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ABSTRACT

This article explores how the law currently influences accountability in three different privatization contexts: (1) private schools operated independently of the state; (2) public schools operated by private organizations under charter or subcontract with government entities; and (3) private schools participating in publicly-funded voucher programs. A discussion of unconstitutional delegation law and the relationship between comprehensive regulation and the state action doctrine is included. Also featured is a comprehensive look at how a combination of constitutional, statutory, administrative, and charter/contract law has affected accountability of educational management organizations in Arizona, Michigan, and Massachusetts. Tables portraying accountability provisions in each state are included. The article concludes that there is a narrow policy-making channel between too little and too much regulation and that private organizations should not assume that they will be able to operate public schools or participate in publicly-funded voucher programs without surrendering some of their autonomy. (Contains 150 endnotes.) (SLD)

The Legal Framework for Educational Privatization and Accountability

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THE LEGAL FRAMEWORK FOR EDUCATIONAL PRIVATIZATION AND ACCOUNTABILITY

Abstract

Educational privatization is not new. Private schools operating independently of the state have been around since before the founding of the Republic. But even this relatively pure form of privatization has not been devoid of state regulation. While the U.S. Supreme Court accords states considerable authority to regulate traditional private schools, accountability measures for the most part have been modest. Consequently, in most states, institutional autonomy remains largely intact.

What happens when private organizations operate public schools pursuant to contracting-out agreements and charters? What happens when private schools participate in publicly funded voucher programs? In the case of charters, too much regulation defeats their purpose. Yet, as this article reveals, there are limits as to how much autonomy the state can convey without violating state constitutional provisions that restrict the extent to which the state legislature can delegate a core governmental responsibility to private entities. The very first case to reach a state supreme court dealing with charter schools focused on this issue. In response, the state legislature added accountability measures to satisfy constitutional demands but at the expense of institutional autonomy.

In the case of voucher programs, too little regulation raises unconstitutional delegation concerns. Too much may constitute unreasonable regulation of private schools under the U.S. Supreme Court's *Pierce v. Society of Sisters* and *Farrington v. Tokushige* decisions, as well as raise issues about interference with parent rights and the free exercise of religion. Additionally, there is concern that receipt of public funding in combination with accountability measures may make private schools sufficiently public that they are governed by federal constitutional constraints just as are traditional public schools. This has been the experience of private housing providers under the federal Section 8 public housing voucher program.

This articles explores how the law currently influences accountability in three different privatization contexts: private schools operated independently of the state, public schools operated by private organizations under charter or sub-contract with government entities, and private schools participating in publicly funded voucher programs. Included is a discussion of unconstitutional delegation law and the relationship between comprehensive regulation and the state action doctrine. Included as well is a comprehensive look at how a combination of constitutional, statutory, administrative, and charter/contract law has affected accountability of educational management organizations in Arizona, Michigan, and Massachusetts. Tables portraying accountability provisions in each state are included. The article concludes that there is a narrow policy making channel between too little and too much regulation and that private organizations should not assume that they will be able to operate public schools or participate in publicly funded voucher programs without surrendering some of their autonomy.

From *The Legal Framework for Educational Privatization and Accountability* by Frank R. Kemerer, Ph.D. and Catherine Maloney, M.A. Dr. Kemerer is Regents Professor of Education Law and Director of the Center for the Study of Education Reform at the University of North Texas in Denton, where Catherine Maloney is a research assistant and doctoral student.

THE LEGAL FRAMEWORK FOR EDUCATIONAL PRIVATIZATION AND ACCOUNTABILITY

By
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Permitting private firms to operate public charter schools or participate in publicly funded voucher programs is a recent development. Public policy on appropriate accountability measures remains unclear. Advocates of privatization seek to keep accountability regulation as close to a market approach as possible. If parents don't like the schools, they can withdraw their children and seek schooling elsewhere. Opponents maintain that privatized schools should meet the same accountability standards as traditional public schools. From a legal perspective, the matter is significantly more complex than either advocates or opponents suggest.

The purpose of this article is to examine the relationship between the legal framework for educational privatization and the process of holding these institutions accountable to parents and to the state in return for the receipt of public funds. The article does not discuss how privatized schools should be held accountable or examine various approaches to accountability. Rather, the discussion explores how the law currently influences accountability in three different privatization contexts: private schools operated independently of the state, public schools operated by private organizations under charter or sub-contract with government entities, and private schools participating in publicly funded voucher programs. Along the way, we pause to discuss how state constitutional law affects the ability of government to privatize its core functions.

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REGULATION OF PRIVATE SCHOOLS OPERATED INDEPENDENTLY OF THE STATE

In 1925 the U.S. Supreme Court unanimously ruled in *Pierce v. Society of Sisters* that an Oregon statute requiring all children to attend public schools violated the property rights of private school operators and interfered with the rights of parents to control their children's upbringing.[1] At the same time, the Court recognized that the state has the right to impose reasonable regulations on private schools. "No question is raised," wrote Justice James McReynolds, "concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."[2]

While the Supreme Court did not clarify what is reasonable, two years later in *Farrington v. Tokushige* it declared that a Hawaiian statute had gone too far in regulating private foreign language schools -- chiefly Japanese -- by giving the department of public instruction virtual control over them.[3] The regulations specified the payment of a per-student fee; the reporting of student names, sex, parents or guardians, place of birth, and residence; teaching permits and pledges; times when the schools could operate; courses to be taught; and textbooks to be used. The statute required English equivalents to be incorporated in the foreign language textbooks and gave the department of public instruction the right to appoint inspectors to enforce the law. The government's purpose of promoting Americanism was insufficient to justify the restrictions. Writing again for the Court, Justice McReynolds asserted, "Enforcement of the act probably

would destroy most, if not all of [the schools]; and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think is important and we cannot say is harmful."[4]

Over the years, states have relied on *Pierce* to set standards for private schools. In practice, these measures have been for the most part modest, encompassing such matters as health and safety codes, length of the school year, enrollment reporting, and, less frequently, teacher qualifications and minimal curricular specifications.[5] Legal challenges generally have been decided in favor of states, even in the face of claims that such measures interfere with the free exercise of religion.[6] The relationship between private religious schools and accountability is important, since 78 percent of private schools are religiously affiliated.[7] In 1990, the U.S. Supreme Court ruled in *Employment Division, Department of Human Resources of Oregon v. Smith* that religion is not entitled to special exemption from otherwise neutral government regulation of general applicability.[8] The case is discussed in the last section of this article in relation to publicly funded voucher programs. It remains uncertain whether either state constitutional or statutory law can countermand the *Smith* decision.[9]

Private schools also are subject in varying degrees to selected federal civil rights statutes such as Title VII of the 1964 Civil Rights Act and the Americans with Disabilities Act, though there often are exemptions for very small schools and for those that are religiously affiliated.[10] However, many, if not most, private schools operated independently of the state are not subject to federal statutes that require receipt of federal funds to be applicable or that provide an exemption for religious institutions. These include the Individuals with Disabilities Education Act;[11] Section 504 of the Rehabilitation Act of 1973, which prevents discrimination on the basis

of disability;[12] and Title IX of the 1972 Education Amendments, which prohibits sex discrimination.[13]

Constitutional scholar Mark Tushnet appears correct when he maintains that there is little difference in the authority that the state has under the U.S. Constitution to regulate both public and private schools. Concluding that contemporary policy issues regarding the regulation of private schools should be addressed without regard to constitutional considerations, Tushnet argues that "There may be constitutional limits on what legislatures can prescribe or prohibit with respect to private schools, as there are on what they can do with respect to public schools, but these limits are sufficiently loose that contemporary policy issues dealing with public and private schools ought to be discussed without regard to the Constitution. The policy issues are just that, policy issues, and public deliberation about their wisdom or folly ought to proceed unpolluted by concern that some policy choices would be unconstitutional."[14] Still, the generally modest nature of state regulations applying to private schools tells us little about what falls on either side of the reasonable/unreasonable boundary set forth in *Pierce*, though it is clear from *Farrington* that there is a limit to the regulations a state can impose.

While Tushnet's comments appear true of the federal constitution, there are important constitutional provisions in most state constitutions that restrict the ability of the legislature to give private schools autonomy from state regulation when these schools receive substantial funding directly or indirectly from the state. The state, then, is faced with a dilemma: too much regulation may violate the federal constitution as being unreasonable and excessively intrusive; too little may violate the state constitution. The latter is area of the law that most commentators on school choice and educational privatization overlook.

THE RELATIONSHIP BETWEEN CONSTITUTIONAL LAW AND EDUCATIONAL PRIVATIZATION

With few exceptions, state constitutions either confine the funding of education to public schools or specifically prohibit the use of public funds to aid private schools.[15] Most of these restrictions originate from a desire to prevent legislatures from funding religious schools, but they often are cast in more sweeping terms. These provisions, however, cannot be taken at face value, since they are subject to the interpretation of state courts.[16] Further, they do not speak directly to the operation of public schools by private entities.

A potent but less well known restriction concerns limitations on the legislature's ability to delegate core governmental responsibilities to private actors. Identified as unconstitutional delegation law, this doctrine generally has been repudiated at the federal level but remains viable at the state level.[17] That education is a core governmental activity is clear from the fact that virtually all state constitutions vest their legislature with responsibility for education.[18] Chief Justice Warren E. Burger recognized in *Wisconsin v. Yoder* that "Providing public education ranks at the very apex of the function of a State."[19] The first issue discussed in this section is how the judicial construction of state constitutional provisions vesting governmental entities with the establishment and control of education significantly affects how private entities are held accountable for the operation of public schools.

The second issue to be addressed in this section is whether private organizations performing governmental services have become sufficiently part of the state that they must recognize the constitutional rights of their constituents. The Fourteenth Amendment to the U.S. Constitution prohibits the state and its political subdivisions from restricting federal constitutional rights. While it seems indisputable that charter schools are state actors, it is less

clear for contracting-out arrangements and very much in doubt for private schools participating in publicly funded voucher programs.

Unconstitutional Delegation Law

Unconstitutional delegation law concerns the ability of government to delegate its core governmental functions to a private party. The Supreme Court of New Jersey has defined the problem this way: "Both state and federal doctrines of substantive due process prohibit delegations of governmental policy-making power to private groups where a serious potential for self-serving action is created thereby. To be constitutionally sustainable, a delegation must be narrowly limited, reasonable, and surrounded with stringent safeguards to protect against the possibility of arbitrary or self-serving action detrimental to third parties or the public good generally."[20] A New Jersey lower court cited this passage in upholding the state's charter school law in 1999. Because, under the terms of the statute, charter schools remain public schools even if operated by private entities and because they are subject to the control of the Commissioner of Education, the court found that the legislature did not unconstitutionally delegate authority to private actors.[21]

The lower court ruling was affirmed by the Supreme Court of New Jersey a year later with two caveats.[22] First, noting that public policy as rooted in the state constitution requires an end to segregation in New Jersey public schools regardless of cause,[23] the high court held that the Commissioner of Education must assess the impact of charter schools on racial balance in public schools generally and take whatever steps are necessary to prevent segregation. Second, because the state constitution requires a thorough and efficient system of public schools, the commissioner must consider the economic impact charter schools may have on districts of

residence and either disapprove a charter school or adjust the funding formula set forth in the charter school legislation to assure constitutional compliance. Notice how state constitutional requirements prompted the Supreme Court of New Jersey to tighten the oversight responsibilities of the Commissioner of Education. Terms like *general*, *uniform*, *thorough*, *public*, and *common* appear frequently in state constitutions and could result in similar constraints elsewhere.[24]

The leading illustration of the unconstitutional delegation law issue in the context of school choice and educational privatization occurred in Michigan just after the enactment of its charter school law in 1993. The statute allowed the formation of charter schools, termed "public school academies" as nonprofit corporations. The self-selected board of directors then applied to an authorizing body for a charter contract. Like many state constitutions, article VIII, section 2 of the Michigan Constitution prevents the use of public funds directly or indirectly "to aid or maintain any private, denominational or other nonpublic, preelementary, elementary, or secondary school."[25] In light of this provision, the legislature prohibited churches and religious organizations from instituting charter schools, termed "public school academies," but permitted other persons and private entities to do so.

The plaintiffs contended that the academies were in effect licensed private schools not under the control of the state, contrary to article VIII, section 2 and also to section 3, which gives the state board of education "[l]eadership and general supervision over all public education."[26] Though the legislation had defined a public school academy in the charter school law as a public school, the trial court refused to accept this assertion at face value. It found that the thrust of the charter school legislation was to allow unelected private boards to operate public schools and to do so without state board of education oversight, contrary to the explicit provision of the state

constitution. Therefore, the charter school law was unconstitutional. The decision was affirmed at the appellate court level in a 2-1 decision.[27] The majority too refused to accept the legislation at face value. "The Court must look through forms and behind labels into the substance of the law," wrote the judges. "The people have a right to have the limitations in a state constitution respected and given the fair and legitimate force which its terms require."[28]

By the time the case reached the Michigan Supreme Court, the legislature had revised the law to make it clear that the academies are public schools "subject to the leadership and general supervision of the state board over all public education under section 3 of article VIII of the state constitution of 1963."[29] The revised law, Act 362, amended part 6A of the School Code by adding restrictions that prohibited public school academies from levying taxes,[30] required all charter school teachers except college professors to be certified in accordance with state board of education regulations,[31] and required academies to comply with provisions of the school code.[32] In its 1997 decision upholding the constitutionality of the charter school law, the Michigan Supreme Court cited these changes.[33] The majority pointed out that the state board and its agents decide the issuance and revocation of charters and control the money. "[The Act] does not expressly limit the power of the board of education," the majority noted, adding, "The Legislature intended the other sections of the School Code to apply to the public school academies."[34] The high court did not find that allowing private organizations to operate academies violated article VIII, section 2 of the state constitution against aid to private schools, agreeing with the legislature that this provision applies only to religious private schools.

