



How *Espinoza v. Montana Department of Revenue* Will Undermine Civil Rights

In *Espinoza v. Montana Department of Revenue*, the Supreme Court held that Montana's voucher program must fund private religious schools if it funds secular private schools. This decision could open the door to new and expanded taxpayer-funded private school voucher programs across the country. In addition to violating fundamental principles of religious freedom by requiring taxpayers to fund religious education, this decision could also require taxpayers to fund schools that discriminate.

Despite spurious claims from President Trump and Education Secretary Betsy DeVos that “school choice is the civil rights issue of our time” (a claim made even more offensive and baseless given this administration's repeated attacks on civil rights¹), private school vouchers effectively strip students of many of the rights and protections they would have in public schools—*undermining* their civil rights. At a time when our nation is grappling with the consequences of demonstrated, dramatic racial inequality, Trump's disingenuous claims about private school vouchers are not just tone deaf, they distract from efforts for real change.

Private school vouchers lack sufficient protections for students and teachers, including protections against discrimination based on religion, sex, sexual orientation, gender identity, and disability. Additionally, in some states, voucher programs have led to increases in school segregation.² This is no surprise considering private school voucher programs were first created to avoid the Supreme Court's ruling in *Brown v. Board of Education*.³

The *Espinoza* decision could embolden Trump and DeVos to push to expand these harmful voucher programs nationwide. Rather than diverting funds to private religious schools, lawmakers should fully fund our often under-resourced public schools, which are open and nondiscriminatory in their acceptance of all children, and which educate 90% of our country's students.

Voucher Programs Lack Sufficient Protections for Students' Education and Civil Rights

Taxpayer dollars should never fund discrimination. Yet, private schools funded by vouchers do not provide the same federal civil rights protections to students as public schools, such as those in Titles IV and VI of the Civil Rights Act, Title IX of the Education Amendments Act of 1972, the Individuals with Disabilities Education Act, and Title II of the Americans with Disabilities Act. And students who attend private schools using vouchers are stripped of the First Amendment, due process, and other constitutional and statutory rights guaranteed to them in public schools.

In addition, voucher programs generally lack state-level protections for students. A 2019 survey of existing state voucher programs found that only 42% include nondiscrimination protections.⁴ Although all the states with nondiscrimination provisions protected race, they provided few other protections:

- only 24% included disability;
- only 24% included religion;
- only 18% included sex;
- only 11% explicitly included sexual orientation; and
- only 5% explicitly included gender identity.

Even when state programs have nondiscrimination protections, religious schools are often exempt. And, because the vast majority of private schools participating in voucher programs are religious,⁵ the majority of voucher schools do not provide even basic civil rights protections to students. In fact, in the Montana voucher program at issue in the *Espinoza* case, 94 percent of taxpayer-funded vouchers went to private religious schools.⁶ And 10 of 12 religious schools in that state's voucher program had discriminatory policies.⁷

Moreover, voucher programs rarely include appropriate enforcement mechanisms to ensure that voucher schools comply with the law. For children and families attending public schools, there are clear systems for oversight (including data collection), ways to report violations, and penalties for noncompliance. Without providing the same mechanisms for children and families in private schools, vague references to nondiscrimination will not provide needed protection.

Private School Voucher Programs Enable Taxpayer-Funded Discrimination

Religious Discrimination

- Many voucher schools impose a religious litmus test on students and their families. Some schools discriminate against students based on their or their families' religious beliefs,⁸ and some condition admissions on adherence to certain religious principles.⁹

LGBTQ Discrimination

- Private schools that accept taxpayer-funded vouchers often deny admission to, or expel, LGBTQ students and students with LGBTQ family members.¹⁰ Many private voucher schools also teach anti-LGBTQ curriculum,¹¹ and some promote conversion therapy for LGBTQ students.¹²
- For example, a 2019 investigation in Florida uncovered 156 private voucher schools with anti-LGBTQ views that educated more than 20,800 students using more than \$129 million dollars in state-funded vouchers.¹³

Discrimination Against Students with Disabilities

- Students with disabilities who attend a private school with a voucher are considered parentally placed in that school and they forfeit many of the protections provided to students and families under the Individuals with Disabilities Education Act (IDEA). For students, this can mean losing services such as those listed on the student's Individualized Education Program (IEP), and the right to be educated in the least restrictive environment. Families also lose due process protections that would provide recourse if they believe their child is not receiving necessary special education services.
- Private voucher schools often deny admission to students with disabilities or to students based on other factors like disciplinary history, which disproportionately affects students with disabilities.¹⁴ As a result, in some state voucher programs, students with disabilities have been systematically excluded from the program.¹⁵

Employment Discrimination

- Students are not the only ones who lack important protections in private schools that take taxpayer-funded vouchers. Teachers and other school employees at religious schools also face discrimination.

