



2019

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Recommended Citation

Olivia Perry, *Learning to Discriminate: Vouchers and Private School Policies' Impact on Homosexual Students*, 17 FIRST AMEND. L. REV. 477 (2022).

Available at: <https://scholarship.law.unc.edu/falr/vol17/iss3/5>

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LEARNING TO DISCRIMINATE: VOUCHERS AND PRIVATE SCHOOL POLICIES' IMPACT ON HOMOSEXUAL STUDENTS

Olivia Perry*

INTRODUCTION

What is public education today? With the rise of charter schools, magnet schools, open enrollment systems, and voucher programs, the makeup of public education has greatly changed in the last thirty years. Twenty-eight states currently have some form of private school choice, and fifteen states today have voucher programs,¹ which provide students tuition aid so that they may attend private schools.² Particularly, states choose to enact voucher programs so that more students are able to attend private schools, regardless of economic status, and any private school, generally including religious schools, may opt to participate and enroll students receiving vouchers.³

Although proponents of voucher programs argue that these initiatives give children of low-income families more options and ensure more students receive access to high-quality education, critics respond that these initiatives funnel students away from public schools to private schools.⁴ Many also oppose voucher programs because they pose separation of church and state issues, allowing religious schools to receive money from state governments.⁵ Unambiguously, recent news headlines show that participating religious private schools have the ability to discriminate against students receiving vouchers based on sexual orientation in their admissions policies and more generally in their student handbooks, exposing a critical flaw in state voucher programs.⁶

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¹ Benjamin Erwin, *Interactive Guide to School Choice Laws*, NAT'L CONF. ST. LEGISLATURES (Sept. 28, 2018, 8:56 AM), <http://www.ncsl.org/research/education/interactive-guide-to-school-choice.aspx#/>.

² *See* *Zelman v. Simmons-Harris*, 536 U.S. 639, 639 (2002).

³ *See generally id.* (holding that private school voucher programs are constitutional and do not violate the Establishment Clause, even if they provide aid to religious schools).

⁴ Jason S. Marks, *What Wall? School Vouchers and Church-State Separation After Zelman v. Simmons-Harris*, 58 J. MO. B. 354, 354 (2002).

⁵ *Id.*

⁶ Lindsay Wagner, *Private Christian Schools Receiving Taxpayer-funded School Vouchers Continue to Exclude Students on the Basis of Religion and Sexual Identity*, A.J. FLETCHER FOUND. (Jan. 27, 2017), <https://www.wral.com/private-christian-schools-receiving->

Similar to recent news, this Note will evaluate discriminatory impacts of North Carolina's Opportunity Scholarship voucher program, particularly where participating religious private schools are permitted to deny admission to homosexual students or take a stance against homosexuality. Part I describes the components of the Opportunity Scholarship program and the breadth of discrimination against homosexual students. Part II compares North Carolina's Opportunity Scholarship program to voucher programs in other states and explores how other states deal with potential discriminatory effects based on homosexuality. Part III examines judicial precedents that view the policies of private schools as government speech. The remainder of Part III then argues that courts should not allow private schools to discriminate based on sexual orientation.

I. VOUCHER PROGRAMS: BACKGROUND, COMPONENTS, AND DISCRIMINATION

A. State Voucher Programs

State voucher programs each have their own unique provisions and approaches to handling discrimination. Most invoke Title VI of the Civil Rights Act⁷ and only provide specific protections to students based on race, color, and national origin, but ignoring sexual orientation.⁸ Many states, like Georgia, have provisions in their statutes that actually prohibit participating schools from altering or not complying with their student admissions policies, even when those schools may have discriminatory admissions policies described in their student handbooks.⁹ Two states, Maine and Vermont, have opted to exclude religious schools altogether from participating in their

taxpayer-funded-school-vouchers-continue-to-exclude-students-on-basis-of-religion-sexual-ide/16477602/; Rebecca Klein, *These Schools Get Millions of Tax Dollars to Discriminate Against LGBTQ Students*, HUFFINGTON POST (Dec. 16, 2017 10:03 AM), https://www.huffingtonpost.com/entry/discrimination-lgbt-private-religious-schools_us_5a32a45de4b00dbbcb5ba0be [hereinafter Klein, *Schools Get Millions*]; Julia Donheiser, *Choice for Most: In Nation's Largest Voucher Program, \$16 Million Went to Schools with Anti-LGBT Policies*, CHALKBEAT (Aug. 10, 2017), <https://www.chalkbeat.org/posts/us/2017/08/10/choice-for-most-in-nations-largest-voucher-program-16-million-went-to-schools-with-anti-lgbt-policies/>.

⁷ 42 U.S.C. § 2000d (enacted as part of the Civil Rights Act of 1964, stating that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in . . . or be subjected to discrimination under any program or activity receiving Federal financial assistance")

⁸ FLA. STAT. § 1002.421(2)(a) (2018); N.C. GEN. STAT. § 115C-562.5(c) (2014); WIS. STAT. § 118.60(2)(a)(4) (2018).

⁹ Suzanne E. Eckes et al., *Dollars to Discriminate: The (Un)Intended Consequences of School Vouchers*, 91 PEABODY J. ED. 537, 550 (2016).

voucher programs.¹⁰ On the other hand, Florida has recently enacted a voucher program with the mission of aiding students that have been victims of bullying in public schools.¹¹ Wisconsin is unique in that it allows students to refuse to participate in religious activities at their private schools.¹² Maryland's policy demonstrates the state's recognition that voucher programs can have discriminatory effects on LGBT students; the state requires participating private schools to sign a pledge stating that they will not discriminate in their admissions policies on the ground of sexual orientation.¹³ Some states do not have any antidiscrimination provision in their voucher program statutes.¹⁴ Yet, despite the many variations in each state's voucher program, one aspect remains the same: None of them contain specific language in their antidiscrimination provisions prohibiting discrimination based on sexual orientation.

