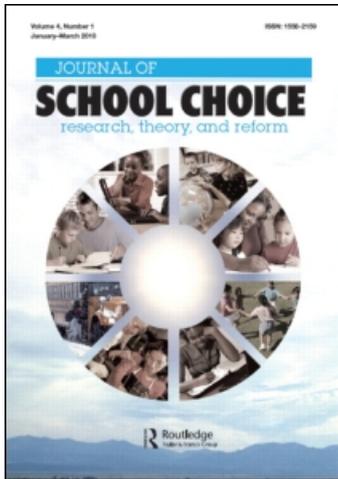


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Special Needs Vouchers Aid Children and Promote Excellence: A Response to “Beyond *Cain v. Horne*”

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This reply addresses concerns raised by Dr. Harmon in “Beyond Cain v. Horne.” In response to the issues she raises, I explain that the appropriate constitutional inquiry is not whether there is some incidental financial benefit to private schools but whether a challenged voucher program was enacted to assist students in obtaining the best possible education or to subsidize private schools. I also argue that vouchers actually go beyond IDEA’s minimal requirement to provide an “adequate” education by empowering parents to obtain the best education available for their child. Moreover, voucher programs for children with disabilities result in increased parental satisfaction and a higher likelihood that students with special needs receive the services the school promised to provide.

KEYWORDS *voucher, Blaine Amendment, school choice, Cain v. Horne, disability*

INTRODUCTION

In the previous article, Dr. Corinne Harmon responds to my analysis of the Arizona Supreme Court’s decision in *Cain v. Horne* (Keller, 2009) that struck down two voucher programs for students with special needs—one for children with disabilities and the other for children in foster care. Harmon believes my constitutional analysis is in error because private schools receive a financial benefit from voucher programs (Harmon, 2010). In reply, I briefly explain that just because private schools receive some incidental

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financial benefit from a voucher program does not undermine their constitutionality so long as the program provides aid directly to families and does so with the intent to benefit children and not private schools. Harmon also asserts that, as a matter of policy, voucher programs result in a loss of federally guaranteed rights under the Individuals with Disabilities Education Act (IDEA). In reality, voucher programs expand and supplement existing rights under IDEA and result in greater accountability to students and increased parental satisfaction (Greene & Forster, 2003).

AN INCIDENTAL FINANCIAL BENEFIT IS NOT THE EQUIVALENT OF AID TO PRIVATE SCHOOLS

Harmon's primary objection to my argument that voucher programs should not be construed as programs "in aid of" private schools is that, in reality, private schools do receive a financial benefit from voucher programs. I agree that private schools do receive an incidental financial benefit from voucher programs, and I noted as much in my original article, but I disagree that the necessary conclusion is that voucher programs are therefore passed "in aid of" private schools. Any time the government subsidizes an activity, the laws of economics guarantee the subsidized activity will increase. So, when the government provides vouchers to parents to send their children to private schools, more parents will choose to send their children to private school. We may even see new private schools open to meet the increased demand resulting from the government subsidy, as Arizona did during the three years it operated its Scholarships for Students with Disabilities Program (Arizona Revised Statutes §15, 2006a) and its Displaced Pupils Grant Program (Arizona Revised Statutes §15, 2006b). However, the fact that some private schools may realize a financial benefit from a voucher program does not mean the state enacted the voucher program as a means to aid private schools. Rather, voucher programs are designed and intended to aid families in choosing the school that best suits their child's unique educational needs, and any financial benefit that accrues to private schools is merely incidental to the primary goal of improving educational opportunities for children.

In *Cain v. Horne*, the Arizona Supreme Court construed the language in Article IX, section 10 of the Arizona Constitution, which provides that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." This provision does not bar programs that aid churches, private or sectarian schools, or public service corporations. It bars programs passed "in aid of" those various institutions. Clearly, the founders intended to prohibit the legislature from providing direct aid to church and private schools. But nothing in Article IX, Section 10 suggests that Arizona's founders were concerned about indirect aid programs in which public funds reach private schools as

the result of purely private actors operating pursuant to a completely neutral government program that neither favors private over public school, nor one private school over another (*Kotterman v. Killian*, 1999).

Harmon acknowledges that Arizona law permits public school districts to place children with disabilities in private schools and use public funds to pay tuition to those schools (Arizona Revised Statutes §15, 2008). However, as did the Arizona Supreme Court in *Cain*, Harmon fails to explain why district placements do not aid private schools but parent placements pursuant to a voucher program should be considered aid to private schools. Both types of placement use public funds to pay the private schools' tuition and thus incidentally benefit private schools. Properly construed, however, such incidental aid does not run afoul of constitutional restrictions on aid to private schools because the public funds are appropriated in both instances to benefit children, not institutions. Under a properly structured voucher program, any benefit that flows to private schools does so only as the result of the uncoerced, genuine decision of the families who are the intended beneficiaries of the voucher program. Ironically, prior to *Cain v. Horne*, the Arizona Supreme Court was far more concerned with substance over form and had applied a legal test that sought to determine who a program was truly designed to benefit (*Community Council v. Jordan*, 1967), a test that, if it had been applied in *Cain v. Horne*, would have resulted in a finding that Arizona's voucher programs were enacted "in aid of" children and families, not "in aid of" private schools.

