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Legal Issues Involving Educational Privatization And Accountability

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Abstract- While the U.S. Supreme Court accords states considerable authority to regulate traditional private schools, accountability measures for the most part have been modest. Proponents of expanded educational privatization through sub-contracting, charter school, and publicly funded voucher programs hope to continue this hands-off approach. Opponents seek to impose many, if not most, of the same accountability measures that apply to traditional public schools. This paper explores the accountability issue from a legal perspective. First, the paper examines the considerable authority the state has to regulate all schools, whether public or private. Then, the paper focuses on constraints that state constitutions impose on the ability of the state to delegate its responsibility and

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funding for public education to private actors without accompanying accountability measures. Best labeled "unconstitutional delegation law," the doctrine is evident in the first charter school litigation to reach a state supreme court. Next the paper examines how privatization in corrections, the federal Section 8 public housing voucher program, and contracting out of special education services has affected the autonomy of private organizations. These analogies shed some light on possible future patterns in education. In addition to constitutions, accountability measures emanate from state statutes, administrative agency regulations, charters, and contracts.

The paper studies how this is so in three states with extensive educational privatization: Arizona, Massachusetts, and Michigan. As will be evident, only Arizona approaches a pure market-approach to accountability. The last part of the paper reviews accountability issues in publicly funded voucher programs. Interestingly, private schools participating in the Milwaukee and Cleveland voucher programs operate relatively autonomously. But an expanded voucher program raises a dilemma for the state. Too little accountability raises unconstitutional delegation concerns. Too much raises issues of unreasonable regulation of private schools and interference with parent rights contrary to U.S. Supreme Court precedent and, for religious schools, triggers concerns about interference with free exercise of religion. The challenge for states is to navigate this narrow policy making channel by developing accountability measures that satisfy legal requirements but do not intrude significantly on institutional autonomy. The paper concludes that in the absence of judicial precedent and empirical research, it would be unwise for private entities to assume that they will be able to operate public schools or participate in publicly funded voucher programs without surrendering some of their autonomy.

A law review version of this paper, complete with detailed legal citations, will appear in a forthcoming volume of West's Education Law Reporter.

The Occasional Paper Series of the National Center for the Study of Privatization in Education (NCSPE) is designed to promote dialogue about the many facets of privatization in education. The subject matter of the papers is diverse, including research reviews and original research on vouchers, charter schools, home schooling, and educational management organizations. The papers are grounded in a range of disciplinary and methodological approaches. The views presented in these papers are those of the authors and do not necessarily represent the official views of the NCSPE.

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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 paper 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 paper will 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, 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.

REGULATION OF PRIVATE SCHOOLS OPERATED INDEPENDENTLY OF THE STATE

In 1925 the U.S. Supreme Court unanimously ruled 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 the names, sex, parents or guardians, place of birth, and residence of each student; 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. Wrote Justice McReynolds for the Court, "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."

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. Legal challenges generally have been decided in favor of states,

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[1] Pierce v. Society of Sisters, 268 U.S. 510 (1925).
[2] Pierce, p. 534.
[3] Farrington v. Tokushige, 273 U.S. 284 (1927).

even in the face of claims that such measures interfere with the free exercise of religion.[4] The relationship between private religious schools and accountability is an important consideration, since 85 percent of private schools are religiously affiliated.

Private schools also are subject in varying degrees to selected federal civil rights laws such as Title VII of the 1964 Civil Rights Act, though there often are exemptions for very small schools and for those that are religiously affiliated. However, most private schools are not subject to a number of federal laws that require receipt of federal funds to be applicable. These include the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973 prohibiting discrimination based on handicap, and Title IX of the 1972 Education Amendments prohibiting sex discrimination.

Table I shows the legal framework for the regulation of private schools operated independently of the state in comparison with traditional public schools. (*See Table 1 in Appendix*.)

It would appear from Table 1 that constitutional scholar Mark Tushnet is right when he maintains that there is little difference in the authority that the state has to regulate both public and private schools under the U.S. Constitution. Tushnet concludes that contemporary policy issues regarding the regulation of private schools should be addressed without regard to constitutional considerations. "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."[5] While this may be true, 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 an outer limit to the

[4] For a list of decisions favoring the state, see New Life Baptist Church Academy v. East Longmeadow, 885 F.2d 940 (lst Cir. 1989), pp. 950-51. The most notable exception to general deference to the state is a 1976 Ohio Supreme Court ruling, State v. Whisner, 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).

[5] Mark Tushnet, "Public and Private Education: Is There a Constitutional Difference?" University of Chicago Law

regulations a state can impose.

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

THE RELATIONSHIP BETWEEN CONSTITUTIONAL LAW AND ACCOUNTABILITY WHEN PRIVATE ENTITIES RECEIVE PUBLIC FUNDS

State constitutions with few exceptions have provisions confining the funding of education to public schools only or specifically prohibiting the use of public funds directly or indirectly to aid private schools. Most originate from a desire to prevent legislatures from funding religious schools, but they often are cast in far more sweeping terms. These provisions, however, cannot be taken at face value, since they are subject to the interpretation of state courts. Since I have examined this body of law elsewhere in the context of the constitutionality of publicly funded voucher programs, I will not discuss it here.[6]

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. That education is a core governmental activity is clear from the fact that virtually all

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Forum (1991), p. 74.

