



SPECIAL REPORT

FLAWS AND FAILINGS: A Preliminary Look at the Problems Already Encountered in the Implementation of the District of Columbia's New Federally Mandated School Voucher Program

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INTRODUCTION

In early 2004, Congress passed, and President Bush signed into law, an omnibus appropriations act that also created a new federally-funded school voucher program in the District of Columbia, the first such federally-funded voucher program in the country.¹ Under this program, for five years beginning with the 2004-05 school year, federal taxpayers will subsidize the tuition of low-income students in the District of Columbia who can gain admittance to religious and other private schools, up to a maximum of \$7,500 per year per student.² For fiscal year 2004, more than thirteen million dollars have been appropriated for the voucher program.

According to the voucher law, the primary purpose of the voucher program is to allow low-income students in D.C.'s public schools most in need of improvement (as defined by the federal law) to leave those schools and attend "higher-performing" schools.³ However, there is no requirement in the law that the private schools participating in the voucher program demonstrate that they are in fact "higher-performing" (e.g., by subjecting themselves to the same criteria applied to public schools under federal law). To the contrary, the Senate rejected an amendment offered by Senator Mary Landrieu that would have required private schools participating in the voucher program to be subject to some of the same requirements as public schools under the No Child Left Behind Act. Ironically, the voucher legislation uses the No Child Left Behind Act to define which *public* schools in D.C. are most in need of improvement and whose students are therefore given priority in the voucher program.

Moreover, although the voucher program is supposed to provide educational "choice" to low-income students, the law does not prohibit private schools from imposing admissions tests or other admissions requirements on voucher students, or from charging them tuition in excess of the maximum voucher amount of \$7,500 per year if in fact their tuition rates are higher.⁴ And while the vast majority of private schools

¹ See Pub. L. No. 108-199, the Consolidated Appropriations Act of 2004. The provision creating the D.C. voucher program was included in this multi-billion-dollar omnibus appropriations measure after a separate bill that would have created a voucher program in D.C. failed to receive Senate approval on its own.

² In order to be eligible to participate in the voucher program, a student must reside in the District of Columbia and must come from "a household whose income does not exceed 185 percent of the poverty line." Pub. L. No. 108-199, Div. C, Title III, Sec. 312(3).

³ Pub. L. No. 108-199, Div. C, Title III, Sec. 303.

⁴ Indeed, the Senate rejected an amendment offered by Senator Landrieu that would have prohibited private schools participating in the voucher program from charging tuition to voucher students in excess of the voucher amount.

participating in the D.C. voucher program are religious schools, there is also no provision in the law protecting voucher students who attend religious schools from being required to participate in religious worship or other religious activities that may be contrary to their own beliefs, or from prohibiting those schools, now funded with public monies, from discriminating against employees on the basis of religion.

The voucher program has been imposed on the District of Columbia over the objection of many local elected officials, including D.C. Congressional Delegate Eleanor Holmes Norton, who has repeatedly spoken out against a federally-mandated voucher program in D.C., not only because it is unsound and ignores the real needs of students in D.C., but also because it tramples on the right of the District's residents to govern themselves. And while the voucher program has the support of D.C. Mayor Anthony Williams and School Board Chair Peggy Cooper Cafritz, they do not speak for the majority of School Board members. To the contrary, on July 17, 2002, the D.C. School Board, by a unanimous vote except for the abstention of one member, passed a resolution opposing the imposition of a voucher program on D.C.⁵ As more recently stated by School Board member William Lockridge, "The current pro-voucher advocacy of our Board President Ms. Cooper Cafritz reflects her personal change of heart regarding this issue; however, the Board has spoken. We do not want vouchers in the District of Columbia."⁶ On July 24, 2003, six members of the D.C. Council and four members of the D.C. School Board sent a letter to the House Appropriations Subcommittee on the District of Columbia urging that vouchers be removed from the D.C. appropriations bill and explaining that funds were urgently needed for the city's *public* schools.⁷ The D.C. voucher program was passed by the House only after the Republican leadership held four separate votes on it, and held the vote open well beyond the normal time period in order to secure passage of the bill.⁸

The voucher program is being run by the U.S. Department of Education ("DOE") in cooperation with the Mayor of the District of Columbia, and administered by a private organization called the Washington Scholarship Fund. The Washington Scholarship Fund was created in 1993 to provide privately-funded "scholarships" to students in the District of Columbia to allow them to attend religious and other private schools. Its Board chair is Joseph E. Robert, Jr., "a local real estate mogul who has spent millions promoting school vouchers . . ."⁹ Robert has "ties to such national figures in the voucher movement as Wal-Mart heir John Walton and his American Education Reform Council; Howard Fuller . . . who now heads the Black Alliance for Educational Options; and the Institute for Justice . . ."¹⁰ At the Department of Education, the voucher program is overseen by the Office of Innovation and Improvement, which is headed by

⁵ See Letter of William Lockridge to Hon. Ted Stevens, Chair, Senate Committee on Appropriations (July 17, 2003).

⁶ Letter of William Lockridge to Hon. Ted Stevens, Chair, Senate Committee on Appropriations (July 17, 2003).

⁷ Letter of Councilmember Carol Schwartz, *et al.* to Hon. Rodney Frelinghuysen and Hon. Chaka Fattah (July 24, 2003).

⁸ H.R. 2765, Roll Call Votes 478, 479, 490 and 491.

⁹ Spencer S. Hsu, "How Vouchers Came to D.C.," *Education Next* (Fall 2004), at 47.

¹⁰ *Id.*

Assistant Deputy Secretary of Education Nina Rees, a staunch advocate of publicly-funded school voucher programs who worked at the Heritage Foundation and at the Institute for Justice before joining the Bush administration.

Given the very serious concerns raised by publicly-funded voucher programs generally and this program specifically, with millions of dollars in federal funds already at stake, and with millions more authorized but not yet appropriated, it is important to take a look at how the program is being implemented. Through a Freedom of Information Act request to the Department of Education, People For the American Way Foundation has obtained documents pertaining to the initial implementation of the voucher program.¹¹

From these documents, as well as from other publicly available information, it is clear that the voucher program has not been implemented as Congress intended, that it is not truly serving the priorities set out in the statute, and that, for this school year at least, it cannot even be evaluated as the statute requires. Among other things:

- while the voucher law gives the greatest priority to students attending D.C. public schools most in need of improvement as defined by federal law, it appears that *fewer than 75* of the more than 1,300 students who received vouchers came from those public schools
- at the same time, *more than 200 students already enrolled in private schools*, almost three times that number, have received vouchers
- so few students applied for vouchers that the voucher program cannot be evaluated this year by comparing the performance of students who are using vouchers with that of those students who sought but could not get vouchers, although the voucher law requires that such a comparison be made
- the vast majority of schools participating in the voucher program are religious schools, as to which there are serious concerns of government-funded discrimination based on disability and religion, as well as concerns regarding religious coercion; additionally, the Department of Education and the Washington Scholarship Fund have not given participating schools adequate information about applicable D.C. civil rights law protecting students and employees from discrimination on a number of bases, including disability and sexual orientation
- D.C. voucher proponents have attempted to obscure factors that limit how much “choice” is actually available to students

We caution that this is a preliminary report, that the voucher program is in its first year, and that the Department of Education refused to produce all of the documents responsive to our FOIA request. Nevertheless, the documents that have been provided to us indicate that the serious concerns raised about the D.C. voucher program prior to

¹¹ The Department withheld a number of documents responsive to our request, asserting that they were exempt from production under FOIA for various reasons, including that they were “predecisional.” Our administrative appeal concerning the improper denial of disclosure of those documents is currently pending.

its implementation were and remain valid. It is imperative that Congress and the District of Columbia take a hard look at how the millions of dollars in taxpayer funds already appropriated for the D.C. voucher program are being spent before any more public funds are appropriated.