- Under Title VII's religious exemption, private religious schools can refuse to employ anyone who is not a member of the same faith.¹⁶
- Religious schools may also claim the "ministerial exception" for their teachers, which would mean teachers are not covered by *any* civil rights laws, including Title VII's protections against employment discrimination based on race, color, national origin, religion, sex, sexual orientation, or gender identity or the ADA's protections against employment discrimination based on disability.¹⁷

Private School Vouchers Can Increase Segregation

In addition to the outright discrimination that takes place in private voucher schools, voucher programs also have a sordid past rooted in racism. Vouchers were first created to allow white students to evade integration orders in the wake of *Brown v. Board of Education* and to fund segregation academies designed to keep black and white students apart.¹⁸ Even today, national data show that private schools tend to be more segregated than similarly situated public schools¹⁹ and enroll higher populations of white students compared to public schools.²⁰ In fact, as of 2012, 43% of private school students across the country attended virtually segregated schools, meaning schools where white students comprise 90% or more of the school's enrollment.²¹ In some state voucher programs, segregation rates are even higher. Examples of vouchers increasing segregation include:

- A 2016 study found that Louisiana's voucher program had a negative impact on integration in private schools.²²
- In Milwaukee in 2013-2014, more than 77% of African American students in the public schools attended "intensely segregated" schools, but for African American students in the voucher program, that number rose to more than 85%.²³
- A 2010 study of Georgia's tuition tax credit program revealed that while only 10% of white students in public schools attended virtually segregated schools, within the program at private schools this rose dramatically to 53%.²⁴

We Must Reject Private School Vouchers

Given this data on school segregation and the lack of legal protections for students in voucher programs, it is clear that vouchers are a civil rights problem—not a solution—for students. Private school vouchers exacerbate inequities among students, and studies repeatedly show they fail to improve—and often decrease—academic outcomes and educational opportunities for students.

The Supreme Court's *Espinoza* decision could usher in more taxpayer funding for private schools, and with it, taxpayer-funded discrimination. In contrast, public schools serve all students regardless of religion, disability, English fluency, sexual orientation or gender identity, or any other factor, and they provide students with critical civil rights protections. As we work toward addressing injustice in our nation, public schools are a unifying factor in our diverse communities and a pillar of our democracy. The solution for safeguarding students' civil rights is not more private school vouchers; rather, it is funding and strengthening our public schools.