[6] Frank R. Kemerer, "The Legal Status of Privatization and Vouchers in Education," in Henry M. Levin (ed.), Studying Educational Privatization: Setting the Agenda (Boulder, CO: Westview Press, 2000 - forthcoming). See also Frank R. Kemerer "State Constitutions and School Vouchers," Education Law Reporter, vol. 120 (Oct, 1997), and Julie Vallarelli, "Note: State Constitutional Restrains on the Privatization of Education," Boston Law Review,

state constitutions vest their legislature with responsibility for education.[7] 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."[8] 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

The unconstitutional delegation doctrine concerns the ability of government to delegate its core governmental functions to a private party. The New Jersey Supreme Court 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

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vol. 72 (1992), pp. 390-93.

[7]See generally Allen W. Hubsch, "Education and Self-Government: The Right to Education Under State Constitutional Law, Journal of Law and Education, vol.18 (1989). In an appendix, Hubsch lists the primary constitutional provision of each state that pertains to the establishment of an educational system.

[8] Wisconsin v. Yoder, 406 U.S. 205 (1972), p. 213. The Court also testified to the centrality of education to the purpose of government in Brown v. Board of Education, 347 U.S. 483 (1954), p. 493: "Today, education is perhaps

self-serving action detrimental to third parties or the public good generally."[9] The key to permissible delegation is the presence of guidelines and regulations to limit the discretion of private entities to usurp governmental authority for their own interests. Of course, the imposition of regulatory provisions for this purpose has the effect of limiting institutional autonomy. A New Jersey lower court cited this passage in upholding the state's charter school law in 1999. Since under the terms of the statute, charter schools remain public schools even if operated by private entities and since they are subject to the control of the state commissioner of education, the legislature did not unconstitutionally delegate authority to them.[10]

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. Like many states, Michigan has a very strict constitutional provision preventing the use of public funds directly or indirectly "to aid or maintain any private, denominational or other nonpublic, preelementary, elementary, or secondary school."[11] In light of this provision, the legislature prohibited churches and religious organizations from operating charter schools, termed "public school academies," but permitted other private entities to do so.[12] Presently, about 70 percent of Michigan's academies -- some 120 -- are operated by private organizations.[13]

The lawsuit contended that the academies were in effect licensed private schools not under the control of the state, contrary to provisions of the Michigan Constitution stipulating that the state legislature "shall maintain and support a system of free public elementary and secondary schools as

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the most important function of state and local governments."
[9] Ridgefield Park Educ. Assn. v. Ridgefield Park Bd. of Educ., 393 A.2d 278 (1978), pp. 287-288.
[10] In re Charter School Application, 727 A.2d 15 (N.J. Super. A.D. 1999), p. 44.
[11] Mich. Const. art. VIII, § 2. For a discussion of similar constitutional provisions in other states, see Frank Kemerer, "State Constitutions and School Vouchers," West's Education Law Reporter, Vol. 120 (1997), pp. 4-15.
[12] Mich. Comp. Laws Ann §§ 380.501, et seq. (West 2000).
[13] Gary Sykes, et al., "The Michigan Experience: School Choice and School Change," Education Week, Feb. 9, 2000, p. 38.

defined by law" and that the state board of education has "leadership and general supervision over public education."[14]

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 private boards to operate schools and to do so without oversight by the state board of education, contrary to the explicit term of the state constitution. Therefore, the charter school law was unconstitutional.

By the time the case reached the Michigan Supreme Court, the legislature had revised the law to make it clear that the academies are under the control of the state board of education and subject to its regulations. Other new restrictions prohibited public school academies from levying taxes and required all charter school teachers except college professors to be certified in accordance with state board of education regulations. In its 1997 decision upholding the constitutionality of the charter school law, the Michigan Supreme Court cited these changes.[15] The majority noted that the state decides the issuance and revocation of charters, controls the money, and requires academies to comply with various provisions of the school code. The high court did not find that allowing private organizations to operate academies violated the aforementioned state constitutional prohibition against aid to private schools, construing that provision to apply only to religious private schools.

Notice how concern about complying with the state constitution forced changes in the law. 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

[14] Mich. Const. art. 8, §§ 2 and 3.
[15] Council of Organizations and Others for Education About Parochiaid, Inc. v. Governor, 566 N.W.2d 208 (Mich. 1997).

restrictions that regular public schools have, thus removing any competitive value."[16] A central question unanswered by the litigation is whether the legislature went too far in imposing the restrictions. Might something less intrusive than making the academies subject to the rule-making authority of the state board of education and requiring all the teachers to be state-certified have satisfied the requirements of the state constitution? 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."[17] Later in the paper, we will examine how educational management companies are being regulated in Michigan.

How the unconstitutional delegation doctrine might apply 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 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.[18] These rights include the freedoms of

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[16] Lyndon G. Furst, "The Short But Very Curious Legal History of Michigan's Charter Schools," Education Law Reporter, vol. 105 (January 1996), p. 11.
[17] Council of Organizations v. Governor, 566 N.W.2d 208, 224 (Mich. 1997) (Boyle, J., dissenting).
[18] 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

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 complying 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. However, as one commentator notes, a legislative declaration that a charter school is a public entity does not necessarily make it so.[19] It is conceivable that a court may nullify such a

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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 right after the Civil War to enforce the provisions of this amendment. Known as 42 United States Code Section 1983, 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 juridiction 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 (1978).

