, Congress risks permitting exclusionary practices to proliferate because federal law has not kept pace with educational delivery.

State legislators also need to examine their charter and voucher school laws to ensure they have taken adequate steps to address non-discrimination. While these laws may have been developed as an experiment with educational deregulation, we can ill afford to experiment with equity and access in programs funded by public dollars. Insisting that publicly funded programs ensure access to the entirety of the public should be beyond argument.

Finally, we would be remiss if we did not point out that one particular group seems in particular need of a renewed commitment to non-discrimination. From a legal and policy perspective, the question in the 1950s through the 1980s was: Can private religious schools discriminate based on race as a result of their sincerely held religious beliefs? The Supreme Court found that such policies were contrary to U.S. public policy, which outweighed the sincere religious beliefs guiding some schools.⁹⁸ Today, the question is: Can private schools discriminate against LGBT students as a result of sincerely held religious beliefs? Michael Petrilli, president of the Thomas B. Fordham Institute, a pro-school choice group, finds it "abhorrent" that there are schools that will not welcome gay students. At the same time, he states: "But if we believe in a pluralist system, then there's got to be room—again, for what I may find abhorrent—to be a part of that, if we believe it's important for parents, especially low-income and working-class parents, to get to have a choice."⁹⁹ Like Secretary DeVos, Petrilli suggests an elevation of parental choice and a devaluing of equity. In the past, the Supreme Court has held that the state has the authority to address racial discrimination in private schools.¹⁰⁰ In fact, courts have held that it is permissible to withhold tangible governmental benefits, including federal tax-exempt status, from private schools practicing racial discrimination.¹⁰¹ It may require similar litigation to consider the limits of private schools' treatment of LGBT individuals, especially when those schools receive large amounts of state funds. As one legal scholar explains:

[T]he fact that the Court has not treated all forms of discrimination identically should not limit a state's authority to assert a compelling interest in eradicating all invidious discrimination in education. The important point is that the Court has recognized that education plays a unique and essential role in our

society and that discrimination is incompatible with this role. While most of the relevant education cases have dealt with race, the Court has appropriately expressed its disapproval of discrimination in more general terms.¹⁰²

We believe that policies that exclude LGBT individuals, particularly private religious schools reliant on state voucher funds, are also contrary to U.S. public policy and agree with the Supreme Court that “discriminatory treatment exerts a pervasive influence on the entire educational process.”¹⁰³

Recommendations

States must ensure that each of its educational programs provides equal educational opportunities. To the extent that states have determined that voucher programs and charter schools are part of the menu of educational opportunities, those programs must also ensure equitable access to both students and employees. To do anything else is to return to the days of separate and inherently unequal education. The federal government must address this issue as well. We offer the following recommendations to close the door between educational privatization and discrimination.

1. Congress should amend federal anti-discrimination laws to clarify that states directly or indirectly channeling public funds to private schools through voucher, tax credit scholarship, or education savings account programs must ensure that those programs operate in non-discriminatory ways. Likewise, in order to remove any potential ambiguity, Congress should clarify that charter schools are fully bound by non-discrimination laws.
2. Federal agencies should explore whether governmental benefits should be withheld from private schools failing to meet non-discrimination standards. For example, the Internal Revenue Service should consider whether private schools that discriminate should be denied tax-exempt status—as is already the case for private religious schools that discriminate against African American students in admissions policies.
3. State legislatures should include explicit anti-discrimination language in their state voucher laws to ensure that private schools participating in publicly funded voucher programs do not discriminate against students and staff on the basis of race, color, sex, race, class, gender, gender identity, sexual orientation, disability, ethnicity, national origin, or primary language. These provisions should declare that non-discriminatory access is a condition of participation in any voucher, tax credit scholarship, or education savings account program.
4. State legislatures should adopt or amend charter school laws to ensure that policies and practices are reviewed throughout the charter school process (that is, during charter proposal, contract, oversight, revocation, and renewal) to ensure non-discriminatory access for all students. Schools failing to attract and retain reasonably heterogeneous student populations should be directed to address the problem and should be considered for non-renewal if the problem is not corrected.

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- 73 *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999).
- The requirement that FAPE be provided results in cost sharing between federal, state, and local sources, but places the responsibility on the local level to fund the services – whether or not federal and state legislatures appropriate sufficient funds to cover the costs.
- 74 *Endrew F. v. Douglas County School District*, 580 U.S. ____, 137 S.Ct. 988 (2017).
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