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Endnotes

- ¹ See [Trump Administration Civil and Human Rights Rollbacks](#), Leadership Conf. for Civil & Human Rights (2020).
- ² See Halley Potter, [Do Private School Vouchers Pose a Threat to Integration?](#), Century Found. (2017) (“[V]oucher programs on balance are more likely to increase school segregation than to decrease it or leave it at status quo.”).
- ³ Steve Suitts, *Overturing Brown: The Segregationist Legacy of the Modern School Choice Movement* 90 (2020) (“The school choice and voucher movement is remarkable in replicating so closely the primary strategies and tactics of Southern segregationists while claiming the righteous mantle of the people and movement who fought against those segregationists.”).
- ⁴ Bayliss Fiddiman & Jessica Yin, [The Danger Private School Voucher Programs Pose to Civil Rights](#), Ctr. for Am. Progress (May 13, 2019). Only 3% of state voucher programs protected all categories of sex, race, disability, religion, sexual orientation, and gender identity.
- ⁵ For example, 81% of students using a voucher in Washington, DC, attend private religious schools. Jill Feldman, et al., [Evaluation of the DC Scholarship Program: An Early Look at Applicants and Participating Schools Under the SOAR Act](#), U.S. Dep’t of Educ., 29 (Oct. 2014).
- ⁶ Brief for Am. Civil Liberties Union as Amici Curiae Supporting Appellant, *Espinoza v. Montana Dept. of Revenue*, 435 P.3d 603 (Mont. 2018) at Attachment 4.
- ⁷ *Id.*
- ⁸ Kimberly Quick, [Second Class Students: When Vouchers Exclude](#), Century Found. (Jan. 11, 2017) (“For example, according to its written policy, a North Carolina private school accepting vouchers denies admission to ‘those in cults, i.e. Mormons, Jehovah Witness, Christian Science, Unification Church, Zen Buddhism, Unitarianism, and United Pentecostal.’”).
- ⁹ See, e.g., U.S. Gov’t Accountability Office, GAO-16-712, [Private School Choice Programs Are Growing and Can Complicate Providing Certain Federally Funded Services to Eligible Students](#) 27 (2016) (voucher school that required all students in fourth grade and above to follow a list of religious principles); Leslie Postal, [Florida’s New Voucher Program Could Prompt Lawsuit](#), Orlando Sentinel (May 28, 2019) (private school that “enrolls about 300 voucher students . . . demands parents abide by a ‘lifestyle policy’ that forbids ‘homosexual and transgender orientation.’”).
- ¹⁰ E.g., Chris Fitzsimon, [More Taxpayer Funding for Voucher Schools that Openly Discriminate Against LGBT Students and Parents](#), NC Policy Watch (July 27, 2016) (voucher school’s handbook stated that it would refuse to admit and will expel students that are “living in, condoning, or supporting any form of sexual immorality; practicing or promoting a homosexual lifestyle or alternative gender identity”).
- ¹¹ E.g., Southern Educ. Found., [Issue Brief: Georgia’s Tax Dollars Help Finance Private Schools with Severe Anti-Gay Policies, Practices, & Teachings](#) (Jan. 2013) (“at least 115 private schools [participating in the tax-credit voucher program] have explicit anti-gay policies or belong to associations that condemn homosexuality”).
- ¹² Rebecca Klein, [Millions Of Taxpayer Dollars Are Going to Schools that Push Conversion Therapy](#), HuffPost (June 10, 2020) (Florida private schools accepting millions in taxpayer-funded vouchers promote conversion therapy for LGBTQ students).
- ¹³ Leslie Postal & Annie Martin, [Anti-LGBT Florida Schools Getting School Vouchers](#), Orlando Sentinel (Jan. 23, 2020).
- ¹⁴ Selene Almazan & Denise Stile Marshall, [Council of Parent Attorneys & Advocates, School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice](#) (June 2016).
- ¹⁵ E.g., [Letter to Tony Evers, State Superintendent, Wisc. Dep’t of Pub. Instruction, from U.S. Dep’t of Justice, Civil Rights Div., Educ. Opportunities Section](#), Apr. 9, 2013 (intervention by the Department of Justice to require Wisconsin to implement policies and practices to eliminate discrimination against students with disabilities in its administration of the Milwaukee voucher program).
- ¹⁶ 42 U.S.C § 2000e–1.
- ¹⁷ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 194 (2012) (teacher considered a minister for purposes of ministerial exception was barred from bringing an employment discrimination suit under the ADA); see also *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 769 F. App’x. 460 (9th Cir. 2019), cert. granted, 140 S. Ct. 679 (2020); *Biel v. St. James Sch.*, 911 F.3d 603 (9th Cir. 2018), cert. granted, 140 S. Ct. 680 (2019).
- ¹⁸ Chris Ford, et al., [The Racist Origins of Private School Vouchers](#), Ctr. for Am. Progress (July 12, 2017).
- ¹⁹ Tomas Monarrez, et al., [When Is a School Segregated? Making Sense of Segregation 65 Years after Brown v. Board of Education](#), Urban Institute (Sept. 2019).
- ²⁰ U.S. Dep’t of Educ., [School Choice in the United States: 2019](#) (Sept. 2019).
- ²¹ *Overturing Brown* at 77.
- ²² Jonathan N. Mills, et al., [How Has the Louisiana Scholarship Program Affected Students? A Comprehensive Summary of Effects after Two Years](#), Educ. Research Alliance (Feb. 2016).
- ²³ Lisa Kaiser, [Still Separate, Still Unequal](#), Shepherd Express (May 14, 2014).
- ²⁴ Alex Morris, [The Hidden War Against Gay Teens](#), Rolling Stone (Oct. 10, 2013).