[19] Jason L. Wren, Note, "Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to These Innovative Schools," Review of Litigation, vol. 19 (Winter 2000). See also Karla A. Turkeian, Note, "Traversing the Minefields of Education Reform: the Legality of Charter Schools," Connecticut Law Review, vol. 29 (1997), and Justin M. Goldstein, Note, "Exploring 'Uncharted' Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution," Southern California Interdisciplinary Law Journal, vol. 7 (Summer 1998).

declaration if it is not in keeping with the general thrust of other provisions in the legislation.

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.[20] 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.[21] 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.[22] But as noted below, 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. In *Blum v. Yaretsky*, the Court noted that to extend constitutional requirements to private entities, a

[20] Marsh v. Alabama, 326 U.S. 501 (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 (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 (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).

[21] Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976) (expressly overruled Logan Valley in holding that there is 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.

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. This may be done by showing that the state has exercised coercive power or encouragement with regard to the private decision. In this case, 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.[23] 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."[24] 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.[25] 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

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Robins, 447 U.S. 74 (1980).

[22] Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

[23] Blum v. Yaretsky, 457 U.S. 991 (1982).

[24] Lugar v. Edmondson Oil Company, 457 U.S. 922, 937 (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.

[25] West v. Atkins, 487 U.S. 42 (1988).

services to prison inmates. Were it otherwise, a federal district court noted in a 1983 ruling, "the state could avoid its constitutional obligations simply by delegating governmental functions to private entities."[26]

Returning to our due process hypothetical, there would be some question here 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 may 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.

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.[27] The resulting body of federal law carries implications for the status of charter schools. In ruling in 1995 that Amtrak is subject to

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[26] Lombard v. Eunice Kennedy Shriver Center for Mental Retardation, Inc., 556 F. Supp. 677 (D. Mass. 1983) (because the state had an affirmative obligation to provide medical care to an involuntarily confined mentally retarded patient, had delegated that responsibility to the private center, and the center assumed the responsibility, the private center must be considered to have acted under color of state law and its acts must be considered actions of the state).

[27] For a discussion, see Justin M. Goldstein, Note, "Exploring 'Uncharted' Territory," pp. 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 (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).

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."[28] In the Amtrak case, *Lebron v. National Railway Passenger Corporation*, the majority provided guidelines for evaluating the legal status of government-created corporations. Wrote Justice Antonin Scalia 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."

Charter schools too 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 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* (1982), 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. 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

[28] Lebron v. National Railroad Passenger Corporation, 115 S.Ct. 961 (1995).

discretion of the school. The majority concluded that the school had not sacrificed its private status by becoming substantially publicly funded.[29]

Neither the Milwaukee nor Cleveland voucher program requires private schools to convert to public entities as a condition of participating, though the matter did surface early on regarding the Milwaukee voucher program when the State Superintendent of Public Instruction developed an extensive list of regulations governing private schools participating in the original voucher program enacted in 1990. 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. In 1998 the regulations relating to individual rights were made essentially advisory following a dispute between legislative leaders and state department officials.[30]

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 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 were there against their will and the school received substantial state funding and regulation.[31] The involuntary nature of the confinement

[29] Rendell-Baker v. Kohn, 457 U.S. 830 (1982).
[30] Interview with Charles Toulmin, Wisconsin Department of Public Instruction, September 27, 1999.
[31] Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982), cert. denied, 460 U.S. 1009 (1983).

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 regulation, may be enough to convince some judges that the schools are performing a public function in the same manner as a public agency and should be subject to the same constitution constraints.[32]

Of course, nothing precludes a legislature from requiring schools to observe student and teacher constitutional rights as a prerequisite to participation in a publicly funded voucher program. Some policy makers may view this as essential, given the state's interest in educating students for a democratic society where constitutional rights are sacrosanct. On the other hand, some legislators may opt to let parents decide whether they want their children to attend schools where constitutional rights may not be recognized. We will explore this question in more detail in the section of the paper dealing with voucher programs.

Because neither unconstitutional delegation law nor state action law has developed regarding privatization of education, we will look at how these issues have been treated in two non-education sectors. The first concerns contracting-out prisons to private entities and the second concerns the use of public money to provide housing vouchers for poor families.

ACCOUNTABILITY LESSONS FROM THE NON-EDUCATION SECTOR

Private Prisons

Like schooling, the operation of prisons was once the province of private entities. Even after the conversion to public prisons in the 20th century because of rampant abuses, contracting out was

[32] Robert M. O'Neil, "School Choice and State Action," in Stephen D. Sugarman and Frank R. Kemerer (Eds)., School Choice and Social Controversy: Politics, Policy, and Law (Brookings Institution Press, 1999). See also Ralph Mawdsley, "State Action and Private Educational Institutions," West's Education Law Reporter, vol. 117

common practice for things like laundry, food, and health services. Rising costs and overcrowding renewed interest in privatization. Privatization began first with nonsecurity and community-based facilities.[33] During the 1980s, nine states adopted legislation permitting contracting out prison operation. Currently, half the states and the federal government have enacted enabling legislation for the privatization of prisons and more than 100 private prison facilities are operating in the country, with an annual growth rate of 30 percent.[34] In 1996, three percent of the adult prisoner population was housed in private prisons. While as many as seventeen firms operate prisons, two -- Corrections Corporation of America and Wackenhut -- control almost 75 percent of all beds under contract, a potentially serious problem from the standpoint of competition.

The unconstitutional delegation doctrine surfaced early on in prison privatization since the adjudication and confinement of felons is at the apex of governmental responsibilities.[35] A decade ago, the Criminal Justice Section of the American Bar Association commissioned a comprehensive study of constitutional, statutory, and contractual issues involved in prison privatization. The resulting Model Statute and Model Contract were designed to guide the development of privatization policies that would not unconstitutionally contract away government's responsibility

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(1997).