The Constitution guarantees the separation of church and state, mandating that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"¹⁵ But, vouchers can be used for private, religious schools because the Supreme Court upheld Ohio's voucher program in *Zelman v. Simmons-Harris*. There, the Court upheld voucher programs generally, by ruling that where a government aid program, such as school voucher programs, is neutral, and the aid goes to religious schools as a result of parents' private choice, the program is not readily subject to challenge under the Establishment Clause.¹⁶ That said, this ruling was not unanimous.¹⁷ Justice Stevens argued in his dissent that a state's education crisis, a state's range of educational choices, and the voluntary character of school choice should not have factored into the Court's decision.¹⁸ More importantly, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, argued in his dissent that "[t]he applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson v. Board of Ed. of Ewing*,"¹⁹ where the Supreme Court unanimously ruled that "[n]o tax in any amount, large or small, can be levied to support any religious activities, whatever they may be called, or whatever form they may adopt to teach or

¹⁰ ME. STAT. tit. 20-A, §§ 2951–2955 (2018); VT. STAT. ANN. tit. 16, §§ 821–836 (West 2019).

¹¹ FLA. STAT. § 1002.40 (2018).

¹² WIS. STAT. § 118.60(7)(c) (2018).

¹³ MD. CODE. ANN., EDUC. § R00A03.05 (2018).

¹⁴ Eckes et al., *supra* note 9, at 548.

¹⁵ U.S. CONST. amend. I.

¹⁶ *Zelman v. Simmons-Harris*, 536 U.S. 639, 679–80 (2002).

¹⁷ *See generally id.*

¹⁸ *Id.* at 685–86 (Stevens, J., dissenting).

¹⁹ *Id.* at 686 (Souter, J., dissenting).

practice religion.”²⁰ *Zelman*’s 5-4 decision already puts vouchers on shaky footing.

Although vouchers have been upheld, critics and policy experts continue to have different theories of how well vouchers intersect with separating church and state.²¹ Staunch opponents of vouchers argue that any state money paid to a religious school thereby aids a religion and expresses a governmental preference.²² Voucher proponents, on the other hand, believe that state money paid to a religious school is simply a purchase of educational services and is similar to the loaning of secular textbooks to nonpublic students, which has been upheld.²³ Others agree with Justice O’Connor that vouchers are consistent with the Establishment Clause because “‘parents of students eligible for vouchers have a genuine choice between religious and nonreligious schools,’ and it is only through these choices that government monies reach religious schools.”²⁴

Statutes may provide separate protections. Although Title IX of the Education Amendments of 1972 may be enough to prove that voucher schools may not discriminate against homosexual students, its applicability is questionable. Title IX prohibits the discrimination based on sex from any school receiving federal assistance.²⁵ “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .”²⁶ However, it does not explicitly prohibit discrimination based on sexuality, and the clause has an exemption for practices that would be inconsistent with an organization’s religious beliefs.²⁷ Also, Title IX does not apply “to an educational institution which is controlled by a religious organization if the application . . . would not be consistent with the religious tenets of such organization.”²⁸ Lastly, with regard to school admission policies, Title IX only applies to vocational and higher education institutions.²⁹

Because voucher schools are receiving public tax dollars, one would think that they would be barred from discrimination

²⁰ *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 16 (1947).

²¹ *See Marks*, *supra* note 4, at 354–55.

²² *Id.* at 355.

²³ *Id.*; *Bd. of Educ. v. Allen*, 392 U.S. 236, 243–45 (1968).

²⁴ *Marks*, *supra* note 4, at 357 (quoting 536 U.S. 639, 672 (2002) (O’Connor, J., concurring)).

²⁵ 20 U.S.C. § 1681(a).

²⁶ *Id.*

²⁷ *Id.*

²⁸ 20 U.S.C. § 1681(a)(3).

²⁹ *Id.* § 1681(a)(1).

based on sexual orientation in the way that public schools are barred. So why are they not?

Because voucher programs have very few accountability requirements for private schools when compared to public schools, they still have the freedom to maintain their prior student handbooks' acceptance and expulsion policies.³⁰ Research shows that this autonomy may lead to insufficient protection from discrimination; a 2016 study found that no school voucher program nationwide sufficiently protects LGBT students from discrimination from participating private schools.³¹ Specifically, many participating religious schools have student handbook provisions stating that homosexuality is a sin or explicitly prohibiting homosexual students and family members of homosexual individuals from attending, creating backlash among the public.³² In addition, some schools have also faced public pressure to no longer accept voucher funds due to their stances on homosexuality.³³

B. North Carolina's Voucher Programs

In 2013, North Carolina's Opportunity Scholarship Program was enacted by the North Carolina General Assembly.³⁴ It provides that students in kindergarten through twelfth grade are eligible to receive "free or reduced-price lunch" with funding of up to \$4,200 per year to attend a participating private school.³⁵ To participate, private schools must (1) report documentation to the State Education Assistance Authority of tuition and fees charged; (2) conduct a background check of the staff member with the highest authority; (3) provide parents of students receiving vouchers with reports on students' academic progress; (4) administer a standardized test to students receiving vouchers; and (5) provide the Authority graduation rates for students receiving vouchers, and conduct a financial review.³⁶ Additionally, they must not discriminate based on race, color, or

³⁰ See FLA. STAT. § 1002.421(2)(a) (2018); N.C. GEN. STAT. § 115C-562.5(c) (2014); WIS. STAT. § 118.60(2)(a)(4) (2018).

³¹ Eckes et al., *supra* note 9, at 537.

