



Private Schools Should Learn from Charter Schools Without Adopting their Regulatory Scheme

By Jason Bedrick
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Last week, the Friedman Foundation for Educational Choice released a new study by Andy Smarick that I hope private school leaders will read... but that legislators, for the most part, will not.

Smarick's study, "The Chartered Course," explores how private schools and advocates of educational choice can learn from the charter sector. As expected from a man of Smarick's experience and intellect, the study offers great insights about how private schools could emulate and collaborate with charter schools, especially regarding a network structure, talent pipelines, and incubators. Smarick holds out the Cristo Rey Network as an example of a high-performing network of private schools that resembles a charter management organization and has grown considerably. As educational choice programs enlarge the demand for private schooling, the private schools that follow Smarick's advice will be better positioned to grow to meet that demand.

Smarick also proposes that states create a new government agency modeled after Independent Chartering Boards to regulate educational choice programs:

"Similar to Independent Chartering Boards, states could develop **independent agencies to oversee private school choice programs**. Such an agency would provide separation from the State Education Agency (SEA), which operates under direct oversight of elected public officials and typically is focused on compliance and regulations. It could also **develop accountability mechanisms**, including performance contracts, that are sensitive to the independence of private schools as well as the need for public accountability." [emphasis added]

Smarick recognizes that the bureaucrats at SEAs are often hostile toward school choice programs, which they often view as competing with (or even threatening to) the public schools at the center of the SEA's mission. In that sense, there's a strong case to be made for moving regulatory authority over the programs out of the SEAs. While there are several states in which the SEA has demonstrated great support for choice (e.g. – Florida and Arizona), political winds can change suddenly and there's no guarantee that such support will continue (as Tony Bennett could tell you).

However, it's not clear that a separate government entity charged with regulating private schools would be much better. The power to regulate is the power to destroy, and that's a power that opponents of educational choice greatly desire. Under Smarick's model, politicians would have control over who sits on the board:

“Generally appointed by the governor or state legislature, board members of ICBs may not have the same political independence as an institute for higher education or nonprofit organization. However, nor will it have the same political dependencies of an SEA or a district. [...] Agencies similar to an ICB should be developed to oversee private schools participating in choice programs.”

Such boards would be entirely too dependent on political good fortune. Recognizing this, Smarick suggests staggering terms on the board to prevent its capture by hostile forces. However, that only works when the political pendulum swings back quickly. In the event of a more lasting political realignment, staggering only delays the inevitable.

Where a state's SEA already has significant regulatory authority over private school choice, as is the case in several existing voucher programs, then moving that authority out of the SEA makes sense. But Smarick proposes that the boards have the ability to “develop accountability mechanisms” and “performance contracts,” which would make them powerful than the existing SEAs. While an SEA normally could not foist a curriculum or testing regime on private schools participating in a choice program without an act of the legislature, the ICB-style boards could include such provisions in the performance contracts. And, as the federal Department of Education did with NCLB waivers, the board could make receiving voucher funds dependent on compliance with Common Core and a host of other regulations.

Imagine that newly-elected Governor Billy DeShplasio appoints longtime choice foes Farmen Carina and Riane Davitch to the board. “We support private schools,” they announce with twinkles in their eyes, “We just think that if they're getting public funding that they should be accountable to the public. That's why they should only hire certified teachers, teach the state curriculum, and administer the state tests.”

As dangerous as ICB-style boards are for voucher programs, they are even more inappropriate for scholarship tax credits (STCs). Under STC laws, it is often the case that only government agency directly involved with the scholarship program is the department of revenue. That's by design.

Whereas SEA bureaucrats often view educational choice as inimical to their core mission, the department of revenue bureaucrats are less likely to have any ideological objections to educational choice. Indeed, they tend to view STCs as just another tax credit, no different than historical preservation tax credits or green energy tax credits. While the former are eager to attach any regulation possible within their statutory authority to quash the perceived threat, the latter are more likely to view additional regulations as unnecessary work for them. Since these STC laws have already avoided the problem of hostile SEAs, an ICB-style board is both unnecessary and likely counter-productive.

In addition, creating new government agencies to oversee and regulate private schools receiving tax-credit scholarships could endanger the constitutional status of STC laws. The laws currently pass constitutional muster despite the presence of anti-aid provisions in state constitutions because the courts recognize that tax credits entail private money, not government revenue. Having a government agency overseeing the schools receiving that money would muddy the waters. One can already hear the ACLU claiming, “Well of course it’s public money, why else have a government agency overseeing it?” After all, the government doesn’t oversee the Salvation Army, nor does it have “performance contracts” with the Red Cross or Habitat for Humanity.

Smarick has attempted to devise an accountability regime that is more nuanced and sensitive to the unique missions of private schools than other proposals to impose state regulations on private educational choice. However, Smarick’s proposal still relies too heavily on the government to ensure quality. While networks, incubators, and franchising certainly have roles to play in expanding educational options, the role of government should be as limited as possible. Rather, as the Friedman Foundation proclaimed in an open letter it recently coauthored, “our education system should ensure choice to all students so that every school is held truly and directly accountable to families.”

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