- **DOE's documents indicate that of the more than 1300 students who were awarded vouchers for the 2004-05 school year, fewer than 75 attended D.C. public schools that are most "in need of improvement" -- the highest priority group specified by Congress**

According to the statute creating the D.C. voucher program, the primary purpose of the program is to enable low-income students to escape public schools that are in need of improvement as defined by the No Child Left Behind Act ("NCLB"), and to attend higher-performing schools.¹² To that end, Congress listed three priorities to be followed by the organization or organizations ("eligible entities") chosen to administer the voucher program, with the first priority given to low-income students in D.C. who attend public schools in need of improvement under NCLB:

In awarding grants under this title, the Secretary shall give priority to applications from eligible entities who will most effectively--

- (1) give priority to eligible students who, in the school year preceding the school year for which the eligible student is seeking a scholarship, attended an elementary school or secondary school identified for improvement, corrective action, or restructuring under section 1116 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6316);
- (2) target resources to students and families that lack the financial resources to take advantage of available educational options; and
- (3) provide students and families with the widest range of educational options.

Pub. L. No. 108-199, Div. C, Title III, Sec. 306.

In 2004, there were *fifteen* public schools in the District of Columbia that were "in need of improvement" under NCLB.¹³ Nonetheless, according to the documents provided to us by DOE, *only 74 students from those schools applied for vouchers.*¹⁴ While the documents do not reveal whether all of those applicants actually received a voucher, even assuming they did, this means that fewer than 75 of the 1,359 vouchers awarded for 2004-05¹⁵ -- *less than 6%* -- went to the students prioritized by Congress.

¹² Congress declared that the purpose of the voucher law is "to provide low-income parents residing in the District of Columbia, *particularly parents of students who attend elementary schools or secondary schools identified for improvement, corrective action, or restructuring* under section 1116 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6316), with expanded opportunities for enrolling their children in higher-performing schools in the District of Columbia." Pub. L. No. 108-199, Div. C, Title III, Sec. 303 (emphasis added).

¹³ See, e.g., Justin Blum, "D.C. Seeks Higher Profile for Vouchers," *Washington Post* (May 9, 2004).

¹⁴ E-mail from Babette Gutmann to Sally Sachar (June 9, 2004) and attached spreadsheet of applicant data.

¹⁵ Sewell Chan, "Many D.C. School Vouchers Go Unused," *Washington Post* (Sept.

At the same time, and as further discussed below, nearly three times that many vouchers -- 208 -- were given to students already attending private schools.

In a May 16, 2004 e-mail, Sally Sachar, the head of the Washington Scholarship Fund ("WSF"), expressed her hope that vouchers be given to all of the applicants from the 15 "needs improvement schools," particularly given the congressional priorities and "particularly because it really is NOT VERY MANY CHILDREN." E-mail from Sachar to Nina Rees *et al.* (May 16, 2004) (emphasis in original).¹⁶ WSF appears to have been very sensitive about the small number of vouchers that were awarded to students in the "needs improvement" schools, and certainly was not eager to share this information with the press, nor does it appear that the information was given out.

Indeed, in a June 9, 2004 e-mail from Sally Sachar entitled "Help for Press Release," concerning the press release that WSF was drafting to announce the number of applicants for vouchers, Sachar wrote: "Can/should we say anything about how many are from the 15 needs improvement. *Pretty sure we do not want to say this, but just wondering.*" E-mail from Sally Sachar to Babette Gutmann, Nina Rees, Michelle Walker, *et al.* (June 9, 2004)(emphasis added).

On June 10, 2004, WSF issued a press release announcing the number of students who had applied for vouchers. While WSF stated in the release that a total of 1,721 eligible students had applied for vouchers, and that students in the 15 "needs improvement" schools would receive the highest priority when the vouchers were awarded, WSF did *not* mention the very small number of applicants from those schools. In the *Washington Post* article the very next day, that number was not mentioned either.¹⁷ Instead, the *Post* reported that approximately 1,200 low-income students would receive vouchers, including about 200 students already enrolled in private schools.

No doubt D.C. voucher advocates will attempt to defend the very small number of voucher students from the "needs improvement" schools in the same manner that WSF has defended the relatively few number of voucher applicants overall, by stating that this is the first year of the program and claiming that there was little time for implementation. (See, e.g., WSF press release of June 10, 2004.) Nonetheless, in the same time frame that WSF obtained applications from only 74 students in the public schools "needing

1, 2004). According to this article, 1,359 students were notified in June 2004 that they had been awarded vouchers. Since that time, "the families of 290 had dropped out or not responded to efforts by program administrators to reach them." *Id.* As of the date of the article, 1,013 of the remaining students had been placed in voucher schools, with 56 still unmatched to a school.

¹⁶ The rest of this e-mail indicates that the program evaluators, whose goal Sachar described as being "a randomized study in every way possible," may have been arguing to place the applicants from the "needs improvement" schools into a blind lottery with other applicants, which would not have given the students from the "needs improvement" schools the statutory priority that Congress required. Indeed, Sachar wrote, "I really think the congressional intent of giving clear priority to this group, makes it difficult to justify purposefully NOT giving a scholarship to as many children in this category as slots allow" *Id.* (emphasis in original).

¹⁷ Justin Blum, "D.C. Vouchers Outnumber Applicants," *Washington Post* (June 11, 2004).

improvement,” there were more than 1,100 applicants from *other* public schools, and more than 500 applicants from private schools.¹⁸

Moreover, the documents reveal that WSF made concerted efforts to target students in the 15 “needs improvement” schools. For example, a WSF document states that they made “direct phone calls to families, many of whom were in our fifteen low performing schools. The calls [sic] estimated that 20% answered and showed definite interest. The other 80% were mildly interested . . . or just did not answer the phone. *We thought that was an excellent rate.* Next year, we hope to have the time to be more organized and track the results of our outreach more carefully.” E-mail from Ruth Bollinger of WSF to Bernice Stafford (June 8, 2004) (ellipsis in original; emphasis added). On Saturday, May 8, 2004, Sally Sachar reported to DOE that WSF that day had made an

executive decision . . . that we need a more pointed, aggressive, concerted and very specific strategy to target the 15 needs improvement schools. Naturally, a lot of our efforts to date have reached these school communities (80,000 plus fliers, mailings, phone call outs . . . broad media effort by FFC, us and DCPSC, paid radio and print media, press releases (free media), etc. *But we want to be sure that we have both done, and can say we have done, as much as we can with outreach to these 15 schools.* . . . Given the priority given to this group in the statute, we just cannot take any chance with this — from a programmatic, political, or press perspective. . . .

So, here is what we will do:

1. Extend the deadline for applications [sic] until Friday, May 14.
2. Do extensive leafletting at 15 schools on M and T . . .
3. Keep our office open evenings through Friday evening. . .
4. Talk on Monday about what else we will do as part of this targeted outreach — may do another meeting in the community next week on top of the two in SE on Monday. . . .

As the program operators, we just want to be 1000% sure that we have done whatever we can to reach our target families!

E-mail from Sally Sachar to Nina Rees, *et al.* (May 8, 2004) (emphasis added).¹⁹

¹⁸ See E-mail from Babette Gutmann to Sally Sachar (June 9, 2004) and attached spreadsheet of applicant data.

