



Public Funding for Non-Public Schools

BY NATHAN J. DIAMENT

For more than forty years, securing government support for day schools and *yeshivot* has been at the top of the Orthodox Jewish community's public policy agenda. We have not been alone in this; the Catholic community, as well as other population segments that use non-public schools, has worked in coalition with us to seek such support. After these many years of effort, it is worth considering what has been gained, what remains hoped for and, most importantly, what can truly be achieved. In brief, while a single "silver bullet" solution, such as a government-funded school voucher program, is still many years away from reality, there are a host of other possibilities for public funding that can bring real near-term benefits to our community.

The State of the Law

At the outset, we must recognize that there are significant legal barriers to wholesale government support for non-public schools, particularly religious schools, in the United States. The best-

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known barrier is the Establishment Clause of the First Amendment of the United States Constitution.¹ For many years, with non-Orthodox segments of the Jewish community urging it on, the Supreme Court understood this provision as barring government programs that directly aid religious schools. At the same time, programs that could be structured to deliver aid in a broad or indirect manner were permitted. So, providing bus transportation for all schoolchildren—including those attending religious schools—was ruled permissible decades ago, as was loaning secular textbooks and other instructional materials. More recently, the Court ruled in favor of state-sponsored remedial and special education classes in religious schools as well as providing computers and other technological teaching tools to religious schools. The Court has also looked favorably upon tax credits for educational expenses or financial contributions that are made available to a broad class of the population (i.e., all schools or parents, not just religious ones).

Thus, the Supreme Court's jurisprudence in this arena evolved away from demanding "strict separation" of church and state. In fact, in 2002 the Court ruled a school voucher program in Cleveland, Ohio, to be constitutional and not a violation of the Establishment Clause. This ruling was a

capstone of the Court's current understanding: So long as a government benefit is awarded for a secular purpose, on the basis of religion-neutral criteria, and it is left to the free and independent choices of individuals whether this benefit is ultimately used for religious purposes, the Establishment Clause is not transgressed.

But this is not the end of the story in the courts. Just because the federal Constitution does not prohibit a school voucher program, or any other program which might aid religious schools, that does not mean that a state or county is required to provide such a program or benefit.² Moreover, more than thirty states have in their constitutions what are known as "Blaine Amendments," which contain more explicitly restrictive language regarding public aid for non-public schools than the federal Constitution. While these amendments have a sordid historical lineage,³ they are the current resort of school voucher opponents who have turned to state courts to block such proposals.⁴

Despite this legal landscape, there are many programs that support non-public schools operating in various states. New York provides busing and remedial education services for students and loans secular textbooks to schools. Ohio provides subsidies for the administration of standardized tests. Arizona,

Minnesota and Pennsylvania are among those states offering a tax credit for various education-related expenses or contributions. There are also federal programs, often administered by state agencies, which can benefit our community's schools. These range from federal homeland security grants to special education services for the learning disabled to excessive noise remediation for schools located near airport facilities. These programs are all constitutional under existing precedents and materially benefit our community. They are not a "silver bullet" solution such as vouchers, but they are more likely to assist our schools and families sooner. The challenge for our community is to intelligently harness the potential of these programs for our material benefit. That has more to do with politics than law.

The State of the Politics

Why can't we pursue school vouchers, you may ask? The simple political reality is that the vast majority of families in the United States send their children to public schools. If you add up all the children in all the non-public schools in this nation, it would be a small percentage of the total school population. Thus, there is little political support for voucher initiatives that would reallocate funds that would otherwise support public schools in a wholesale fashion.⁵ This is why, in large part, the nature of voucher proposals and their politics has changed from the initial broad-based versions to programs designed to benefit inner-city minority populations who are economically unable to relocate to suburban districts with excellent public schools.⁶ There is no politically viable voucher proposal in the United States today that would benefit lower-to-middle-income families, not to mention those better off financially.⁷

Thus, in terms of seeking opportunities for near-term support for our schools, we must pursue opportunities to expand programs already in place and offer initiatives that do not pit our community and our non-public school

allies against the public school sector. But lest one be disappointed, there are significant opportunities in this realm.

A Practical Public Policy Agenda

All of the public support programs benefiting non-public schools listed in the first section of this essay exist in various states and localities today, but no single locality offers them all to its population. Our community would benefit greatly from bringing existing programs from one state to another, and in most instances such programs can be positioned in politically popular terms.