[33] For a discussion, see Peter J. Duitsman, Comment, "The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding," North Carolina Law Review, vol. 76 (September 1998), pp. 2214-2218.

[34] Duitsman, pp. 2218 and 2265, n. 361.

[35] The unconstitutional delegation doctrine has not been without criticism because of the retreat evident in U.S. Supreme Court decisions in the 1930s in using it to invalidate federal legislation giving broad rulemaking and adjudicative authority to bureaucratic agencies. For a discussion in the privatization of corrections context, see Warren L. Ratliff, "The Due Process Failure of America's Prison Privatization Statutes," Seton Hall Legislative Journal, vol. 21 (1997). However, Ratliff recognizes its continued use by state courts. Rather than rely on nondelegation doctrine, Ratliff bases his thesis on the due process principle of financial disinterestedness. Citing U.S. Supreme Court decisions invalidating state and federal statutes giving too much leeway to private parties to misuse government power for their own ends, Ratliff finds that only two states – Wyoming and Florida – adequately protect the liberties of prisoners under the Fourteenth Amendment Due Process Clause. He concludes that the majority of state privatization statutes are unconstitutional because they subordinate inmate liberties to the financial interests of private prison operators. Interestingly, 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," New York Times, May 14, 2000.

and control.[36] Professor Ira P. Robbins, who conducted the study, stressed the importance of accountability and designed the Model Statute and Model Contract to provide it. It has been reported that half the states have enacted enabling legislation requiring that private facilities comply with local and state regulations and also meet standards set by the American Corrections Association (ACA).[37] To help protect against incompetent private party operation of facilities, most states that allow prison privatization specify the qualifications that contractors must exhibit to be eligible for sub-contracting. The contracts themselves are detailed regarding the conditions contractors are to meet and provide incentives and sanctions for failing to achieve specified goals. Of course, to assure accountability, contracts must be carefully monitored.

Though the U.S. Supreme Court has yet to rule on the matter, there is general consensus in legal commentary that private corporations operating prisons act under color of state law and are subject to constitutional law regarding inmate rights. Furthermore, the government cannot avoid liability by contracting out. As one commentator who has had extensive experience in negotiating prison privatization contracts notes, "Once the contract is signed, it is essential to understand that the government will remain liable for violations of the constitutional rights of the prisoners, even if the private company is responsible for the acts or omissions." Under 42 U.S.C. § 1983, the operator is an extension of the government, and its actions remain 'state actions.' The government cannot hide behind its private operator. An inmate can sue either party.[38]

Case law also is clear on this point. In a 1996 ruling, a Florida federal judge observed that when a governmental entity delegates public functions to a private entity, the private entity becomes sufficiently public that it may be held accountable as though it were public. Here, the court noted

[36] The Model Statute and Model Statute are set forth with extensive legal commentary in Ira P. Robbins, "The Legal Dimensions of Private Incarceration," American University Law Review, vol. 38 (1989).
[37] See Simon, ""Who's Minding the Rights of Inmates When Justice Goes to the Lowest Bidder?" 19 Human Rts.

that Florida had enacted a statute permitting counties to contract with private entities to run their jails and prisons. Thus, the private operator of a county jail could be held liable for unconstitutionally detaining an arrestee over a three-day period.[39]

There are implications as well for the liability of employees of private prisons. The U.S. Supreme Court has ruled that public employees are entitled to qualified immunity from liability for federal wrongs under § 1983 unless it can be shown their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[40] However, in 1997, the Court in a five-to-four ruling refused to extend the same qualified immunity to employees of a private, for-profit corporation managing a Tennessee correctional center. The majority noted no firmly rooted tradition of immunity for such employees and no public policy reason to extend it.[41] Thus, private prison operators must incur the additional expense of training employees and securing insurance. Increasing expenditures may serve as a disincentive to privatization.

In sum, experience with prison privatization indicates that concern about unconstitutional delegation of a core governmental responsibility has produced considerable state regulation and monitoring. Privatized prisons are considered sufficiently clothed with state action that they are subject to the constraints of the U.S. Constitution just as are correctional facilities operated by

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Spring 1992, p. 22

[38] Martin E. Gold, "The Privatization of Prisons," Urban Lawyer vol.28 (1986), pp. 379-380.

[39] Blumel v. Mylander, 919 F. Supp. 423 (MD. Fla 1996).

[40] Harlow v. Fitzgerald 457 U.S. 800, 818 (1982).

[41] Richardson v. McKnight, 521 U.S. 399 (1997). Writing for the majority, Justice Steven Breyer observed that, unlike governmental entities, competitive pressures provide incentives for private prison operators to make sure their employees are neither too aggressive (thus creating liability) nor too timid (thus inviting a competitor who claims to be able to do a better job) in carrying out their duties. Further, unlike the state, private prison operators can shield their employees from personal liability through salary offsets or through statutorily required insurance, and thus neutralize fears of prospective employees. Thus, there is no need for qualified immunity. In a concluding paragraph, the majority noted that it was not deciding whether a private individual more closely connected to government, e.g., through close governmental supervision, might be entitled to qualified immunity, nor whether the prison guards in the case might be entitled to something other than immunity such as a good faith defense. For critical discussion of this ruling, see "Case Comment: Qualified Immunity - Privatized Governmental Functions," Harvard Law Review, vol. 111 (November 1997).

government.