³² Wagner, *supra* note 6; *Fayetteville Christian School Student Handbook, 2016 Edition*, FAYETTEVILLE CHRISTIAN SCH., http://media.wix.com/ugd/284162_ced89d6d26284fa1a9fc32edf4ab17ea.pdf (last visited May 7, 2019); Chris Fitzsimon, *More Taxpayer Funding for Voucher Schools that Openly Discriminate Against LGBT Students and Parents*, NC POL'Y WATCH, (July 7, 2017), <http://www.ncpolicywatch.com/2016/07/27/more-taxpayer-funding-for-voucher-schools-that-openly-discriminate-against-lgbt-students-and-parents/>.

³³ See, e.g., Pressley Baird, *Christian School to Refuse State Money Over Anti-Gay Policy*, STAR NEWS ONLINE (Dec. 6, 2013, 5:00 PM), <https://www.starnewsonline.com/article/NC/20131206/News/605048219/WM/>.

³⁴ N.C. GEN. STAT. § 115C-562.2 (2016).

³⁵ *Id.* § 115C-562.2(b) (2016).

³⁶ *Id.* § 115C-562.5 (2016).

national origin.³⁷ Despite this litany of mandates, there is no non-discrimination requirement based on sexual orientation.³⁸

Two years after its enactment, the North Carolina Supreme Court upheld the constitutionality of the Opportunity Scholarship Program in *Hart v. State*.³⁹ In *Hart*, voucher opponents alleged that state funds were being given to voucher schools that discriminate in their admissions policies based on religion, including schools that had students sign a pledge that they fully agreed with the school's religious views and practices.⁴⁰ Established in *Zelman v Simmons-Harris*, the U.S. Supreme Court uses the following inquiry to decide whether vouchers are constitutional: "whether the program nonetheless has the forbidden effect of advancing or inhibiting religion." Although the answer to that question should be in the affirmative, the Court reasoned that the program should not be subject to challenge by the Establishment Clause because the program itself is neutral regarding religion and because the program aids "a broad class of citizens who, in turn, direct aid to religious schools" by their own choice.⁴¹

In *Hart*, the North Carolina Supreme Court held that the program did not violate constitutional requirements for school funding, did not violate the state's Uniformity Clause, and was for a "public purpose."⁴² However, the Court added that the issue of whether voucher schools discriminate based on religion should be decided later.⁴³

Here plaintiffs are taxpayers of the state, not eligible students alleged to have suffered religious discrimination as a result of the admission or educational practices of a nonpublic school participating in the Opportunity Scholarship Program. Because eligible students are capable of raising an Article I, Section 19 discrimination claim on their own behalf should the circumstances warrant such action, plaintiffs have no standing to assert

³⁷ *Id.*; 42 U.S.C. § 2000d (2014).

³⁸ See N.C. GEN. STAT. § 115C-562 (2016).

³⁹ 774 S.E.2d 281 (N.C. 2015).

⁴⁰ Eckes et al., *supra* note 9, at 541.

⁴¹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 640 (2002).

⁴² *Hart*, 774 S.E.2d at 290.

⁴³ *Id.* at 141.

a direct discrimination claim on the students' behalf.⁴⁴

In a short but strongly-worded dissent, Justice Wynn argued that the Opportunity Scholarship Program is a “cruel illusion” that appears to be a solution to education inequities but instead only exacerbates these inequities.⁴⁵ Justice Wynn concluded his dissent by stating “[i]n time, public schools may be left only with the students that private schools refuse to admit based on . . . religious affiliation [or] sexual orientation”⁴⁶ Since the *Hart* decision, no allegations of discrimination from voucher schools have returned to the North Carolina Supreme Court, making the Court’s approach to deciding discrimination cases against voucher schools a little unclear. As shown by recent discrimination incidents at voucher schools nationwide based on sexual orientation, however, Justice Wynn seems to have foreseen what was to come.

North Carolina’s Opportunity Scholarship Program has grown immensely since its initial implementation in 2014–15, as shown by the increasing numbers of students receiving vouchers and participating private schools.⁴⁷ The number of participating schools with enrolled voucher recipients has almost doubled, and seven times as many students received a voucher in 2017–18 as in the program’s initial year.⁴⁸ In 2017–18, 7,371 students received funding through the Opportunity Scholarship program, and over \$28 million was granted to students attending participating schools.⁴⁹ 457 private schools participated in the program from 2017–18, and 405 of those schools enrolled funding recipients.⁵⁰ The majority of voucher funds have gone to religious schools. In 2015–16, out of the \$12 million spent on Opportunity Scholarship Program vouchers, \$11 million went to religious schools, and religious schools today remain a key portion of participating private schools, as shown by the fact that each of the top twenty participating private schools based on enrollment numbers in 2017–18 has a religious affiliation.⁵¹

Since the initial implementation of North Carolina’s Opportunity Scholarship Program in 2014–15, participating religious private schools have made the news numerous times

⁴⁴ *Id.*

⁴⁵ *Id.* at 156–57.

⁴⁶ *Id.* at 157.

