



# Avoiding Government Regulation: *Why Parental School Choice Is Possible Without Destructive Government Control of Private Schools*

by Allan E. Parker, Jr.

## Key Points

- Neither vouchers nor tax credits give the government any more legal authority to regulate private schools and home schools than it has right now.
- The State now regulates private schools without any state financing. That state power exists because of the police power of the state.
- Universal school choice, such as through Taxpayer Savings Grants, will create thousands of new consumers who will have a vested interest in protecting private schools from additional regulation.

Neither vouchers nor tax credits give the government any more legal authority to regulate private schools and home schools than they have right now. In theory, school choice is designed to create options and diversity, not regulatory one-size-fits-all mandates. If the political will is for regulations, school choice will not pass. If the political will is for many options, regulations will be minimal, as they are now for private schools, when school choice passes. But private school regulations exist now, including health and safety regulation of buildings. Neither tax credits, vouchers, nor grants of any kind require regulation in any form. But common sense, anti-fraud regulations as exist now probably always will.

The Texas Constitution allows for school choice without strings attached. Education is a function of states, and states are free to set up educational systems any way they desire.<sup>1</sup> The Texas Constitution requires the Legislature to support education but does not require that the government employ the teacher.<sup>2</sup> Thus, the Texas Constitution permits a system that allows parents to choose the schools their children attend, and government regulation of private schools is not required.

The Texas Government can, and already does, regulate private schools in Texas without any voucher, grant, tuition tax credit, or financial support of any kind. The power to regulate exists whether we adopt school choice or not. The state already regulates home and private schools that do not receive any financial assistance. The regulations are currently rational and have been applied somewhat reasonably, so that in recent years, many people do not realize they are being regulated. But make no mistake, Texas government already can control and does mandate the method and content of education in private and home-schools. For example, according to the Texas Home School Coalition website, “To home school legally in Texas, you must follow three state law requirements:

- The instruction must be *bona fide* (i.e. not a sham).
- The curriculum must be in visual form (e.g. books, workbooks, video/monitor).
- The curriculum must include the five basic subjects of reading, spelling, grammar, mathematics, and good citizenship.”<sup>3</sup>

The State mandates the subjects that must be taught now without any state financing going to private schools. That state power exists because of the police power of the state. Neither vouchers nor tax credits change that legally in any way. In fact, state police power is what forces parents by law to send their child to school, even if the child is bullied or unsafe.<sup>4</sup>

By definition, parental school choice will break the government-controlled education monopoly. Choice creates a new environment where the public recognizes that the government may fund education without being the provider of education.<sup>5</sup> As more people see good private schools in action, the public will be less likely to accept the argument that government regulation is desirable or needed. Private schools are accountable to consumers. Fear of future regulations should not prevent the benefits of school choice from being enacted. The Legislature currently regulates

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both home schools and private schools, by requiring education in designated core subjects.<sup>6</sup> They could regulate it more heavily if they wanted right now. The power to regulate is inherent in the police power of the state, not funding. The protection for church affiliated private schools is in religious liberty law, not refusing funding.<sup>7</sup>

Home schoolers are protected now from destructive government regulation by the power of active grassroots advocacy,<sup>8</sup> not because they refuse to take state money. The state has an incentive to keep parents’ education dollars for itself. The state could mandate that home schoolers must teach “Common Core” type citizenship without giving parents a penny in return. What prevents that from happening? It is not the law, nor the Constitution. It is fear by the Legislature of the wrath of the home school movement which was willing to go to jail for its children and which is still one of the most active and attentive constituencies in the Texas political environment.<sup>9</sup>

The U.S. and Texas Constitutions provide greater protection from state regulation to religious schools and home schoolers. Religious schools that accept school choice programs, such as the Taxpayer Savings Grant, actually have stronger protection than secular private schools because the U.S. Constitution prohibits “excessive entanglement” between church and state.<sup>10</sup> For example, SB 1575 and HB 3497 filed in 2013 had no excessive entanglement problem.<sup>11</sup> Excessive state regulation would increase the likelihood that the courts would strike down either the regulation or the program. The free exercise of religion clause also provides greater protection for religious rights, as in the Michigan case which upheld the right of parents to home school for religious reasons but not for secular reasons.<sup>12</sup>

The receipt of a scholarship, voucher, or grant does not result in federal, Individuals with Disabilities Education Act (IDEA) coverage of the private school attended by the recipient of the grant. This was established in the original case upholding the Milwaukee program, *Davis v. Grover*. Grover, the superintendent of public instruction, argued that the private schools were subject to IDEA, and the Court rejected that claim. The grant recipients have no greater rights under the IDEA than any other students placed by their parents in private schools. This issue was also raised with respect to Florida’s McKay program, which provides scholarships only to IDEA-eligible students, and the United States Department of Education confirmed that the students using the scholarships to go to private schools waived their protections under Section 504 and the IDEA. If the parents want the regulated school, they can stay in public school. After all, the regulations are designed to get a good result. If they don’t, if they want a more cooperative approach, they can choose private school.