Section 8 Public Housing Voucher Program

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.[42] 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.[43] The extensive regulation of the landlord-tenant relationship and the housing quality standards deter many private housing vendors from participating in the program.[44] 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.

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[42] 42 U.S.C. § 1437f(o) (2000)
[43] 24 C.F.R. § 982.401 (2000).
[44] See Mark A. Malaspina, Note, "Demanding the Best: How to Restructure the Section 8 Household-Based Rental

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.[45] 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. 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 in this paper, 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."[46] 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.[47]

Other federal courts have held that tenants faced with eviction also are entitled to a due process hearing.[48] 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

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Assistance Program," Yale Law and Policy Review, vol. 14 (1996). The discussion of design issues in the Section 8 program carry significant implications for school voucher programs.

[45] 24 C.F.R. § 982.310(a)-(e) (2000).

[46] Gallman v. Pierce, 639 F. Supp. 472 (N.D. Cal. 1986), p. 481.

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

[48] Swann v. Gastonia Housing Authority, 675 F.2d 1352 (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, 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.

life, and his right to do so is a constitutionally protected property interest."[49] 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 requires 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.[50]

That housing is considered an important interest deserving of federal court protection is evident in the 1997 decision of an Illinois federal court holding that a private landlord violated a tenant's due process rights in conjunction with her eviction.[51] "Plaintiff lost her subsidized housing unit, her housing subsidy, her personal possessions, and was rendered homeless. The nature of plaintiff's interests sufficiently outweigh the government's administrative and fiscal interests in a summary disposition of this case." Citing the cases described in the previous section regarding state

[49] Gorsuch Homes, Inc. v. Wooten, 597 N.E.2d 554 (Ohio App. 1992), p. 558. 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 (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.

[50] Franklin Tower One v. N.M., 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. The court suggested, but did not rule, that this law might prohibit a private landlord from refusing to participate in the Section 8 program.

action, the judge noted that the tenant had sufficiently described a symbiotic relationship between defendants and the federal government to satisfy the threshold requirement for state action for the protection of constitutional due process. The judge ordered the parties to discuss settling the case before making another appearance in court.

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.

HOLDING PRIVATIZED SCHOOLS ACCOUNTABLE IN CONTRACTING OUT AND CHARTER SCHOOL PROGRAMS

At present, about 12 percent of the 2000 charter schools operated in 16 states and the District of Columbia have been granted to private organizations. Most of these organizations are for-profit. 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

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[51] Anast v. Commonwealth Apartments, 956 F.2d 792 (N.D. Ill. 1997).

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."[52] 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.[53] 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.[54] 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.[55]

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 Education Disabilities Act (IDEA). Under IDEA, the state and school district remain responsible for ensuring that a handicapped child placed by the state or

[52]55. School District of Wilkinsburg v. Education Association, 667 A.2d 5 (Pa.1995).
[53] 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 as Pa. Stat. 24 P.S. §§ 17-1715-A and 17-1717-A (1998).
[54] Tex. Educ. Code Ann. § 11.157 (West 2000).
[55] Tex. Att'y Gen. Op. DM-355 (1995).

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."[56] Federal regulations give state education agencies the responsibility of ensuring that these requirements are met.[57] And opinions issued by the Office of Special Education Programs (OSEP), which is responsible for overseeing IDEA, make this clear.[58]

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]."[59] 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 motion by the school 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.[60]

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

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[56] 20 U.S.C.A.§ 1412 (a)(10)(B)(ii) (West 2000).
[57] 34 C.F.R. § 300.401(b) and (c) (2000).
[58] See, for example, Letter to Garvin, 30 Indiv. with Disabilities Educ. Law Rep. 609 (May 14, 1998).

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 not comparable to what would be available in public school. These services can be provided at the private school, using private school personnel or public school personnel. If the services are below what the student 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.[61] 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.[62] 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.[63] However, funding can be a problem in these

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[59] Council of Children with Special Needs, Inc. v. Cooperman, 501 A.2d 575 (N.J. Super. Ct. App. Div. 1985).
[60] Ross v. Allen, 515 F. Supp. 972 (S.D. N.Y. 1981).
[61] For a full discussion, see Laura Rothstein, "School Choice and Children with Disabilities," in Stephen D. Sugarman and Frank R. Kemerer (eds), School Choice and Social Controversy: Politics, Policy, and Law (Brookings 1999).
[62] 20 U.S.C. § 1413(a)(5) (1997). For a discussion, see Rothstein, "School Choice and Children with Disabilties," pp. 334-341.
[63] Jay P. Heubert, "Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation," Harvard Civil Rights - Civil Liberties Law Review, vol. 32 (1997), p. 320. 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 resides 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

instances, since charter schools normally do not have the authority to tax, thus limiting their sources of funding to what they can get from the state.[64]

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 federal disability law. In Cleveland, the schools may deny admission to children with disabilities who require separate educational programming.[65] These programs, however, simply are too small to tell us what the responsibilities of voucher schools ultimately will be for educating children with disabilities.

Private Schools Operating Charter Schools: Accountability Patterns in Three States

Of the 32 states with functioning charter schools, Arizona, Massachusetts, and Michigan have the most charter schools being 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). Table 2 illustrates the lines of authority between education agencies and private educational management organizations (EMOs) in the three states. As the table shows, Michigan has the most complex organizational arrangement, and this bodes ill for institutional autonomy. (*See Table 2 in Appendix*.)