Concern about compliance with the state constitution forced changes in the statute; yet, as one commentator notes, by making the changes, the legislature "may have negated the very value of public school academies by making them subject to all the rules, regulations, and

restrictions that regular public schools have, thus removing any competitive value."[35] The key to permissible delegation is the presence of guidelines and regulations that limit the discretion of private entities to usurp governmental authority for their own interests. But what guidelines and regulations?

A central question unanswered by the Michigan litigation is whether the legislature went too far by adding restrictions in response to the trial court ruling and, by so doing, unnecessarily constrained the autonomy of the academy boards. Might something less intrusive than requiring all the teachers to be state-certified and making the academies subject to the authority of the state board of education and the provisions of the school code have satisfied the requirements of the state constitution? Indeed, the Michigan Legislature went even further when it amended Section 6A of the School Code by adding a new Section 6B that imposed tight controls on the academies, e.g., provided that the authorizing body select the initial academy board and that the state board exercise day-to-day control over academy affairs.[36] Section 6B was automatically repealed when 6A was found constitutional.

In a careful study, Preston Green advises that the Michigan litigation carries implications for other states, noting how closely the state may have to control charter schools where the state constitution either limits funding to public schools or forbids the funding of private schools.[37] In her dissenting opinion, Michigan Supreme Court Justice Patricia Boyle acknowledged the tradeoff between accountability and autonomy: "This case is about the inevitable tension that exists between the intent to create schools that are free from the burden of regulation in order to allow experiments in improved learning, and the constitutional imperative that public funds not be used for private purposes."[38] We will examine in some detail *infra* how the current legal framework in Michigan affects the autonomy of educational management companies.

The application of unconstitutional delegation law to publicly funded voucher programs is an interesting question because the delegation of educational responsibility is not directly to private schools but to parents. Would a state be required to impose conditions on parents for expenditure of the money, e.g., restrictions on using the money for home schooling? Would the doctrine require the state to establish conditions for participating private schools? Or both?

State Action Principle

The second major constitutional issue impacting educational privatization is whether private entities providing core governmental services have become sufficiently public that they must recognize the constitutional rights of their constituents. The Fourteenth Amendment to the U.S. Constitution and its enabling statute require states and their political subdivisions to do so.[39] These rights include the freedoms of speech, religion, assembly, and association; the right to be free from unreasonable search and seizure; the right to due process of law; the right to equal protection of the laws; and other rights that the U.S. Supreme Court has considered fundamental, e.g., marriage and privacy. To what extent does the receipt of public money in combination with compliance with governmental accountability and oversight measures convert wholly private action into state action? The matter is important, because other than slavery, the U.S. Constitution does not apply to wholly private action. Thus, unlike public schools, private schools operating independently of the state are not required to comply with constitutional law. Because the relationship between a private school and its constituents is contractual in nature, the school has great authority to determine conditions of employment and student enrollment.

What happens when private organizations operate public schools? Generally, charter school legislation specifies that these schools are public. This means that, even if they are operated by a private entity, they must recognize the constitutional rights of their constituents

just like public schools.[40] However, as one commentator notes, a legislative declaration that a charter school is a public entity does not necessarily make it so.[41] It is conceivable that a court may nullify such a declaration if it is not in keeping with the general thrust of other provisions in the legislation. Such was the case with the trial court decision striking down the initial Michigan charter school legislation, discussed *supra*.

Suppose a legislature states that a charter school operated by a private organization is *not* subject to federal constitutional constraints. Later, a student is expelled without receiving notice and a hearing. The student sues in federal court, claiming that he was denied his constitutional rights to due process. Is the school public or private for purposes of constitutional law?

In order for constitutional law to apply to private actors, there must be a clear linkage between the private conduct and the state. The Supreme Court has articulated three tests to make this determination: the public function test, the close nexus test, and the state compulsion test. The public function test asks whether the private organization is performing functions normally the purview of government. In 1946, the Supreme Court ruled this to be the case with a company town and in the 1960s extended the principle to a private park and a private shopping mall.[42] However, the Court later refused to extend the public function concept to other privatized activities and overruled its earlier decision regarding the private shopping mall.[43] Thus, the mere fact that a private school serves a public function alone is insufficient to convert its actions to those of the state. The high court ruled as much in a 1982 decision.[44] But as noted *infra*, the public function concept may have continuing viability in combination with other factors.

The close nexus and state compulsion tests surfaced in several 1982 Supreme Court rulings.[45] In *Blum v. Yaretsky*, the Court noted that to extend constitutional requirements to private entities, a close nexus must be established between the state and the challenged action of

the private entity so that the action may fairly be treated as that of the state.[46] This may be done by showing that the state has exercised coercive power or encouragement with regard to the private decision. In *Blum*, the Court ruled that a private nursing home's transfer of Medicaid patients to a lower level of care based on medical judgment was not state action because the decision was not prompted by the state or its officials but rather reflected the judgment of medical professionals. In *Lugar v. Edmondson Oil Company*, the Court in a closely divided opinion set forth a two-part approach to attributing private action to the state. First, the action "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible."[47] Second, the party charged with the action must be a person who fairly may be said to be a state actor because he is a state official, because he acted together with or obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state. In other words, not only must the legal basis for the actions be found in state law, but the actor must also be closely related to the state.

A few years later, a unanimous Court relied on these precedents to hold that a private physician under contract to provide orthopedic services on a part-time basis at a state prison hospital was a state actor.[48] The critical factor was not whether the physician was on the public payroll or paid by contract but rather that he was exercising power possessed by virtue of state law and made possible because he had been clothed with state authority to render medical services to prison inmates. A federal district court ruled similarly a few years earlier with regard to an allegation of inadequate medical care by a resident at a privatized mental health institution. The judge found the Eunice Kennedy Shriver Center for Mental Retardation to be a state actor since the state had an affirmative obligation to provide medical care to an involuntarily confined

mentally retarded patient, had delegated responsibility to the Shriver Center, and the Center assumed the responsibility. Were it otherwise, the court noted, "the state could avoid its constitutional obligations by delegating governmental functions to private entities."[49]

Returning to our due process hypothetical, there would be some question whether the state could fund a private organization to undertake the government's core responsibility of providing public education and, in the process, declare that the private organization is not subject to federal constitutional law. First, unconstitutional delegation law may prevent the state from turning its responsibilities over to a private entity in this manner. Second, the fact that the charter school is state-funded, the officials are operating under state authority to provide educational services, and the interests of students are involved – all militate against an abrogation of federal constitutional rights. If this were possible, the state could convert all its public schools to private charter schools as a way of avoiding constitutional law constraints.

In some states, charter schools are organized as nonprofit corporations or exercise the same powers as business corporations. Where this is the case, the schools bear some resemblance to government-created corporations like the United States Olympic Committee and Amtrak. The U.S. Supreme Court has considered the status of entities like these to determine if they are sufficiently part of government to be subject to constitutional restraints.[50] The resulting body of federal law carries implications for the status of charter schools operated by private entities. In ruling in 1995 that Amtrak is subject to constitutional limitations despite language in the statute stipulating that Amtrak is not an agency or part of government, the Court noted that "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."[51] In the Amtrak case, *Lebron v. National Railway Passenger Corporation*, the majority provided

guidelines for evaluating the legal status of government-created corporations. Justice Antonin Scalia wrote for the Court, "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."[52]

Charter schools also are created by government to serve governmental objectives. However, their governing boards are not appointed by government, though charterers approve the board, oversee their operation, and, at the renewal point, sometimes can remove board members. It would appear that case law pertaining to the status of government–created corporations may have some bearing on the status of charter schools operated by private organizations for purposes of constitutional law.

The public versus private status issue is of particular concern to private schools participating in publicly funded voucher programs because most do not want to lose their independence. Private schools can find some solace in another well known U.S. Supreme Court ruling dealing with state action. In *Rendell-Baker v. Kohn*, another of the 1982 decisions involving the state actor question, the Court was confronted with claims by two teachers that their First Amendment free speech rights and Fourteenth Amendment due process rights were violated when their contracts were terminated by a private school.[53] The school enrolled maladjusted high school students and received nearly all of its funding from the state. While the school did have to comply with various state regulations as a result of the funding, personnel matters were left to the discretion of the school. The majority concluded that the school had not sacrificed its private status by becoming substantially publicly funded. As Ralph Mawdsley

observes in a comprehensive discussion of the issue, "Current case law, consistent with *Rendell-Baker,* indicates that the connection between the state and a private educational institution must be more than the presence of state standards and financial assistance; there must be an entangling and causative relationship."[54] The U.S. Supreme Court will have another opportunity to address the matter in the 2000 term in a case involving penalties imposed by an athletic association against a private school.[55]

Neither the Milwaukee nor Cleveland voucher program requires private schools to convert to public entities as a condition of participating. However, the matter did surface early on regarding the Milwaukee voucher program when the Wisconsin State Superintendent of Public Instruction developed an extensive list of regulations governing private schools participating in the original voucher program enacted in 1990.[56] Included among them was a provision that private schools had to serve children with disabilities and a provision requiring recognition of all federal and state guarantees protecting the rights and liberties of individuals. Specifically listed were freedom of religion, expression, association, unreasonable search and seizure, equal protection, and due process. When the voucher program was challenged, the trial judge terminated the regulations pertaining to special education but allowed the other regulations pertaining to individual rights to continue.[57] The trial court's decision regarding the regulations was not taken up on appeal, and thus the regulations remained in force for a number of years. In 1998 the regulations relating to individual rights were made essentially advisory following a dispute between legislative leaders and state department officials.[58] Interestingly, during the period the student rights regulations were in force, private school operators ignored them, and the Wisconsin Department of Public Instruction did not intervene.[59]

School voucher programs are too few and too new to provide any information about how vouchers might change the status of private schools. One earlier federal appellate court ruling, however, is illustrative of how closely the private school must be tied to the state in order for it to be subject to constitutional strictures. In *Milonas v. Williams*, the U.S. Court of Appeals for the Tenth Circuit concluded that a private school for involuntarily confined youths was required to observe student Fourteenth Amendment due process rights because the students attended against their will and the school received substantial state funding and regulation.[60] The involuntary nature of the confinement diminishes the significance of the ruling for voluntary educational voucher programs. Still, the control a school exerts over students is greater than that exercised over teachers. This fact, in combination with substantial state funding and comprehensive regulation, may be enough to convince some judges that the private schools are performing a public function in the same manner as a public agency and should be subject to the same constitutional constraints.[61]

An apt analogy is the federal Section 8 public housing voucher program.[62] To aid low-income families in obtaining decent housing and to promote economically mixed housing, Congress established a housing certificate program in 1974 and expanded the program to include housing vouchers in 1983.[63] Now merged, the two programs give low-income families wide choice among housing vendors in the private market. Some million and a half households participate in the program nationwide. Eligible low-income families first obtain a voucher from the public housing authority and then seek out an apartment and an owner willing to execute a lease. Generally, the tenant pays no more than 30 percent of household income toward the monthly rent, with the housing authority picking up the balance in relation to local fair market

rent levels established by the Department of Housing and Urban Development (HUD).

The statute leaves considerable discretion to the private housing provider in selecting tenants. However, it spells out the amount of assistance, housing quality standards and periodic inspections, types of housing, and conditions for termination of leases. Implementing federal regulations are more detailed. For example, the regulations specify criteria for such areas as sanitary facilities, food preparation and refuse disposal, space and security, thermal environment, illumination and electricity, structure and materials, interior air quality, water supply, lead-based paint, access, site and neighborhood, and smoke detectors.[64]

Landlords face stringent barriers to removing a problem tenant under the Section 8 program. The owner may terminate a lease only for grounds specified in HUD regulations.[65] When the term of the lease is over, the landlord may choose not to renew it only if there is good cause or other sufficient reason.[66] These restrictions limit the discretion of landlords to evict unruly tenants whose behavior falls short of the good cause provisions listed in the regulations. And they have constitutional implications. In an instructive 1986 decision, a federal district court in California found sufficient government involvement in the Section 8 program to give the tenant a constitutionally protected property right in his lease. The court acknowledged that under U.S. Supreme Court precedents discussed earlier, the flow of public money alone to the private landlord is insufficient to constitute governmental action. "When, however, the relevant statutes and regulations are viewed in their entirety this court concludes that 'state action' exits."[67] The plaintiffs were entitled to a thirty-day notice of termination of their month-to-month lease, which included a statement of reasons constituting good cause for termination.[68]

Other federal courts have held that tenants faced with eviction also are entitled to a due

process hearing.[69] In 1992 an Ohio appellate court cited a number of cases for the proposition that unless good cause for eviction is demonstrated, a Section 8 tenant "may remain in the housing for life, and his right to do so is a constitutionally protected property interest."[70] In this case, the landlord had secured an eviction against a tenant in state court over a dispute involving graffiti allegedly painted on the building by the tenant's son. The tenant argued that the eviction action had not comported with her right to due process of law. The appellate court agreed, noting that the requirement of the federal regulations and the lease agreement require a meeting with the landlord to discuss the proposed termination. This had not happened. Nor had the final amount of damages owed by the tenant been determined. Further, the trial court had not adequately considered the tenant's mitigating circumstances. The appellate court overturned the eviction notice. The Supreme Court of New Jersey ruled in 1999 that though a private landlord may opt not to participate in the Section 8 voucher program, once an existing tenant becomes eligible for a Section 8 voucher, the landlord may not terminate the lease for this reason.[71]

The extensive regulation of the landlord-tenant relationship and the housing quality standards deter many private housing vendors from participating in the program.[72] This results in an under-supply of housing and, together with discrimination in tenant selection, serves to concentrate Section 8 housing opportunities in poor, minority neighborhoods with high crime rates.[73] The lesson to be learned from this cursory review of the Section 8 housing voucher program is that substantial flow of public monies to private vendors in combination with extensive regulation reduces vendor autonomy and, if the interests at stake are sufficiently important, subjects private vendors to the same constitutional constraints that apply to government.