¹⁹ In a May 10, 2004 e-mail, Sachar wrote that they were extending the application deadline “to Friday” (May 14) and that “Nina [Rees] supports the extension, in particular, *because she wants to be sure we have done everything we can to reach out to the 15 needs improvement schools.*” E-mail from Sachar to Marsha Silverberg (May 10, 2004) (emphasis added). Rees did apparently reject one suggestion that Sachar had made “about other ways of reaching parents in the NCLB schools.” Sachar asked whether anyone had “talked to Mayor Williams and/or Kevin Chavous about sending a letter home (from one of them) with every child in the 15 schools -- telling the parents about the program . . . ?” E-mail from Sachar to Rees (May 10, 2004). Rees replied, “This is not a great idea. It accentuates the Mayor’s problems with DCPS. . . .” E-mail from Rees to Sachar (May 10, 2004).

Whether because of insufficient or misdirected efforts by WSF, time limitations, and/or lack of interest in the voucher program among D.C. parents, it is unclear exactly why WSF obtained so few applications from students in the “needs improvement” schools. However, whatever the reason or reasons, the fact remains that very few students from D.C.’s public schools most in need of improvement -- the students primarily targeted by Congress under the voucher program -- have been awarded vouchers for this school year.

- **A significant number of vouchers have gone to students who were *already* in private school, *and* WSF apparently wanted that number to be even higher**

According to the *Washington Post*, vouchers have been awarded for the 2004-05 school year to *208 students who were already enrolled in private schools*. S. Chan and V. Strauss, “For Voucher Program, The Lessons Begin,” *Washington Post* (Sept. 5, 2004). While this is approximately 15% of the total number of students who were awarded vouchers for this school year (1,359²⁰), and nearly three times the number who had been enrolled in public schools “in need of improvement,” the documents provided to us indicate that WSF wanted the number of private school students receiving vouchers to be even higher.

Before turning to those documents, we note that the very idea that students already enrolled in private schools would receive publicly-funded vouchers seems at odds with the purposes of the voucher program as stated by Congress. While the voucher legislation does not expressly prohibit vouchers from being awarded to students already enrolled in private schools, the first of the three priorities in the statute -- students attending public schools most in need of improvement -- completely excludes private school students, and the other two priorities are not genuinely served by awarding vouchers to students already attending private schools. As noted above, those two program priorities are “students and families that lack the financial resources to take advantage of available educational options” and “provid[ing] students and families with the widest range of educational options.” For students who are in fact *already* attending private schools and remain there, the voucher program is not expanding or widening their educational options at all.

Even the DOE seems to agree. In a set of Frequently Asked Questions written before the start of this school year and posted on DOE’s web site, DOE states that the voucher law does not preclude “children who are currently enrolled in private schools” from receiving vouchers. But DOE goes on to state:

However, they would not receive the priority for students enrolled in public schools identified for improvement, corrective action, or restructuring; nor would they be likely to receive the priority for students who lack the resources to take advantage of available educational options (*since they already have the*

²⁰ Sewell Chan, “Many D.C. School Vouchers Go Unused,” *Washington Post* (Sept. 1, 2004).

resources to attend a private school).²¹

This is exemplified by a story in the *Washington Post*, which reported that one of the students who received a voucher this year is in the eighth grade at Sidwell Friends, which charges \$22,415 a year for tuition and which this student has attended *since the fifth grade* “on a nearly full private scholarship.” S. Chan and V. Strauss, “For Voucher Program, The Lessons Begin,” *Washington Post* (Sept. 5, 2004) (emphasis added). For this private school student, and others like her, vouchers did not expand educational options but instead replaced private funds with taxpayer dollars. Senator Dick Durbin had warned his colleagues of this possibility, observing that the language of the voucher program legislation contained “no prohibition . . . that the 1,000 to 2,000 vouchers that are created . . . will all be given to children who are already in private schools.” Vol. 149 Cong. Rec. S 11953 (Sept. 25, 2003)(statement of Sen. Durbin).²²

Not only does the voucher legislation allow vouchers to be given to students already in private schools, *it also essentially leaves the number of such vouchers awarded up to the discretion of the program administrators*, subject only to the priorities set out in the legislation. Indeed, in a June 1, 2004 e-mail, Marsha Silverberg of DOE’s Institute of Education Sciences noted that there were “500 current private school students” seeking vouchers, and that “the number awarded scholarships *is up to the policy makers*. WE NEED THIS DECISION BY WEDNESDAY.” E-mail from Silverberg to Sally Sachar, Nina Rees, *et al.* (June 1, 2004)(emphasis added).²³

²¹ U.S. Department of Education, D.C. Choice Incentive Program, Frequently Asked Questions, No. 7 (emphasis added), <<http://www.ed.gov/programs/dcchoice/faq.html>> (visited Dec. 28, 2004). There may have been some dissension within DOE on this point. In an e-mail sent to DOE on Feb. 28, 2004, WSF said that it had been interpreting the statute to require priority for public school attendees “and only if there is room would students attending private schools be offered slots through the lottery. Please advise.” E-mail from Sally Sachar to Iris Lane (Feb. 28, 2004). In a reply from Thomas Corwin at DOE, Corwin stated that he read the statute as giving priority to the students attending the “needs improvement” schools and that “[a]ll other children — public, private, home-schooled, rising kindergartners — *would be treated equally*. One might surmise that 306(2), which gives priority to students and families that lack the resources to take advantage of educational options, would make it difficult for most private school students to qualify. But I don’t think you could structure the lottery explicitly to give lower priority to private school students.” E-mail from Thomas Corwin to Sally Sachar (Mar. 1, 2004) (emphasis added).

²² And in terms of whether the voucher program provides genuine “choice” for students, it should be noted that Sidwell Friends allocated only *one* slot for a voucher student. See, e.g., e-mail from Sally Sachar to Nina Rees (May 10, 2004) (“Sidwell is in by the way. . . They will take ONE slot but it is hugely symbolic”); e-mail from Sally Sachar to DJ Nordquist, *et al.* (June 10, 2004) (Sidwell is “only taking one slot.”).

²³ DOE’s Institute of Education Sciences is overseeing technical support for the voucher program as well as the congressionally required evaluations. See “Department Awards Contract for First Phase of Evaluation of D.C. Choice Program,” U.S. Department of Education Press Release (Mar. 29, 2004), available at <<http://www.ed.gov/print/news/pressreleases/2004/03/03292004a.html>> (visited Nov. 8, 2004).

WSF made a number of pleas to DOE to *increase* the number of private school students receiving vouchers, ostensibly to increase the total number of students receiving vouchers (and thus make the voucher program look more in demand).²⁴ For example, in a May 22, 2004 e-mail, Sally Sachar asked Nina Rees and Marsha Silverberg if it would

be acceptable -- if we give scholarships to all of the public school students -- to increase the private school number to 300 -- so we could hit 1000. I really think hitting 1000 is important, if less than 1/3 are private (AND WE HAVE NOT DEPRIVED PUBLIC SCHOOL CHILDREN OF SPACE), the story will be FINE, I think. And we are totally tracking with the legislation in terms of priority. I just ask you to think about this as you are designing the lottery. As the program implementers, this is VERY DEFINITELY our priority. Would still leave a lot of ROOM for next year! I really really really urge you to consider this!!!!²⁵

Two days later, Sachar wrote to Rees: "If we give out scholarships to 1,000 public school kids we would very much like to give out 250 or 275 private school scholarships. That is still a low number relatively [sic] to the number of public school kids, and I think very defensible in light of the statute and if no public school kids are denied. I know I need to discuss this with Michelle Walker [of the Mayor's office] and plan to." E-mail from Sally Sachar to Nina Rees, *et al.* (May 24, 2004).

