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School Choice Programs Do Not Render Participant Private Schools "State Actors"

Vanessa Ann Countryman†

In June 2002, the Supreme Court upheld the constitutionality of the Cleveland school choice program.¹ In the aftermath of that decision, it is likely that more cities and school districts will implement their own school choice programs.² Though much prior scholarship has defended these programs,³ scholars should now address the secondary legal issues that the implementation of these programs will raise.

Under the typical school choice program, the state identifies sub-standard public schools (as measured by test scores and other factors) and offers a small percentage of students the opportunity to receive a voucher.⁴ This voucher represents a portion of the cost to the state of educating that student in the sub-standard school for one year.⁵ The student then may choose to

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1 Zelman v Simmons-Harris, 536 US 639, 652 (2002) (upholding the constitutionality of Cleveland’s School Choice Program).


4 Milton Friedman initially advanced this idea of school choice and the term voucher, though his proposal was not limited in scope to poorer schools or students. See Clint Bolick, Voucher Wars: Waging the Legal Battle over School Choice 3-4 (Cato Inst 2003).

5 See, for example, Cleveland Pilot Scholarship Program, Ohio Rev Code §§ 3317.03(I)(1), 3317.08(A)(1) (West 2003). Under this program, students may receive scholarships of 75 or 90 percent of the tuition of private schools (depending upon the family's income), which are not permitted to charge more than $2,500 per year for tuition.
apply that voucher to another, better-performing public school, or to a private school participating in the program. Most students who choose private schools through these programs attend religious schools.

When students attend private schools through publicly-funded school choice programs, the private sphere blurs with the public sphere. Because of their ties to the state, private schools that participate in school choice programs potentially could be regarded as state actors. Because school choice programs are new, no litigation has yet arisen over the question of whether a private school in a school choice program can be considered a state actor.

This is not an abstract question. Rather, the identification of a private school as a state actor has real consequences for school

Participating public schools would receive that scholarship, as well as the "average daily membership" expenditure. When the number of applicants exceeds the number of available spaces, the students are chosen by lottery. See also Florida's Opportunity Scholarship Program, Fla Stat Ann § 1002.38(1) (West 2003) ("The Legislature shall make available opportunity scholarships in order to give parents the opportunity for their children to attend a public school that is performing satisfactorily or to attend an eligible private school when the parent chooses to apply the equivalent of the public education funds generated by his or her child to the cost of tuition in the eligible private school.").

7 See, for example, the Cleveland program, in which 77 percent of the students in the program enrolled in religious schools. Dan Murphy, F. Howard Nelson, and Bella Rosenberg, The Cleveland Voucher Program, available online at <http://www.aft.org/research/reports/clevlawdoes.htm#Who> (visited May 3, 2004).
8 See Laura T. Rahe, Zelman v. Simmons-Harris and the Private Choice Doctrine, 50 Cleve St L Rev 221, 249-50 (2003) (discussing the possibility that a school accepting voucher money could be considered a state actor); Ira Bloom, The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice?, 32 J L & Educ 139, 167, n 139 (2003) (noting that the receipt of public funding may make voucher schools vulnerable to being declared state actors). In a more general context, one scholar examined the general problems of governmental action through private actors, pointing to school choice programs as one example. She concluded that the state action tests are largely inapplicable to these private exercises of governmental power and the emphasis should be upon structures that will ensure constitutional accountability. See Gillian E. Meltzger, Privatization as Delegation, 103 Colum L Rev 1367, 1500 (2003). This Comment seeks to examine more closely the legal analysis that courts are likely to undertake in the examination of school choice programs.

9 There is widespread hostility to school choice programs, making subsequent litigation on collateral issues likely. Opponents include the National Education Association and the American Civil Liberties Union. See Institute for Justice Current School Choice Litigation Information, available online at <http://www.ij.org/cases/> (visited May 3, 2004). See also Holmes v Bush, 2002 WL 1809079 (Fla Cir Ct) (holding that Florida's Opportunity Scholarship Program violates a state constitutional provision by taking money from public treasury to indirectly aid sectarian institutions). The Florida Opportunity Scholarship Program continues to function while awaiting appeal. Litigation is also ongoing in Maine. See Anderson v Town of Durham, 2003 WL 21386768 (Me) (dismissing a claim against Durham that the tuition reimbursement violated the Anderson's First and Fourteenth Amendment rights).
choice programs. For example, the procedural protections that a student is due before she is disciplined, and consequently whether a student is owed protection under the Fourteenth Amendment, depends on whether the school is a state actor. If a student admitted to a school choice program is disciplined and ultimately expelled from the better school, the student has lost something more than just a place at a school. That student has lost an opportunity to escape the public school system that had not served her. The impulse in these situations may be to attempt to undo the loss and somehow prevent the school from expelling the student. Thus, litigation over whether a private school participant can be considered a state actor may arise in the context of the procedural rights of disciplined students.

This Comment argues that courts should not distinguish between private schools that participate in school choice programs and those that do not by finding participant private schools to be state actors. Part I provides background on the differences in procedural protections in the public and private school settings. Part II analyzes current Supreme Court jurisprudence on state action. Part III argues that a private school’s participation in school choice programs should not render it a state actor for purposes of the Fourteenth Amendment. Part IV examines the particular problem presented by any attempt to declare religious schools state actors, thus supporting the argument in Part III. Part V points out that the absence of a finding of state action will not leave the students in school choice programs without procedural protections. The low level of procedure typically imposed in the private school setting provides sufficient protection.

I. DUE PROCESS RIGHTS OF PUBLIC AND PRIVATE SCHOOL CHILDREN

The Due Process Clause of the Fourteenth Amendment protects against deprivations of life or a recognized liberty or property interest without appropriate procedural safeguards. Those procedural safeguards typically involve notice of the possi-

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10 See West Virginia State Board of Education v Barnette, 319 US 624, 637 (1943) (holding that students in public schools are owed Fourteenth Amendment protections).
11 "No state shall . . . deprive any person of life, liberty, or property, without due process of law." US Const, Amend XIV, § 1.
ble deprivation,\textsuperscript{13} as well as a hearing to challenge the action.\textsuperscript{14} The Fourteenth Amendment guarantees these protections, but only for actions by the state.\textsuperscript{15} Actions by private individuals do not fall under the scope of the Due Process Clause.\textsuperscript{16} Private schools are private actors: they may act as they choose, and the Fourteenth Amendment will offer no protection to those affected by a private organization's actions.\textsuperscript{17} Therefore, to understand what is at stake for the private school students in school choice programs, it is helpful to have some background about the procedural rights of both public and private school students.

A. Due Process Rights of Public School Students

The Supreme Court consistently has held that public high school students enjoy Fourteenth Amendment protections, as public schools are creatures of the state.\textsuperscript{18} For example, in \textit{Goss v Lopez},\textsuperscript{19} the Supreme Court considered the due process rights of public school students who had been suspended for ten days or less without a hearing.\textsuperscript{20} Because Ohio established a public school system and compelled attendance, the Court determined that the students possessed a property interest in their public education.\textsuperscript{21} The Due Process Clause protected that property interest, and thus, the state could not deprive the students of their

\textsuperscript{13} \textit{Mullane v Central Hanover Bank and Trust Co}, 339 US 306, 314-15 (1949) ("An elementary and fundamental requirement of due process in any proceeding which is accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

\textsuperscript{14} \textit{Matheus v Eldridge}, 424 US 319, 335 (1976):


\textsuperscript{16} See \textit{Burton v Wilmington Parking Authority}, 365 US 715, 722 (1961) (stating that the protections of the Fourteenth Amendment do not extend to "private conduct abridging individual rights").