With regard to education vouchers, nothing, of course, precludes a legislature or administrative agency from requiring schools to observe student and teacher constitutional rights as a prerequisite to participation in a publicly funded voucher program. Some policymakers may view this as essential, given the state's interest in educating students for a democratic society where constitutional rights are sacrosanct. This was the position taken by the Wisconsin Superintendent of Public Instruction with regard to the original Milwaukee Parental Choice Program discussed *supra*. On the other hand, others may opt to let parents decide whether they want their children to attend schools where constitutional rights may not be recognized.

HOLDING PRIVATIZED SCHOOLS ACCOUNTABLE IN CONTRACTING OUT AND CHARTER SCHOOL PROGRAMS

About 12 percent of public charter schools are operated by private organizations.[74] These are concentrated in 16 states and the District of Columbia. Most of these organizations are for-profit and number fewer than 20. In addition, a few companies such as Edison Schools operate public schools under contract with school districts. In general, privatization arrangements are governed by state statutes that allow private organizations to apply for charters directly or to operate charter schools on a contracting-out basis with public entities receiving charters. When state law is silent, problems arise. For example, a few years ago the Wilkinsburg School District outside Pittsburgh contracted with the for-profit Alternative Public Schools, Inc., to operate one of its low performing elementary schools. The problem in this case was that while state law allowed school districts to contract out for various auxiliary services, it did not expressly allow for contracting out the instructional program. The Wilkinsburg teachers union sued the district for violating state law.

In 1995 the Pennsylvania Supreme Court upheld the arrangement by a 4-2 vote in a surprising decision that saw contracting-out as a way for the local school district to meet its obligation under the state constitution to provide "a thorough and efficient system of public education."[75] However, a Pennsylvania trial court later terminated the contract in light of the enactment of a charter school law that prohibits for-profit companies from directly operating public schools.[76] At this writing, a similar challenge has been mounted against the Dallas school district's decision to contract with Edison Schools to operate six of its schools. However, a provision of the Texas Education Code does allow school districts to contract with a public or private entity to provide educational services for the district.[77] At the same time, the Texas attorney general has advised that the private vendor is subject to all state statutory requirements applicable to public school districts.[78]

To get some idea of how the legal framework for contracting-out and charter schools affects accountability, we look first at experience with contracting out special education services to private organizations and then examine three states where sizeable numbers of private organizations operate charter schools.

Contracting-Out Special Education Services

Provision of special education services by specialized private schools is the most well known form of contracting out in public education and represents the apex of government oversight and control. Private organizations undertaking these responsibilities are subject to extensive accountability under the Individuals with Disabilities Education Act (IDEA). Under IDEA, the state and school district remain responsible for ensuring that a handicapped child placed by the state or school district in a private school obtains a free, appropriate education: "In

all cases . . . the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies."[79] Federal regulations give state education agencies the responsibility of ensuring that these requirements are met.[80] And opinions issued by the Office of Special Education Programs (OSEP), which is responsible for overseeing IDEA, make this clear.[81]

When private organizations agree to provide special education services to public agencies on a contracting-out basis, they surrender a significant degree of autonomy because they must accept the regulations that accompany disability law. A New Jersey appellate court refused to set aside the state's stringent bookkeeping and accounting practices for private schools serving students with disabilities, noting that "private schools that choose to receive handicapped public school pupils under Chapter 46 [state law] must therefore relinquish some of the privacy and control over their affairs that they otherwise would have under the general provisions of chapter 6 [state law pertaining to private schools]."[82] A federal district court in New York found that since the city board of education retained primary responsibility for services to handicapped students the board placed in a private school and the school was subject to considerable monitoring and regulation, the plaintiff had a good chance of proving at trial that the actions of the school were the equivalent of the state. The school's motion to dismiss the lawsuit was denied. The case involved a private school psychologist who alleged that her dismissal was in retaliation for her complaining to the city board of education about the suspension of a student and thus a violation of her constitutional rights.[83]

When parents choose to place their children with disabilities in private schools operating

independently of the state, however, the situation is quite different. The public agency is responsible for seeing that some special education services are provided, though they need not be comparable to what would be available in public school.[84] The special education services may be provided at the private school, using private school personnel or public school personnel.[85] If increased services are required in order to meet the student's needs, the private school can seek reimbursement from the parents for the additional costs. Alternatively, the student can travel to the public school to receive the services. In either case, the private school is not subject to governmental oversight, since it has not contracted with the public agency to provide special education services.[86] Thus, the status of the private school remains private.

Somewhere in between the private organization that specializes in contracting with public agencies to provide special education services and the private school operated independently of the state is the private organization operating public schools pursuant to a charter or contracting-out agreement. What services must it offer children with disabilities? The 1997 amendments to IDEA make it clear that the local education agency that issues the contract or charter is responsible for assuring that special education services and funding for them occur in the same manner as in its other public school programs.[87] Where charters are issued by state-level agencies, the entity receiving the charter is responsible for providing special education services as though it were a newly created school district, subject to the provisions of state law.[88] However, funding can be a problem in these instances, since charter schools normally do not have the authority to tax, which limits their resources to what they can get from the state.[89]

The role of federal disability law in publicly funded voucher programs is not yet known. By virtue of the trial court ruling, the Milwaukee voucher schools are exempt from having to

comply with IDEA.[90] In Cleveland, the schools may deny admission to children with disabilities who require separate educational programming.[91] These programs, however, simply are too small to tell us what the responsibilities of voucher schools ultimately will be for educating children with disabilities under a broader publicly funded voucher program.

Private Schools Operating Charter Schools: Accountability Patterns in Three States

Arizona, Massachusetts, and Michigan have the most charter schools operated by for-profit companies. In these states, the charter law either allows these organizations to secure charters directly (Arizona) or to operate charter schools under sub-contract with charter recipients (Massachusetts and Michigan). While the number of charter schools that can operate is capped in Massachusetts at 120, there is no limit in the other two states.[92] In Arizona, for-profit organizations operate a large number of the charter schools including nine of the 10 charters with five or more campuses. In Michigan about 70 percent of Michigan's academies -- some 120 -- are operated by educational management organizations.[93] In part, the rapid expansion of privatization in these states reflects the permissive nature of the states' charter school laws and in part it reflects incentives to private corporations. In Arizona, for example, the state charter school law allows all property accumulated by a charter school to remain the property of the school.[94] In Michigan a private operator of a public school academy (charter school) doesn't have to contribute to the state retirement fund if the teachers are employed by the company.[95] In Michigan, charter conveyors can charge an administrative fee for granting and overseeing a charter, thus constituting an incentive to grant charters.[96] In Arizona, school districts also have done so.[97]

While it is commonly assumed that charter schools are freed from state regulation and

function relatively autonomously, this is not entirely true. In fact, a close look at the provisions of state statutes, regulations, charters, and sub-contracts in the relatively permissive charter school climate of these three states reveals that private entities operating charter schools are subject to considerable accountability, particularly in Michigan and Massachusetts. The following paragraphs briefly examine the legal framework in each state as it pertains to accountability regarding governance and reporting, curriculum and assessment, personnel, and fiscal matters. A table has been constructed for each state to provide an overview of key requirements.

Arizona

Arizona's charter school law emerged in 1994 as a compromise between Republican and Democratic legislators divided over the issue of vouchers as an education reform measure. Frustrated by the defeat of three voucher proposals in the previous three legislative sessions, Republican legislators led by then House Education Chair Lisa Graham adapted a charter proposal authored by the Goldwater Institute, a conservative Arizona think-tank, as an alternative to the failed voucher measures. Designed to introduce market-based accountability measures and to reduce bureaucratic constraints, the charter proposal received bipartisan support and became law on September 15, 1994.

Arizona's charter law places chartering authority with local school districts and with two governor-appointed state-level boards, the State Board of Education and the newly created State Board of Charter Schools.[98] As a means to preserve the legislative intent of the law and limit bureaucratic intervention upon implementation of the charter school program, the statute does not specify the role of the Arizona Department of Education's (ADE) role in charter school

regulation and control other than to permit it, along with the auditor general, to conduct financial, program or compliance audits.[99] Recognizing that charter schools, by definition public schools, would legitimately fall within the bureaucratic purview of the ADE, lawmakers went a step further and passed the charter school law without funding for state-level administrative staff. This meant that agencies such as the two state level boards, the ADE, and the Office of the Auditor General, did not have the financial capacity to employ additional staff to monitor the new schools and effectively disabled state agency regulation of Arizona's charter school program.[100] As a result, abuses occurred.[101]

Persons, as well as public and non-profit and for-profit private organizations, can apply for charters.[102] At present, all private organizations operating charter schools have obtained their own charters from one of the authorizing bodies; none subcontracts with a charter recipient. Teachers do not need to be state certified, and the state has no collective bargaining. The Arizona law exempts charter schools from all statutes and rules relating to regular public schools except those set forth in the charter law.[103] However, the state attorney general has advised that charter schools are subject to the state's open meetings and open records acts.[104] As noted in Table 1, accountability provisions are sparse.

Table 1 Here

The statute holds charter school sponsors responsible for the administration and oversight of the schools they sponsor.[105] The law does not affect the state board of education's duty to exercise general supervision over the public school system.[106] Charter schools are to provide

Table 1: Arizona
Key Accountability Provisions for Privatized Charter Schools

Source	*Governance & Reporting*	*Curriculum & Assessment*	*Personnel*	*Fiscal*
Statute	Compliance with dept. of ed. rules to assure compliance with federal and state civil rights and health and safety laws; dept. of ed may conduct audits Sponsor oversight Annual school report card	Participation in state testing programs	Fingerprinting for charter school applicants and nonprofessional personnel Employee resumes available to parents	Compliance with uniform system of financial records, procurement rules, and audit requirements unless exempted by sponsor Insurance requirement
State ed regs	Compliance with state open meetings and open records acts (Atty. Gen. Op)	Responsibility to comply with state board minimum course and competency goals Identify and serve special ed. students including offering extended year services		
Charter contracts	Amendments to charter require sponsor approval Components of annual report card spelled out; to be given to all parents, presented at an annual public meeting, and submitted to dept. of ed. Monthly attendance reporting to sponsor; annual report to sponsor Must allow sponsor to audit and dept. of ed. officials to visit and inspect at any time Must retain all documentation Sponsor may revoke charter	Compliance with outcome measures as specified by sponsor (see also reporting requirements under Governance)		Operating entity assumes responsibility for costs including contracting for goods and services Insurance requirements detailed

Sources: Ariz. Rev. Stat. Ann. §§ 15.181 -15. 189 (West 2000); Ariz. Admin. Code (selected provisions) (2000); sample charter school contracts issued by the Arizona Charter School Board and the State Board of Education; negotiated charters with the state charter school board.

comprehensive, nonsectarian educational programs, comply with state and federal special education laws, and participate in the Arizona Instrument to Measure Standards (AIMS) test.[107] Charter schools also must meet state board of education regulations regarding minimum educational standards and testing requirements, as well as the educational needs of English as a Second Language (ESL) and special education students.[108] The statute establishes that each charter school must complete an annual report card.[109] The charters with private educational organizations examined for this article detail the requirements of the report card, including descriptions of educational goals, attendance statistics, and standardized test results.

The statute requires the state auditor general to prescribe a uniform system of financial record keeping.[110] In the last legislative session, the legislature tightened up on fiscal accountability in light of reports of financial mismanagement and misuse of the charter granting power by a few local districts for granting charters to schools to operate in other parts of the state in return for a percentage of the per-student charter allotment. Charter schools now must submit a detailed financial plan at the charter application and renewal stages.[111] After July 1, 2000, school districts are limited to granting charters within their borders.[112] The charters reviewed for this article track the statute with regard to fiscal accounting and provide that sponsor representatives must be permitted to visit the school and conduct audits of the school's financial records. The charters underscore nondiscrimination in employment provisions but add little else to the discussion of charter school personnel functions.

In short, the Arizona charter school climate for educational management companies is hospitable, with accountability measures limited in scope. Arizona comes close to a market-based accountability system.