⁴⁷ *Opportunity Scholarship Program Summary of Data*, N.C. ST. EDUC. ASSISTANCE AUTHORITY, http://www.ncseaa.edu/documents/OPS_Summary_Data.pdf (last modified Mar. 7, 2019).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

due to controversial stances and actions regarding homosexuality.⁵² Even participating schools' websites that state they do not discriminate in their admissions policies may still have student handbook provisions that treat homosexuality negatively.⁵³ In 2013, Myrtle Grove Christian School dropped out of the Opportunity Scholarship Program due to public backlash over its policy requiring families to sign a statement claiming that they would not engage in any homosexual activity.⁵⁴ Additionally, many of the participating Christian schools have statements in their schools' handbooks that disparage or explicitly state that they will not admit homosexual students.⁵⁵ Fayetteville Christian School, which received the fifth greatest number of vouchers in 2017–18,⁵⁶ states in its school handbook that the school “will not admit families that engage in illicit drug use, sexual promiscuity, homosexuality (LGBT) or other behaviors that Scripture defines as deviate and perverted.”⁵⁷

Likewise, Liberty Christian Academy in Richlands, which ranked the fourth highest in schools receiving vouchers in 2016–17,⁵⁸ has a similar policy banning homosexuality.⁵⁹ One of the school's policies states that grounds for expulsion include:

“living in, practicing, condoning, or supporting sexual immorality, including but not limited to, sex outside of marriage, homosexual acts, bi-sexual acts; gender identity different than the birth sex at the chromosomal level; promoting such practices; or otherwise the inability to support the moral principles of the school (Leviticus, 20:13a, Romans 1:27, Matthew 19:4-6).”⁶⁰

⁵² Baird, *supra* note 33; Wagner, *supra* note 6.

⁵³ See Klein, *Schools Get Millions*, *supra* note 6.

⁵⁴ Baird, *supra* note 33.

⁵⁵ Wagner, *supra* note 6; *Fayetteville Christian School Student Handbook*, *supra* note 32; Fitzsimon, *supra* note 32.

⁵⁶ *Opportunity Scholarship Program Summary of Data*, *supra* note 47.

⁵⁷ Wagner, *supra* note 6; *Fayetteville Christian School Student Handbook*, *supra* note 32.

⁵⁸ *Opportunity Scholarship Program Summary of Data*, *supra* note 47.

⁵⁹ Wagner, *supra* note 6.

⁶⁰ *Id.*

Raleigh Christian Academy, which ranked twelfth in most vouchers received from 2017–18,⁶¹ also has a student handbook policy stating that homosexuality is a ground for expulsion.⁶²

Similarly, Bible Baptist Christian School has a student handbook provision banning homosexual students and students with homosexual family members.⁶³ Page 76 of the school's student handbook states, “[t]he school reserves the right, in its sole discretion, to refuse admission to an applicant or to discontinue enrollment of a current student [on this basis]. This includes, but is not limited to, living in, condoning, or supporting any form of sexual immorality; practicing or promoting a homosexual lifestyle or alternative gender identity.”⁶⁴

A number of North Carolina voucher schools now have religious student handbooks that discriminate against students based on sexual orientation. How do other states with voucher programs solve this issue? Part Two compares how other states protect students based on sexual orientation from voucher school policies.

II. COMPARING NORTH CAROLINA'S OPPORTUNITY SCHOLARSHIP PROGRAM TO OTHER PROGRAMS

Similar to North Carolina, other states with voucher programs have had issues regarding public funds going to religious schools that discourage or prohibit homosexuality.⁶⁵ Most states incorporate Title VI into their voucher statutes, so by law, they only protect students from discrimination based on race, color, and national origin.⁶⁶ Those insufficient protections from discrimination are not solely present in these states. In a 2017 national investigation of private religious schools participating in state voucher programs, Huffington Post found that at least 700 religious private schools receiving vouchers either openly oppose LGBT issues or have policies discouraging

⁶¹ *Opportunity Scholarship Program Summary of Data*, *supra* note 47.

⁶² Wagner, *supra* note 6.

⁶³ Fitzsimon, *supra* note 32.

⁶⁴ *Id.*

⁶⁵ See Brian Slodysko & Maria Danilova, *Indiana Christian School at Center of LGBT Voucher Debate*, INDYSTAR (June 19, 2017, 7:20 AM), <https://www.indystar.com/story/news/education/2017/06/19/indiana-christian-school-center-lgbt-voucher-debate/407914001/>; Donheiser, *supra* note 6; Kim Severson, *Backed by State Money, Georgia Scholarships Go to Schools Barring Gays*, N.Y. TIMES (Jan. 20, 2013), <https://www.nytimes.com/2013/01/21/education/georgia-backed-scholarships-benefit-schools-barring-gays.html>; Rebecca Klein, *Exclusive: Florida Wants to Help Bullied Kids—Unless They're Gay*, HUFFINGTON POST (Aug. 9, 2018, 7:01 AM), https://www.huffingtonpost.com/entry/florida-anti-bullying-gay-students_us_5b69d2b2e4b0de86f4a5edcf [hereinafter Klein, *Bullied Kids*].

⁶⁶ See FLA. STAT. § 1002.421(2)(a) (2018); N.C. GEN. STAT. § 115C-562.5(c) (2016); WIS. STAT. § 118.60(2)(a)(4).

or prohibiting homosexuality.⁶⁷ The study found that of all voucher schools nationwide, 76 percent are religious, and 14 percent have specific policies against LGBT students, employees, or both.⁶⁸ Currently, only two states with voucher programs have provisions in their statutes prohibiting religious schools from participating: Maine and Vermont.⁶⁹ However, no state currently has specific language in their antidiscrimination statutes prohibiting discrimination based on sexual orientation.⁷⁰

In Indiana, the state with the largest school voucher program in the country,⁷¹ participating religious school Lighthouse Christian Academy has received public backlash due to a statement in its admissions brochure stating that the school may refuse admission or expel students based on their homosexuality.⁷² The school has not yet refused admission based on homosexuality, but the school's attorney has defended the policy, stating "parents are free to choose which school best comports with their religious convictions. For a real choice and thus real liberty to exist, the government may not impose its own orthodoxy and homogenize all schools to conform to politically correct attitudes and ideologies."⁷³

An investigation conducted by Chalkbeat found that ten percent of Indiana's private schools participating in the state voucher program in 2016–17 had policies that discouraged or prohibited homosexuality, and ten percent of these schools received over \$16 million in public funds.⁷⁴ Additionally, because twenty percent of the participating schools did not publicize their admissions policies, it is likely that ten percent is a low estimate.⁷⁵ Indiana's voucher statute requires that participating private schools "abide by the school's written admission policy fairly and without discrimination."⁷⁶ However, as Eckes argues, this provision does not prevent schools from discriminating because participating schools are allowed to

⁶⁷ Klein, *Schools Get Millions*, *supra* note 6.