\textsuperscript{17} \textit{Jackson v Metropolitan Edison Company}, 419 US 345, 349 (1974) ("[This Court] affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, however discriminatory or wrongful, against which the Fourteenth Amendment offers no shield.") (citations omitted).

\textsuperscript{18} See \textit{West Virginia State Board of Education v Barnette}, 319 US 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.").

\textsuperscript{19} 419 US 565 (1975).

\textsuperscript{20} Id.

\textsuperscript{21} Id at 574.
entitlement to a public education without the minimum protections of the Due Process Clause.\textsuperscript{22}

The Supreme Court briefly described the "minimum procedures" required by the Due Process Clause and determined that the students "must be given some kind of notice and afforded some kind of hearing."\textsuperscript{23} The Court stated that its decision did not require a formal procedure, merely an "informal give-and-take between student and disciplinarian."\textsuperscript{24} The Court limited its holding, however, to short suspensions not exceeding ten days.\textsuperscript{25} In dicta, the Court suggested that it might require more formal procedures when the punishment exceeded a ten-day suspension.\textsuperscript{26}

Lower courts have determined that this "give-and-take" requires that the student be given oral and written notice of the charges, and if he denies the charges, an opportunity to hear the evidence against him and the opportunity to refute it.\textsuperscript{27} These notice requirements are not stringent; frequently they require simply that the student have notice of the date, time, place, and circumstances of the alleged violation.\textsuperscript{28} The opportunity to be heard does not necessitate a formal hearing, and often, courts will find that a student who has admitted her guilt or had an opportunity to explain to the school her side of the story is entitled to no formal hearing.\textsuperscript{29}

\textsuperscript{22} Id.
\textsuperscript{23} Goss, 419 US at 579.
\textsuperscript{24} Id at 584. Interpreting this language, lower courts have determined that this "give-and-take" requires that the school give the student oral and written notice of the charges, and if the student denies the charges, an opportunity to hear the evidence against him or her and the opportunity to refute it. See, for example, Atcitty v Board of Education of San Juan County School District, 967 P2d 1261, 1264 (Utah 1998) ("We conclude that appellant received Goss' procedural due process requirements. . . . The informal setting in which the principal provided appellant an opportunity to discuss or refute the allegations was all the procedural due process owed to appellant.").
\textsuperscript{25} Goss, 419 US at 581.
\textsuperscript{26} Id at 584.
\textsuperscript{27} Atcitty, 967 P2d at 1264. See also Larry Bartlett and James McCullagh, Exclusion from the Education Process in the Public Schools: What Process is Now Due, 1993 BYU Educ & L J 1 (discussing caselaw involving procedural due process at elementary and secondary public schools, with particular emphasis upon the concerns of the Powell dissent in Goss).
\textsuperscript{28} See, for example, Walker v Bradley, 320 NW2d 900, 900-01 (Neb 1982) (discussing notice requirements).
\textsuperscript{29} Boster v Philpot, 645 F Supp 798, 800 (D Kan 1986) (holding that where a student has admitted his guilt there is no right to a hearing); Montoya v Sanger Unified School District, 502 F Supp 209, 213 (Cal 1980) (holding that if the student admits all relevant facts then an informal hearing is not necessary). But see Strickland v Inlow, 519 F2d 744, 746 (8th Cir 1975) (holding that students have the right to present their views even if
B. Procedural Protections for Private School Students

The constitutional concerns of *Goss* do not arise in the private school context because private schools are considered private actors for purposes of the Fourteenth Amendment. Accordingly, since the Fourteenth Amendment only applies to state actors, private schools have the absolute right to control their own decisionmaking procedures. In *Flint v St Augustine High School*, for example, a Louisiana court of appeals overturned the trial court's determination that a private-school student, expelled for a second violation of a no-smoking rule, had not received due process. The court declared that "private institutions . . . have a near absolute right and power to control their own internal disciplinary procedure. . . . If there is color of due process—that is enough."

The decision in *Goss* also addressed the nature of what a student loses when she is expelled or suspended from public education. The impulse to provide due process protection to public school students flows not only from a formalist application of the notion that state action triggers Fourteenth Amendment protection, but also from an understanding that the students have lost something difficult to replace.

The concern of the Court over the loss of an education does not apply in the private school context because if a private school were to expel a student, that child may simply attend the public school that serves her district. The state system of public schooling exists as an option for those students who have lost their private school education. In contrast, a student who is expelled from her public school does not have a corresponding fall-back
guilt has been admitted).

30 See *Flint v St Augustine High School*, 323 So2d 229, 234 (La 1976) (holding that private schools are private actors).
31 *Jackson v Metropolitan Edison Co*, 419 US 345, 349 (1974) (noting the difference between public and private action for purposes of protection under the Fourteenth Amendment).
32 See *Hernandez v Don Bosco Preparatory High*, 730 A2d 365, 370 (NJ 1999) (holding that a private school is held to the constitutional requirements of due process only if the private school has "substantial involvement with the state").
33 323 So2d 229 (1976).
34 Id at 234.
35 Id at 234-35.
36 *Goss*, 419 US at 576.
37 Id.
38 See *Jenkins v Leininger*, 659 NE2d 1366, 1376 (Ill 1995) (noting the existence of alternatives to public schooling).
school; if the parents cannot or will not pay for private schooling, finding schooling becomes difficult, if not impossible.

The New Jersey Supreme Court concluded that private high school students are entitled to less procedural protection than that afforded both public high school students and private university students because of this ability to fall back on the public school system. As it is more difficult simply to transfer universities, the procedural rights of private university students must be protected. In contrast, the private high school student may simply transfer to a public school, the court reasoned, without significant loss. Thus, the court held that a private high school must only adhere to its own published guidelines and follow a fundamentally fair procedure.

This Comment assumes the propriety of these determinations regarding the procedural rights of private school students. The question of students' procedural rights in general has been amply debated in the literature. Rather, this Comment ultimately concludes that because private schools in school choice programs are not state actors, they should enjoy the lower procedural standard even after they choose to participate in school choice programs.

II. TESTS TO DETERMINE WHETHER A PRIVATE ACTOR IS CONSIDERED A STATE ACTOR UNDER THE FOURTEENTH AMENDMENT

A clear line divides courts' approaches to students' disputes with public versus private schools. Public schools are state actors and face heightened procedural requirements under the Four-

39 Hernandez, 730 A2d at 371.
40 Id at 375.
41 Id.
42 Id at 376. For a general discussion, see Lisa Tenerowicz, Note, Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings, 42 BC L Rev 653 (2001) (analyzing the methods courts have used to determine which procedures are fundamentally fair).
teenth Amendment. In contrast, private schools are private actors, and as such, do not face these requirements. The Supreme Court has recognized, however, certain circumstances in which private conduct may be deemed state action for the purposes of the Fourteenth Amendment. In particular, the Supreme Court has articulated two key tests for determining whether a private actor can become a state actor for the purposes of Fourteenth Amendment analysis: the delegation of a public function test and the entwinement test.