Michigan

Michigan's charter school law developed as the result of a political showdown between Democratic and Republican legislators concerned with property tax reform. Contained in a school reform package that proposed drastic changes to the system of school finance, school district consolidation and inter and intra-district choice measures, the charter school proposal was, according to some observers, not much more than a "footnote" to the larger bill.[113] Michigan teacher unions noticed, however, and strongly objected to the charter school proposal, rallying lobbyists and teachers to Lansing to voice their opposition to the measure. Paradoxically, the protests against charters served to fuel the arguments for school choice. Pointing to teacher unions as a lobby with a vested interest in the educational status-quo, Republican Governor John Engler, a strong proponent of school choice, called for passage of the reform proposal as means to "smash the school bureaucracy," and force a solution of Michigan's failing public schools.[114] The school reform measure passed in spite of teacher union opposition and in December 1993 introduced the most ambitious charter school program in the country.

As noted *supra*, the Michigan Supreme Court upheld the revised charter school program after the legislature amended the law to clarify that public school academies, as charter schools are known in the state, are subject to the authority of the state board of education and various state laws applicable to public schools generally, including teacher certification. To say that the academies are autonomous under current law would be erroneous. Noting that his list is by no means exhaustive, one Michigan authority sets forth some 59 provisions of the school code that apply to the academies, as well as 39 other state statutes and 25 federal statutes.[115] Table 2 below highlights key accountability provisions that emanate from the charter statute, regulations by the

state department of education, regulations issued by state authorizing bodies, the charters granted by the authorizing bodies to public school academy boards, and the contracts negotiated by public school academy boards with educational management companies. The state authorizing bodies are unique in Michigan. Charters can be issued by local and intermediate school boards, community college boards, and governing boards of state public universities.[116] Nearly 90 percent of the 173 public school academy charters in Michigan have been issued by state universities.

Table 2 About Here

It is apparent from the table that the legal framework for privatization of public charter schools is both more complex and more encompassing in Michigan than in Arizona. Not only are public school academies subject to the authority of the state board of education,[117] they also are governed by the policies of their respective authorizing body.[118] Spurred by accusations that the academies are not being held sufficiently accountable and by criticism from academy boards that services do not justify the three percent fee authorizing bodies receive from public school academy allotments, authorizing bodies have begun to take their oversight role more seriously, though considerable confusion exists as to what their actual function is.[119]

A case in point is Central Michigan University, which among the state universities has granted the majority of charters. Expressing increased concern that public school academy boards are being dominated by the educational management companies they hire, the university developed a comprehensive list of policies in 1999 that clearly delineate the role of the academy

Table 2: Michigan

Key Accountability Provisions for Privatized Public School Academies (Charter Schools)

Source	*Governance & Reporting*	*Curriculum and Assessment*	*Personnel*	*Fiscal*
Statute	Subject to state brd of ed leadership and supervision Subject to authorizing body oversight & monitoring; revocation of charter by authorizer nonappealable Subject to fed and state law applicable to school districts, e.g., civil rights, spec ed Must meet authorizing body's requirements for governance structure Compliance with state open meetings, freedom of information, coll. barg. laws, among others	Charter must specify educ goals and methods Subject to state student assessment	Teacher certification (unless college professor) & background checks required Subject to terms of coll. barg. contract if authorized by local district (right to coll. barg. generally)	At least annual audit by CPA Authorizing body is fiscal agent and forwards payment to school
State ed regs	Same as traditional public school	Same as traditional public school	Same as traditional public school	Same as traditional public school
Author-izer regs* for charter schools	Brd mtns at least monthly; copy of agenda & minutes Nondiscrim. policies Annual rpt Submit EMO contract	Technology plan Report student assessment measures & results	Teacher certification and background check data Submit contracts and job descriptions with employee groups	Submit budget info including previous year audit Insurance policies & various compliance forms Submit correspondence from various entities, e.g., dept. of ed, legal action
Charter	Authorizer appoints academy brd; governance details set forth Oversight activities by authorizer detailed Specifies grds and procedures for charter revocation	Details curriculum and student assessment Academic reports specified	Authorizes academy brd to contract with personnel Authorizes academy brd to contract with EMO Specifies coll. barg. is responsibility of academy brd	Details financial activities of authorizer body and academy brd
EMO** contracts	EMO accountable to academy brd; periodic rpts and annual review required Financial, education, student records are property of academy and available for inspection and audit	Substantial changes to educational goals or programs require academy brd approval Accountable to academy brd for student performance	Must inform academy brd of compensation and fringe benefit schedules Delineates who are employees of academy and of EMO	Terms of compensation for EMO specified Academy brd selects indep. auditor EMO provides academy brd with projected budget for approval, monthly financial statements, quarterly financial and student performance rpts; annual audit

*The authorizer regulations set forth here reflect those developed by the state universities that have granted a large number of public school academy charters in the state. The regulations differ slightly among the universities. Central Michigan University developed a detailed list of policies in 1999 for clarifying the role of the academy board and the educational management company, termed "educational service provider." The policies have been incorporated into the charters granted to the public school academies by the university and must be reflected in the terms of the contracts the academy boards negotiate with service providers.

**EMO=educational management organization (now termed "educational service provider" in many contracts) that operates the charter school under contract with a public school academy board. The accountability provisions listed here are among those included in a majority of the ten sample EMO contracts examined. Given the small sample and variability from contract to contract, they are not definitive on accountability contract terms but do convey some idea of what the contracts typically say regarding accountability.

Sources: Mich. Comp. Laws Ann. §§ 380.501-507 and various sections (West 2000); Mich. Admin. Code, various sections (2000); charter documents from state universities; and ten sample charters and EMO contracts.

board vis a vis the company and that must be included in all of the university's charters.[120] The term "educational service provider"(ESP) is used in these regulations to clarify that the management function resides with the public school academy board, not its hired operator. Among other things, the policies require the academy board to provide detailed information about the ESP to the university charter school office prior to execution of the agreement, to assure that board members are completely independent of the ESP, to employ its own legal counsel to negotiate an arms-length agreement, and to assure that the contract addresses a long list of provisions delineating the respective functions of the academy board and the ESP. Non-delegable academy board functions include, among others, adopting curriculum and curriculum amendments; determining food service and transportation; expelling older students; and selecting, hiring, and terminating or contracting for employees. Both the charters issued to the academies by Central Michigan University and the contracts the academies in turn negotiate with ESPs that were reviewed for Table 2 conform to these new policies.

The accountability provisions in Table 2 are numerous and quite similar to those required of traditional public schools. Under the statute as noted *supra*, the authorizing body for a charter school is responsible for oversight and monitoring regarding governance, compliance with state and federal law, and teacher qualifications. Public school academies are subject to both state board and authorizing body regulations, the latter focusing primarily on reporting requirements. In addition to serving as the fiscal agent for the academy, the authorizing body monitors the academy's compliance with the terms of the charter and has the non-appealable power to revoke it.[121] Among other things enumerated in the charter school statute,[122] the charters between the authorizing bodies and the academies specify the relationship of the authorizing body to the

academy board, the role of the academy board, the mission and curriculum of the school, and the goals against which the charter is to be assessed. Educational management contracts negotiated by academy boards with private companies delineate the relationship between the academy board and the management company. Some of the contracts convey other powers to the academy board such as selecting an educator auditor for reviewing academy management and removing the director hired by the educational management company. Though not all of these provisions are systematically or uniformly enforced, charter school operators in the state complain about the amount of paperwork that they must prepare. In addition to completing nearly one hundred state reporting forms a year, school administrators say they spend an average of 8.6 hours per month completing the reporting forms of their authorizing bodies.[123]

Massachusetts

Like Michigan, the Massachusetts charter school law emerged as a measure contained within a greater reform package which included reforms related to school finance, school quality, and teacher tenure. Despite vigorous opposition from teacher unions, the charter school proposal received bipartisan support and became law with the passage of the Massachusetts Education Reform Act in June 1993.

Charter schools in Massachusetts are of two types: commonwealth charter schools approved by the Commonwealth Board of Education and Horace Mann charter schools approved by local school districts and the local collective bargaining agent.[124] The Commonwealth Board of Education actually grants all charters. While only nonprofit organizations, teachers, and parents can form charter schools, the schools themselves are not prohibited from contracting with a for-profit educational management organization.[125] Private and parochial schools are not

eligible for charter school status.[126] Teachers in Horace Mann charter schools approved by local districts must be state certified, while teachers in commonwealth charter schools approved by the Commonwealth Board of Education must be state certified unless they have passed the state teacher exam.[127] In the case of educational management companies, teachers remain employees of the charter school board. Unlike Michigan, the Massachusetts Department of Education has developed a set of regulations that specifically apply to charter schools.[128] Thus, it is relatively easy to discern what accountability measures apply to them. Further, the channeling of all charter school approvals through the Commonwealth Board of Education minimizes the imposition of additional regulations and controls by intermediate authorizing bodies. The renewal or revocation of the five-year charter is the mechanism that drives the accountability plan.[129]

Table 3 lists the major accountability provisions applying to charter schools in Massachusetts.

Table 3 about here

The charter school statute requires Commonwealth Board of Education approval of educational management contracts, specifies that charter schools are subject to much of state law applying to public schools including collective bargaining but not teacher tenure and dismissal, and requires periodic financial and academic progress reports. In addition, each school must issue an annual report to the charterer and to parents by August 1st that sets forth academic progress information, a financial statement, and other information required by the board of

Table 3: Massachusetts
Key Accountability Provisions for Privatized Charter Schools

Source	*Governance & Reporting*	*Curriculum and Assessment*	*Personnel*	*Fiscal*
Statute	State brd of ed approval of EMO contract terms No discrim in admissions, including sexual orientation, disability, acad achievement, or athletic ability Subject to same legal requirements as other public schools, e.g, open meetings, student discipline (but not teacher employment) State brd of ed may place charter school on probationary status or revoke charter Annual academic progress and financial rpt to state brd of ed and to parents	Meet same assessment requirements as other public schools	Teacher certification or state test Subject to coll. barg law	Annual audit filed with dept. of ed and state auditor State auditor may investigate budget and finances
State ed regs	Components and dates of annual rpt specified; state brd of ed may conduct site visits Components and dates of annual enrollment rpt specified State brd of ed approval for changes in student code of conduct State brd of ed may require additional info Reasons for revoking charter specified	Annual rpt to include progress made toward meeting goals of charter	Employee criminal history check	Annual independent audit consistent with state brd of ed guidelines
Charter	Delineates governance system. Specifies relationship between charter brd and EMO	Details educ. mission, program, and student assessment Sets forth school evaluation criteria	Specifies teacher and admin. evaluation	Funding sources, projected initial budget, and fiscal accountability measures set forth
EMO* contracts	Quarterly reports to charter brd on student progress and financial operations Accountable to charter brd; causes for termination specified	Curric and inst stds must meet state regulations Annual parent survey; comparison with nearby schools (Edison) Outside evaluator for school's program (Beacon)	Principal selection requires charter brd. approval (Beacon) If charter brd agrees to coll barg contract that materially interferes with EMO program, EMO can terminate contract (Edison)	Charter brd approves budget Quarterly financial rpts to charter brd and disclosure at brd's request

* Where provisions are unique to a particular contract, the EMO is identified in brackets. Note that only four contracts were reviewed; thus the provisions listed are not definitive but do convey some idea of how the contracts contribute to accountability.

Sources: Mass. Gen. Laws Ann. ch. 71, §§ 89 (West 2000); Mass. Regs. Code, tit. 603, §§ 1.01-1.13 (2000); *Massachusetts Charter School Accountability Handbook*, Mass. Dept. of Education, 1999; four charters and contracts for schools with EMOs.

education.[130] Department of education regulations specify the contents of the reports and authorize site visits. In addition to the initial goals outlined in the charter application, the department of education requires charter school operators and educational management organizations to submit a detailed accountability plan prior to the second year of operation.[131] The plan must offer an in-depth explanation of the school's performance objectives and clarify how progress toward the objectives will be measured. Inspectors from the department make one-day site visits during the second and third years of the contract, and after the school has applied for renewal of the charter (in the third or fourth year), the inspectors make a comprehensive four-day renewal inspection and visit, resulting in a final report critiquing the school's overall performance and progress towards its goals. A substantive piece of evidence in deliberations over the charter's renewal, the inspection report is made generally available to the public and is posted on the department of education's website.

The contracts with educational management organizations detail the relationship between the company and the charter school nonprofit board. Interestingly, several contracts add accountability measures of their own. Thus, Edison specifies that an annual parent survey and comparison with the performance of neighboring schools should be measures of its effectiveness. Presumably, the company believes it will do well on these measures. Edison also has a provision that if the charter school board agrees to a collective bargaining provision that seriously handicaps the ability of the company to achieve its contracted goals, the company may terminate the contract. Beacon has a provision that allows the charter board to approve the school principal. In short, while there are more constraints on the autonomy of educational management organizations in Massachusetts than in Arizona, the accountability framework in

Massachusetts appears to be more straightforward than the maze of measures in Michigan.

In sum, it seems striking in both Michigan and Massachusetts how much the legal framework has the potential to impact the autonomy of private entities to operate public charter schools. The schools are held to the same requirements as regular public schools for such matters as teacher certification, collective bargaining, student assessment, student discipline, open meetings and records, fiscal oversight, and periodic reporting. Each of these constricts the autonomy of school operators. And some are more constricting than they appear at first glance. Comprehensive subject-matter student assessment, for example, has the potential to control the curriculum of the school. Rather than a lack of accountability, it appears that if all the various requirements were strictly enforced, the real problem could be excessive monitoring and control. The fact that many of the overseers are closely aligned with the bureaucracy of traditional public education adds to the concern.