⁶⁸ *Id.*

⁶⁹ ME. STAT. tit. 20-A, §§ 2951–2955 (2018); VT. STAT. ANN., tit. 16, §§ 821–836 (2019).

⁷⁰ Eckes et al., *supra* note 9, at 553.

⁷¹ Cory Turner, *The Promise and Peril of School Vouchers*, NAT'L PUB. RADIO (May 12, 2017, 6:00 AM), <https://www.npr.org/sections/ed/2017/05/12/520111511/the-promise-and-peril-of-school-vouchers>. In 2018–19, over 36,290 Indiana students participated in voucher programs, and 329 private schools participated. *School Choice: Indiana—Choice Scholarship Program*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/indiana-choice-scholarship-program/> (last visited May 7, 2019).

⁷² Slodysko & Danilova, *supra* note 65.

⁷³ *Id.*

⁷⁴ Donheiser, *supra* note 6.

⁷⁵ *Id.*

⁷⁶ IND. CODE § 20-51-4-3(b) (2017).

enforce their admissions policies, which may be discriminatory themselves.⁷⁷

In Georgia, where individuals and corporations receive state tax credits for donations to nonprofit groups that provide money to participating private schools,⁷⁸ as many as a third of all participating private schools have strict policies against homosexuality.⁷⁹ A 2013 study by the Southern Education Foundation found that 115 Georgia private schools have these student handbook policies opposing homosexuality or hold a religious philosophy that sees homosexuality as a sin.⁸⁰ However, because public information about the program is limited by state law, the percentage of participating schools that discriminate or hold hostile policies regarding homosexuality may be much higher.⁸¹ One reason why discrimination may be such an issue in Georgia is that the state's Department of Education has advised that a participating private school need not "alter its curriculum or program of instruction."⁸² This statement encourages participating schools with policies opposing homosexuality to enforce those policies.⁸³ Furthermore, participating schools are not required by state law to accept student program applicants.⁸⁴

In Virginia, which has a tax credit program to enable low-income students to attend private schools, Timberlake Christian Schools emerged in the headlines in 2014 after expelling a student that had attended the school for five years because she wore her hair short and wore pants instead of skirts, thereby not acting "Christlike."⁸⁵ Although the student did not attend the school as a result of the tax credit program, this incident shows that this school, as well as other state schools, are free to expel or deny admission to students receiving state assistance based on their gender identity and sexual preference.⁸⁶

Beginning Autumn 2018, Florida launched a unique voucher-like program that is aimed at assisting bullied students attend private schools.⁸⁷ Florida's Hope Scholarship Program allows purchasers of motor vehicles to contribute their vehicle

⁷⁷ Eckes et al., *supra* note 9, at 550.

⁷⁸ GA. CODE ANN. § 20-2A-1 (2017).

⁷⁹ *A Failed Experiment: Georgia's Tax Credit Scholarships for Private Schools*, SOUTHERN EDUC. FOUND., <https://www.southerneducation.org/publications/afailedexperiment/> (last visited May 7, 2019). *See also* Severson, *supra* note 65.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Eckes et al., *supra* note 9, at 550.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Klein, *Schools Get Millions*, *supra* note 6.

⁸⁶ *Id.*

⁸⁷ *See* FLA. STAT. § 1002.40 (2018).

sales tax to fund private school scholarships amounting to up to \$7,000 for students that have been bullied or physically beaten in a public school.⁸⁸ As of August 1, about 70 schools had signed up to participate in the program.⁸⁹ Of these 70 participating schools, about 10 percent either claimed in their student handbooks and mission statements that they refused to accept homosexual students or detailed forms of discipline for students in same-sex relationships.⁹⁰

In Maryland, which has a voucher program that requires participating schools to sign a pledge promising to not reject students based on homosexuality,⁹¹ a state education panel voted to prohibit a private school from participating in the voucher program because the school stated that it reserved the right to refuse admission to homosexual and transgender students.⁹² After learning that Trinity Lutheran Christian School's handbook included discriminatory language based on sexual orientation, the panel ultimately decided that the school would no longer receive voucher funds.⁹³ The school's handbook stated that the school may expel or deny enrollment to any student "who is living in, condoning or practicing homosexual lifestyle or alternative gender identity; promoting such practices or otherwise having the inability to support the moral principals [sic] of the school."⁹⁴ The policy also stated that the school had the right "to refuse admission of an applicant or to discontinue enrollment of a student of a same sex marriage or relationship."⁹⁵ Private schools participating in the voucher program must sign a pledge stating that they will not discriminate against students based on race, color, national origin, or sexual orientation.⁹⁶ Since Maryland's enactment of the voucher program and pledge requirement, at least twelve schools have decided not to take vouchers because they did not want to sign the anti-discrimination pledge.⁹⁷

Although Wisconsin does not have an explicit antidiscrimination provision for participating voucher schools, it does have a number of statutes that may sufficiently eliminate

⁸⁸ *Id.*

⁸⁹ Klein, *Bullied Kids*, *supra* note 65.

⁹⁰ FLA. STAT. § 1002.40(13) (2018).

⁹¹ S.B. 190 § R00A03.05, 2016 Leg. (Md. 2016), available at <http://mgaleg.maryland.gov/2016RS/bills/sb/sb0190E.pdf#page=128> (last visited May 7, 2019).