Many parents of children on Individualized Education Plans (IEPs) will be unlikely to opt out to private school for a voucher they would have to supplement, particularly if their school district does a good job of educating children with disabilities. But many districts don’t. Parents in those districts may find that even a modest voucher will enable them to do better in private school. According to the Milwaukee School Choice Demonstration Project, some 9 percent of the children participating in the Milwaukee program have disabilities—probably of a less costly sort.<sup>13</sup>

Taxpayers Savings Grants are funded entirely by state money, and specifically exclude federal funds.<sup>14</sup> This means that private schools do not have to comply with federal special education or other regulations under that program.

Universal school choice, such as through Taxpayer Savings Grants, will create thousands of new consumers who will have a vested interest in protecting private schools from regulation. There is greater safety in greater numbers; whereas private schools today are a small minority. The home school community has been very effective in that regard.<sup>15</sup> By most accounts, private schools in Texas have not been as politically active as home schoolers in recent years.

Liberty depends on an educated citizenry. Educating millions of students in schools that value liberty and teach accurately the founding and constitutional principles of American History could create a new generation of students opposed to excessive government in all its forms.

Most school choice plans are totally voluntary. If they come with too many restrictions, refuse them. No individual or private school is ever required to participate in a program. Private schools now compete successfully with a free, but heavily regulated government product. Choice programs like Taxpayer Savings Grants simply provide consumers with an additional choice of where to send their child to school.

## Conclusion

Public schools educate 94 percent of the students in Texas.<sup>16</sup> This system is a totally top down, politically controlled, government monopoly with little to no power for parents. The result is low student achievement on a massive scale.<sup>17</sup>

School choice, or child-centered funding, would increase the power of consumers (parents) and force the bureaucracy to respond to real consumer (parents) needs—learning and safety—not political needs. Under child-centered funding the money follows the child to the school of the parents' choice. The particular mechanism—grant or tax credit—has no legal impact on government authority to regulate at all. Instead, the determinant is the specific language contained in any particular bill. Courts have not favored one method over another in this regard. ★

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## Endnotes

<sup>1</sup> FN 8, *Edgewood IV*, 893 S.W.2d 450, 463 (Tex. 1995).

<sup>2</sup> In *Edgewood IV*, the Texas Supreme Court said: "The Constitution does not require, however, that the State Board of Education or any state agency fulfill [the mandate to provide a general diffusion of knowledge]. As long as the Legislature establishes a suitable regime that provides for a general diffusion of knowledge, the Legislature may decide whether the regime should be administered by a state agency, by the districts themselves, or by any other means."

<sup>3</sup> "State Requirements," Texas Home School Coalition (accessed 16 June 2014).

<sup>4</sup> See truancy laws: Tex. Educ. Code §25.085.

<sup>5</sup> Milton Friedman and Rose Friedman, *Free to Choose* (Mariner Books: 1990).

<sup>6</sup> "State Requirements," Texas Home School Coalition (accessed 16 June 2014).

<sup>7</sup> *Lemon v. Kurtzman*.

<sup>8</sup> Tim Lambert, "Conservative Groups Decry Legislative Intimidation," Texas Home School Coalition (30 Apr. 2014).

<sup>9</sup> Valerie Hopkins, "Life, Liberty, and the Pursuit of Homeschooling," *Open Democracy*, 20 (Feb. 2013).

<sup>10</sup> *Lemon v. Kurtzman*.

<sup>11</sup> See SB 1575 and HB 3497.

<sup>12</sup> *People v. DeJonge*.

<sup>13</sup> Patrick J. Wolf, John F. Witte, David J. Fleming, "Special Education and the Milwaukee Parental Choice Program," University of Arkansas Department of Education (Feb. 2012).

<sup>14</sup> "Frequently Asked Questions," Taxpayer Savings Grants (accessed 16 June 2014).

<sup>15</sup> Vernon L. Bates, "Lobbying for the Lord: The New Christian Right Home-Schooling Movement and Grassroots Lobbying," *Review of Religious Research* 33, No. 1 (1991) 3.

<sup>16</sup> According to the National Center for Education Statistics, there were 5,000,470 students enrolled in the K-12 Texas school system in fall 2011. See Table 203.20 "Enrollment in public elementary and secondary schools, by region, state, and jurisdiction: Selected years, fall 1990 through fall 2023." There were 285,320 students enrolled in private K-12 schools. See Table 205.80, "Private elementary and secondary schools, enrollment, teachers, and high school graduates, by state: Selected years, 2001 through 2011." National Center for Education Statistics (accessed 18 June 2014).

<sup>17</sup> Melissa Taboada, "About Half of Texas Schools Fail Federal Standards," *Austin American-Statesman* (8 Aug. 2012).

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