ISSUES OF ACCOUNTABILITY IN PUBLICLY-FUNDED VOUCHER PROGRAMS

In this final section, we explore how the law affects state efforts to hold private schools accountable when they participate in publicly funded voucher programs. For the sake of discussion, we will make the assumption that a voucher program encompassing religious private schools does not violate either the federal or state constitution. This is a big assumption, since the U.S. Supreme Court has not yet ruled on the matter.[132] If the high court rules favorably from the standpoint of the First Amendment Establishment Clause, an important follow-up question is whether it will allow states to apply their own constitutional provisions to the issue. One-third of

the states have stricter anti-establishment provisions than the federal constitution.[133] To date, the few state supreme courts that have ruled on school vouchers or voucher-like programs have issued inconsistent decisions.[134]

The Milwaukee and Cleveland Experience

Publicly funded voucher programs encompassing private religious and non-religious schools are ongoing in Milwaukee, Cleveland, and the State of Florida. Currently, 91 private schools in Milwaukee and 56 private schools in Cleveland enroll a total of 12,000 voucher students. The Florida voucher program implemented in 1999 currently encompasses several Catholic schools and a small number of students. While vouchers lost ground following failed ballot initiatives in California and Michigan in the November 2000 elections, the concept of allowing parents to choose schools commands significant support in public opinion polls.[135] With the election of George W. Bush, a strong voucher supporter, and a Supreme Court many consider hospitable to vouchers, broadly based choice programs encompassing private schools are likely to expand, albeit gradually.

Two-thirds of the private schools in Milwaukee and four-fifths of the private schools in Cleveland are religious. In the case of Milwaukee, participating private schools are subject to the underwhelming regulations for Wisconsin private schools generally, e.g., have a primary purpose of providing education, offer instruction for a minimum number of hours annually, and offer a sequential curriculum.[136] The voucher law requires each choice school to meet only one of the following: at least 70 percent of the students in the program are to advance one grade level each year, the private school's average attendance rate for students in the program is to be at least 90 percent, at least 80 percent of the students in the program are to demonstrate significant

academic progress, or at least 70 percent of the families of pupils in the program are to meet parental involvement criteria established by the private school.[137] The schools also are required to adhere to federal anti-discrimination law (though, as noted earlier, they are not required to serve children with disabilities following the trial court ruling that continues in force), all health and safety laws that apply to public schools, and submit an annual financial audit to the Wisconsin Department of Public Instruction (DPI). The schools are required to admit applicants randomly except for siblings of enrolled students and to exempt students who are not of the school's faith from religious activities.[138] The latter does pose some intrusion on the autonomy of the school, and disputes have arisen over it. Notice that there are no requirements for teacher certification, curriculum content, enrollment diversity, student discipline, compliance with open meetings and open records acts, or student assessment.

Following early and bitter disputes between the DPI and legislative leaders, the Wisconsin Legislature eliminated most of the initial accountability measures when the program was expanded in 1995.[139] Included among them was the requirement for an annual evaluation conducted by the DPI. As noted *supra*, the DPI-imposed requirement that private schools observe the constitutional rights of students was made advisory. The legislature directed the Legislative Audit Bureau to conduct a financial and performance evaluation in 2000. That report focused mostly on fiscal matters, noting that the lack of a uniform testing requirement precluded an assessment of academic achievement.[140]

The Cleveland, Ohio scholarship (voucher) program for low-income families exerts only limited accountability measures on participating private schools, though the state does have an extensive set of regulations that private schools must follow to be considered state-accredited

(called "chartered" in Ohio state law).[141] However, religious private schools with "truly held religious beliefs"are subject only to a few minimal state regulations, following a 1976 Ohio Supreme Court ruling.[142] Both state-accredited and non-accredited private schools may participate in the scholarship program – the latter by approval of the state superintendent of instruction. The Cleveland scholarship law prohibits participating schools from discriminating on the basis of race, religion or ethnicity; from teaching hatred; requires minimum enrollment per class and for the school as a whole; and prohibits dissemination of false or misleading information.[143] Voucher schools may not charge more than ten percent of the voucher in additional tuition or fees. Except for enrolled students and siblings, admission is by lot in kindergarten through third grades. Scholarships for children already in private schools are limited to 50 percent of the total. Thereafter, the students may continue at the school through the eighth grade. Schools are not required to be co-educational or, as noted *supra*, to admit separately-educated handicapped students

It is apparent from this brief review that, aside from the random admission requirement, state constraints on the private schools participating in the Milwaukee and Cleveland programs are not particularly intrusive. This suggests that, given the autonomy most private schools have historically enjoyed, the publicly funded voucher is the best vehicle for keeping accountability measures minimal. However, both programs are too small and localized to tell us much about the accountability measures associated with a broader program that channels substantial state funding to private schools. Recall the earlier discussion about unconstitutional delegation law. It is likely that accountability measures will expand in response to concerns about unconstitutionally delegating state responsibility for education on a large scale to private entities.

Political pressure in this direction from teacher unions and traditional public school interest groups also will increase. The issue then becomes whether vouchers can be restricted to nonreligious private schools to avoid problems arising from the regulation of religious private schools. Or, barring that, determining whether the constitutional protection for free exercise of religion entitles the latter to an exemption from accountability measures required of other private schools.

Can Voucher Programs Be Restricted to Nonreligious Private Schools?

Often it is asserted that only nonsectarian private schools should be allowed to participate in publicly funded voucher programs. This is how the Milwaukee program originally was structured in 1990. There are strong arguments both in support and against such a position.

The first argument in support of the exclusion of religious private schools is that the entire matter of breaching the Jeffersonian wall between church and state is avoided. Second, as in the case of refusing to fund abortions for low-income families,[144] it can be argued that the government has a right to confine funding to educational programs that are in accord with its mission. Since it would be constitutionally impermissible for the state to underwrite religious education, it can limit a voucher program to public schools and secular private schools. Third, the state's accountability program for participating schools would be uniform in that no special considerations need be given to the religious issue.

Now consider the arguments against excluding religious private schools. First, refusing to include them seriously limits the supply of available schools, since, as noted *supra*, 78 percent of private schools are religiously affiliated. Indeed, this was a major problem in the initial Milwaukee voucher program. Only a handful of independent private schools participated, with

four schools enrolling over 80 percent of the students. Second, such a limitation undercuts parents' ability to choose religious schools for their children and thus hobbles the concept of school choice. A prime motivating factor in choice of private schooling is religion. Third, the exclusion of parents and religious schools amounts to discrimination against the free exercise of religion. Both the U.S. Supreme Court and several state supreme courts have expressed particular sensitivity to this issue.[145] Finally, disallowing parents from choosing religious private schools constitutes unconstitutional viewpoint censorship because the state excludes religion from a wide variety of approaches to education. By excluding religion, the state violates the First Amendment free speech clause.[146]

While stating the arguments against and in favor of including religious private schools in voucher programs is easy, determining how the issue is likely to be settled is not. Even assuming the U.S. Supreme Court would uphold an educational voucher program encompassing religious private schools does not necessarily resolve the issue because the high court could still permit states to apply their own constitutions to the matter in the interest of federalism. Indeed, in unanimously ruling in 1986 that the Establishment Clause of the First Amendment does not prevent the provision of vocational rehabilitation services to aid a blind student to pursue religious studies at a Christian college, the justices noted that the Court was considering only the First Amendment issue and that, on remand, the Washington State Supreme Court was free to consider the "far stricter" dictates of the Washington state constitution.[147] The Washington high court did so and struck the aid plan down as a violation of the state constitution's anti-establishment clause.[148] If the U.S. Supreme Court were to follow this precedent in a future voucher case, then the strong anti-establishment provisions in the constitutions of many states

would exclude religious private schools from publicly funded voucher programs.

Might Religious Private Schools Be Exempt from Voucher Regulations?

There appears to be predisposition among a majority of the members of the U.S. Supreme Court to uphold a carefully crafted voucher program encompassing religious private schools.[149] Assuming this to be the case and assuming the state constitution does not bar the participation of religious private schools, can the state hold these schools to the same accountability measures that are imposed on participating public and private schools generally? Once again, there are legal arguments on both sides of the issue.

The first argument supporting nonexemption is that a publicly funded voucher program presumably will be voluntary, and if a school finds the regulatory and accountability provisions excessive, it doesn't have to participate. Second, the state must impose accountability measures on a large-scale publicly funded voucher program encompassing private schools to satisfy state constitutional delegation requirements. Third, the U.S. Supreme Court ruled in a 1990 decision, *Employment Division of the Oregon Department of Human Resources v. Smith*, that religion is not entitled to an exemption from neutral laws of general applicability.[150] In 1993 Congress tried to overturn this ruling by enacting a statute known as the Religious Freedom Restoration Act that required the state to establish a compelling purpose whenever governmental action substantially burdened the free exercise of religion. In 1997 the high court struck the law down as an intrusion on the prerogative of the Court to determine the dimensions of constitutional rights.[151] So, from the perspective of this decision, if all private schools had to comply with reasonable regulations to participate in a publicly funded voucher program, religious private schools would have to comply as well.

However, in *Smith* the Supreme Court recognized a hybrid situation where religion in combination with other constitutional rights might qualify for an exemption. Writing for the Court, Justice Antonin Scalia cited *Wisconsin v. Yoder* as an example. In *Yoder*, the Court granted Old Order Amish parents the right to have their children exempted from compulsory schooling beyond the eighth grade.[152] That case, he observed, involved not only free exercise of religion but also the fundamental right of parents to control the upbringing of their children. The latter right was established in two Supreme Court decisions in the 1920s, *Meyer v. Nebraska*[153] and *Pierce v. Society of Sisters*.[154] That parental rights continue to be fundamental is now beyond dispute, given the U.S. Supreme Court's 2000 decision in a child visitation case from the State of Washington in which a majority of the justices reaffirmed the earlier rulings regarding parental authority.[155]

In light of these considerations, policymakers face a dilemma. On the one hand, state constitutions require some accountability to avoid unconstitutionally delegating the core governmental responsibility for education to private organizations, and the *Pierce* ruling permits reasonable regulation of private schools. On the other hand, private schools can challenge accountability regulations as unreasonable under both the *Pierce* and *Farrington* rulings. Parents may challenge them as a denial of their constitutional rights to choose alternatives to the public schools and, in the case of religious private schools, as a violation of their free exercise of religion. Between the restrictions of the state constitution and those of the federal constitution lies a narrow policymaking channel for wise accountability measures that strike a balance between institutional accountability and autonomy. The problem for policymakers is knowing exactly what these are in the absence of empirical research and judicial precedent.

SUMMARY AND CONCLUSION

Educational privatization is not new. Private schools operating independently of the state have been around since before the founding of the Republic. But even this relatively pure form of privatization has not been devoid of state regulation. As we have seen, the U.S. Supreme Court long ago gave its blessing to reasonable state regulation of both public and private schools. Still, the amount of regulation demanded of these schools is relatively sparse. Consequently, in most states, private school autonomy largely remains intact.

At the opposite pole from the private school operated independently of the state is the public school operated by a non-profit or for-profit organization. These schools presumably remain public and are subject to the same regulatory framework as traditional public schools. Public charter schools operated by private entities are an exception, since the idea of the charter school is to be free from most state regulation. To saddle these schools with numerous accountability and reporting requirements defeats their purpose. Yet, there are limits as to how much autonomy the state can convey without violating state constitutional provisions that restrict the extent to which states can delegate a core governmental responsibility to private entities. The very first case to reach a state supreme court dealing with charter schools focused on this issue, and as we have seen, the Michigan Legislature avoided having its charter school law declared unconstitutional by adding provisions to assure public accountability. Whether these measures are correct is another matter. As the analysis of the legal framework in that state indicates, the accountability requirements are extensive for charter schools, most of which are operated under contract by for-profit private organizations.

It may well be that the most extreme form of educational privatization by the state – voucher programs encompassing private schools – will result in the least regulation. This has been the general experience with the Milwaukee and Cleveland voucher programs to date, though how this will play out in the long run is a matter of speculation. Still, participating private schools start out as relatively autonomous entities, and this may be enough to keep legislators from overburdening them with constricting regulation. Aside from the wisdom of doing so, the state has the authority to impose a variety of accountability measures on nonreligious private schools participating in publicly funded voucher programs. How much of this it can impose on religious private schools remains uncertain under current constitutional law.

A central question for private schools participating in voucher programs is whether they will be subject to the same constitutional constraints as public schools. Experience in the non-education context suggests when private entities undertake public functions in close collaboration with the state, they become the equivalent of the state for purposes of observing constitutional rights. As the U.S. Supreme Court has observed, the state can't be in the position of avoiding its constitutional obligations by contracting with a private entity.

The law regarding educational privatization is just beginning to develop, and it is more multi-faceted and complex than most public policy makers and educators realize. But this much is clear. To assume that private entities will be able to operate public schools or participate in publicly funded voucher programs without surrendering some of their autonomy seems naive, especially in the absence of research showing which accountability measures count and in the absence of judicial precedent to help point the way.

ENDNOTES

1. 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

2. *Pierce*, 268 U.S. at 534, 45 S.Ct. at 573.

3. 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646 (1927).

4. *Farrington*, 273 U.S. at 298, 47 S.Ct. at 409.

5. For a searching and mostly critical discussion of state regulation of private schools, *see* E. Vance Randall, *Private Schools and State Regulation,* 24 URB. LAW 341 (Spring 1992).