⁹² Liz Bowie, *Private School Loses State Voucher Money Over Anti-LGBT Policy*, BALTIMORE SUN (Oct. 13, 2017), <http://www.baltimoresun.com/news/maryland/education/bs-md-school-voucher-discrimination-20171012-story.html>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ MD. CODE. ANN., EDUC. § R00A03.05 (2018).

⁹⁷ Bowie, *supra* note 92.

discrimination through other means. For instance, “a private school may reject an applicant only if it has reached its maximum general capacity or seating capacity,”⁹⁸ must randomly select students if applicants exceed the space available⁹⁹ and must permit voucher students to opt out of any religious activity.”¹⁰⁰ Wisconsin is the only state with a provision in its voucher statute that allows students to opt out of religious activities.¹⁰¹

Although the programs in Maryland and Wisconsin seem to be more progressive in protecting students based on sexual orientation than other programs, there is still room to ask whether voucher programs remain a viable option, especially because school policies promoting discrimination are not the only form. Other forms of discrimination against sexual orientation are much subtler and harder to identify.¹⁰² Because voucher schools, including mostly religious schools, receive public school dollars, should vouchers be deemed unconstitutional? Are school voucher policies a form of government speech? Part III examines the reasons why voucher school religious policies are governmental speech and discriminate against homosexual students.

III. CONSTITUTIONAL ARGUMENT AGAINST VOUCHERS GOING TO DISCRIMINATORY SCHOOLS

Even though voucher programs consist of state funds, speech from participating voucher schools cannot be considered government speech because these schools are private and vary in their focuses. In *Rust v. Sullivan*, the Supreme Court ruled that a federal regulation prohibiting private family-planning services that received federal funds from referring to abortion as a valid form of family planning did not violate the First Amendment.¹⁰³ The Court stated that “the government may ‘make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.’”¹⁰⁴ The Court continued that the government’s restriction did not discriminate because it instead “merely chose[] to fund one activity to the exclusion of the other.”¹⁰⁵

⁹⁸ WIS. STAT. §§ 118.60(3)(a), 119.23(3)(a) (2017).

⁹⁹ WIS. STAT. §§ 118.60(3)(ag)(3)(b), 118.60(3)(a)(3)(b), 119.23(3)(a) (2017).

¹⁰⁰ WIS. STAT. §§ 118.60(7)(c), 119.23(7)(c) (2017). See also Eckes et al., *supra* note 9, at 548.

¹⁰¹ Eckes et al., *supra* note 9, at 548.

¹⁰² Klein, *Schools Get Millions*, *supra* note 6.

¹⁰³ 500 U.S. 173 (1991).

¹⁰⁴ *Id.* at 192–93 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

¹⁰⁵ *Id.* at 193.

The Court later clarified *Rust* in *Rosenberger v. Rector and Visitors of University of Virginia* where it struck down a university's denial of funding to a student organization that wrote a Christian newspaper.¹⁰⁶ The Court explained that its *Rust* ruling described a specific category of government speech cases where a different First Amendment analysis should be applied due to a distinction between government messages and private messages.¹⁰⁷ There, the Court stated that “[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”¹⁰⁸ The issues in *Rosenberger* were categorically different from the ones in *Rust* because in *Rosenberger*, “the University was not itself ‘speak[ing] or subsidiz[ing] transmittal of a message it favor[ed] but instead expend[ing] funds to encourage a diversity of views from private speakers.’”¹⁰⁹

Voucher programs are more similar to the government funding described in *Rosenberger* than to the refusal of funding in *Rust*, because voucher schools individually transmit their own messages. Like the university funding in *Rosenberger*, the purpose of voucher programs is to create a “free and robust marketplace of ideas”¹¹⁰; one of the main justifications for voucher programs is that they give more students access to schools with different viewpoints and curriculum focuses. Even though the vast majority of voucher schools nationwide are religious schools, these schools have stances based on different religions, and they have different curriculum. In *Rosenberger*, on the other hand, the university funded a wide variety of messages by giving funds to student groups like the Gandhi Peace Center, Students for Animal Rights, and the Lesbian and Gay Student Union.¹¹¹ Scholars suggest that “the provision of public services – even if they have an expressive component – is conceptually distinct from the creation of a forum for debate,” where “the state provides resources for the very purpose of association and expression”¹¹² Here, the breadth in voucher schools likewise helps demonstrate that voucher school policies should not be viewed as government speech.

¹⁰⁶ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 820 (1995).

¹⁰⁷ *Id.* at 833.

¹⁰⁸ *Id.* (citing *Rust*, 500 U.S. at 196–200).

¹⁰⁹ Michael Kavey, *Private Voucher Schools and the First Amendment Right to Discriminate*, 113 YALE L.J. 743, 753 (2003) (quoting *Rosenberger*, 515 U.S. at 834).

¹¹⁰ *Rosenberger*, 515 U.S. at 850 (O'Connor, J., concurring).

¹¹¹ Brief for the Petitioners at 4–5, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (No. 94-329).

¹¹² Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 980 (2003).