While the number of charter schools that can operate presently is capped in Massachusetts at 120, there is no limit in the other two states. Consequently, privatization is well established. In Arizona, for-profit organizations operate a large number of the charter schools including nine of the

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placement. Mass. Gen. Laws Ann. ch. 71, § 89(t) (West 2000).

[64] 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 J. Zollers and Arun K. 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. For a general discussion of the problems school choice may pose for children with disabilities, see Laura Rothstein, "School Choice and Children with Disabilities."

10 charters with five or more campuses. In Michigan they operate 70 percent of the state's charter schools. 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.[66] 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.[67] In Michigan, charter conveyors can charge an administrative fee for graning and overseeing a charter, thus constituting an incentive to grant charters. In Arizona, school districts have done so.

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. This is a matter of concern, because charter schools are supposed to be something more than just publicly-created choice schools. Existing school districts can create thematic schools if they wish to. Charter schools, on the other hand, are thought to less top-down initiated than market-created in response to client demands. It is worth keeping this mind when reading this section. In the following paragraphs, we 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.

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[65] Ohio Rev. Code Ann. 3313.977(B) (2000).
[66] Ariz. Rev. Stat. § 15-183(U) (2000).
[67] Mich. Atty. Gen. Op. No. 6915 (1996).

Arizona

Arizona has created a specialized state agency, the State Board of Charter Schools, to authorize and oversee charter schools. Charters also may be sponsored by the state board of education and by local school districts. Non-profit and for-profit entities can apply for charters. 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 most statutes and rules relating to regular public schools. However, the state attorney general has advised that charter schools are subject to the state's open meetings and open records acts.[68] As noted in Table 3, accountability provisions are sparse. (*See Table 3 in Appendix*.)

The statute holds charter school sponsors responsible for the administration and oversight of the schools they sponsor. Charter schools are to provide comprehensive, nonsectarian educational programs, comply with state and federal special education laws, and participate in the Arizona Instrument to Measure Standards (AIMS) test. 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. The statute establishes that each charter school must complete an annual report card. The charters with private educational organizations examined for this paper detail the requirements of the report card, including descriptions of educational goals, attendance statistics, and standardized test results. Charter schools must allow sponsor representatives to visit the school and conduct audits of the school's financial records.

[68] Ariz. Atty. Gen. Op. No. 195-10 (1995).

The statute requires the state sponsors to document and monitor charter school accounting methods and procedures and to prescribe a uniform system of financial record keeping. The charters track the statute with regard to fiscal accounting. They 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

As noted earlier in the paper, the Michigan Supreme Court upheld the revised charter school program after the legislature had 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.[69] Table 4 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. Republican Governor John Engler, a

[69] Leonard C. Wolfe, Public School Academy Authorizing Bodies: Chartering Authorities, Oversight Bodies and Fiscal Agents: A Framework for Oversight, Dykema Gossett, P.L.L.C., August 1998. Document prepared for Central Michigan University, Eastern Michigan University, Ferris State University, and Grand Valley State

strong proponent of charter schools, appoints board members at state universities and thus through the authorizing bodies can end-run the elected state board of education.[70] Nearly 90 percent of the 173 public school academy charters in Michigan have been issued by state universities. (*See Table 4 in Appendix*.)

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, they also are governed by the policies of their respective authorizing body. 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.[71]

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 delineating the role of the board and the company that must be included in all its charter agreements. 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

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University.

[70] Jerry Horn and Gary Miron, Evaluation of the Michigan Public School Initiative, Western Michigan University, Jan. 1999, p. 58.

[71] Horn and Miron, p. 61. See also Public Sector Consultants and Maximus, Inc., Michigan's Charter School Initiative: From Theory to Practice, 1999, p. 26. http:www.mde.state.mi.us/reports/psaeval9901/psaeval.shtml. MDE.

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.[72] 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 4 conformed to these new policies.

The accountability provisions in Table 4 are numerous and quite similar to those required of traditional public schools. Under the statute, 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. Among other things, 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

[72] Educational Service Provider Policies, Charter Schools Office, Central Michigan University. July 15, 1999.

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 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.[73]

Massachusetts

Charter schools in Massachusetts are of two types: commonwealth charter schools approved by the state board of education and Horace Mann charter schools approved by local school districts and the local collective bargaining agent. The state board of education grants all charters. While only nonprofit organizations, teachers, and parents can form charter schools, the schools themselves may contract with a for-profit educational management organization. Teachers in Horace Mann charter schools must be state certified, while teachers in commonwealth charter schools must be state certified unless they have passed the state teacher test. 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. Thus, it is relatively easy to discern what accountability measures apply to them. Further, the channeling of all charter school approvals through the board of education minimizes the imposition of additional regulations and controls by intermediate authorizing bodies.

Table 5 lists the major accountability provisions applying to charter schools in Massachusetts. *(See Table 5 in Appendix*.)

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 (but not teacher tenure and dismissal), and requires periodic financial and

[73] Horn and Miron, p. 58.

academic progress reports. The department of education regulations flesh these out by specifying reporting dates and authorizing site visits. 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 more straightforward than the maze 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 reporting. Each of these constricts the autonomy of school operators. And some are more constricting than they appear at first glance. Comprehensive subject-matter 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.[74] 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. To date, the few state supreme courts that have ruled on school vouchers or voucher-like programs have issued inconsistent decisions.[75]

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

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[74] For a thorough discussion, see Jesse Choper, "Federal Constitutional Issues," in Stephen D. Sugarman and Frank R. Kemerer, eds., School Choice and Social Controversy: Politics, Policy, and Law (Washington, D.C.: Brookings, 1999).