A. Delegation of a Public Function Test

The delegation of a public function test examines whether a private actor has assumed responsibility for an action which is typically undertaken by the government. The case most relevant to analysis of school choice programs is Rendell-Baker v Kohn. In this case, the Supreme Court considered whether a private school that received over 90 percent of its funding from public funds could be declared a state actor. At issue in Rendell-Baker was the discharge of a teacher who the school had hired with the state's approval and paid with state-provided funds. The teacher argued that the school had discharged her without due process of law.

The Court ultimately found that the private school was not a state actor. In reaching this conclusion, the Court asked "whether the school's action in discharging [the teacher] can fairly be seen as state action." The Court's answer turned on its

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44 Goss, 419 US at 573.
45 See Wisch v Sanford School, Inc, 420 F Supp 1310, 1313 (Del 1976).
47 The Court has articulated other tests as well. For example, the Court will consider whether the state action results from the state's "coercive power," or when the private actor is controlled by an "agency of the state." Brentwood, 531 US at 296. Fundamentally, all of these tests seek, through a fact-intensive analysis, to determine whether the private action can fairly be considered that of the state. Jackson v Metropolitan Edison Co, 419 US 345, 351 (1974). This Comment focuses on the delegation of a public function and entwinement tests because these are the tests applied in relevant lower court cases, and lend themselves most clearly to the analysis of school choice programs.
49 Id at 842 (noting that the school's purpose was to educate maladjusted students who could not remain in the public school system).
50 Id at 834.
51 Id at 838.
52 Rendell-Baker, 457 US at 831.
53 Id at 838.
consideration of four factors: the receipt of public funds, the regulation by the state, the performance of a public function, and the nature of the relationship between the state and the school. The Court held that none of these factors sufficed to warrant a finding of state action. First, the receipt of public funds did not transform the acts of some aspects of the institution into state actions. Second, the extensive regulation of some aspects of the school did not change the nature of the discharge from private to public, as the decision at issue was not linked to the state's regulation. Third, the Court declared that the mere performance of a "public function" did not sufficiently transform a private actor into a state actor. Fourth, the Court rejected the idea of a "symbiotic relationship" between the State and the school because the state received no financial profit from the school.

Several years later, in West v Atkins, the Court further explored the public function test, reaching the opposite conclusion from that in Rendell-Baker. In this case, the Court determined that a doctor under contract to the state to provide medical care for inmates, acted "under color of state law" within the meaning of 42 USC § 1983 ("Section 1983"). The Court refused to draw a distinction between a physician's being on the state payroll versus being under contract. This refusal seems to run counter to the language of Rendell-Baker, which assumed that the state must exclusively provide the function in order for the private

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54 Id at 840.
55 Id at 840-43.
57 Id at 841.
58 Id at 842 ("[T]he question is whether the function performed has been traditionally the exclusive prerogative of the State.").
59 Id.
60 Rendell-Baker, 457 US at 842.
62 Id at 45 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."). Section 1983 creates a cause of action against the government for the deprivation of civil rights. See 42 USC § 1983 (2000). If a private actor's conduct satisfies the state-action requirements of the Fourteenth Amendment that conduct also is an "action under color of state law" and can then be attacked under Section 1983. See also Lugar v Edmondson Oil Company, 457 US 922, 928-35 (1982) (stating the reciprocal nature of due process rights under the Fourteenth Amendment and the rights protected by Section 1983).
63 West, 487 US at 54.
actor to be considered a state actor. In general, the state is not the exclusive provider of medical care. Many private doctors offer medical services to a large segment of the population; here, however, the Court found that the doctor engaged in state action.

Instead of emphasizing the function that the private actor was serving, the Court in *West* examined the relationship between the three relevant parties: the doctor, the prisoner, and the state. The Court noted that “[t]he State bore an affirmative obligation to provide adequate medical care to West; the State delegated that function to respondent Atkins; and respondent voluntarily assumed that obligation by contract.” The Court was concerned that the prisoner had no option other than to accept the medical care from the contracted doctor; to the prisoner, the lack of choice meant that it made no difference whether the doctor was under contract or an actual employee of the prison.

This lack of choice makes the holding in *West* consistent with that in *Rendell-Baker*. The Court in *Rendell-Baker* examined the exclusivity requirement from the point of view of the service provided. If the state is the only purveyor of the function at issue, it cannot avoid responsibility for that service by allowing a private actor to accomplish it. The Court in *West* was concerned with the point of view of the individual receiving the services. The state provided all services to the inmate, including medical services, without providing another option for obtaining these services. While it is true that the state does not traditionally and exclusively provide medical care to the larger populace, the state is the only source of medical treatment for prison inmates. In these limited circumstances, the delegated function of medical care is the exclusive province of the state.

In the same year as *West*, the Court again analyzed the notion of delegating governmental authority to a private actor. In *NCAA v Tarkanian*, a basketball coach was sanctioned by the University of Nevada, Las Vegas (“UNLV”), a state actor, under rules promulgated by the National Collegiate Athletic Associa-

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64 *Rendell-Baker*, 457 US at 842.
65 *West*, 487 US at 56.
66 Id.
68 Id.
69 *West*, 487 US at 44.
It was the NCAA, rather than UNLV, however, that controlled the disciplinary proceedings. Thus, this case presented a mirror image of the traditional state-action situation. The question presented here, however, was whether the fact that UNLV complied with the rules promulgated by the NCAA transformed the NCAA into a state actor. The Court inquired “whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.” Distinguishing West, the Court noted that though a state certainly may delegate authority to a private party, and thereby make that party a state actor, this situation was not controlling. The NCAA could not “be regarded as an agent of [UNLV] for purposes of that proceeding.” The University had not controlled the actual decision by the NCAA to discipline the coach. This case suggests that a crucial element of this doctrine lies in the state’s control of the action at issue. The University did not guide or dictate the disciplinary decision litigated in this case.

These three cases together suggest that the Court examines two primary elements under the delegation of a public function test. First, the Court considers whether the state has delegated an exclusive state function to a private actor. In Rendell-Baker, the Court found that while the state does provide education, it is not the only supplier of education in the United States. In West, however, the inmate could receive medical treatment only through the state. Second, the Court examines the particular proceeding in question and determines whether the delegation applied to that particular action. In Tarkanian, for example, the Court focused on the fact that UNLV did not control the actions of the NCAA, and thus the NCAA could not fairly be perceived as an “agent” of the State.

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71 Id at 186-87.
72 Id.
73 Id.
74 Tarkanian, 488 US at 192.
75 Id at 195.
76 Id at 196 (emphasis added).
77 Id.
78 Tarkanian, 488 US at 196.
79 Rendell-Baker, 457 US at 842.
80 West, 487 US at 44.
81 Tarkanian, 488 US at 196.
B. The Entwinement Test

The entwinement test differs from the delegation of a public function test in the focus of its examination. Rather than seeking to isolate the service provided by the state or the relationship between the state and the recipient of the service, the entwinement test examines the contacts between the state and the private actor in aggregation.82

The entwinement test was articulated in *Brentwood v Tennessee Secondary School Athletic Association.*83 In this case, an interscholastic athletic association had penalized Brentwood Academy for violating the association's regulations pertaining to recruitment.84 The Court found that this regulatory enforcement action constituted state action under the Fourteenth Amendment.85 The Court examined the particulars of the supervision and internal workings of the athletic association and determined that public institutions and public officials influenced the association to such an extent as to render the entire body a state actor: "[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it."86

