

For God's Sake, Don't Segregate! Two Kinds of Religious Schools and Equality in
Education

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Introduction

The rich discussion concerning religious education usually focuses on the content and scope of the parental right to direct the upbringing of their children, and the duties the state has regarding religious children's schools. This lively debate is driven primarily by the concern that schools that serve religious communities, and especially anti-liberal religious minorities, will fail to supply children with the education they need in order to become autonomous, self-sufficient and tolerant members of society in a modern liberal state. Framed this way, religious schools that provide adequate secular education and endorse liberal values seem to raise no concerns, and should be allowed to operate uninterrupted, and possibly even be supported.

This article disputes this stance and argues that religious schools that provide satisfactory secular education, prepare their students for higher education, and instill democratic civic values, may create a separate category of challenges that justify state intervention. Empirical evidence shows that in recent years, religious schools in many democratic countries are gradually losing their religious distinction, and are increasingly becoming a means of gaining educational advantage. As a result, religious schools are attracting high achieving students, some of whom are not members of the religious community that established the schools. These advantaged students leave public schools, in a process called 'creaming'. Creaming harms public schools and the students that remain in them because students' achievements depend,

among other things, on the educational abilities of their peers. Creaming also results in public schools being composed of a higher proportion of students from disadvantaged backgrounds, students who are not native language speakers and disabled students, all of whom are more expensive to educate.

Not all religious schools cause this effect. There is, I argue, an inverse relationship between how strong the religious character of the school, and the extent to which it creates these processes. The more robust the religious education, pervading all classes, activities and the schools' atmosphere, the less likely the school is to appeal to a broader population of students and thus to infringe upon equality in education. In order to demonstrate this claim, I distinguish between two kinds of religious schools that are located at two ends of a continuum of religious schools. The first kind of school, which I call *non-creaming religious schools*, consists of schools that provide robust religious education that differs substantially from that of public schools, in content, values and atmosphere, and often does not fully prepare its students for successful participation in modern society. These religious schools are the archetypical kind of religious schools that philosophers and legal scholars have in mind when engaging in the debates mentioned above concerning civic education. They are highly valued by members of their community, as they offer education that is completely different than that provided by public schools, and as a result are sometimes perceived as a threat to the liberal state. Yet while they raise concerns pertaining to their ability to prepare students for participation in the workforce and civic life, they would not create the distributive justice concerns caused by creaming.

What I call *Creaming religious schools*, in contrast, are religious schools that offer quality secular education in addition to their religious education. They grant

their students all the credentials and skills that traditional public schools do, and the religious aspects in them are relatively mild. These schools, when successful, appeal not only to members of the religious community but also to high achieving students from outside the religious community who would otherwise attend traditional public schools. Losing advantaged students weakens traditional public schools and causes a decline in their student's educational achievements. Because they do not raise the liberal concerns, creaming religious schools have, for the most part, evaded philosophical and legal criticism. In this article I argue that when religious schools cream state intervention is justified in order to prevent the negative effects they have on educational equality.

Creaming religious schools needs to be distinguished, I argue, not only from non-creaming religious schools. Creaming religious schools also differ, in the normative considerations that apply to them, from regular secular creaming schools (most typically prestigious private schools), and justify therefore a separate discussion. An argument for restricting the religious schools (as opposed to an elitist private school) must address the counter-argument concerning the parental right to religious education. I argue, however, that the religious justification in favor of creaming religious schools is especially weak, for two reasons. First, only members of the religious community can voice the religious justification, and creaming religious schools often have large shares of non-member students. Second, their relative similarity to public schools, and the nature of their remaining uniqueness, I argue, suggest that they are not crucial for realizing the right to religious education, when this right is properly construed. As a result, I conclude that when these schools indeed negatively affect other schools, the religious argument in their favor cannot redeem the inequality they create.

Law has a central and unexpected role in the development and thriving of creaming religious schools. Various legal systems have instated antidiscrimination rules that do not allow religious schools to consider religion in their admission policies. In order to accommodate students who do not belong to the relevant religious denomination, antidiscrimination rules are usually accompanied by rules making all religious activity at school elective. While this seems, at first brush, an effective way of contending with inequality caused by creaming religious schools, antidiscrimination rules, in fact, exacerbate the problem of. They enhance the attractiveness of creaming religious schools to non-member students, making the choice of religious schools a means to gain educational advantage rather than a realization of religious convictions. Therefore, antidiscrimination rules should be replaced by other means of regulation, better suited to contend with the special challenge of creaming.