[75] The supreme courts of Wisconsin and Ohio have ruled in favor of publicly funded vouchers programs encompassing religious private schools. The supreme courts of Washington State and Massachusetts have ruled against them. In Maine, New Hampshire, and Vermont, the supreme courts have ruled against private school tuition reimbursement programs that have similarities to vouchers. Litigation continues in state court on the Florida statewide voucher program. 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.

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 suggesting that if the program were designed differently, the outcome would be different. Indeed, how a voucher program is designed has great implications for its constitutionality. For a thorough discussion, see Frank R. Kemerer, "State Constitutions and School Vouchers," Education Law Reporter, vol. 120 (October 1997) and "The Legal Status of Privatization and Vouchers in Education," in Henry M. Levin, ed., Studying Educational Privatization: Setting the Agenda (Boulder, CO: Westview Press, 2000 - forthcoming).

small number of students. Over twenty states have voucher-like programs pending before their legislatures at this writing.

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.[76] 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.[77] 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. 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

[76] Wis. Stat. § 118.165 (2000).

Legislature eliminated most of the initial accountability measures when the program was expanded in 1995.[78] Included among them was the requirement for an annual evaluation conducted by the DPI. As noted earlier in the paper, 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.[79]

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).[80] 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.[81] Both state-accredited and non-accredited private schools may participate in the scholarship

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[77] Wis. Stat. § 119.23 (2000).

[78] 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 "The Politics of Vouchers" in John F. Witte, The Market Approach to Education: An Analysis of America's First Voucher Program (Princeton, NJ: Princeton University Press, 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.

[79] Milwaukee Parental Choice Program: An Evaluation, Legislative Audit Bureau, State of Wisconsin, February 2000.

[80] 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 (6th Cir. 1996).

[81] 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, 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. Whisner is generally regarded as the exception to

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.[82] 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 note earlier, 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 long enjoyed, the publicly funded voucher is the best vehicle for states to use to keep 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 our 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 to private entities on a large scale. 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

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general judicial deference to state regulation of religious and non-religious private schools.

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 was originally 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,[83] 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 85 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

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[82] Ohio Rev. Code Ann §3313.976(A) (West 2000).
[83] Rust v. Sullivan, 500 U.S. 173 (1991).

several state supreme courts have expressed particular sensitivity to this issue.[84] 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.[85]

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.[86] The Washington high court did so and struck the aid plan down as a violation of the state constitution's anti-establishment clause.[87] 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.

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[84] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (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 Board, 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 Durham v. McLeod, 192 S.E.2nd 202 (S.C. 1972) (per curiam), appeal dismissed, 413 U.S. 902 (1973) (exclusion of religious schools from a student college tuition assistance program would materially disadvantage the schools).

[85] Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (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).

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.[88] Assuming this to be the case and assuming the state constitution does not bar the participation of religious private schools, can the state hold them 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 unconstitutional 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.[89] 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

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[86] Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986).
[87] Witters v. State Commission for the Blind, 771 P.2d 1119 (Wash. 1989).
[88] Based on a careful review of past decisions, I have prophesied that a slim majority of the present justices on the U.S. Supreme Court will 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. Frank R. Kemerer, "The Constitutional Dimensions of School Vouchers," Texas Forum on Civil Liberties and Civil Rights, vol. 3 (Summer 1998), pp. 156-161 and fn. 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, 120 S.Ct. 2530 (2000). At this writing, there is widespread belief that the Cleveland voucher program, which presently is pending before the U.S. Court of Appeals for the Sixth Circuit, is likely to be appealed to the U.S. Supreme Court.
[89] Employment Division, Department of Human Resources of Oregon v. Smith, 117 S.Ct. 2157 (1997) (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).

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.[90] 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.[91] 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* and *Pierce v. Society of Sisters*.[92] 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.[93]

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

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[90] City of Boerne v. Flores, 117 S.Ct. 2157 (1997).
[91] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[92] Meyer v. Nebraska, 263 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).
[93] Troxel v. Granville, 120 S.Ct. 2054 (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).

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 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 were the right ones 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.

If experience with privatization in corrections, public housing, and special education is any indication, private entities undertaking educational services on behalf of the state can expect considerable state monitoring and control. It may well be that the most extreme form of educational privatization by the state -- voucher programs -- 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. While it appears that the state can assure through a variety of accountability measures that nonreligious private schools participating in publicly funded voucher programs serve public interests, 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. As we have noted from experience in the non-education context, 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.

APPENDIX

Table 1: Regulation of Public Versus Private Schools

	General Rule	Legal Basis	Recent Example
Public	Reasonable relation to state interest	10th Amendment; state constitution*	No violation of school district rights for state to transfer local district revenue to property poor districts. *Edgewood I.S.D. v. Meno*, 893 S.W.2d 450 (Tex. 1995).
Private (Nonreligious)	Reasonable relation to state interest	*Pierce v. Society of Sisters*, 1925	No violation of parent or school rights to require private schools to participate in statewide student testing program. *Ohio Assoc. of Independent Schools v. Goff*, 92 F.3d 419 (6th Cir. 1996).
Private (Religious)	Reasonable relation to state interest	*Pierce v. Society of Sisters*, 1925; *Employment Div. v. Smith*, 1990**	No burden on free exercise of religion for public school to refuse transfer credits from unaccredited religious private school. *Hubbard v Buffalo Indep. Sch. Dist.* 20 F. Supp.2d 1012 (W.D. Tex.1998).