VOUCHER PROGRAMS EXPAND PARENTAL RIGHTS

Harmon also asserts that voucher programs undermine IDEA's promise to meet the educational needs of children with disabilities. Contrary to Harmon's unspoken assumption, public school districts frequently do a poor job of providing needed services to children with disabilities. Voucher programs thus go beyond IDEA's promise to provide a mere "appropriate" education by expanding IDEA's existing "opt out" rights to offer parents a genuine opportunity to provide their children the best education available. Harmon is concerned that parents who opt out of IDEA by choosing a private education will no longer be able to avail themselves of IDEA's "due process" procedures. However, Harmon fails to take into account the significant burdens imposed by IDEA's due process procedures, burdens that often mean those protections are illusory for parents without the means to hire an attorney to enforce them. And even when the public schools do provide an adequate education, for many parents adequate is not good enough when there is a better option in the private market. Harmon's argument fails to acknowledge that in reality a parent who contracts directly with a private school for education services is in a far stronger bargaining position than a parent whose child's education is governed by IDEA. Moreover, the

existing social science research strongly suggests that voucher programs for children with disabilities result in increased parental satisfaction and better educational environments for children.

Under IDEA, school districts are not required to provide children with disabilities with the best available education (*Board of Education of the Hendrick Hudson Central School District v. Rowley*, 1982). Rather, IDEA merely requires that school districts provide a "free and appropriate public education" (United States Code, 2010). The U.S. Supreme Court interprets this to mean that school districts must afford students a "basic floor of opportunity" consisting at a minimum "of access to specialized instruction and related services that are individually designed to provide educational benefit to the handicapped child" (*Board of Education of the Hendrick Hudson Central School District v. Rowley*, 1982, p. 201). While the guarantee of a free and appropriate education may be more than students without disabilities are entitled to under federal law, children with disabilities deserve more than merely an "appropriate" education. They deserve the best available education.

Under IDEA, a child's placement and the educational services to which he or she is entitled are determined by a team of individuals, including the child's parents, who are responsible for crafting a document known as an Individual Education Program (IEP). While parents have a voice as part of the IEP team, parents do not have the authority to make the final educational placement decision. When parents and districts disagree about the educational services that best meet students' needs, regulatory compliance under IDEA is achieved largely through an adversarial process (Zirkel, 2003). If the parents object to the IEP team's decisions, the parents' options are limited. They may give up and accept the IEP as written, or they can either (a) "unilaterally" place their child in a private school or (b) keep their child in the public school while spending time, energy, and effort appealing the IEP team's decision. Sadly, if parents choose the latter option, "the [appeal] process is ponderous" and by no means certain (*School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 1985). Indeed, "[a] final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed" (*School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 1985, p. 370).

If parents unilaterally withdraw their child in favor of a private placement, while pursuing their due process remedies, IDEA

allows a court or hearing officer to require a state agency "to reimburse the parents [of a child with a disability] for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child." (*Winkelman v. Parma City School District*, 2007, p. 526)

The recovery of tuition in the form of a reimbursement is in no way guaranteed, meaning parents must be prepared to pay the cost of tuition themselves. In addition, the cost of hiring counsel to litigate a reimbursement case, coupled with the uncertain outcome, undoubtedly discourages many parents from pursuing this course of action. Voucher programs thus supplement this existing opt out right by guaranteeing that parents who are dissatisfied with their child's public education can opt out of the public system without the uncertainty and expense created by IDEA as currently written and enforced.

Harmon also ignores the fact that parents who choose to use a voucher to send their child to private school may, at any time, return their child to the public school system and thereby come once again under IDEA's regulatory authority. Using a voucher to attend a private school does not require parents to burn their bridges behind them.

Finally, the research concerning vouchers for children with disabilities demonstrates that parents like having additional educational options and that students with disabilities benefit socially and academically from voucher programs. Greene and Forster (2003) found that under Florida's voucher program for children with disabilities:

- A full 92.7% of voucher participants were satisfied or very satisfied with their private schools, while only 32.7% were similarly satisfied with their prior public schools.
- Participating students were victimized far less by other students in their private schools. In public schools, 46.8% of participating students reported they were bothered often, and 24.7% of participating students were physically assaulted. Yet, in private schools only 5.3% of participating students were bothered often, and only 6% reported being assaulted.
- Private schools outperformed public schools on the authors' measurement of accountability for services provided. Only 30.2% of participating families said they had received all services required under federal law from their public school, while 86% of participants reported that their private school provided all the services they promised to provide.
- Behavior problems also reportedly dropped in students attending private schools using a voucher. Forty percent of voucher participants said their children exhibited behavior problems in public school, but only 18.8% reported such behavior in private schools.

A legislative report in Utah regarding its voucher program for children with disabilities reported similar findings (Osterstock, Herring, & Buys, 2008):

- 91% of parents agreed that their child's private school provided promised services for their child's disability.
- 91.9% thought that their child's needs were/are met at the private school.
- 89.11% were satisfied with their child's private school.

- 100% of parents thought that the voucher program should continue to exist for eligible students.

Even reports critical of voucher programs have found that parents using vouchers tend to express higher degrees of satisfaction with services than parents in district schools (Van Lier, 2008). As the lawyer who defended Arizona's voucher program in *Cain v. Horne*, I spoke with dozens of parents who gladly left behind their IDEA "rights" in favor of a voucher that gave them control of their child's education. As I traveled the state collecting these parents' testimonies, two very clear themes developed. The first was that parents overwhelmingly believed that their public schools were little more than glorified babysitting services. The second was that parents believed that public school special education teachers did not believe that children with disabilities have the capacity to grow either academically or socially. Parents gladly renounced IDEA's due process "rights" in favor of private education because they found private school teachers who believed their children could learn and grow and who were interested not in babysitting children but in educating them.

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