Education tax credits are an excellent example. Pennsylvania, as well as several other states,⁸ offers state tax credits for education-related contribu-

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tions by corporations to school scholarship funds. Corporations can contribute up to \$100,000 to a scholarship fund and receive a 75 percent state tax credit. Thus the contribution only costs the donor \$25,000. Since being enacted in 2001, this program has generated tens of millions of dollars of contributions to such funds that have benefited both the public and non-public school sectors. It thus does not pit public against private in a zero-sum game of politics. The Jewish Federation of Philadelphia administers the scholarship fund for the schools in that city, and the tax credit has enabled the Federation to considerably increase its level of support for the day schools. The tax credit empowers all schools to solicit funds from businesses, large and small, within their communities on the basis of seeking investment in their schools. In states such as Arizona and Minnesota, credits are offered to individuals who make such

contributions or incur other education-related expenses. Again, the political appeal of such a program is that it benefits the public sector and the non-public sector; it is a *zeh nebeneh vezeh nebeneh* (mutually beneficial) approach.⁹

Transportation is another example. While the two states with the largest Orthodox populations—New York and New Jersey—provide such a service to day school children alongside all other schoolchildren, others do not. The Orthodox families of Baltimore and Silver Spring, Maryland, for instance, face the challenge of either paying more than \$2,000 per child for private bus transit or disrupting their daily routine with carpools. Of course, since public school children already receive bus transportation, we cannot present it as a benefit for all in those terms, but it can be presented as a program that reduces road congestion and pollution. If, through providing transportation, or at least a subsidy, Maryland would reduce or eliminate the carpools that bring thousands of cars onto the roads, commuters in Baltimore and suburban Washington would benefit greatly.

The Means of Pursuit

The legendary politician Tip O'Neil famously said, "All politics is local"; with regard to programs that support schools and education, nothing could be more true. Education budgets and regulations in the United States are primarily determined at the state and local government levels. It is thus necessary for the Orthodox community to increase its efforts in cultivating relationships with local and state officials and building coalitions with local organizational and communal allies. Today's city councilman is tomorrow's state assemblyman and the next day's congressman.¹⁰

The precedent value of a program that exists in another state or locality is considerable. Thus, to inform New York State legislators of the benefits of the Pennsylvania tax credit program in seeking its adoption in Albany is very useful. But it is not sufficient.

The struggle to pay day school tuition is an albatross around the neck of the Jewish community. But a new program is helping Jewish families in Milwaukee pay their day school tuition bill. The program pays the full tuition for ninety-six out of the 606 children who attend Milwaukee's three Jewish day schools. (The remaining families do not receive any aid.)

I am referring to the Milwaukee Parental Choice Program, commonly known as school vouchers. Through the program, which began in the 1990-1991 school year, the state of Wisconsin pays tuition to private schools for participating students. The school must accept the payment, which is approximately \$6,000, as full tuition. Originally only nonsectarian schools were entitled to participate, but in 1995 the law was amended to include religious schools as well (provided voucher students be allowed to refuse participation in religious instruction). After a multi-year court challenge, the program was ruled constitutional by the Wisconsin Supreme Court. The United States Supreme Court refused to hear an appeal, and in 1998 religious schools, including Yeshiva Elementary School (YES), on Milwaukee's west side, began enrolling voucher students. YES is the only Jewish school in the United States benefiting from government vouchers.

While \$6,000 is below the true cost of educating a student, the voucher program provides a great financial boost to the school. Those families eligible to receive vouchers have low incomes, and few, if any, would be able to pay more

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than a fraction of their family's tuition bill. Thus, \$6,000 per student is much more than the school would be able to collect in tuition.

"Without vouchers we would never be able to provide the high quality education that we do," says Rabbi Eliezer Speiser, principal of YES. "[Were the voucher program to come to an end], we would have to lay off teachers, combine classes and cut corners. The impact would be devastating to our school."

"When YES was founded the plan was to succeed with income from tuition and donations," explains Jim Hiller, a member of the school board. "When vouchers came on the scene, they removed the pressure on parents to pay tuition and allowed us to focus on fundraising among the parent body and the broader community."

Since the Milwaukee Jewish Federation maintains one scholarship fund for all the local day schools, the vouchers take a load off the shoulders of the entire Jewish community. If voucher families would have to apply for federation scholarships, there would be that much less money to subsidize children at the other schools. According to one estimate, vouchers free up up to \$100,000 per year for the Jewish community to subsidize other pupils.

Most Orthodox families in Milwaukee can't benefit from the voucher program because of the following eligibility criteria:

1. The school must be located within the Milwaukee city limits. Additionally, the child must reside within the city limits. Two of the three day schools are in the suburbs, making them

ineligible to receive vouchers. Most Milwaukee Jews live in the suburbs as well.

2. Family income must be less than 175 percent of the poverty line. Most Jewish families' incomes, thank goodness, exceed that amount.