In another May 24 e-mail from Sachar to Rees, Sachar noted the desire to "[g]ive out as many private school as we feel we can justify legitimately given the politics, which believe me I understand . . . remember I am one of THEM!!!! . . . I would like to have an understanding with you and Michelle Walker (and Nicole if need be) that we will make a decision about the private when we see how many public we have . . . Is that doable? That it could be 200 or possibly more if we have more public school kids, because then the ratio is less." E-mail from Sally Sachar to Nina Rees (May 24, 2004) (ellipsis in original). Rees had written to Sachar earlier that day to say that "we will have a hard time justifying giving more scholarships to private school kids *b/c people (not Rooney but [Senator Dianne] Feinstein) will think the system was rigged from the start to give preference to the kids who were getting WSF scholarships before.*" E-mail from Rees to Sachar (May 24, 2004) (emphasis added).

It is clear from the above correspondence that both the DOE and WSF recognized the "political" sensitivity of giving vouchers to students already attending private schools. Indeed, Sally Sachar stated in a June 1, 2004 e-mail to Nina Rees,

²⁴ See, e.g., E-mail from Sally Sachar to Nina Rees *et al.* (May 16, 2004) ("Is there any way we can increase the number of slots for private school students to closer to 275 or 300 . . . I do think if we do not make a dent in the appropriation there will be concerns . . . lack of the big 'mo' if you will.") (second ellipsis in original).

²⁵ Sachar had expressed similar thoughts in a May 16, 2004 e-mail: "Is there any way we can increase the number of slots for private school students to closer to 275 or 300 -- still a relatively low percentage? . . . While I TOTALLY TOTALLY agree with the notion of not having a disproportionate number of scholarships for private schools, I think it is important that we give out a hefty amount of scholarships this year." According to Sachar, the eligible students in the private schools "are just as financially needy as the others."

Michelle Walker and others regarding the drafting of a press release that WSF intended to issue to announce the number of students who had applied for vouchers: “We will have to decide how much we say preemptively about public school vs. private school students (we will definitely get asked this question, but we can decide whether it makes more sense to put it out there affirmatively or wait to be asked.) The number of private school students will be pretty small relatively speaking.”

According to one e-mail, Nina Rees of DOE and Michelle Walker of the Mayor’s office did not want the WSF press release to state specifically how many vouchers would be going to students already in private schools. “Nina and Michelle thought we should not state how many we will give to children already in private schools. In fact there are legal reasons for not locking into a number, but they thought it was better just not to be specific at all here.” E-mail from Gregory McCarthy (D.C. government) to Sally Sachar, *et al.* with Sachar comments (June 9, 2004).

In a June 10, 2004 e-mail exchange, Sally Sachar reported to Nina Rees that she had spoken with “Justin” (apparently Justin Blum of the *Washington Post*) and that “[h]e was very interested in the private school slot issue and I explained that this was a policy matter and a matter of balancing different priorities against legislative intent.” Rees also talked to Blum and told Sachar that he had told her (Rees) that Sachar had told him that it was “our” (DOE’s) policy call, which clearly Rees was disturbed about. Sachar replied that “I said over and over in NO uncertain terms that it was a joint decision!! Do I need to call him back?” Rees replied: “he may have just been fishing for something. I told him it was a joint decision. Just wanted to make sure *b/c I don’t want to be left holding that bag.* I thought we all agreed to it.” (Emphasis added.)

- **The vast majority of the voucher schools are religious schools, as to which there are serious concerns regarding government-funded discrimination on the basis of disability and religion, as well as religious coercion; also, DOE and WSF have failed to give voucher schools adequate guidance on applicable civil rights laws**

The vast majority of private schools that D.C. students with vouchers are attending this school year are religious schools.²⁶ Discrimination by such schools against voucher students with disabilities is a distinct possibility, given how WSF and DOE have explained the law to those schools. In a statement of “Frequently Asked Questions” posted on DOE’s website (and incorporated by WSF in its own set of FAQs to voucher schools), DOE has issued a very carefully crafted answer addressed to religious schools to the question of whether students with disabilities “have an equal right to participate in this program.” According to DOE,

The entity that administers this program must select students who are eligible to

²⁶ WSF’s June 10, 2004 press release stated that of the 50 private schools participating in the voucher program as of that date, “44% are Archdiocese schools, 30% are non-sectarian private schools, and the remaining 26% are other sectarian schools.” According to a WSF press release issued on Sept. 1, 2004, three more private schools had decided to participate in the voucher program. See <<http://www.washingtonscholarshipfund.org/090104.asp>> (visited Dec. 27, 2004).

participate through a lottery that does not discriminate on the basis of disability and will help place those students in schools that best meet their needs. The issue of whether a student with a disability must be given an equal opportunity to attend a particular, participating private school is more complicated. *No Federal law forbids a participating religious school from discriminating against students with disabilities in admissions*, assuming the school does not receive Federal financial assistance under other programs.²⁷

In other words, according to DOE and WSF, although a student with a disability cannot be barred from securing a voucher through the lottery, he or she *can* be denied admission to a participating religious school because such discrimination is not prohibited by federal law, which certainly would deprive that student of the educational “choice” that vouchers are supposed to provide.

Whatever the limitations of federal anti-discrimination law, however, both DOE and WSF have failed to inform religious schools participating in the voucher program that the *District of Columbia Human Rights Act* -- which applies in relevant part to any private as well as public “educational institution” in D.C. -- prohibits them from discriminating against voucher students on the basis of disability by denying, restricting, abridging, or conditioning the use of or access to any of their “facilities, services, programs, or benefits.” D.C. Code Title 2, Sec. 2-1402.41.

Inexcusably, even beyond the specific question regarding students with disabilities, both DOE and WSF have completely omitted any reference to the D.C. Human Rights Act -- the city’s preeminent civil rights law -- in their separate discussion of “civil rights requirements” that will apply to private schools participating in the voucher program.²⁸ Instead, DOE and WSF have limited the guidance they have given to voucher schools to the federal voucher law, which does not protect students against discrimination on as many bases as does the D.C. Human Rights Act, and does not protect employees in the voucher schools at all.²⁹

²⁷ U.S. Department of Education, D.C. Choice Incentive Program, Frequently Asked Questions, No. 14 (emphasis added), <<http://www.ed.gov/programs/dcchoice/faq.html>> (visited Dec. 28, 2004). The same answer was given to voucher schools by WSF in a set of Frequently Asked Questions, at 5 (Apr. 28, 2004), and posted on its web site, <<http://www.dcscholarship.org/schoolqa.php>>(FAQs as of May 13, 2004)(visited May 27, 2004). In each case, the answer went on to state that the Americans with Disabilities Act prohibits non-religious private schools from discriminating against students with disabilities. In a set of FAQs issued by WSF for the benefit of families interested in the voucher program, WSF stated, “Participating schools must follow federal laws that protect students with disabilities, but those laws differ depending upon whether a private school is religious or if it receives other financial aid from the federal government. If your child has a disability, please contact WSF for more information.” See “Frequently Asked Questions About the Opportunity Scholarship Program,” <<http://www.dcscholarship.org/familyfaq.php> (as of Aug. 27, 2004) (visited Dec. 30, 2004).

²⁸ See U.S. Department of Education, D.C. Choice Incentive Program, Frequently Asked Questions, No. 13 <<http://www.ed.gov/programs/dcchoice/faq.html>> (visited Dec. 28, 2004); and WSF Statement of Frequently Asked Questions, at 6 (Apr. 28, 2004).

²⁹ The D.C. Human Rights Act, for example, prohibits private schools in D.C. from

At the very least, DOE and WSF should immediately revise the written guidance they have published concerning civil rights laws applicable to religious and other private schools participating in the voucher program, and explain to them the applicability and substance of the D.C Human Rights Act, particularly insofar as it prohibits employment discrimination as well as discrimination against students on the basis of disability and other characteristics. Given the misleading information that they have previously published, the new guidance should be sent to each of the private schools currently participating in the voucher program and to any additional schools that may have expressed an interest in participating next year.