The exact contours of this test remain undefined, but fundamentally the test considers whether the involvement of the state with the internal workings of the private actor is so pervasive as to convert the actions of the private actor into state action. In applying the entwinement test, the Court noted that "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government."87 In *Brentwood,* the Court focused upon the fact that public officials dominated the decisionmaking body of the association.88 The opinion seemed

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82 *Brentwood,* 531 US at 303 ("When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test.").
84 Id at 293.
85 Id at 297.
86 Id at 298.
87 *Brentwood,* 531 US at 295-96.
88 Id.
rooted in the idea that the association’s decision itself became entwined with the state apparatus because public officials had participated in the decisionmaking process.\footnote{Id.}

C. Logiodice v Trustees of Maine Central Instituted\footnote{296 F3d 22 (1st Cir 2002), cert denied 537 US 1107 (2003).}: An Example of the Application of Both Tests

Both the entwinement test and the delegation of a public function test remain widely used in the lower courts and in particular have been used in cases analogous to the school choice program situation.\footnote{See, for example, Wisch, 420 F Supp at 1313-14 (applying versions of the “entwinement” and the “public function” tests, though predating Brentwood and Rendell-Baker).} Analysis proceeds under both tests because they examine different aspects of the school’s relationship with the state, and thus, a finding of state action under one test does not necessitate a similar finding under the other.\footnote{Brentwood, 531 US at 303.} As the public function test turns on a limited number of factors, if the control of an exclusive governmental function is missing then this test will not be met. The entwinement test differs from the public function test in that the entwinement test does not require that the state directly control the private actor’s action in order to justify a finding of state action. The entwinement test seeks only to determine whether the state has permeated the apparatus of the private actor. At a certain point, the involvement of the state with the private actor becomes so pervasive that the private actor may fairly be considered a state actor.\footnote{Id at 293.} The entwinement test determines whether, in the aggregate, there are a sufficient number of state contacts to identify a state actor.\footnote{Id at 303 ("'Coercion' and 'encouragement' are like 'entwinement' in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead. Facts that address any of these criteria are significant, but no one criterion must necessarily be applied.").} Thus, a court can apply both test to determine whether a particular act amounts to state action.

A recent First Circuit case, Logiodice, demonstrates analysis of state action under both tests.\footnote{Logiodice, 296 F3d 22.} The court in Logiodice held that a student who attended a private school funded by the local public school district was not entitled to Fourteenth Amendment

\footnotesize{\bibliography{references}}
protections when he was expelled from the private school. The student’s school district did not have a public school, and accordingly, any student who wished could attend the local private school through public funding. The court applied both the delegation of a public function test and the entwinement test by analyzing whether the private school had performed a traditional state function and whether it was so entwined with the government as to warrant a finding of state action.

Addressing the public function test, the First Circuit determined that in order to constitute state action the private party must perform a function that is traditionally and exclusively reserved to the government, such as holding elections or administering town governance. The court then found that education is not a function exclusively reserved to the state. Citing Rendell-Baker for the exclusivity requirement of the public function test, the court noted that prior courts have “declined to describe private schools as performing an exclusive public function.”

The court did point out that in all of the cases it cited, an employee of the school, rather than a student, brought the suit. The court noted that it might have been easier to find state action in the previous cases if the relationship between the possible state actor and the claimant was changed. In other words, if the plaintiff had been a student, the claim of state action might have been stronger. While the court did not discuss its precise reasoning, its concern may have arisen because of the specific facts of Logiodice. A disciplinary proceeding affecting a student seems more tied to the purpose of state regulation than does an employment decision. The state creates public schools and regulates them for the purpose of educating the students, not for the employment of teachers. The court, however, ultimately expressed disquiet with the notion of identifying a state actor differently depending upon the identity of the individual bringing the suit, and ultimately discarded this consideration as a basis

96 Id at 24.
97 Id.
98 Id at 24.
99 Logiodice, 296 F3d at 26.
100 Id.
101 Id, citing Pierce v Society of the Sisters, 268 US 510 (1925).
102 Logiodice, 296 F3d at 27, citing Robert S v Stetson School, Inc, 256 F3d 159, 165-66 (3d Cir 2001) and Johnson v Pinkerton Academy, 861 F2d 335, 338 (1st Cir 1988).
103 Logiodice, 296 F3d at 27.
for distinguishing Rendell-Baker. Rather, the court followed the plain language of that decision, noting that schooling is not an exclusive state function and, thus, state action could not be found on that basis.

The court, however, noted as an aside that West might be the most apposite case, suggesting that in that case the Supreme Court did not rely entirely on the public function doctrine. Rather, the Court focused on the fact that the doctor had fulfilled a constitutionally protected right of the inmate to adequate medical care. The court concluded that the student in Logiodice did not have a constitutional right to education, thus making West inapposite.

Though state action could not be found under the stringent public function test, the court continued its analysis and applied the entwinement test. In discussing this test, the court distinguished Brentwood on the grounds that in the instant case, private trustees ran the private school. Though the private school received funding from the local school district, the state did not interfere in the disciplinary proceedings of the school. The court noted that as the state had financial control over the school, it easily could have dictated disciplinary procedures as well; because it did not, the court concluded that the private school alone controlled disciplinary decisions. The contacts with the state did not rise to such a level as to transform the private school into a state actor.

In commenting upon its own decision not to find state action, the court reflected the concerns articulated in Goss about the nature of the student’s loss: the “threat of wrongful expulsion from the local school of last resort (at least for those who cannot pay) is the heart of the impulse to expand the state action doctrine to reach this case.” Ultimately, however, the court shied away from imposing constitutional standards upon privately

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104 Id.
105 Id.
106 Id at 29.
107 Logiodice, 296 F3d at 29.
108 Id.
109 Id at 27.
110 Id at 27.
111 Logiodice, 296 F3d at 28.
112 Id at 27-28.
113 Goss, 419 US at 576.
114 Logiodice, 296 F3d at 29-30.
governed institutions. The court implicitly weighed the burden upon the student against the institutional burdens on the private school. While the court acknowledged that the student did not receive the due process protection he would have received under *Goss* had he attended public school (more formal procedures), the court did not believe that the student had suffered a total denial of due process rights. The school gave the student and his parents notice of the charges, and as there was no dispute over the facts, the school did not choose to give the student an opportunity to respond.

III. PRIVATE SCHOOLS PARTICIPATING IN SCHOOL CHOICE PROGRAMS SHOULD NOT BE CONSIDERED STATE ACTORS

To understand why private schools participating in school choice programs should not be considered state actors, one must first understand how private schools differ from public schools in ways relevant to this analysis. Proponents of school choice programs point out that these programs offer the benefits of private schools to children in the lowest-quality public schools. Private schools set their own curricula, and control their own hiring, class size, and disciplinary proceedings. These freedoms allow the private schools to tailor their programs to the individual students, and to ensure control not only over the program, but over the participants in it, as well. Public schools, limited by state-imposed regulations, do not enjoy these freedoms.