Additionally, precedential authority outside of the education field shows that LGBT discrimination automatically deserves a closer look constitutionally. The Supreme Court has ruled that laws that discriminate based on sexual orientation should be given a higher level of scrutiny, and this higher level of scrutiny helps show why discrimination against homosexual individuals should not be facilitated through government funding.¹¹³ In *Romer v. Evans*, the Court struck down a Colorado constitutional amendment that denied homosexual individuals special protection.¹¹⁴ It found that even though proponents of the amendment claimed that it treated homosexual individuals the same as everyone else, the amendment essentially repealed all existing statutes, regulations, ordinances, and policies of the state that ban discrimination based on sexual orientation.¹¹⁵ Using a heightened rational basis test, the Court found that the amendment violated equal protection under the Fourteenth Amendment because it placed homosexuals into a solitary class in both the private and governmental sphere.¹¹⁶ The Court reasoned that “a law declaring that in general it should be more difficult for one group of citizens than for all others to seek aid from government is itself a denial of equal protection of the laws in the most literal sense.”¹¹⁷

The Court in *Romer* concluded that the real reason behind the amendment was animus against homosexuals and that the amendment was too broad to be a legitimate means to a legitimate end.¹¹⁸ Specifically, the amendment was too broad because it imposes “a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation.”¹¹⁹ Also, the amendment’s reach was too narrow because “its breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects[.]”¹²⁰ “[I]f ‘equal protection under the laws’ means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”¹²¹ The Court’s ruling was not unanimous; Justice Scalia, joined by Justices Rehnquist and Thomas, dissented, arguing that states should be allowed to show their moral disapproval through legislation and

¹¹³ See *Romer v. Evans*, 517 U.S. 620 (1996).

¹¹⁴ *Id.* at 621.

¹¹⁵ *Id.* at 629.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 633.

¹¹⁸ *Id.* at 621.

¹¹⁹ *Id.* at 632.

¹²⁰ *Id.*

¹²¹ *Id.* at 634–35 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

that the holding would damage the role of states as laboratories.¹²²

On the other hand, the Supreme Court has ruled that groups sometimes have the First Amendment right to exclude individuals based on homosexuality, though this ruling was not in the context of education or of the rights of schools.¹²³ In *Boy Scouts of America v. Dale*, the Court held that New Jersey's public accommodations law could not be used to force Boy Scouts to admit a homosexual individual because groups have the First Amendment right of expressive association.¹²⁴ The Court held that applying the state statute at issue here would significantly burden the Boy Scouts' desire to not "promote homosexual conduct as a legitimate form of behavior."¹²⁵ The *Boy Scouts* holding has not yet been applied to private schools, and it should not be applied to voucher schools because voucher school policies best fit categorically as government speech.

The unique role of schools in society and the Court's particular treatment of education in its rulings also serve as a compelling argument against applying the *Boy Scouts* ruling to voucher schools. In *Brown v. Board of Education*, the Court referred to education as "the very foundation of good citizenship."¹²⁶ The Court further emphasized the importance and uniqueness of education in *Plyler v. Doe*, when it stated that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."¹²⁷ Even though *Plyler* states that education is not a "fundamental right,"¹²⁸ the Court went on to stress "the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."¹²⁹

Another factor that distinguishes *Boy Scouts* from voucher school policies is that unlike the Boy Scouts, private schools are free to drop out from participating in voucher programs if they would prefer to keep their admissions and student handbook stances on homosexuality. Private schools cannot really claim that their First Amendment rights have been burdened because they are not being forced outright to change their policies.¹³⁰ As shown in instances in North Carolina, private schools have in

¹²² *Id.* at 644–53 (Scalia, J., dissenting).

¹²³ See generally *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

¹²⁴ *Id.* at 656.

¹²⁵ *Id.* at 651.

¹²⁶ 347 U.S. 483, 493 (1954).

¹²⁷ 457 U.S. 202, 221 (1982).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Kavey, *supra* note 109, at 770.

fact chosen to drop out of voucher programs where administrators would prefer to keep their stances and policies.¹³¹ This “easy escape from governmental regulation” was not available to the Boy Scouts.¹³²

Although the *Brown* and *Plyler* opinions both discuss public rather than private schools, their reasoning should apply to voucher schools, especially in light of the Court’s discussion of discrimination in both public and private schools. The Court has stated that “discriminatory treatment exerts a pervasive influence on the entire educational process”¹³³ and that “legitimate educational function cannot be isolated from discriminatory practices.”¹³⁴

Even though private schools have much more autonomy and are not subject to as much government regulation as public schools, they are not immune to governmental intervention.¹³⁵ The Supreme Court ruled in *Runyon v. McCrary* that private schools could not discriminate against African-American students.¹³⁶ The Court found that Section 1981, which prohibits private schools from denying admission to prospective students because they are African-American, does not violate the First Amendment rights of free association and privacy, or of a parent’s right to make choices regarding their children’s education.¹³⁷ Although the First Amendment protects one’s right “to engage in association for the advancement of beliefs and ideas,”¹³⁸ private schools do not have the affirmative right to exclude against racial minorities.¹³⁹ Even though parents have the right to send their children to private schools offering a form of specialized education, they do not have the right to send their children to schools “unfettered by reasonable governmental regulation.”¹⁴⁰

Although the *Runyon* case explicitly states that the ruling only applies to the exclusion of black students and does not apply to any other form of discrimination,¹⁴¹ the same principles underlying the Court’s *Runyon* decision apply to the exclusion of homosexual students at private schools participating in voucher programs. Eight years after *Runyon*, the Court ruled that “[t]here

¹³¹ Baird, *supra* note 33.

¹³² Kavey, *supra* note 109, at 770.

¹³³ *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

¹³⁴ *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 593–94 (1983) (quoting *Norwood*, 413 U.S. at 468–69).

¹³⁵ *See generally* *Runyon v. McCrary*, 427 U.S. 160 (1976).

¹³⁶ *Id.*

¹³⁷ *Id.* at 175–79.

¹³⁸ *Runyon*, 427 U.S. at 175 (quoting *NAACP v. Alabama*, 357 U.S. 449, 478 (1958)).