In keeping with their mission to inculcate students in the beliefs and practices of a particular faith, sectarian schools typically infuse religion and religious worship into the school day.³⁰ Religious coercion is therefore also a possibility at religious voucher schools. Unlike the Wisconsin statute governing the Milwaukee voucher program, which allows parents of voucher students to “opt” their children out of “any religious activity” in the voucher schools, Wis. Stat. §119.23(7)(c), the D.C. voucher law has no provision protecting students in this manner, except that voucher schools cannot discriminate against voucher program applicants or participating students based on religion (or race, color, national origin, or sex).

Employment discrimination on the basis of religion is another possibility at religious schools participating in the voucher program. For example, all applicants for employment in an Archdiocesan Catholic School must sign a “statement of acceptance of guiding principles,” agreeing to “teach and exemplify” a stated set of guiding principles that include: “As Christian institutions committed to the teachings of the Catholic Church, Catholic schools prepare students to respond in faith to Jesus Christ and to understand his message [and] to view human existence in terms of divinely appointed goals”³¹ It cannot be doubted that some non-Catholics would not be comfortable signing such a statement as a prerequisite for employment. In addition, the Archdiocese of Washington states on its web site that “applicants wishing to be considered for the position of principal of a Catholic school must be practicing Catholics in good standing.”³²

While religious schools are permitted under Title VII to engage in religious discrimination in hiring when using private funds, serious constitutional issues are raised when those private schools receive public funds. The law is unsettled on this point; at

discriminating against students and employees on the basis of sexual orientation.

³⁰ For example, according to Holy Redeemer Catholic School, a pre-K to 8th grade school that is participating in the voucher program, “Religion plays an integral part in everything we do. In addition to the daily Religion class, students participate in School Mass, Prayer Services and other Church liturgies.”

<<http://holyredeemer.homestead.com/files/Curriculum.htm>> (visited Jan. 27, 2005).

³¹ Archdiocese of Washington, Application for Employment in an Archdiocesan Catholic School, available at: <http://www.adw.org/education/teach_app.pfd> (visited Dec. 29, 2004).

³² Catholic Schools of the Archdiocese of Washington, Procedures for Application for School Employment, available at <http://www.adw.org/education/teach_procedures.pdf> (visited Dec. 29, 2004).

least one lower court has held that the Title VII exemption cannot properly apply to positions that are funded with government dollars. See *Dodge v. Salvation Army*, 1989 U.S. Dist. LEXIS 4797 (S.D. Miss. 1989). Federal taxpayers should not be required to subsidize private institutions that engage in religious discrimination in employment, however justifiable that discrimination may be for an institution when it is operated solely with private funds.

- **The Archdiocese of Washington apparently would not give final agreement to participate in the voucher program until it received assurance from DOE that it could raise tuition for new students**

Under the new voucher program, federal taxpayers are paying as much as \$7,500 annually in tuition and fees for each voucher student attending a private school. Documents provided to us by DOE indicate that the Archdiocese of Washington would not agree to have its schools participate in the voucher program until it had received assurance from the Department that it would be lawful for it to raise tuition rates for *new* students. The fact that the proposal by the Archdiocese covered only new students indicates that the contemplated tuition hike would allow the Archdiocese schools to capitalize on the new voucher program by obtaining more in taxpayer funds than they otherwise would have.

According to a letter sent by the DOE's General Counsel on March 9, 2004 to Dr. Patricia Weitzel-O'Neill, the Superintendent of Catholic Schools of the Archdiocese of Washington, Weitzel-O'Neill had sent a memorandum dated February 27, 2004 to DOE "concerning the plans of the Archdiocese of Washington for charging tuition and fees to students attending Archdiocesan Catholic Schools in the District of Columbia and whether those plans comply with" the provision of the D.C. voucher law prohibiting participating private schools from charging voucher students more in tuition and fees than the schools customarily charge to other students.³³ DOE's response to the Weitzel-O'Neill memorandum indicates that the Archdiocese was apparently considering ways to increase its tuition and fees with the result of increasing the public monies it would get from voucher students.

According to DOE's response, the Archdiocese memo set out two options. Under Option A, the "Cost Based Tuition Model," the Archdiocese "would raise tuitions to represent the actual costs of educating students, *but would 'grandfather' families currently enrolled so that those families would continue to be charged the current tuition. Only newly entering families would be charged the new cost-based tuition.*" (Emphasis added.) DOE opined that this *would be* consistent with the voucher law, so long as "new families of both scholarship and non-scholarship students will be charged the same cost-based tuition and fees; and any financial assistance to non-scholarship students is based on an individual assessment of need or merit, and not an across-the-board subsidy to offset the increase in tuition."

Under Option B, the "Tuition Plus Fees Model," different fees would be charged

³³ Letter from Brian W. Jones, DOE Office of the General Counsel, to Dr. Patricia A. Weitzel-O'Neill (Mar. 9, 2004). A FOIA request that we submitted to DOE in November 2004 for a copy of Weitzel-O'Neill's Feb. 27, 2004 memorandum is still outstanding.

to different students, “to cover the costs of the services needed by the student...[F]ees will cover the per pupil cost of all academic programs outside the required curriculum...” Examples were given for remedial and language programs for ESL students. Again, DOE opined that this would be consistent with the voucher law, so long as voucher and non-voucher students “with comparable needs and services are charged comparable tuition and fees” and “the fees will be assessed for scholarship students only for services that they in fact need and receive.”

DOE ended the letter by saying “We hope that with this letter indicating the acceptability of your tuition and fees options, we may look forward to welcoming the Archdiocesan Catholic Schools of the District of Columbia to the D.C. School Choice Program.”³⁴

We do not know whether the Archdiocese has actually put either of these “options” into effect — raising tuition for *new* students only and/or changing the schools’ fee schedules.³⁵ If so, the schools would be receiving more public funds from the voucher program than they otherwise would have if tuition had remained at the rates in effect prior to the implementation of the voucher program. The voucher program, however, is supposed to be about giving low-income children greater educational opportunities, not subsidizing private schools with public funds.³⁶ Congress and the District of Columbia should investigate whether any private schools participating in the voucher program have taken advantage of the program and federal taxpayers in this manner.³⁷

³⁴ It appears that having the Archdiocese schools participate in the voucher program was extremely important to those running the program. According to one WSF e-mail, the Archdiocese was “begged to add slots.” E-mail from Sally Sachar to Clint Bolick (May 28, 2004).

³⁵ The tuition rates for 2004-05 that are published on the Archdiocese web site, www.adw.org (visited Dec. 28, 2004), do not distinguish between “new” students and those previously enrolled (although some of the schools charge higher tuition for non-Catholics and/or non-parishioners).

³⁶ The Archdiocese of Washington schools may not have been the only schools to contemplate increasing tuition in light of the voucher program. Documents provided to us indicate, for example, that the Academy For Ideal Education apparently considered raising its Lower School tuition from \$5,170 to \$7,500 (a 45% increase), and the Anacostia Bible Church Christian School apparently considered raising its tuition for first graders from \$4,610 to \$6,610 (a 43% increase). See e-mail from Ethel Morgan of WSF to Sally Sachar (May 24, 2004). The documents do not reveal whether these increases were put in place.

³⁷ It appears from the documents provided to us that WSF reviewed certain private schools that planned to raise tuition by a specific triggering percent in order to see if the increases were justified, but the documents do not detail how WSF evaluated any such increase. The documents do indicate that WSF was reluctant to set the trigger at an amount that would include the Archdiocese schools. See, e.g., e-mail from Sally Sachar to Nina Rees, *et al.* (May 24, 2004) (“This is the situation for the 3 schools getting reviewed. . . I plan to increase the school enrollment trigger to 30% and the tuition increase to 25% (don’t want to inadvertently capture an archdiocese school and these schools are SO beyond those numbers.)”).