If the participant private schools were declared state actors, they would lose their decisionmaking autonomy. This not only detracts from the benefits of the school choice program, but it also impacts those parents who did not send their children to the school because of the school choice program. Parents choose to

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115 Id.
116 Id at 30.
117 Id.
118 *Logiodice*, 296 F3d at 30.
119 See Bolick, *Voucher Wars* at 15 (cited in note 4).
120 See *Blount v Department of Educational and Cultural Services*, 551 A2d 1377, 1383-84 (Maine 1988) (noting the autonomy of private schools).
121 See *Asociacion de Educacion Privada de Puerto Rico v Echevarria Vargas*, 289 F Supp 2d 1, 4 (Puerto Rico 2003) ("The state may not institute unreasonable regulations which are so pervasive and all encompassing that they destroy the autonomy of private schools.") (citations omitted); *New Life Baptist Church Academy v Town of East Longmeadow*, 886 F2d 940, 945 (1st Cir 1989) (noting that state regulation of a private school must not be so pervasive as to effectively eradicate the private school's autonomy).
send their children to a particular school based on certain factors, and the state's imposition of further requirements upon the school impacts parents' private choices.122

The analysis by the First Circuit in Logiodice is a template for the application of the delegation of the public function and entwinement tests in the private school setting. The facts in that case are analogous to school choice programs because in both situations, the state funds students to attend a local private school in place of a public school.123 The principles set forth in Logiodice, however, do not capture all aspects of state involvement with private school participants in school choice programs that could arguably transform these schools into state actors.

One could argue that private schools in school choice programs become private state actors for two reasons. First, the private school fulfills a public function by standing in the place of the state actor, the public school. The state has delegated a public function to the private school, thus the private school should be treated like a public actor. Second, the private school has a variety of contacts with the state, including through public funding and various state-imposed regulations,124 which may combine to transform the quality of its acts into those of the state.

But ultimately, neither of those arguments can succeed. Although there are elements of the school choice program that seem to suggest that participatory private schools are state ac-

122 Classifying a private school as a state actor raises the specter of unequal treatment within a school. If only certain students receive public funding, should only those students receive higher due process protections? It seems problematic that a private school might be deemed a state actor with regards to only a certain segment of its student body. The court in Logiodice discussed a related idea: "[Rendell-Baker] involved claims to due process protection made by teachers and not students; our own decisions in both cases held out the possibility that students might have a better claim." Logiodice, 296 F3d at 27. The court then noted that "[w]hether state actor status should depend on who is suing is debatable." Id. A distinction can be drawn based on whether the relevant class of persons received the services of the private institution. Thus, a participatory private school could be a state actor with respect to its students and not its teachers (the distinction turning on the function provided). This reasoning does not suggest, however, that a school may be a state actor with respect to only a portion of the population: the school provides the same services to all the students, regardless of whether they attend through the school choice program. Furthermore, if the state contacts are sufficient to elevate the private school to public actor status, then they will do so relative to the entire student body, not merely those particular students who attend with state funding.

123 See, for example, the Ohio Pilot Project Scholarship Program, Ohio Rev Code Ann §§ 3313.978(1)-(2) (West 2003).

124 See, for example, Milwaukee Parental Choice Program, Wis Stat Ann § 119.23 (West 2003) (requiring private schools to be subject to finance accounting standards, and the monitoring of the school by the superintendent).
tors, ultimately they are insufficient to warrant a finding of state action.

A. The Delegation of a Public Function Test Does Not Apply in School Choice Settings

The Court in *Rendell-Baker* unequivocally asserted that a finding of state action under the delegation of a public function test depends on "whether the function performed has been traditionally the exclusive prerogative of the State." That case concerned a private school that received funding from the state and offered an alternative to public schooling for certain students. The facts are analogous to those in a school choice setting and thus, *Rendell-Baker* strongly suggests that private schools in school choice programs should not be considered state actors. This conclusion is echoed in *Logiodice*, when the First Circuit echoed that standard by tersely rejecting the argument that public schooling was an exclusive state prerogative: "Obviously, education is not and never has been a function reserved to the state."127

It could be argued, however, that *West* would control any determination of state action in the school choice setting since the Court there “did not base its decision on the public function doctrine,” but rather focused on the fact that “the state had delegated to a private actor a duty it was affirmatively obligated to provide.” In *West*, if the state denied an inmate medical attention, the individual would have no other options, and thereby the denial would violate his constitutionally protected right to medical care while incarcerated. The parallel argument would be that the school choice program develops around the premise that the student cannot receive an adequate education from the public school and, due to financial constraints, cannot otherwise attend another school. While it may be too dramatic to say that the

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125 *Rendell-Baker*, 457 US at 842 (internal citations omitted).
126 See *Rendell-Baker*, 457 US at 842 (“There can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry. Chapter 766 of the Massachusetts Acts of 1972 demonstrates that the State intends to provide services for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the State. . . . That a private entity performs a function which serves the public does not make its acts state action.”).
127 *Logiodice*, 296 F3d at 26.
128 Id at 40 (López dissenting).
129 See, for example, Florida’s Opportunity Scholarship Program, Fla Stat Ann
student is "trapped" in a failing educational system just as an inmate is locked in prison, the state provides, through the medium of the school choice program, the education it is affirmatively obligated to offer.\footnote{130}

In contrast to the constitutional protections offered to inmates, the Court has not recognized a federal constitutional right to education.\footnote{131} But while no federal constitutional right to education exists, a state constitution can create such a right by creating educational requirements for the government.\footnote{132} The dissent in Logiodice noted that "as surely as West had a right under federal law to medical services, students in Maine have a right under its constitution to an education."\footnote{133} It could be argued, therefore, that West is controlling in school choice situations, and thus, the participating private schools should be deemed state actors.\footnote{134}

\footnote{130}§1002.38(1) ("The Legislature finds that the State Constitution requires the state to provide a uniform, safe, secure, efficient, and high-quality system which allows the opportunity to obtain a high-quality education. The Legislature further finds that a student should not be compelled, against the wishes of the student’s parent, to remain in a school found by the state to be failing for 2 years in a 4-year period.").

\footnote{131}Some state constitutions require an “adequate” education. See, for example, Fla Const Art 9, § 1 (West 2003) ("Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require."); NY Const Art XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."); Ohio Const Art VI, § 2 ("The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State."); Wyo Const Art VII, § 9 ("The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state, between the ages of six and twenty-one years, free of charge.").

\footnote{132}San Antonio Independent School District v Rodriguez, 411 US 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

\footnote{133}See, for example, NY Const Art XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."); NJ Const Art VIII, § 4, P 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen."); Ohio Rev Code Ann §§ 3313.48 and 3313.64 (West 2003) (directing local authorities to provide a free education and requiring attendance). See also Daniel Pollack and David Schnall, Expelling and Suspending Students: An American and Jewish Legal Perspective, 9 New Eng J Intl & Comp L 334 (2003) (discussing the notion of fundamental and non-fundamental rights in relation to how states determine their own educational policies).

\footnote{134}Logiodice, 296 F3d at 40.

\footnote{134}Even under the federal Constitution, it could be suggested that there is some sort of right to a minimal education which cannot be denied to a certain group of students. See
A crucial distinction, however, exists between *West* and a school choice program, and indeed, between a voucher school and the school at issue in *Logiodice*. In a school choice situation, if the student is expelled from the private school, the student simply would return to her original public school. While that option may not appeal to the student, it will not deprive the student of an education. As one court pointed out, the loss of a private education simply requires the student to transfer to a public school. This loss is not as significant as the total deprivation of education, which results from expulsion from a public school.

The presence of choice distinguishes the school choice programs from the situations in the public school setting. The premise of these school choice programs lies in the free and independent choices of the parents of the students. In *West*, the inmate received treatment from a doctor under contract, and had no choice whether to receive the medical treatment from that doctor. While a parent may not wish to return her child to the public school system, she cannot deny that after expulsion the public school system remains an option. Expulsion from a private school does not leave the student without educational options—the local public school remains open to her.