6. For a list of decisions favoring the state, *see New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 940, 950-51 [56 Ed.Law Rep. [82]] (lst Cir. 1989). The most notable exception to general deference to the state is a 1976 Ohio Supreme Court ruling, *State v. Whisner*, 42 Ohio St.2d 181, 351 N.E.2d 750 (Ohio 1976) (state board's minimum regulations for private elementary schools were so intrusive as to violate the parent's right to freedom of religion and their right to control their children's upbringing).

7. PRIVATE SCH. UNIVERSE SURVEY 1997-98, U.S. DEPT. OF EDUC. (1999). Of the 78 percent, 29.9 percent were Catholic and 48.2 percent were affiliated with another religion. The remainder were nonsectarian.

8. 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

9. Texas, for example, enacted a statute in 1999 prohibiting the state or political subdivision of the state from "substantially burdening a person's free exercise of religion" unless it can establish "a compelling governmental interest" that "is the least restrictive means of furthering that interest." Free exercise of religion means "an act or refusal to act that is substantially motivated by sincere religious belief." Penalties include injunctive relief, compensatory damages not exceeding $10,000 per incident, as well as reasonable attorney fees and costs. Aggrieved persons must give government 60 days notice before filing a lawsuit so that government may remedy the alleged burden, unless threat is imminent or the person did not have knowledge of the government's exercise of authority. The law is known as the Texas Religious Freedom Restoration Act, TEX. CIV. PRAC. & REM. CODE ANN. §§110.001 - .012 (West 2000). There is yet no interpretive case law.

10. Title VII of the 1964 Civil Rights Act, which prevents discrimination on the basis of race, color, religion, sex, or national origin, applies to organizations with fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceeding year. 42 U.S.C.A. § 2000e(b) (West 2000). The Act does not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a

particular religion to perform work. 42 U.S.C.A. § 2000e-1(a) (West 2000). Title III of the Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of disability and requires compliance with certain architectural access requirements, applies to private schools whether they receive federal financial assistance or not. 42 U.S.C.A. §§ 12181(7) (West 2000). However, that title also has a religious organization exemption, which states that the provisions do not extend to religious organizations or entities controlled by religious organizations. 42 U.S.C.A § 12187 (West 2000). Thus, if a religious organization controls the activities of a school, that school would not be subject to the terms of the ADA.

11. 42 U.S.C.A. §§ 1400 *et seq.* (West 2000). However, public agencies are responsible for providing some services to children who are enrolled by their parents in private schools. This matter is discussed *infra*.

12. 29 U.S.C.A. § 794 (West 2000).

13. 20 U.S.C.A. § 1681(West 2000).

14. Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43, 74 (1991).

15. Frank R. Kemerer, *The Legal Status of Privatization and Vouchers in Education, in* STUDYING EDUCATIONAL PRIVATIZATION (Henry M. Levin, ed., 2001 - forthcoming).

16. *See* Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 ED.LAW REP. [1] (Oct. 2, 1997), and Julie Vallarelli, Note, *State Constitutional Restraints on the Privatization of Education*, 72 B.U.L. REV. 381, 390-93 (1992).

17. Speculation has surfaced that the U.S. Supreme Court may revitalize the unconstitutional delegation doctrine to invalidate congressional legislation. Linda Greenhouse, *Justices May Review the Nondelegation Doctrine*, N.Y. TIMES, May 14, 2000. For a general discussion, see George Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 711-716 (1975).

18.Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.LAW & EDUC. 93 (1989). In an appendix, Hubsch lists the primary constitutional provision of each state that pertains to the establishment of an educational system.

19. 406 U.S. 205, 213, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 15 (1972). The Court also testified to the centrality of education to the purpose of government in *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed.2d 873 (1954): "Today, education is perhaps the most important function of state and local governments."

20. *Ridgefield Park Educ. Assn. v. Ridgefield Park Bd. of Educ.*, 78 N.J. 144, 393 A.2d 278, 287-88 (N.J. 1978).

21. *In re Charter Sch. Application*, 320 N.J.Super.174, 727 A.2d 15, 44 [133 Ed.Law Rep. [927] (N.J. Super. A.D. 1999).

22. *In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.*, 164 N.J. 316, 753 A.2d 687 [145 Ed.Law Rep. [431]] (N.J. 2000).

23. Citing *Jenkins v. Township of Morris Sch. Dist. and Bd. of Educ.*, 58 N.J. 483, 279 A.2d 619 (N.J. 1971).

24. Frank R. Kemerer, *School Choice Accountability*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY 174 (Stephen D. Sugarman & Frank R. Kemerer, eds., 1999).

25. MICH. CONST. art. VIII, § 2. A constitutional amendment on the Michigan November 2000 ballot to repeal this component of § 2 and institute a tuition voucher program for attendance at a nonpublic elementary or secondary schools failed by a wide margin. For a discussion of constitutional provisions that restrict funding to private schools in other states, *see* Kemerer, *supra* note 15 at 4-15. In 1998, Green noted that in addition to Michigan, 14 other charter school states have constitutional provisions either restricting funding to public schools or forbidding funding to private schools. Preston Green, *Are Charter Schools Constitutional?: Council of Organizations and Others for Education About Parochiaid v. Governor*, 125 ED.LAW REP. [1] (June 11, 1998), at 1 and Table 1 at 7.

26. MICH. CONST. art. VIII, §§ 2 and 3.

27. *Council of Organizations and Others For Education About Parochiaid v. Governor of Michigan*, 216 Mich.App. 126, 548 N.W.2d 909 [110 Ed.Law Rep. [402]] (Mich.App. 1996).

28. *Id.* 548 N.W.2d at 912-13.

29. MICH. COMP. LAWS ANN. § 380.501 (1) (West 2000).

30. *Id.* § 380.503(8).

31. *Id.* § 380.505(1) and (2).

32. *Id.* § 380.502(3)(h).

33. *Council of Organizations and Others for Education About Parochiaid, Inc. v. Governor*, 455 Mich. 557, 566 N.W.2d 208 [120 Ed.Law Rep. [265]] (Mich. 1997).

34. *Id.* 566 N.W.2d at 214, 217.

35. Lyndon G. Furst, *The Short But Very Curious Legal History of Michigan's Charter Schools*, 105 ED.LAW REP. [1] Jan. 25, 1996) at 11.

36. MICH. COMP. LAW. ANN. §§ 380.512a(4)(b)(iii) and .516a(1) (West 1996) (repealed 1997).

37. Green, *supra* note 25, at 6-15.

38. *Council of Organizations v. Governor*, 566 N.W.2d at 224 (Boyle, J., dissenting).

39. The relevant portion of the Fourteenth Amendment states, "All citizens born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Congress enacted an important civil rights statute, 42 U.S.C. § 1083, right after the Civil War to enforce the Fourteenth Amendment. The statute provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within its jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress [in federal court.]" The statute allows for injunctive relief and compensatory damages against public officials. The U.S. Supreme Court has interpreted the word "person" in this statute to encompass political subdivisions of a state such as a municipality or school district. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

40. In *Jones v. SABIS Educational Systems, Inc.*, 52 F.Supp.2d 868 (N.D. Ill.1999), the federal district court assumed without discussion that the foundation that received a charter to operate two charter schools in Chicago and the private company hired by the foundation to run the schools were both sufficiently public for purposes of 42 U.S.C. § 1983 to be required to recognize the constitutional rights of employees. This was true even though the charter and the foundation's agreement with SABIS specified that all instructional providers and other employees of the schools were employees of SABIS and not the foundation. The case arose when the African American principal of one of the schools was terminated after he allegedly protested the adoption of a discipline code that he believed violated the Individuals with Disabilities Education Act and protested SABIS's refusal to hire two African American teachers. The termination decision was made by the general counsel of SABIS in response to a directive from the SABIS Director General. According to allegations in the complaint, the foundation director offered advice on how to terminate the principal, assisted in interrogating staff members, and explained what to tell staff members and parents. Later, officials of both the foundation and SABIS allegedly took actions to cover up SABIS's true motivations for the termination by retaliating against staff members, conducting a "sham" audit, and suggesting to parents that the principal had embezzled money from the school. The principal sued both the foundation and SABIS, as well as various officials of both, alleging a number of violations of federal and state law. The trial judge dismissed the plaintiff's § 1983 claim against SABIS. "[T]o hold SABIS liable for its employees' unconstitutional acts, plaintiff must allege that SABIS's official policy or custom was the 'moving force of the constitutional violation.'" At 878 (citing *Iskander v.*

Village of Forest Park, 690 F.2d 126 (7th Cir. 1982), quoting *Monell v. Dept. of Soc. Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (U.S. 1978)). There was no allegation that the company had a policy or custom that was the moving force behind the officials' action. For the same reason, the claim against the charter school foundation was dismissed. With regard to the individual defendants, because the plaintiff was an at will employee, he had no property right in his employment, and the individual defendants had no obligation to provide him with due process. Nor was there any evidence in the complaint that the principal's liberty interest in a good reputation was damaged sufficiently to deny him the opportunity to find alternate employment. The plaintiff was directed to file an amended complaint.

41. Jason L. Wren, Note, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to These Innovative Schools,* 19 REV. LITIG. 135 (2000). *See also* Karla A. Turkeian, Note, *Traversing the Minefields of Education Reform: the Legality of Charter Schools,* 29 CONN. L. REV. 1365 (1997), and Justin M. Goldstein, Note, *Exploring 'Uncharted' Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution*, 7 S. CAL. INTERDISCIPLINARY L.J. 133 (1998).

42. *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed.2d 265 (1946) (private town officials' prohibition of distribution of religious literature within the town violated First and Fourteenth Amendment rights); *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) (private park restricting access to blacks violated Fourteenth Amendment); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968) (First and Fourteenth Amendments protect peaceful labor picketing in the driveways and parking areas of private shopping centers when the picketing is focused on a particular business in the shopping center).

43. *Hudgens v. National Labor Relations Board*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976) (expressly overruled *Logan Valley* in holding that there is no First or Fourteenth Amendment right to picket inside a private shopping mall). It is important to note, however, that the Supreme Court has recognized that states may use their own state constitutional provisions to grant persons broad access and free speech rights at privately-owned establishments. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (state constitutional provision permitting persons to exercise free speech on the property of private shopping centers do not violate owner's right under the First, Fifth, and Fourteenth Amendments because state can expand individual liberties through its own constitution).

44. *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982).

45. Often known as the *Blum* trilogy, these cases include *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), and *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). All three are discussed *infra*.

46. 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982).

47. 457 U.S. 922, 937, 102 S.Ct. 2774, 2753, 73 L.Ed.2d 482 (1982) (corporate creditor and its president acted under color of state law when using a state statute to secure prejudgment attachment of a debtor's property in state court without affording the debtor due process of law). Justice Byron White for the majority observed in a footnote that the Court was not holding that "'a private party's mere invocation of state legal procedures constitutes "joint participation" or "conspiracy" with state officials satisfying the § 1983 requirement of action under color of law.'" The holding was limited to the factual context of the case. 457 U.S. at 939, 102 S.Ct. at 2755, n. 21.

48. *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

49. *Lombard v. Eunice Kennedy Shriver Center for Mental Retardation, Inc.*, 556 F. Supp. 677, 680 (D. Mass. 1983).

50. For a discussion, *see* Goldstein, note 41, at 156-165. The U.S. Supreme Court ruled in 1987 that the U.S. Olympic Committee is not part of government for purposes of observing constitutional rights. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 107 S.Ct. 1971, 92 L.Ed.2d 427 (1987) (USOC did not violate the First Amendment rights of the San Francisco Arts & Athletics, Inc., in preventing use of the name "Gay Olympic Games," since USOC is not part of government).

51. *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 373, 397, 115 S.Ct. 961, 973, 130 L.Ed.2d 902 (1995).

52. *Id.* 513 U.S. at 400, 115 S.Ct. at 974-975.

53. 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 [4 Ed.Law Rep. [999]](1982).

54. Ralph Mawdsley, *State Action and Private Educational Institutions*, 117 ED.LAW. REP. [411, 416] (June 12, 1997).

55. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 13 F.Supp.2d 670, 129 Ed.Law Rep. [291] (M.D. Tenn. 1998), *rev'd*, 180 F.3d 758, 136 Ed.Law Rep. [145] (6th Cir.), *reh'g en banc denied*, 190 F.3d 705 (1999), *cert. granted*, ___ U.S. ___, 120 S.Ct. 1156, 145 L.Ed.2d 1069, 142 Ed.Law Rep. [34] (2000). The case raises the question of whether a state athletic association was acting as a state actor when it imposed penalties on a Christian private school for violating the association's recruiting rule. The private school contends that the rule forbidding contact between coaches and prospective students until the students had attended the private school for three days constitutes a violation of free speech. The trial court ruled in favor of the school. The court noted that the athletic association was intimately tied to the State Board of Education and that federal district courts in Tennessee had consistently construed the association to be a state actor. The trial court also cited the U.S. Supreme Court's decision in *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469, 50 Ed.Law. Rep. [17] (1988). In *Tarkanian*, the high court ruled five-to-four that the actions of the University of Nevada at Las Vegas in levying sanctions against its basketball coach

pursuant to NCAA recommendations did not convert the NCAA into a state actor. Writing for the majority, Justice Stevens drew on previous precedents to observe that "In the typical case raising a state-action issue, a private party has taken the decisive step that caused harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct, if it delegates its authority to the private actor, or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual action." 488 U.S. at 192, 109 S.Ct. at 462 (citations omitted). None of these conditions was present in the *Tarkanian* case. In fact, the University of Nevada and the Attorney General of Nevada strongly opposed the NCAA sanctions. The Court thus viewed NCAA as a private organization under whose rules the University of Nevada conducted its athletic program. However, in a footnote, Justice Stevens observed that the situation would be different for an athletic association composed of schools, many of them public, in the same state. 488 U.S. at 193, n.13, 109 S.Ct. at 462, n.13. The trial court cited this footnote in its decision in *Brentwood*. The Sixth Circuit reversed the trial court. The court noted that in the same footnote, Stevens observed that both the majority and dissent agreed that, even if a state actor in connection with public schools, an athletic association would not be acting as a government entity in its relations with private universities. Hence, the Sixth Circuit didn't find the *Tarkanian* ruling controlling. The appellate judges in *Brentwood* pointed out that conducting or coordinating interscholastic sports is not a core governmental power reserved to the states, that the athletic association receives no funding from the state, and that there is no authority authorizing Tennessee to conduct interscholastic athletics or to empower another entity to do so. Thus, the athletic association was not a state actor.