- **DOE has already acknowledged that the voucher program cannot be evaluated this year in the manner required by Congress**

Through the voucher legislation, Congress has required that DOE and the Mayor's office "shall jointly select an independent entity to evaluate *annually* the performance of students who received scholarships under the 5-year program under this title, and shall make the evaluations public . . ." Sec. 309(a)(1). The legislation mandates that DOE "ensure that the evaluation is conducted using the strongest possible research design for determining the effectiveness of the programs funded under this title that addresses the issues described in paragraph 4," which include a comparison of "the academic achievement of participating eligible students . . . to the achievement of students in the same grades in the District of Columbia public schools; *and* the eligible students in the same grades in the District of Columbia public schools who sought to participate in the scholarship program but were not selected." Pub. L. No. 108-199, Div. C, Title III, Sec. 309(a)(2) and (a)(4)(emphasis added).

By DOE's own admission, the voucher program cannot be evaluated this year as Congress has mandated. Because so few students applied for vouchers, evaluators cannot compare the academic achievement of students who received vouchers with students in the same grades who sought vouchers but did not receive them, because the latter control groups do not exist. Marsha Silverberg of DOE's Institute of Education Sciences acknowledged this in a June 10, 2004 e-mail to Sally Sachar concerning expected press questions about the evaluation, and explained that WSF could reply:

the Department will be evaluating the program, including testing and tracking the progress of students who applied and received scholarships this year. If anyone asks, we would say that we will compare the performance of this year's students to the performance of DCPS students, as required by the law. *There is not an adequate control group this year for a comparison of applicants who did and did not receive scholarships*, but we anticipate having one for next year's cohort.

(Emphasis added.)³⁸

The documents provided to us indicate that the small number of applicants created some tension between those who wanted to give out as many vouchers this first year as possible (for obvious political purposes), and the evaluators who were seeking to maximize slots for the next school year in the hopes of having a genuine control group and being able to evaluate the voucher program in a meaningful way.

For example, in an e-mail dated May 24, 2004, Marsha Silverberg wrote that "For the evaluation, we need to conserve as many slots and potential applicants for next year's lottery as possible. . . I know there are conflicting priorities -- you, understandably,

³⁸ The next day, the *Washington Post* reported that "[f]ederal officials had planned to assess the program's effectiveness by comparing the performance of voucher recipients to that of students who wanted grants but were forced to remain in public schools. Because of the low number of applicants, such a study will not be possible in the first year, federal officials said." Justin Blum, "D.C. School Vouchers Outnumber Applicants," *Washington Post* (June 11, 2004).

want to fill as many slots as possible this year, while we want as many available as possible for a lottery next year.” E-mail from Silverberg to Sally Sachar and Nina Rees (May 24, 2004). On June 1, 2004, Silverberg wrote, “Because so few students will be denied scholarships thru the lottery, it is not possible to use this year’s applicants for an evaluation of the program’s impact or effectiveness. In order to meet Congress’ intent, it will be VERY important that next year, WSF generate as close to 2,000 public school applicants as possible. In order to detect impacts, if there are any, we need 800-1000 students assigned to receive scholarships next year, and a similar number (or slightly less) assigned to not receive scholarships.” E-mail from Marsha Silverberg to Sally Sachar *et al.* (June 1, 2004).

Similarly, Marsha Silverberg wrote on June 3, 2004, “Our objective is to make sure we can actually do a rigorous evaluation with next year’s cohort; that means ensuring a large number of applicants (1600-2000) and 800-1000 scholarships (and slots) for public school lottery winners next year.” E-mail from Silverberg to Sally Sachar, *et al.* (June 3, 2004). According to Silverberg, “A waiting list or preferred treatment for this year’s non-recipients will contaminate the lottery and reduce the slots available to lottery winners next year. If we thought we’d have many more applicants and slots than needed next year, we could let the current non-recipients in outside the lottery. But we think it will be hard, as it is, to get 2000 applicants and 800-1000 slots for lottery winners, so we strongly suggest that you simply ask those families to re-apply and be part of the lottery next year.” *Id.*

On May 24 Silverberg wrote that if 1200 “scholarships” were given out this year: “[e]ven with attrition that barely leaves the funds available next year to have at least a 800 public school treatment group (who are awarded scholarships) and 800 control group students. *Those are the numbers we need to make sure the evaluation can find any program impact.* Fewer than that number means that, if there is any impact, we won’t be able to detect it statistically. To me, that would be the very worst possible scenario.” E-mail from Marsha Silverberg to Sally Sachar, Nina Rees, *et al.* (May 24, 2004).

The relatively few number of students who applied for vouchers for 2004-05 has presented DOE not only with a problem concerning the mandatory evaluation, but also with a public relations problem. For example, DJ Nordquist, the Deputy Director of DOE’s Office of Public Affairs, advised Sally Sachar in May 2004 to be “very, very careful with the national media (and CBS News in particular). *We obviously have some vulnerabilities with the DC Choice program since it appears that it is going to be undersubscribed,* which is a point that the media is certainly going to exploit . . .” E-mail from DJ Nordquist to Sally Sachar (on or about May 24, 2004) (emphasis added).

And in correspondence that Nina Rees had on May 21, 2004 with Clint Bolick, a founder of the Institute for Justice and one of the country’s leading proponents of school vouchers, Rees had to disabuse Bolick of the impression that all was going well with the applications. Bolick had written: “[a]t least for now, the reports we’re getting is [sic] that parent outreach is going very well -- lots more applications than slots, parents are getting info, etc.” E-mail from Clint Bolick to Nina Rees (May 21, 2004). Rees replied: “We should talk. It is good that you are hearing positive news. It’s just that most of the parents who have signed up are not actually at or below 185% of the poverty line or there are problems with their applications. I think (and I am low balling here) after all is said and done we will only place 800-1000 kids . . . I just can’t see how we will be able to

do more. And just fyi, we don't really have more applications than slots. We do in high school and middle schools b/c we have so few private school slots but we don't have oversubscription in elementary schools." E-mail from Nina Rees to Clint Bolick (May 21, 2004) (ellipsis in original).

DOE was careful to keep certain members of Congress informed about the implementation of the voucher program. For example, on May 25, 2004, Nina Rees told Sally Sachar that before WSF issued its press release announcing the number of voucher applicants and related data, "there are some members [of Congress] that we need to give advance notice to and I have promised them they would get these details before they read about them in the Post." In a separate e-mail of the same day, Rees wrote to Sachar that "Spector (ugh) wants it and while I hate the guy, we need to be nice to him I am told." E-mail from Rees to Sachar (May 25, 2004) (spelling as in original).

- **The Washington Scholarship Fund was essentially chosen by default to administer the voucher program**

In enacting the federal legislation creating the D.C. voucher program, Congress envisioned that the program would be administered by one or more "eligible entities" chosen "on a competitive basis." Pub. L. No. 108-199, Div. C, Title III, Sec. 304 (a). On February 4, 2004, pursuant to that legislation, DOE issued a notice in the Federal Register inviting applications from entities seeking an award to administer the voucher program. 69 Fed. Reg. 5434 (Feb. 4, 2004). While this solicitation also envisioned the competitive process required by the statute, no genuine competition in fact occurred. According to the documents provided to us by DOE, the Washington Scholarship Fund was the only local entity to apply to administer the voucher program,³⁹ and only one other applicant, located in Chicago, submitted an application at all.⁴⁰

³⁹ WSF's application, dated March 5, 2004, stated that it was submitting its proposal "in partnership with Capital Partners for Education, DC Parents for School Choice, the Greater Washington Urban League, and the Parent Group." Letter from Sally J. Sachar, WSF, to Iris Lane, Department of Education (Mar. 5, 2004).