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1. See *Rodriguez*, 411 US at 25 n 60 (“If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of ‘poor’ people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. ... [The State] has undertaken to do a good deal more than provide an education to those who can afford it. It has provided what it considers to be an adequate base education for all children.”); *Plyler v Doe*, 457 US 202, 221 (1982) (“[Education] is [not] merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and lasting impact of its deprivation on the life of the child, mark the distinction. ... In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore 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.”).
3. *Id* at 372.
4. *Zelman v Simmons-Harris*, 536 US 639, 652 (2002) (“Because the program ensured that parents were the ones to select [the schools] ... the circuit between government and religion was broken.”).
B. The State’s Regulation and Funding of School Choice Programs Do Not Transform Participant Private Schools into State Actors

Under Brentwood, simple entwinement principles could dictate that school choice programs should be held accountable as state actors.139 The argument under Brentwood would be that the presence of state regulation and public funding together, divorced from any consideration of the public function doctrine, can suffice to create entwinement and therefore a finding of state action. However, in school choice programs, neither the state funding nor the regulation on the private schools alone are sufficient for a finding of state action. Furthermore, the Court in Brentwood invoked the notion of state control over the decision at issue in the case.140 Neither the funding nor the regulation suggests state control over the school’s functioning.

1. State funding of school choice programs is insufficient to justify a finding of state action.

The fact that the private school participating in the school choice program receives public funds is not dispositive of whether the school is a state actor. The Court in Rendell-Baker explicitly held that the “school’s receipt of public funds does not make the discharge decisions acts of the state.”141 Discussing Rendell-Baker, the Court in West noted that “the fact that the private entities received state funding and were subject to state regulation did not, without more, convert their conduct into state action.”142

The Third Circuit, in Robert S v Stetson School, Inc,143 underlined that the receipt of state funds alone does not transform a private actor into a state actor.144 While the court in Logiodice focused upon state control of the school’s action, the court in Robert S explicitly focused upon the transfer of state money.145

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139 See Brentwood, 531 US at 297-98.
140 Id at 295 (“[S]tate action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.”) (internal quotations and citations omitted) (emphasis added).
141 Rendell-Baker, 457 US at 840.
142 West, 487 US at 52 n 10.
143 256 F3d 159 (3d Cir 2001).
144 Id.
145 Id at 164-65.
The court determined that a private school, specializing in the education of juvenile sex offenders, many of whom were placed in the school through state agencies, was not a state actor, and thus not subject to Section 1983 claims. Following Rendell-Baker, the court observed that the receipt of government funds is not determinative of whether state action exists, and though the state had a contractual relationship with the private school, the requirements did not "compel or even influence the conduct . . . of the staff that [the student] challenged." The Third Circuit here made explicit the connection between money and control: though the state granted the school money, that money did not control the particular incident.

2. The state exercises insufficient control over private schools' decisions to warrant a finding of state action.

A state's regulation of a private school does not automatically trigger a finding of state action. As the Third Circuit in Robert S noted, state-dictated requirements for participation in a program are not sufficient to make a private entity a state actor. The Supreme Court also has declared that "the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. . . . [n]or does the fact that the regulation is extensive and detailed." Previous cases on state action also have focused on state control over the disputed private action. As the Court noted in West, "the private party's challenged decisions could satisfy the state-action requirement if they were made on the basis of some rule of decision for which the State is responsible." In Brentwood, the court reviewed the history of the school and its relationship with the state, noting that the state had granted the school money but did not control its particular actions. The court concluded that the state did not exercise sufficient control over the school's decisions to warrant a finding of state action.

146 Id at 167-68.
147 Robert S, 256 F3d at 165 (internal citations omitted).
148 State courts have also addressed these issues, applying versions of the Brentwood entwinement test. See, for example, Penny v Kalamazoo Christian High School Association, 210 NW2d 893 (Mich App 1973) (finding no state action when a parochial school refused to admit the plaintiff's daughter; though the school had state established curriculum requirements, teacher qualification standards and record requirements, these contacts did not implicate the school's admissions decisions, nor did the school serve an exclusive state function); Oefelein v Monsignor Farrell High School, 353 NYS2d 674 (NY 1974) (determining that the expulsion of a student was not state action, though the state administered regents' exams, classified the property as tax exempt, and dictated the use of secular text books provided by the state).
149 Robert S, 256 F3d at 159.
150 Jackson, 419 US at 350. See also Rendell-Baker, 457 US at 841.
151 West, 487 US at 51 n 10. See also Perkins v Londonderry Basketball Club, 196 F3d
wood, the Court articulated the threshold question of whether there was a “close nexus between the state and the challenged action.” In other cases, the Court focused on whether the challenged action could fairly be called state action. Thus, if the state regulations through school choice programs rose to the level of controlling the actions of the private school, the private school might be found to be a state actor.

In the case of school choice programs, however, the disciplinary actions fall solely within the purview of the private school and its administrators. Because of this, the essential element of control over the challenged action is missing. Under Florida’s “Opportunity Scholarship Program,” a private school desiring admittance to the voucher program must “adhere to the tenants of its published disciplinary procedures prior to the expulsion of any opportunity scholarship student.” Neither the Milwaukee “Parental Choice Program” nor the Cleveland “Scholarship and

13 (1st Cir 1999) (applying the “nexus test” to determine that a privately run youth basketball club was not a state actor). The basketball club in Perkins did not permit a player to participate in a tournament because of her gender. Id at 16. The court emphasized that their inquiry was focused on “the connection between the State and the challenged conduct, not the broader relationship between the State and the private entity,” and went so far as to note that even if the State had conferred “monopoly status” on the private entity, the courts must still require a “snug relationship” between that grant of power and the challenged conduct. Id at 19-20.

152 Brentwood, 531 US at 295.

153 See Tarkanian, 488 US at 196 (“[The NCAA] cannot be regarded as an agent of UNLV for purposes of that proceeding.”) (emphasis added); Rendell-Baker, 457 US at 837 (noting that the decision to discharge was not compelled or even influenced by state regulation).

154 The organic statutes for school choice programs do not address on the internal disciplinary requirements for the private school participants. Even those state statutes which directly address these participant private school’s disciplinary proceedings note that the school needs only adhere to its own procedures. See, for example, Florida’s Opportunity Scholarship Program, Fla Stat Ann § 1002.38(4)(k) (West 2003).

155 Fla Stat Ann § 1002.38(4)(k) (West 2003). But see Moose Lodge No 107 v Irvis, 407 US 163, 176 (1972) (finding state action where state agency regulations affirmatively required the private actor to adhere to all provisions of its constitution and by-laws). The Moose Lodge had discriminatory by-laws governing the service of non-Caucasian guests. Moose Lodge, 407 US at 165. The Court reasoned that the power of the State, through this provision, stood behind the Lodge’s decision to enforce the discriminatory policies. Id at 178. The state placed its power behind the club’s discrimination on the basis of race. Id. This situation, though, is distinguishable from that in the school choice programs. First, it is highly unlikely that any private school admitted to the program would have encoded discriminatory laws into its stated policies. Second, the Florida statute is a procedural mechanism, rather than a substantive policy—it requires only adherence to “procedures” rather than placing the state’s weight behind any particular standards. And the further provision which demands that the student “comply fully with the school’s code of conduct” is also distinguishable; it simply codifies the understanding that in attending the private school, the student is subject to its policies, not those of the public school which the student would have attended. See Fla Stat Ann § 1002.38(4)(k) (West 2003).
Tutoring Program” have any state-mandated provisions which touch on school discipline.\textsuperscript{156} In the Milwaukee and Cleveland programs the statute does dictate financial accountability standards.\textsuperscript{157} In Florida and Milwaukee, both programs have required, as a condition of religious schools’ participation, these schools not to compel any student attending through a school choice program to attend or participate in any religious activity, or to profess particular beliefs.\textsuperscript{158}

While these individual state provisions do not affect the functioning of a school, they do provide standards for schools’ admission to the voucher program, and prevent the school from affirmatively requiring certain behaviors from the students admitted through the school choice program. Even in the case of the Florida and Milwaukee programs, which effectively prevent the schools from disciplining school choice students for refusal to participate in religious activities, these provisions merely carve out a realm of non-interference by the school. Even these statutes leave the school’s disciplinary proceedings to the judgment of the school administrators. These statutes do not rise to the level of controlling the particularities of the disciplinary proceedings of the school that the Supreme Court has found constitutes state action.