*All state constitutions require state legislatures to establish and operate a public schooling system.
**In some cases, state constitutional protections of religion have been cited in striking down regulation of private schools including those that are religious, e.g., *State v. Whisner*, 351 N.E.2d 750 (Ohio 1976). In Texas, the legislature in 1999 enacted a statute that gives religion special protection from government interference. It remains uncertain whether either state constitutional or statutory law can countermand the U.S. Supreme Court's 1990 decision in *Employment Division v. Smith* that religion is not entitled to special treatment. This case is discussed in the last section of the paper focused on voucher programs.

Table 2: Lines of Authority Between Educational Management Organizations (EMOs) and Education Agencies in Arizona, Michigan, and Massachusetts

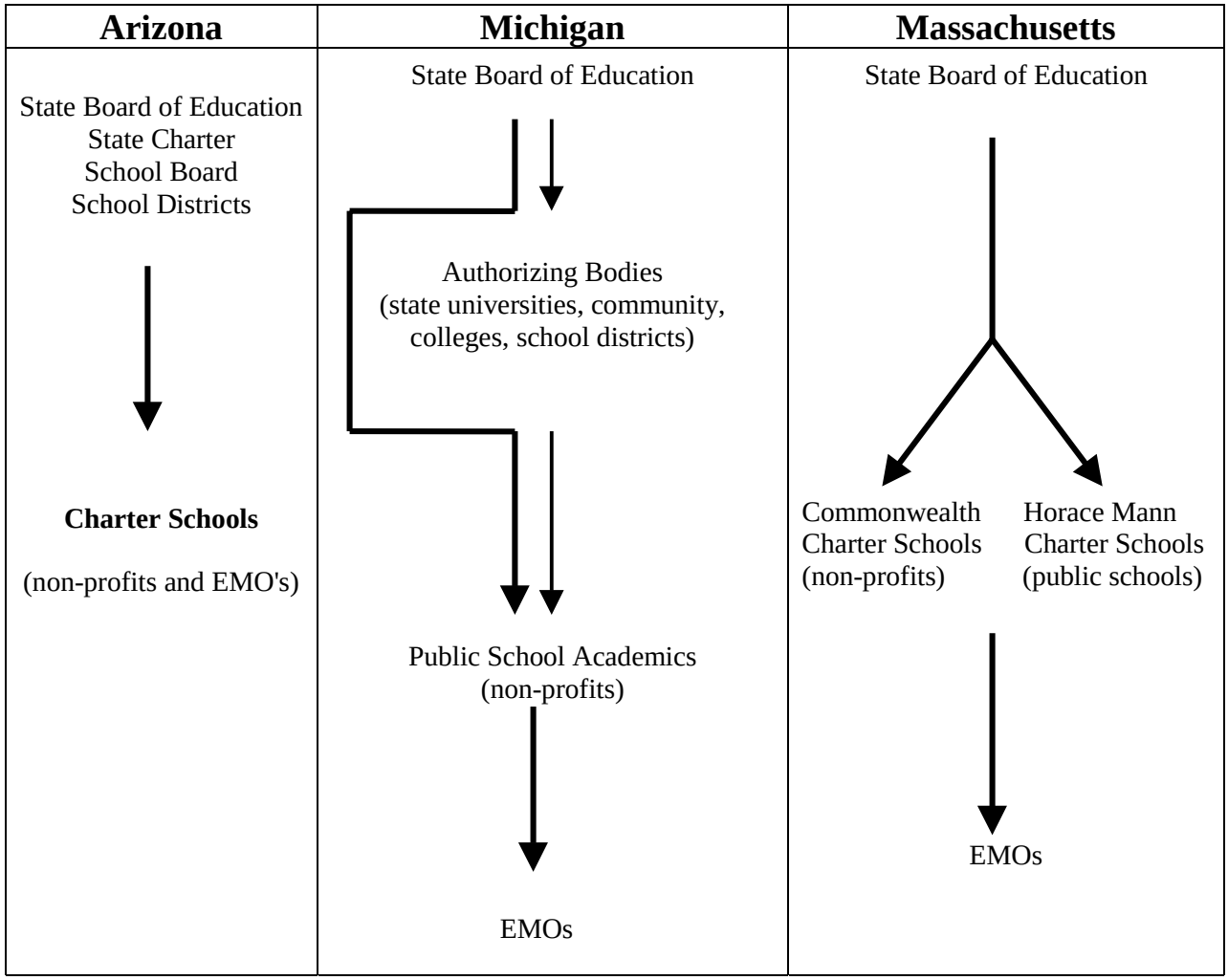

Table 3: Arizona
Key Accountability Provisions for Privatized Charter Schools

Source	*Governance & Reporting*	*Curriculum and Assessment*	*Personnel*	*Fiscal*
Statute	Compliance with dept. of ed. rules to assure compliance with federal and state civil rights and health and safety laws 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	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. §§ 15.181 -15. 189 (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.

Table 4: Michigan
Key Accountability Provisions for Privatized Public School Academies (Charter Schools)

Source	*Governance & Reporting*	*Curriculum & 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 the coll. barg. is responsibility of 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 & 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. 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 §§ 380.501-507 and various sections (2000); Mich. Admin. Code, various sections (2000); charter documents from state universities; and ten sample charters and EMO contracts.

Table 5: Massachusetts
Key Accountability Provisions for Privatized Charter Schools

Source	*Governance & Reporting*	*Curriculum & 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 ch. 71, §§ 89 (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.