⁴⁰ A DOE e-mail dated Friday, March 5, 2004, said that "[a]s of 4:30 p.m. today, the closing time and date for our competition, we have 1 application only -- from the Washington Scholarship Fund. That's it." E-mail from Margo Anderson to Nina Rees, *et al.* (Mar. 5, 2004). However, a DOE e-mail sent on Monday morning, March 8, 2004, said that the closing date for applications had been extended to the close of business that day "because of system problems that the Department was experiencing around the closing time. Evidently, there is a second applicant (from Chicago) in the process of finalizing an application. We should have that application electronically by sometime this afternoon. We'll have to determine if it's eligible first and if it is, we'll have the panel review that application along with the one from the Washington Scholarship Fund." E-mail from Margo Anderson to Nina Rees, *et al.* (Mar. 8, 2004). That application was submitted by the "Center for Educational Partnerships," with an address in Chicago, and identified only one staff member, Maria Webb, "the CEO." It is unclear from the application whether CEP employed other staff, as the application declined to identify other personnel who would be involved in administering the voucher program were CEP to be selected, stating "specific staff has deliberately not been selected." CEP application, at 22.

On March 24, 2004, DOE issued a press release announcing that, in conjunction with the Mayor's office, it had selected WSF to administer the voucher program. The dearth of applicants was not mentioned in the release. To the contrary, the release implicitly suggested that WSF had been chosen competitively from among a number of applicants, noting that Secretary of Education Paige had "announced the competition for selecting the administrator last month."⁴¹ WSF's own press release of March 24, 2004 gave the same impression, announcing that WSF "ha[d] been selected" by DOE and the Mayor's office to administer the voucher program, and was "chosen to operate the program through a competitive application process."⁴² The grant award to WSF is in the amount of \$12.5 million for the first year.

Correspondence produced by the Department of Education indicates that not all voucher proponents were satisfied with WSF's efforts to roll out the voucher program. For example, an e-mail circulated by Brian McManus of Golden Rule [Insurance Company] on May 7, 2004 claimed that "[t]he demand is there, but the marketing plan has failed because WSF didn't start out in the community centers. Yesterday, one parent complained that WSF wasn't reaching the community . . . Our opinions weren't sought on how to role this out or [sic] invited to any planning meetings." E-mail from Brian McManus to unnamed recipients (May 7, 2004). This e-mail prompted Assistant Deputy Secretary of Education Nina Rees to attempt to shut down the criticism: "I am not sure what an e-mail like this is supposed to accomplish. We are all working very hard to get this program up and running. Getting notes like these is extremely demoralizing – and ends up wasting precious energy that could be spent on the program. . . If you have a specific recommendation at this point, let me know." E-mail from Nina Rees to Pat [last name withheld by DOE] (May 11, 2004).⁴³

⁴¹ "Administrator for DC School Choice Incentive Program Selected," Department of Education Press Release (Mar. 24, 2004), available at: <<http://www.ed.gov/print/news/pressreleases/2004/03/03242004.html>> (visited Nov. 5, 2004).

⁴² WSF appears to have known at least by March 22 that it had been "chosen" to administer the voucher program. On that date, for example, Jack Klenk of DOE sent an e-mail to Sally Sachar, the President of WSF, stating, "I am delighted that WSF will administer the program." On the same date, Sachar sent an e-mail to DOE and the Mayor's office entitled "Thank You So Much," stating, "I wanted to drop you a quick note of thanks and to say how excited I am to be working with both of you and your institutions. . . I am developing our own press release for release on Wednesday afternoon [March 24]. Is it possible for me to get a quote from the Mayor and the Secretary?" E-mail from Sally Sachar to Michelle Walker and Nina Rees (Mar. 22, 2004). Nevertheless, the very next day, Sachar told a reporter "in no uncertain terms that we *do not know* if we have been selected as the grantee . . ." E-mail from Sally Sachar to Michelle Walker and Nina Rees (Mar. 23, 2004) (emphasis in original).

⁴³ We have filed an administrative appeal with DOE challenging the Department's improper refusal to disclose the names of certain persons with whom DOE and WSF have corresponded in implementing the voucher program. That appeal is pending.

- **D.C. voucher proponents have attempted to obscure limitations on “choice” actually available to students in the voucher program**

The documents produced to us indicate that proponents of the D.C. voucher program and those in charge of it are well aware of, and apparently have made efforts to obscure, some of the deficiencies in the program. As discussed above, this occurred with respect to such problems as the small number of voucher students from low-performing public schools. It has also taken place concerning the limitations on “choice” truly available to students under the program.

For example, voucher proponents claim that school vouchers provide educational “choice” for parents and students. However, while public schools are required to educate all students, private schools can and do pick and choose. The federal law creating the D.C. voucher program allows them to do so by permitting private schools to impose their normal admissions tests and other admissions requirements on voucher students.⁴⁴ When WSF submitted to DOE a draft set of “Frequently Asked Questions” for private schools making this clear, DOE raised a red flag. WSF’s draft contained this question and answer:

Q. Can a school apply its own admissions criteria?

A. Yes. Schools will be able to identify which students they deem are admissible by using their standard criteria . . .

On April 23, 2004, DOE e-mailed comments regarding the draft to Sally Sachar of WSF, stating:

Sally, the House Ed Committee has been reluctant to put this answer in writing. Many members are unaware that the schools can in fact pick students . . . I am not sure how to fix the answer but if this document is made public, it may damage their vote count.

E-mail from Nina Rees to Sally Sachar (Apr. 23, 2004) (emphasis added).⁴⁵

⁴⁴ In sharp contrast, the Wisconsin statute governing the Milwaukee voucher program requires participating private schools to admit voucher students based on random selection. See Wis. Stat. §119.23(3)(a). Similarly, the Florida voucher statute requires participating private schools to select students “on an entirely random and religious-neutral basis without regard to the student’s past academic history.” Fla. Stat. 1002.38(4)(e). A requirement of random selection helps prevent private schools from skimming off preferred voucher students and leaving the hardest to educate behind.

⁴⁵ Given the statute, the “answer” could not be totally “fixed,” though as ultimately issued to private schools it was watered down: “Yes. We expect there to be a limited number of schools participating in the scholarship program that will apply admissions standards, in addition to placement criteria . . .” WSF’s Frequently Asked Questions About Private School Participation (April 28, 2004). This information was also contained in the FAQs About Private School Participation posted in May 2004 on WSF’s web site, <<http://www.dcscholarship.org/schoolqa.php>> (FAQs as of May 13, 2004)(visited May 27, 2004). In a set of FAQs issued for the benefit of families interested in the voucher program, WSF stated that “Some of the participating schools will have admissions

Another factor that limits student “choice” in the D.C. voucher program is that the voucher law does not prohibit voucher schools where tuition exceeds \$7,500 from charging voucher students more than the maximum voucher amount of \$7,500.⁴⁶ WSF attempted to make it appear that the voucher program gives students more “choice” in private schools than it actually does by proposing that it tell private schools participating in the voucher program that they could not charge voucher students more than \$7,500 in tuition, when in fact the voucher statute contains no such limitation. (Indeed, as noted above, the Senate rejected an amendment offered by Senator Landrieu that would have capped tuition for voucher students at the voucher amount.) WSF proposed to issue this information as part of guidance given to private schools through a set of responses to “Frequently Asked Questions,” and its draft FAQs dated April 22, 2004 stated:

Q. What if the school charges tuition above \$7,500 annually?

A. Schools with tuition in excess of \$7,500 may only charge the DC Scholarship family \$7,500.

Upon review, DOE changed the draft response to read:

Schools with tuition in excess of \$7,500 may charge the DC Scholarship students the same tuition charged to other students and need to provide the DC Scholarship students the same access to the other sources of financial aid as other students.