¹³⁹ *Id.* at 178.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 167–68.

is no constitutional right . . . to discriminate in the selection of who may attend a private school or join a labor union,”¹⁴² further demonstrating that private schools do not have an absolute right to discriminate in who attends. *Runyon* was decided in 1976, about 20 years before the Court recognized homosexuals as a suspect class for the purposes of equal protection under the laws.¹⁴³ Also, the Court decided the *Runyon* case before the introduction of school vouchers and certainly before instances of discrimination against homosexuals occurred at participating voucher schools. *Runyon* applied to a strictly private school, and it naturally follows that the standards for schools receiving public assistance regarding discrimination should be stricter than those for private schools not receiving governmental funding.

IV. OTHER STATES’ INSUFFICIENT ATTEMPTS TO PREVENT PRIVATE SCHOOL DISCRIMINATION AGAINST HOMOSEXUAL STUDENTS

Although Maryland, Florida, and Wisconsin have attempted reforms to negate ongoing or potential discrimination, their efforts are not enough. Maryland has given a valiant effort at achieving this goal by requiring participating private schools to sign a pledge that they will not discriminate against students based on homosexuality. A state panel also has the right to prohibit a school from receiving voucher funds where a participating school has a discriminatory policy, and the state panel has rightfully exercised this power. However, this effort ultimately falls short for three reasons.

First, private schools may still discriminate based on homosexuality even if their mission statements and student handbooks may not describe a specific stance on the topic. Participating private schools may still deny admission to students, and schools could easily articulate a different reason for denying admission to a particular student. The only incidents of discrimination against homosexual students to make the news involve mission statements and school policies with stances against homosexuality because those are the easiest incidents of discrimination to identify; a school could more easily not have a public stance and then deny admission for another reason. Second, the pledge requirement does not hold schools accountable for discrimination, and the state panel may be too late to actually prevent discrimination from happening. Finally, allowing a state panel to make decisions regarding whether a particular school should be allowed to participate effectively

¹⁴² *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

¹⁴³ *See Romer v. Evans*, 517 U.S. 620 (1996).

makes the decision a political one. The decision will depend on the political makeup of the panel, and this mechanism will not be sufficient where a majority of the panel members have their own political or religious beliefs about homosexuality. While the Maryland panel should be praised for taking action against a discriminatory school, it could just as easily decide not to take action, and there is no check on the panel's power.

Florida's voucher program aimed at assisting bullied students is also insufficient to prevent discrimination against students based on homosexuality. While a voucher program targeted at helping bullied students would seem to prevent such discrimination, the program's mission is not enough to achieve the goal. This flaw is shown in the Huffington Post's findings that 10 percent of participating schools have stances in their mission statements or student handbooks that reserve the right to refuse admission to homosexual students.¹⁴⁴ Because there is no accountability measure aimed to ensure that participating private schools do not discriminate based on homosexuality, any participating school may still do so, even when such discrimination would seem to go against the program's mission. Simply stating that the state wants to prevent bullying does not prevent a private school from discriminating, and Florida's Scholarship for Hope program should not be viewed as a sound option.

CONCLUSION

Although the Supreme Court ruled that school voucher programs are constitutional and do not pose a sufficient issue regarding separation of church and state, today's current headlines regarding discrimination against LGBT students in student handbook policies suggest that voucher programs giving public funds to religious schools should be reevaluated. Numerous North Carolina private schools participating in the voucher program have statements in their student handbooks detailing discriminative policies on admission and expulsion of homosexual students and students with homosexual family members.

So, out of the many approaches used in different states' voucher program, which components are most ideal to prevent instances of discrimination against students based on sexual orientation? As shown in the logistics of Florida's program focused on aiding bullied students and the many participating schools with policies aimed against homosexual students, a mission statement targeted to assist bullied students is not

¹⁴⁴ Klein, *Schools Get Millions*, *supra* note 6.

sufficient. Additionally, states like Georgia that advise participating private schools to stick to their admissions policies and not alter them are actively encouraging schools to discriminate based on sexual orientation because many of these schools have discriminatory admissions policies.

So what works? First, state voucher programs should include specific language in their antidiscrimination provisions pertaining to sexual orientation. This way, in the case of an incident of discrimination, students and their families know that they have a legal remedy. Additionally, although Maryland's voucher program is not perfect and has had its own controversies regarding anti-gay discrimination headlines, requiring participating schools to sign a pledge that they will not discriminate in their admissions policies based on sexual orientation also seems to be a step in the right direction. Having participating schools promise that they will not engage in anti-gay discrimination will educate participating schools of their obligations of participating and will encourage those not willing to alter their discriminatory policies to drop out of the program altogether, as has already happened. A provision such as Wisconsin's that prohibits participating schools from denying admission to students and that allows students to opt out of religious activities also seem to be strong steps. But, these provisions offer no protection to students expelled after opting out of those religious activities or due to sexual orientation in general.

These steps are likely not enough. Identifying the potential for discrimination is much easier when a school has an explicit policy against admitting homosexual students. A clear policy is easy to find on the school's website and in itself describes discrimination based on sexual orientation. But what is to stop a participating private school having a stance against homosexuality but exclude it from the student handbook? Unhelpfully, estimates of discriminatory instances are likely to be low because voucher statutes enable schools to expel or refuse to admit students based on sexual orientation. Additionally, because state accountability requirements are generally low for participating private schools, schools may not have to disclose why they opted to expel a student. Even if there was a disclosure requirement, schools could easily provide a different reason and remain off the hook from discriminating.

Although a story has not yet emerged in North Carolina detailing the expulsion or refusal of admittance of a student voucher recipient, one could emerge at any time, as shown by other states with voucher programs. Even though there are a number of valid rationales for voucher programs, such as the lack

of strong educational options for students of low-income families, recent headlines describing LGBT discrimination have exposed a large flaw in these programs that should be addressed. Like all other states with vouchers, North Carolina does not sufficiently protect students from discrimination based on homosexuality, and North Carolina and other states should rethink the unintentional consequences of public funds going to religious private schools.