**IV. THE PARTICULAR PROBLEMS PRESENTED BY RELIGIOUS SCHOOL PARTICIPATION IN SCHOOL CHOICE PROGRAMS**

The Court in *Brentwood* acknowledged that under the entwinement test a finding of state action may be forestalled by countervailing reasons.\textsuperscript{159} “Even facts that suffice to show public action (or, standing alone, would require such a finding) may be outweighed in the name of some value at odds with finding public accountability in the circumstances.”\textsuperscript{160} These values include the autonomy of the private schools.\textsuperscript{161} But furthermore, a find-

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\textsuperscript{156} See Wis Stat Ann § 119.23 (West 2003); Ohio Rev Code Ann § 3313.975 (West 2003).

\textsuperscript{157} Wis Stat Ann § 119.23 (West 2003); Ohio Rev Code Ann § 3313.975 (West 2003).

\textsuperscript{158} Fla Stat Ann § 1002.38(4)(j) (West 2003); Wis Stat Ann § 119.23(7)(c) (West 2003).

\textsuperscript{159} *Brentwood*, 521 US at 295-96.

\textsuperscript{160} Id at 303.

\textsuperscript{161} The private schools in question have a right to function without governmental interference. See *Bright v Isenbarger*, 314 F Supp 1382, 1390 (Ind 1970) (“[T]he type of ‘private’ conduct—operation of private schools—challenged under the Fourteenth Amendment is itself among those fundamental personal liberties which are protected by the Fourteenth Amendment.”).
ing of state action in the school choice setting potentially implicates constitutional values of another sort.

The majority of private schools participating in school choice programs are religious in nature. A finding that these schools are state actors presents two interrelated problems. First, such a finding would contravene Supreme Court precedent holding that there cannot be intrusion by the state into the province of the church. Second, state actors are subject to higher due process requirements under the Fourteenth Amendment. As decided in Zelman v Simmons-Harris, school choice programs are premised on the notion that there is no direct control or connection between the state and a religious institution. To declare a parochial school to be a state actor, and then require these high levels of due process and governmental oversight of these procedural protections, would undermine a premise of these programs, the separation of church and state.

A. Dlaikan v Roodbeen: A Court’s Refusal to Review a Religious School’s Decision

To counter a potential intrusion by the state into the internal functioning of an institution connected with a church, religious schools could argue that these heightened procedural requirements would contravene the Free Exercise Clause. For example, the school could argue that religious decisions—here, disciplinary proceedings—are not properly reviewable by the

162 See, for example, Ira C. Lupu and Robert W. Tuttle, Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles, 78 Notre Dame L Rev 917, 922-23 (2003) (noting that the majority of participating private schools in the Cleveland school choice program are religious).

163 See Everson v Board of Education of Ewing Township, 330 US 1, 16 (1947) (“[T]he clause against establishment of religion by law was intended to erect a wall of separation between Church and State.”). See also Lemon v Kurtzman, 403 US 602 (1971); Grossner v Trustees of Columbia University, 287 F Supp 535, 549 n 19 (NY 1968) (rejecting the argument that all private schools perform a public function as such a finding would render “the very idea of a parochial school . . . unthinkable”).


165 Id at 652 (noting that the school choice program did not violate the Establishment Clause because the “circuit between government and religion was broken”).


167 See generally, Bonnie Daboll, Note, School-Choice Legislation: Constitutional Limitations on State Regulation of Participating Parochial Schools After Zelman v. Simmons-Harris, 55 Fla L Rev 711, 714 (2003) (noting that religious schools might fear that excessive state regulation of schools participating in school choice programs will violate their free exercise rights, and citing as an example the concern of the Milwaukee Archdiocese over the possibility that its diocesan schools would be regulated by the state.)
A difference in level of review would create awkward dichotomies between religious and non-religious schools in the school choice programs. While religious schools could argue that they should be free of judicial review, non-religious schools would not have that ability.

An example of a court’s refusal to review a parochial school’s internal decisionmaking is Dlaikan. A Michigan court of appeals refused to review the decision of a parochial school not to admit two students.

When the claim involves the provision of the very services (or as here refusal to provide these services) for which the organization enjoys First Amendment protection, then any claimed contract for such services likely involves its ecclesiastical policies, outside the purview of civil law. In this regard there can be no distinction between a church providing a liturgical service in its sanctuary and providing education imbued with its religious doctrine in its parochial school. The court determined that it lacked jurisdiction to hear the case because in doing so, it would have to examine the religious doctrine of the church, thereby implicating the First Amendment rights of the religious institution.

This attitude creates a presumption in favor of the disciplinary decisions of religious schools, and frees them from the oversight given other non-religious private schools. The dissenting opinion in Dlaikan illuminates these concerns, focusing upon the rule that civil courts may “assert jurisdiction only over disputes involving property rights which can be resolved by application of civil law.” Judge Taylor, in this dissent, rejected what he perceived to be an “irrebuttable presumption” in favor of religious institutions, and declared that the court could properly review

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168 See Serbian Eastern Orthodox Diocese v Milivojevich, 426 US 696, 713 (1976) (noting the existence of the “general rule that religious controversies are not the proper subject of civil court inquiry”).
169 Dlaikan, 533 NW2d at 720.
170 Id.
171 Id at 593.
172 See City of Boerne v Flores, 521 US 507, 537 (1997) (Stevens concurring) (noting that the Religious Freedom Restoration Act of 1993 “provide[s] the Church with a legal weapon that no atheist or agnostic can obtain”).
173 Dlaikan, 522 NW2d at 722 (Taylor dissenting) (quotations and citations omitted).
the decision to exclude these students, which sounds in both property and contract law.\footnote{Id at 720.}

**B. Review of Religious Schools' Decisions Does Not Violate Their Religious Freedom**

Ultimately, this blanket argument against all judicial review of disciplinary proceedings must fail.\footnote{I do not address any other claims that the religious schools might bring against state regulations, as this is outside the scope of my Comment; rather, I focus on the idea of judicial review, in keeping with the overarching emphasis on judicial review of the disciplinary proceedings and procedural requirements of private schools.} Issues surrounding a religious school’s decision to discipline a student according to the school’s own stated procedures do not implicate First Amendment questions.\footnote{See New Life Baptist Church Academy v Town of East Longmeadow, 885 F2d 940, 944 (1st Cir 1989) (holding that the state may reasonably regulate private secular education, including the secular education offered by religious schools).} This is true both because of the nature of the possible conflicts that will arise between a student and her school and due to the statutory provisions which carve out religious exemptions for those students who attend religious schools on school choice programs.\footnote{See, for example, Fla Stat Ann § 1002.38(4)(k) (West 2003) (“Participating private schools must agree to compel any student attending the private school on an opportunity scholarship to profess a specific ideological belief, to pray, or to worship.”); Wis Stat Ann § 119.23(7)(c) (West 2003) (“A private school may not require a pupil attending the private school under this section to participate in any religious activity if the pupil’s parent or guardian submits to the pupil’s teacher or the private school’s principal a written request that the pupil be exempt from such activities.”).} Finding parochial schools to be state actors is not necessary to preserve judicial review of their decisions to discipline students.