E-mail from Nina Rees to Sally Sachar (Apr. 23, 2004).

Sachar immediately complained to Rees about DOE’s revision: “[Y]our people changed this answer in a way that is important and I want to circle back with you on it. I thought that we were going to say that schools could not charge more than \$7,500 to families. I would like to be able to say that, if that’s okay. There is no way these families can come up with the money anyway so schools will have to absorb the difference.” E-mail from Sally Sachar to Nina Rees (Apr. 23, 2004).

In response, Rees told Sachar “[w]e can’t say that they can’t charge more.” E-mail from Nina Rees to Sally Sachar (Apr. 23, 2004) (emphasis added). Even then Sachar was not satisfied, and she wrote back to Rees: “We cannot say that the schools cannot charge the scholarship family beyond the \$7,500? I understand that they can set the tuition as high as they want – for sure – but cannot we say that they cannot charge the FAMILY more than \$7,500? Having fun yet?” E-mail from Sachar to Rees (Apr. 23,

criteria and each school may have a different process. Those schools will be able to sue these criteria to determine whether a student can be placed in their school.” See “Frequently Asked Questions About the Opportunity Scholarship Program,” <<http://www.dcscholarship.org/familyfaq.php> (as of Aug. 27, 2004) (visited Dec. 30, 2004).

⁴⁶ By contrast, the Florida voucher statute requires participating private schools to “[a]ccept as full tuition and fees the amount provided by the state for each student.” Fla. Stat. 1002.38(4)(i). (That amount is the *lesser* of the school’s actual tuition and fees or a “calculated” voucher amount specified in the law. Fla. Stat. 1002.38(6)(b).)

2004). Rees responded, "*But they CAN charge more.* It's up to the family to decide if they can make up the difference. A private program, other than yours, can make up the difference. I think what you should convey in here is that the school will not receive more than \$7,500 through this program." E-mail from Rees to Sachar (Apr, 23, 2004) (emphasis added).

Despite the statute and these unambiguous e-mails from Rees, Sachar still would not give up. In an e-mail dated April 29, 2004 to Rees and Michael Petrilli at DOE she wrote, "I really want to say that the \$7,500 is the max amount a school can charge a family. . . Families will simply NOT be able to make up the difference, and if we end up giving WSF scholarships to these families, we have limited our ability to expand choice to many more students. Please confirm that it is okay to put the \$7,500 cap out there. I will defend it vigorously and you can say that this was a decision of the administrator!"

On April 30, Petrilli replied: "Here's what our lawyers had to say: On the issue of telling schools they may not charge scholarship students more than \$7,500, WSF can by all means encourage schools not to do so, but I don't think we or WSF has the authority to tell them they may not do so. In fact our letter to the Archdiocese made clear that they can, but that scholarship students would have to be given the same access to other sources of financial aid as other students. So we're not comfortable with this."

As issued by WSF in May 2004 and posted on its web site for the benefit of private schools "interested in participating in" the voucher program and "specifically geared to school leaders,"⁴⁷ the FAQs do not affirmatively inform private schools with tuition greater than \$7,500 that they may charge voucher students the excess, as DOE had suggested in its April 23 revision.⁴⁸ In fact, the FAQs as issued entirely *omitted* the separate question "What if the school charges tuition above \$7,500 annually?" Instead, information concerning tuition is stated confusingly in response to the question "What charges does the scholarship cover?" The stated answer: "For each participating student, the scholarship covers tuition, fees, and transportation expenses, up to a maximum of \$7,500 for any academic year. Schools may not charge scholarship students more than non-scholarship students for tuition or fees, and no student may receive more than \$7,500 total."⁴⁹

⁴⁷ <http://www.dcscholarship.org/schoolinfo.php> (visited May 27, 2004).

⁴⁸ <http://www.dcscholarship.org/schoolqa.php> (FAQs as of May 13, 2004) (visited May 27, 2004).

⁴⁹ An undated set of FAQs posted on DOE's own web site is less obtuse. These FAQs pose the question "Will any students who receive scholarships have to meet costs that are not covered by the scholarship (*i.e.*, will a scholarship always cover the full cost of attending a private school)?" The stated answer: "The great majority of private school slots available for participating students will be in schools that charge less than \$7,500. However, students electing to use their scholarships to attend those schools that charge more than the \$7,500 maximum scholarship would have to make up the difference from other sources (which could include private scholarship funds available to those schools or from other sources)." U.S. Department of Education, D.C. Choice Incentive Program, Frequently Asked Questions, No. 25, <<http://www.ed.gov/programs/dchoice/faq.html>> (visited Dec. 28, 2004). A set of FAQs issued by WSF for the benefit of families interested in the voucher program stated that in the case of tuition and fees in excess of \$7,500, "[w]e are only permitted to apply \$7,500

As a general matter, DOE was not particularly keen on having WSF issue a “private school Q and A” in the first place. After WSF submitted the initial draft to DOE, Nina Rees wrote back to Sally Sachar: “Sally, we are editing away but are you sure you want this out in public? The Post will have a ball with it.” E-mail from Nina Rees to Sally Sachar (Apr. 22, 2004). Sachar replied, “Nina . . . I really think we need a document like this that is thorough and comprehensive. I will check carefully to make sure there is not anything there that would raise concern *and that we don’t want the press to see . . .*” E-mail from Sachar to Rees (Apr. 22, 2004) (emphasis added). Rees cautioned Sachar to let DOE know if WSF decided “not to take some of the edits,” and told Sachar that she was

worried that our answers to questions about whether the school has to fulfill new requirements, or report academic achievement, or can cherry pick students, will all be scrutinized and reported on. Right now it’s written in a very private school-friendly fashion. But the press will make it look like we aren’t going to hold the private schools accountable for anything, and that we’re letting them cream the best kids from DCPS. So we need, in the language, to mitigate that as much as possible.

E-mails from Rees to Sachar (Apr. 22, 2004).

CONCLUSION

As a matter of education policy, the federally-mandated D.C. voucher program is unsound and unwise, authorizing the expenditure of millions of taxpayer dollars to subsidize private schools that are effectively unaccountable to the public for their use of those funds. Moreover, as this preliminary examination of the D.C. voucher program has shown, the serious deficiencies in the program have been exacerbated by flaws in the enabling legislation that have, for example, allowed hundreds of students already attending private schools to be given vouchers, as well as by the program’s failure, at least to date, to effectuate the priorities of the legislation even as stated by Congress. In particular, as implemented in its first year, the program is not primarily serving low-income students in D.C.’s public schools most in need of improvement, the main goal of the voucher program according to Congress. At the very minimum, the voucher program should not continue until the problems revealed by the implementation of the program so far have been addressed and resolved.

Ironically, at the same time that Congress has authorized the expenditure of millions of dollars in federal funds to send some students in D.C. to *private* schools, it has continued to fail to fully fund the No Child Left Behind initiative in D.C.’s *public* schools by more than \$44 million. If Congress is genuinely concerned about improving the educational opportunities for low-income students in our nation’s capital, it should re-think the wisdom of using public funds to send some students to private schools, leaving the rest behind in underfunded public schools.

to each scholarship recipient.” See “Frequently Asked Questions About the Opportunity Scholarship Program,” <<http://www.dcscholarship.org/familyfaq.php> (as of Aug. 27, 2004) (visited Dec. 30, 2004).