56. Notice of School's Intent to Participate, Milwaukee Parental Choice Program, Wisconsin Department of Public Instruction (1990).

57. *Davis v. Grover*, No. 90 CV 2576 (Dane Cir. Ct., Aug 6, 1991).

58. Telephone interview with Charles Toulmin, Administrator of the Milwaukee Parental Choice Program, Wisconsin Department of Public Instruction (September 27, 1999). Tuolmin annually notifies participating private schools that at the legislature's Joint Committee on Administrative Rules meeting on July 30, 1998, it was agreed that in exchange for the department's removal of the student rights list from the department administrative rule, school administrators and principals would sign a letter of acknowledgment. Toulmin's memo also advises that since approximately two-thirds of the choice schools participate through the Milwaukee Public Schools in the federal remedial Title I program, the department views these schools as subject to Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, Section 504 of the Rehabilitation Act of 1973, and the Family Educational Rights and Privacy Act. The letter of acknowledgment states that Judge Susan Steinglass ruled in *Davis v. Grover* that the stated student rights apply to private schools participating in the choice program and that the Department of Public Instruction (DPI) has an obligation to advise participating schools of this fact. This sentence appears at the bottom of the acknowledgment letter: "I hereby acknowledge I have received and read this letter which is not to be construed as an agreement between DPI and

the school, and further, is not to be construed as an admission that the student rights provision attached hereto apply to private schools participating in the choice program." Administrators sign and date the acknowledgment and return the letter.

59. *Id.* In his recent book, John Witte, the official evaluator of the Milwaukee voucher program, observes that from the beginning, private school operators were unwilling to give up their independent powers to expel students. Expulsion procedures for choice students, he notes, "were no different than for non-choice students." JOHN WITTE, THE MARKET APPROACH TO EDUCATION 88 (2000).

60. 691 F.2d 931 [7 Ed.Law Rep. [247]] (10th Cir. 1982), *cert. denied*, 460 U.S. 1069, 103 S.Ct. 1524, 75 L.Ed.2d 947 [19 Ed.Law Rep. [779]] (1983).

61. Robert M. O'Neil, *School Choice and State Action, in* SCHOOL CHOICE AND SOCIAL CONTROVERSY 215 (Stephen D. Sugarman & Frank R. Kemerer, eds., 1999).

62. This analogy is drawn from a longer discussion of both the Section 8 housing voucher program and the privatization of correctional facilities in Kenneth R. Godwin & Frank R. Kemerer, SCHOOL CHOICE TRADEOFFS (2001 - forthcoming).

63. 42 U.S.C.A. § 1437f(o) (West 2000)

64. 24 C.F.R. § 982.401 (2000).

65. 24 C.F.R. § 982.310(a)-(e) (2000).

66. *Rushie v. Berland*, 130 Misc.2d 816, 502 N.Y.S.2d 359 (N.Y. App. Div. 1986) (landlords are required to establish good cause for refusal to review lease of Section 8 housing assistance tenant); *Mitchell v. U.S. Dept. of Housing and Urban Dev.*, 569 F.Supp. 701 (N.D. Cal. 1983) (contention that good cause has to be shown in order to fail to renew lease of housing assistance tenant presented serious question deserving of litigation and preliminary injunction will issue to restrict landlord from evicting tenant).

67. *Gallman v. Pierce*, 639 F. Supp. 472, 481 (N.D. Cal. 1986).

68. The Section 8 housing voucher regulations now specify that notice delineating the reasons for termination of tenancy is required. 24 C.F.R. § 982.310(e)(1) (2000).

69. *Swann v. Gastonia Housing Authority*, 675 F.2d 1342 (4th Cir. 1982) (holding that tenant must have an opportunity to respond but no full hearing is required). *See also S.B. Partnership v. Gogue*, 1997 S.D. 41, 562 N.W.2d 754 (S.D. 1997), where the Supreme Court of South Dakota, citing *Swann*, held that "Undoubtedly, [tenant] had a protected property interest in her tenancy, as termination and subsequent eviction proceedings implicate state action." P. 757. Not only is a showing of good cause a statutory requirement, the court ruled, it also is a requirement of due process. Here, state eviction procedures satisfied both procedural and substantive (the good cause requirement) due process requirements for termination of the lease.

70. *Gorsuch Homes, Inc. v. Wooten*, 73 Ohio App.3d 426, 432, 597 N.E.2d 554, 558 (Ohio App. 1992). In this case, the court ruled in part that state eviction procedures did not satisfy the requirements of procedural due process under the Due Process Clause of the Fourteenth Amendment. Citing the U.S. Supreme Court's seminal decision in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), that state-conferred benefits cannot be taken away with complying without due process requirements, the Ohio appeals court concluded that before a tenant can be evicted from her apartment because of failure to pay a disputed repair bill, the tenant must be given an opportunity to confront and to cross-examine adverse witnesses before a neutral adjudicator.

71. *Franklin Tower One v. N.M.*, 157 N.J. 602, 725 A.2d 1104 (N.J. 1999). In the course of reaching its decision in favor of the tenant, the Supreme Court of New Jersey noted that while Congress did not require landlords to participate in the Section 8 program, states may do so in the interest of ending housing discrimination against low-income families. New Jersey has a statute that prohibits a private landlord from refusing to rent or lease a house or apartment because of the prospective tenant's source of income. N.J. STAT. ANN. § 2A:42-100 (West 2000). The court suggested, but did not rule, that this law might prohibit a private landlord from refusing to participate in the Section 8 program.

72. Mark Malapina, Note: *Demanding the Best: How to Restructure the Section 8 Household-Based Rental Assistance Program*, 14 YALE L. & POL'Y REV. 287 (1996).

73. *Id.* at 288.

74. Center for the Study of Education Reform, University of North Texas, Denton. June 2000. These data were obtained by contacting both state charter school officials and for-profit educational management organizations. Because some charters encompass multiple sites and because others are not yet fully functional, these figures should be treated with great caution. As of September 1999, 1,605 charter schools were operational in 31 states and the District of Columbia. RPP INTERNATIONAL, THE STATE OF CHARTER SCHOOLS 2000: FOURTH-YEAR REPORT, U.S. DEP'T. OF EDUC. 1, 11 (2000). In August 2000, the number had increased to 2069. CENTER FOR EDUCATION REFORM (Washington, DC). *Available on line* <http://www.edreform.com>.

73. *School District of Wilkinsburg v. Education Association*, 542 Pa. 335, 667 A.2d 5 [104 Ed.Law Rep. [1238]] (Pa.1995).

76. *Wilkinsburg Education Association v. School District of Wilkinsburg*, 146-FEB Pittsburg Law Journal 46 (Ct. Common Pleas, Allegheny County, February 1998). The relevant charter school provisions are PA. CONS. STAT. ANN. 24 P.S. §§ 17-1715-A and 17-1717-A (West 2000).

77. TEX. EDUC. CODE ANN. § 11.157 (West 2000).

78. Tex. Att'y Gen. Op. DM-355 (1995).

79. 20 U.S.C.A.§ 1412 (a)(10)(B)(ii) (West 2000).

80. 34 C.F.R. § 300.401(b) and (c) (2000).

81. *See, for example, Letter to Garvin*, 30 Indiv. with Disabilities Educ. Law Rep. 609 (May 14, 1998).

82. *Council of Children with Special Needs, Inc. v. Cooperman*, 501 A.2d 575 [29 Ed.Law Rep. [280]] (N.J. Super. Ct. App. Div. 1985), *petition for cert. denied*, 103 N.J. 290, 511 A.2d 665 (N.J. 1986).

83. *Ross v. Allen*, 515 F. Supp. 972 (S.D. N.Y. 1981).

84. 34 C.F.R. §§ 300.453 and .454 (2000).

85. 34 C.F.R. § 300.456 and .460 -.461 (2000).

86. *See generally* Laura Rothstein, *School Choice and Children with Disabilities, in* SCHOOL CHOICE AND SOCIAL CONTROVERSY 332, 337-339 (Stephen D. Sugarman & Frank R. Kemerer, eds, 1999).

87. 20 U.S.C.A. § 1413(a)(5) (West 2000). *See generally* Rothstein, *id*, at 334-341.

88. Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C. R. - C. L. L. REV. 302, 320 (1997). Heubert notes that state law may place responsibility for providing special education services on autonomous charter schools or on the school district in which the children with disabilities reside or, as in the case of Massachusetts, split the difference. In Massachusetts, autonomous charter schools are required to pay the costs of education children who can be served in other public school settings, but the district of residence has responsibility for those who need private school placement. MASS. GEN. LAWS ANN. Ch. 71, § 89(t) (West 2000).

89. Whether charter schools operated by for-profit organizations adequately comply with federal disability law is subject to some dispute. Several reports have surfaced in recent years showing that Edison Schools, Sabis International, and Beacon Management significantly short-change children with severe disabilities in Massachusetts in the interest of profits and that conflict-of-interest considerations prevent local and state authorities from intervening on behalf of parents. Nancy Zollers and Arun Ramanathan, *For-Profit Charter Schools and Students with Disabilities: the Sordid Side of the Business of Schooling*, PHI DELTA KAPPAN, December 1998. *See also* Peggy Farber, *The Edison Project Scores – and Stumbles – in Boston*, PHI DELTA KAPPAN, March 1998. *See generally* Rothstein, *supra* note 86, at 346-354.

90. "It is, in the end, not the private school's obligation but the public school's obligation to offer participating public school students a free appropriate education if they wish to exercise that right. It seems to me that this requires private schools to admit otherwise qualified handicapped students to the program without discrimination but still leaves to public schools the

obligation to guarantee the rights of handicapped students to free and appropriate placements." *Davis v. Grover*, *supra* note 57, at 23. The trial court's ruling applied only to nonreligious private schools, since they were the only ones eligible to participate in the original Milwaukee Parental Choice Program. In 1997 the program was expanded to encompass religious private schools. Presumably, the religious exemption in the Americans with Disabilities Act would apply to many of these institutions. *See supra* note 10. This being the case, it would appear that any of the religious private schools that receive no federal funds would be exempt from all federal disability law. *See supra* note 58.

91. OHIO REV. CODE ANN. 3313.977(B) (West 2000).

92. In Michigan, the number of charters that can be issued by public universities is capped at 150, with no more than half to be issued by any single university. The number of charters that can be issued by public school districts and community colleges, however, is not capped. MICH. COMP. LAWS ANN. § 380.502(1)(d) (West 2000).

93. Gary Sykes, et al., *The Michigan Experience: School Choice and School Change*, EDUC. WK., Feb. 9, 2000, at 38.

94. ARIZ. REV. STAT. ANN. § 15-183T (West 2000).

95. 1997 Mich. Op. Att'y Gen. 6956 (1996).

96. MICH. COMP. LAWS ANN. § 380.502 (6) (West 2000). According to one report, Central Michigan University secured $2,150,000 from charter school oversight in 1997-98, with expenditures totaling $1,858,000. Public Sector Consultants, Inc. and Maximus, Inc., Michigan's Charter School Initiative: from Theory to Practice (Public Sector Consultants, Lansing, Mich. 1999) at 27. *Available on line* <http:*www.mde.state.mi.us/reports/psaeval9901/psaeval.shtml. MDE*>.

97. Neither the State Board of Education nor the State Board of Charter Schools has statutory authority to charge fees for charter school oversight. However, local school districts have conditioned the granting of charters on receipt of a percentage of the per-pupil allotment the approved charter school receives. This process has been subject to abuse. Steve Stecklow, *Arizona Takes the Lead in Charter Schools – For Better or Worse*, WALL ST. J., Dec. 24, 1996, at A1.

98. ARIZ. REV. STAT. ANN. §§ 15-182, 15-183C (West 2000).

99. *Id.* § 15-183E6.

99. Gregg A. Garn, *Solving the Policy of Implementation Problem: The Case of Arizona Charter Schools*, 7 EDUC. POL. ANALYSIS ARCHIVES at 9-10 (1999) *Available on line* FTP: http:// epaa.asu.edu/epaa/v7n26.html Directory epaa/v7n26.html.

101. For a time, school districts on Indian reservations charged fees as high as $175,000 to issue charters to schools in other areas of the state. Stecklow, *supra* note 97, at A1. The practice has since been prohibited. ARIZ. REV. STAT.ANN. § 15.183C1(d).