Caselaw suggests that procedural review of a religious organization’s decision is acceptable and the court in Dlaikan reached the wrong decision. First, that case is an outlier, and courts dealing with parochial schools’ disciplinary decisions have found those decisions to be properly reviewable.\footnote{See, for example, Penny v Kalamazoo Christian High School Association, 210 NW2d 893 (Mich App 1973) (examining a religious school’s admittance procedures); Oefelein v Monsignor Farrell High School, 353 NYS2d 674, 674 (examining a religious school’s disciplinary decision).} Second, the cases which illustrate a refusal to review religious organizations’ decisions are concerned with judicial interference with doctrinal questions. These types of questions, which implicate “matters of discipline, faith, internal organization, or ecclesiastical rule, cus-
tom or law,”179 usually overlap with conflicts that arise within the organization. For example, some cases deal with employees involved in the doctrinal mission of a church.180 In contrast, the disciplining of a student does not involve doctrinal questions. Furthermore, a student in a religious school is not party to any internal church decisions on doctrine.

Significantly, most school choice programs statutorily require participating religious schools to allow school choice students to avoid participating in the religious life of the school.181 As such, the state has carved out an area of the school’s policies which do not apply to the student. Thus, it is most likely that the disciplinary proceedings will not involve doctrinal questions.182

Additionally, at least one case has permitted procedural review of the decision of a church to expel a member of the congregation. In Baugh v Thomas,183 the New Jersey Supreme Court held that expulsion from a religious community can constitute a serious emotional deprivation, and thus can trigger judicial review to determine if the church adhered to its own stated policies.184 The court determined that if the decision did not involve religious doctrine, there was no compelling reason to review the decisions of religious organizations differently from those of other non-profit organizations.185 The New Jersey court carefully distinguished those Supreme Court cases that held that courts

179 Serbian Eastern Orthodox Diocese, 426 US at 713 (1976).
180 See, for example, Bryce v Episcopal Church in the Diocese of Colorado, 289 F3d 648 (10th Cir 2002) (refusing review where plaintiff was youth minister).
181 See, for example, Fla Stat Ann § 1002.38(4)(j) (West 2003); Wis Stat Ann § 119.23(7)(c) (West 2003).
182 A harder question is presented in situations in which a student is disciplined for contravening religious doctrine unintentionally. For example, an openly gay student in a Christian school might be disciplined in some manner. While it is likely that the student will have cognizable claims against the school, the constitutional claim of insufficient due process should not be wielded to protect him or her. A finding of state action would impermissibly bind the religious school to the apparatus of the state. See Karla D. Shores, Christian School in Jupiter Sued for Expelling Gay Student, South Florida Sun-Sentinal 1B (Oct 22, 2003).
184 Id at 677.
185 Id. See also Taylor v Jackson, 50 App DC 381, 384 (1921) (holding that the decision of a church to expel a member was void as the appellee lacked notice required by church regulations and therefore was denied the opportunity to be heard). But see Kaufmann v Sheehan, 707 F2d 355, 358 (8th Cir 1983) (refusing to review a deprivation of due process claim since any review of whether “the ecclesiastical actions of a church judicatory are . . . ‘arbitrary’ must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church adjudicatory to follow”).
SCHOOL CHOICE PROGRAMS

could not review "ecclesiastical questions," noting that the instant decision simply reviewed procedure, rather than any investigation into spiritual matters or church doctrine. Thus, under the reasoning of Baugh, even if the proceedings involve doctrinal questions, the court may choose only to review the procedural aspects of the proceedings.

V. LOW-LEVEL PROCEDURAL REQUIREMENTS FOR PRIVATE SCHOOLS' DISCIPLINARY PROCEEDINGS PROVIDES A WORKABLE AND CONSISTENT SOLUTION

The question of state action by private schools participating in school choice programs may arise in the disciplinary setting. The implication of a finding of state action would bind these private schools to offering a high level of due process protection. Furthermore, to find state action in the case of secular private schools, but not in the case of religious private schools would create a distinction between two classes of participant schools in school choice programs. Such deference showed to religious schools is unwise and, most likely, impermissible.

In Goss, the Supreme Court recognized that the state deprives a student of something important when that student loses a public school education. In the situation of school choice, the expulsion would deprive the child of the opportunity to attend a higher quality school than the original public school offering. While it does not reach the level of deprivation presented by a public school expulsion, for in the case of expulsion from a private school a back-up public school does remain, the removal of the educational opportunity does deserve procedural protections.

It is not necessary, however, to hold private schools in school choice programs—whether religious or not—to a lower standard.

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186 Presbyterian Church in the US v Mary Elizabeth Blue Hull Mem Presbyterian Church, 393 US 440, 445 (1969) (articulating this notion of "ecclesiastical questions").

187 Baugh, 265 A2d at 677. While this is the only case that addresses the procedural review question squarely, the acceptability of review of religious school's decisions is implicit in other cases. See, for example, Randolph v First Baptist Church of Lockland, 120 NE2d 485, 488 (Ohio 1954) (holding that the court may properly review a church's decision to expel a member for adherence to its stated rules and regulations).

188 Baugh, 265 A2d at 677

189 City of Boerne v Flores, 521 US 507, 537 (1997) (Stevens concurring) (concurring in the judgment to strike down the Religious Freedom Restoration Act on the grounds that it creates an unconstitutional presumption for religious organizations).

190 Goss, 419 US at 576.
than that of "fundamental fairness." The low levels of process traditionally required by private school disciplinary proceedings leave a school free to pursue its own policies for discipline, as well as to offer some level of protection to the students who attend. If one of the few students admitted to a school choice program—in other words, granted the opportunity to leave her marginal school for a better one—is forced to leave for disciplinary reasons, she has lost an opportunity to get a better education, to escape her failing school. But even absent a finding of state action, these students will not be left without any protections. Applying the articulated standards of adherence to stated policies or fundamental fairness keeps the school free from unwarranted interference in the internal decisionmaking of the school, maintaining the autonomy of the school, as well as the possibility of the school choice program, and protects the student from arbitrary decisions.

CONCLUSION

Under the delegation of a public function test and the entwinement test, private schools participating in school choice programs should not be declared state actors. The state lacks the requisite control over the actions of the school and the contacts that do exist between the state and the school are insufficient to transform the private actor into a state actor. That the majority of private schools in these programs are religious supports this argument against a finding of state action.

School choice programs are likely to remain an option for struggling school districts, offering a limited number of stu-
dents the opportunity to achieve a better education. These programs harness the autonomy and flexibility of private schools, which limit class size, control the curricula, and discipline their students as they see fit. To declare these participant private schools state actors would curtail this autonomy and have severe repercussions for the continued viability of school choice programs.