3. There is an overall cap on enrollment in the voucher program that threatens to block future expansion of all the voucher schools.

Why all these rules? Simple—the purpose of the voucher program is to give inner-city kids in failing school districts other options. Advancing the religious needs of Jewish children was the farthest thing from the minds of most of the people who advocated for the program. The low-income Jewish families that live within the city limits and send their children to the Jewish day school located within the city are taking

advantage of a law that was not intended primarily for their benefit.

Two years ago, soon after I became the rabbi of Lake Park Synagogue in Milwaukee, I began to wonder if there was a way to expand the

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voucher program so that a greater number of families could benefit. By chance, Jim Doyle, the governor of Wisconsin, was present at a meeting of the Wisconsin Council of Rabbis that I attended. Naively violating the first rule of every trial lawyer's handbook ("Do not ask a question unless you already know the answer"), I asked the governor about prospects for expanding the voucher program. I proceeded to explain to him how important day school education is to the Jewish community and how helpful the program is for eligible families.


The governor looked at me, and said, somewhat sternly, "Absolutely not. No way. Not as long as I'm in office. And also—definitely not for you [the Jewish community]."

The governor's response reflects the societal antagonism towards breach-


ing the traditional wall separating church and state.

Are vouchers a solution to the problem of escalating tuition at day schools? While they may be a solution for a select group of Milwaukee parents, it is not clear whether such a program could be replicated in other communities. Two critical issues need to be addressed. First, is the Jewish community prepared to weaken the wall between church and state in order to help fund Jewish education? Since day school education is critical for the future of the American Jewish community, I believe we should be willing to do so. Others may disagree.

Second, with which political group or groups should we align ourselves in our campaign to introduce vouchers nationwide? The strongest argument for vouchers—and the only one with any possibility of near-term success—is that they hold promise for boosting the prospects of impoverished minorities. Should we campaign for vouchers in our own neighborhoods on the platform that we are concerned about the low-income students in failing public schools in our midst (then, of course, attempt to add language to proposed legislation that would permit our own community to receive funds)? This would seem to be appropriate only if our concern for this legislation is motivated not only by self-interest but by the belief that vouchers are beneficial for the broader community.

Ninety-six Jewish Milwaukee day school students are lucky. A formidable array of advocacy groups that the Jewish community knows little about brought about the voucher program. These fortunate children are able to stow away in their luggage and enjoy the ride. But don't count on bringing vouchers to your hometown. If you want to benefit from school vouchers, I have a suggestion: Move to Milwaukee. It's a great city—you'll love it. 

It is necessary for a community's leaders to define an agenda of the programs or policies the local community needs implemented and then educate the rank and file of the community about that agenda. Community members must then bring that agenda to officeholders who seek their support. Furthermore, they must hold the officeholders accountable for delivering on these issues or for failing to do so. To paraphrase *Pirkei Avot*, no politician can be expected to provide a benefit without expecting something in return; conversely, the Orthodox community must hold those who represent us accountable for their positions on our most important interests—and support for our schools must be in the first rank.

The Orthodox Union, through its Institute for Public Affairs, is increasing its efforts and investment of resources in support of this agenda. We recently recruited Howard Beigelman, formerly a senior staffer to New York Governor George Pataki, to spearhead an effort to assist local Orthodox communities to develop a targeted policy agenda and to cultivate relationships with key officeholders. Of course, support for our schools is a central element of this effort. We are confident that, with God's help, a partnership between the OU and local Orthodox constituents in this work will yield benefits for our families and our children for years to come. 

Notes

1. Congress shall make no law respecting the establishment of religion or the free exercise thereof.
2. See the Court's opinion in the case of *Locke v. Davey*, decided in 2004.
3. See Nathan Diament, "Retrograde on School Choice," *The Washington Post*, 9 August 2002: A17.
4. Florida's school voucher program is currently before that state's supreme court on these grounds.
5. This fundamental reality is separate and apart from the great polit-

ical power held by the labor unions, which represent teachers and school administrators.

6. See John Tierney, "A Chance to Escape," *The New York Times*, 7 June 2005.

7. The Orthodox Union has, nevertheless, continued to support and advocate for voucher programs out of both a long-range view as well as for the sake of the social justice value for the inner-city youth who will benefit. See Tierney, *supra*.

8. Including Arizona, Florida, Illinois, Iowa and Minnesota.

9. Of course, once such a program is in place in a particular state, and material benefits are realized by a broad set of constituencies, we can work in coalitions to expand the benefits, i.e., raise the \$100,000 tax credit to a \$150,000 tax credit, et cetera.

10. The broader Jewish community has learned and applied this lesson well with regard to pro-Israel advocacy; we have just as great an interest in doing so with regard to educational support,