102. ARIZ. REV. STAT. ANN. § 15-183B.

103. *Id.* § 15-183E.5.

104. Ariz. Att'y. Gen. Op. No. 195-10 (1995).

105. ARIZ. REV. STAT. ANN. § 15-183R.

106. *Id.* § 15-183(D).

107. *Id.* § 15.183E.

108. *Id.*

109. *Id.*

110. *Id* § 15.183E6.

111. *Id.* 15-183A and I.

112. *Id.* § 15-183C1(d).

113. BRYAN C. HASSEL, THE CHARTER SCHOOL CHALLENGE (1999), at 43.

114. Ron Suskind, *Michigan's School-Aid Crisis Offers Crash Course in Convergence of Tax and Education Revolts*, WALL ST. J., Nov. 30, 1993, at A18.

115. Leonard Wolfe, Public School Academy Authorizing Bodies: Chartering Authorities, Oversight Bodies and Fiscal Agents: a Framework for Oversight (Dykema Gossett, P.L.L.C. 1998). Document prepared for Central Michigan University, Eastern Michigan University, Ferris State University, and Grand Valley State University.

116. MICH. COMP. LAWS ANN. § 380.502(2) (West 2000).

117. MICH. COMP. LAWS ANN. §§ 380.501(1), .1281 (West 2000).

118. *Id* §§ 380.502(4), .503(4), .507(1).

119. Jerry Horn and Gary Miron, Evaluation of the Michigan Public School Initiative (Western Michigan University, Kalamazoo, Mich. 1999) at 61. *See also* Public Sector Consultants, Inc. and Maximus, Inc., Michigan's Charter School Initiative: from Theory to Practice (Public Sector Consultants, Lansing, Mich. 1999) at 26. *Available on line* <http:*www.mde.state.mi.us/reports/psaeval9901/psaeval.shtml. MDE*>.

120. EDUCATIONAL SERVICE PROVIDER POLICIES, CHARTER SCHOOLS OFFICE, CENTRAL MICHIGAN UNIVERSITY(1999).

121. MICH. COMP. LAWS ANN. § 380.507(1) and (2) (West 2000).

122. *Id.* § 380.502(3)(a)-(j).

123. Horn and Miron, *supra* note 119, at 58.

124. MASS. GEN. LAWS ANN. Ch. 71, § 89(a), (b) (West 2000.

125. *Id.* § 89(e), (j)(5).

126. *Id.* § 89(e).

127. *Id.* § 89(qq).

128. MASS. REGS. CODE, tit 603, §§ 1.01-1.13 (2000).

129. "[A charter school] has the freedom to organize around a core mission, curriculum, theme or teaching method, and is allowed to control its own budgets as well as hire (and fire) teachers and staff. In return for this freedom, a charter school must demonstrate good results within five years or lose its charter." MASSACHUSETTS SCHOOLS ACCOUNTABILITY HANDBOOK, MASSACHUSETTS DEPARTMENT OF EDUCATION (1999), *available* on line at <http://www.doe.mass.edu>

130. MASS. GEN. LAWS ANN., Ch. 71, § 89(gg).

131. MASSACHUSETTS CHARTER SCHOOLS HANDBOOK, DEPARTMENT OF EDUCATION (1999).

132. See Jesse H. Choper, *Federal Constitutional Issues*, *in* School Choice and Social Controversy 235 (Stephen D. Sugarman and Frank R. Kemerer, eds., 1999).

133. Kemerer, *supra* note 16.

134. The supreme courts of Wisconsin and Ohio have upheld the constitutionality of publicly funded vouchers programs encompassing religious private schools in Milwaukee and Cleveland, respectively. *Jackson v. Benson*, 218 Wis.2d 835, 578 N.W.2d 602 [126 Ed.Law Rep. [399]], *cert. denied*, 525 U.S. 997, 119 S.Ct. 466, 142 L.Ed.2d 419 (1998); *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 711 N.E.2d 203 [135 L.Ed.2d [596]] (1999). [However, the Cleveland voucher program has been declared unconstitutional by both the federal trial court and the U.S. Court of Appeals for the Sixth Circuit. *Simmons-Harris v. Zelman*, 72 F.Supp.2d 834 (N.D. Ohio 1999), *aff'd by divided vote,* 2000 FED App. 0411P (6th Cir. 2000).] The supreme courts of Washington State and Massachusetts have either ruled or opined against them. *Weiss v. Bruno*, 82 Wash.2d 199, 509 P.2d 973 (1973) (en banc), *modified*, 83 Wash.2d 911, 523 P.2d 915 (1974) (allowance

of attorney fees); *Opinion of the Justices to the House of Representatives*, 357 Mass. 846, 259 N.E.2d 564 (1970); *Opinion of the Justices to the Senate*, 401 Mass. 1201, 514 N.E.2d 353 [42 Ed.Law Rep. [881]] (1987). In Maine, New Hampshire, and Vermont, the supreme courts have ruled or opined against private school tuition reimbursement programs that have similarities to vouchers. *Bagley v. Raymond Sch. Dept.*, 1999 Me. 60, 728 A.2d 127 [134 Ed.Law Rep. [226]] *cert. denied*, ___ U.S.___, 120 S.Ct. 364, 145 L.Ed.2d 285 (1999); *Opinion of the Justices*, 136 N.H. 357, 616 A.2d 478 [79 Ed.Law Rep. [141]]; *Chittenden Sch. Dist. v. Vermont Dept. of Ed.*, 169 Vt. 357, 738 A.2d 539, [138 Ed.Law Rep. [858]] (Vt.), *cert. denied sub nom., Andrews v. Vermont Dept. of Ed.*, ___ U.S. ___, 120 S.Ct. 626, 145 L.Ed.2d 518 (1999). Litigation continues in state court on the Florida statewide voucher program. At this writing, the court of appeals reversed the trial court by holding that the program does not violate article IX, section 1 of the state constitution requiring the legislature to establish a uniform system of public free schools and remanding the case for trial on allegations of other constitutional violations. *Bush v. Holmes*, 2000 WL 1459744 (Fla. App. 1 Dist., Oct. 3, 2000). The Arizona Supreme Court has ruled in favor of a tax credit for contributions to nonprofit organizations that, in turn, make the money available for scholarships to religious and nonreligious private schools. *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 [132 Ed.Law Rep. [938]], *cert. denied*, ___ U.S. ___, 120 S.Ct. 284, 145 L.Ed.2d 237 (1999).

But the matter is much more complex than it would seem. Thus, while the high courts in Maine and Vermont ruled against tuition reimbursement programs, there is language in the opinion of each leaving open the possibility of redesigning the programs to meet constitutional deficiencies. Thus the Supreme Judical Court of Maine observed in *Bagley* "While it may be possible for the Legislature to craft a program that would allow parents greater flexibility in choosing private schools for their children, the current program could not easily be tailored to include religious schools without addressing significant problems of entanglement or the advancement of religion. It is up the Legislature, not the courts, to determine whether and how to attempt to structure such a program." 728 A.2d at 146. Similarly the Supreme Court of Vermont noted in *Chittenden* that "Schools to which the tuition is paid by the district can use some or most of it to fund the costs of religious education, and presumably will. We express no opinion on how the State of Vermont can or should address this deficiency should it attempt to craft a complying tuition-payment scheme." 738 A.2d at 562. It is clear that how a voucher program is designed has great implications for its constitutionality. Frank Kemerer, *The Constitutional Dimensions of Sch. Vouchers,* 3 TEX. FORUM ON C.L. AND C. R. 135, 178-79 (1998).

135. Jodi Wilgoren, *School Vouchers: A Rose By Other Name?*, N.Y.TIMES, Dec. 20, 2000, at A1.

136. WIS. STAT. ANN. § 118.165 (West 2000).

137. WIS. STAT. ANN. § 119.23(7)(a) (West 2000).

138. *Id.* §§ 199.23(3)(a), (7)(c).

139. For a fascinating discussion of the politics surrounding the Milwaukee voucher program and how they affected the expansion of the program to encompass religious private schools in

1995, *see* Chapter 7 in JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA'S FIRST VOUCHER PROGRAM (2000). Controversy surrounding Witte's involvement in the program as its state-commissioned evaluator played a role in the legislature's backing away from closely monitoring the program.

140. MILWAUKEE PARENTAL CHOICE PROGRAM: AN EVALUATION, LEGISLATIVE AUDIT BUREAU, STATE OF WISCONSIN (2000). *Available on line* at <http://www.legis.state.wi.us/lab/windex.htm>

141. Included among them are requirements regarding length of the school day and year, specification of curricular contents, teacher certification, student-teacher ratios, and participation in statewide student testing. OHIO ADMIN. CODE § 3301-35-04 (2000). The statewide testing requirement is found in OHIO REV. CODE ANN. §3301.16 (West 2000) and has been upheld as applied to private schools chartered by the state. *Ohio Association of Independent Schools v. Goff*, 92 F.3d 419[111 Ed.Law Rep. [734]] (6th Cir. 1996).

142. These are limited to length of the school day and year; pupil attendance reporting; a bachelor's degree for professional staff; a general list of courses of study; and compliance with state and local health, fire, and safety laws. Ohio Admin. Code § 3301-35-08 (2000). The Ohio Supreme Court decision striking down extensive standards imposed on religious private schools is *State v. Whisner*, 47 Ohio St.2d 181, 351 N.E.2d 750 (Ohio 1976). The court agreed with a "born again" fundamentalist Christian sect that the standards imposed on their school violated both parent free exercise of religion and the right of parents to control their children's upbringing. The court noted that the standards allocated instructional time "almost to the minute" in a prescribed curriculum, required that "all activities" of the private school must conform with board of education policies, and required school-community interaction contrary to the school's desire to remain separate from the community. At 765-767. *Whisner* is generally regarded as the exception to general judicial deference to state regulation of religious and non-religious private schools.

143. OHIO REV. CODE ANN. §3313.976(A) (West 2000).

144. *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991).

145. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (violation of the free exercise of religion for a city to prohibit animal sacrifices for religious purposes when other forms of killing animals are permitted, e.g., meat slaughtering, eradication of insects). In the state education context, *see, for example, Chance v. Mississippi State Textbook Rating and Purchasing Bd.*, 190 Miss. 453, 200 So. 706 (Miss. 1941) (failing to include private school students in a textbook loan program amounts to denial of equal privileges on religious grounds), and *Duram v. McLeod*, 259 S.C. 409, 192 S.E.2d 202 (1972) (per curiam), *appeal dismissed*, 413 U.S. 902, 93 S.Ct. 3060, 37 L.Ed.2d 1020 (1973) (exclusion of religious schools from a student college tuition assistance program would materially disadvantage the schools).

146. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 [101 Ed.Law Rep. [552]] (1995) (university refusal to allow student activity fees to be paid to third party printers of a student religious newspaper violates the Free Speech Clause of the First Amendment as unconstitutional viewpoint censorship).

147. *Witters v. Washington Depart. of Servs for the Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 [29 Ed.Law Rep. [496]] (1986).

148. *Witters v. State Comm'n for the Blind*, 112 Wash.2d 363, 771 P.2d 1119 [53 Ed.Law Rep. 278]] (Wash.), (en banc), *cert. denied*, 493 U.S. 850, 110 S.Ct. 147, 107 L.Ed.2d 106 (1989).

149. A majority of the present justices on the U.S. Supreme Court appears poised to uphold against an Establishment Clause challenge a publicly-funded voucher program that channels money to parents and gives them a wide variety of public and private schools, including those that are religious, from which to choose. Kemerer, *supra* note 134, at 161, n.151. The most recent U.S. Supreme Court decision upholding the channeling of Chapter 2 federal funds to public educational agencies for purchasing instructional and educational materials for use in religious private schools is the latest in a string of decisions that express support for government programs that are neutral regarding religion. *Mitchell v. Helms*, ___ S.Ct. ___, 120 S.Ct. 2530, 147 L.Ed.2d 660 [145 Ed. Law Rep. [44]] (2000). In that case, Justices Scalia, Rehnquist, Thomas, and Kennedy wrote, "If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support for religion.'" At 2544. Justices O'Connor and Breyer, who concurred in the judgment, were less expansive in the treatment of direct aid, but they too viewed indirect aid in a different light: "[w]hen the government provides aid directly to the student beneficiary, that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore wholly dependent on the student's private decision." At 2559. While recognizing the lessening of Establishment Clause concerns when state funding flows to individuals, the three dissenters, Souter, Stevens, and Ginzberg, nevertheless noted the relevance of the possibility of direct subsidies to religious schools "even when they are directed by individual choice." At 2583. Divertibility of public monies to religious purposes remains a major concern to them. What is unknown is the extent to which Justices O'Connor and Breyer subscribe to the impermissible diversion thesis in the context of indirect aid.

150. 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (no denial of free exercise of religion for a state to deny unemployment benefits to a worker who was terminated for using peyote in a Native American religious ceremony, since the law applied generally and was neutral regarding religion).

151. *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

152. 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

153. 262 U.S. 390, 43 S.Ct. 25, 67 L.Ed.2d 1042 (1923)

154. 268 U.S. 510, 45 S.Ct. 571, 696 L.Ed.2d 1070 (1925).

155. *Troxel v. Granville*, ___ S.Ct. ___, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (state law giving judges the authority to determine child visitation rights over parental objections intrudes on the Fourteenth Amendment right of parents to control the upbringing of their children).

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