The paper proceeds as follows: In part 1 I offer a short description of peer effects and creaming, the social processes that underlie the arguments in the paper. Part 2 presents the category of non-creaming religious schools, and demonstrating it using the examples of Amish one-room schools in the U.S.(2.B) and Israeli Ultra-Orthodox schools (2.C). Part 3 describes the phenomenon of creaming religious schools, and how they become a vehicle for social exclusion. The examples in this section include Catholic schools in France (3.B), Religious charter schools in the U.S. (3.C) and Torani schools in Israel (3.D). After completing the descriptive analysis, the paper moves on (part 4) to the normative argument according to which creaming religious schools should be restricted, and to discuss law's role in aggravating inequality in the case of creaming religious schools (part 5). Concluding remarks follow.

1. Peer Effects and Creaming

Student composition is an important factor in determining the quality of education offered in any given school. Education is a unique good, in which the outcome depends, among other things, on the identity of the consumers. Studying in a class with bright and motivated peers, who cultivate academic aspirations and contribute their cultural capital, improves student achievement (Orfield and Lee 2005). Some researchers argue that taken alone, the peer group is the most important factor influencing educational outcome (Johnson 2000; Zimmer and Toma 2000). This can explain, in part, why students' achievements are higher in private schools that group together high achieving students (Lubienski and Lubienski 2014). Correspondingly, concentrating children with low abilities in one school causes negative peer effects that decrease their educational achievement.

There is also substantial evidence according to which the academic attainment of students from affluent families is higher, on average, than that of students from low-income families (Kahlenberg 2001; Rumberger and Palardy 2005; Rothstein, 2004). This is explained by multiple environmental factors, such as inadequate nutrition and health care; exposure to unsafe environment, neighborhood violence, and family crisis, situations that impede their capacity for uninterrupted focus on learning; less parental involvement in schooling; and less exposure to cognitive stimulating activities (Larueau 2003; Ross and Kena 2012; Ermisch et al 2012).

What follows from the correlation between socioeconomic status and educational ability is that grouping together of students according to social class (for example in neighborhood schools when neighborhoods are socioeconomically segregated, or by charging high tuition) also entails grouping together of students according to academic ability. Similarly, schools that select their students according

to seemingly neutral academic qualifications are likely to end up with a homogeneous, affluent student body. Social segregation, therefore, further compromises the educational opportunities of children of lower socioeconomic classes. Negative peer effects join their family background in curtailing the development of their abilities.

The disadvantages caused by social segregation are even more pervasive than described above. Schools that serve advantaged students attract better teachers, whereas the schools that serve disadvantaged children are usually staffed by less professional teachers (Peske and Haycock 2006; Frankenberg 2009). Schools serving advantaged children also benefit from the involvement of parents, who tend to contribute more resources and time the more advantaged they are (Wehlburg et al 1995). As a result, social segregation entails shortchanging children from disadvantaged background also from resources crucial to their success.

Creaming leads to segregation, as it involves concentrating high achieving and motivated students from advantaged families in prestigious (and often selective) schools. When these children are drawn out of the traditional public schools, the public schools are depleted of advantaged children and of the resources they bring with them. Disadvantaged children, who cannot access prestigious schools, remain in traditional public schools that now offer a weaker education than before.¹ The deterioration of the public school induces even more students to leave, creating a downward spiral, until eventually only the most disadvantaged students who are unable to leave, remain.

The factors that enable schools to cream are varied. First, they must be attractive to parents, offering advantages such as better test scores; a better track record in graduates' placements in college; better facilities; more options for advanced

placement (AP) courses or college prep programs; better qualified teachers and teacher-student ratios; ample educational resources for supplies, field trips, labs and technology; a safe and pleasant environment; and, importantly, high ability peers.

Most of the factors detailed above, that account for schools' positive reputations can be reduced to two main advantages: financial (that can ensure a rich curriculum, qualified teachers, better facilities), and student composition. When a school's prestige is related to test scores and Ivy League placement, the schools are, in part, enjoying the benefits of having advantaged students study in them. Student composition also affects violence rates and school environment and the quality of teachers (Peske and Haycock 2006).

While private schools are the paradigmatic examples of creaming schools, enjoying both financial advantages and homogeneous privileged student bodies, creaming can also occur in public schools. Public schools that charge fees or have enrollment processes that include exams, essays or interviews, they also result in socioeconomic segregation (Finn and Hockett 2012). Even absent formal barriers such as fees and selective enrollment policy, several mechanisms may work together to make prestigious public schools more accessible to children from privileged backgrounds. They may offer curricula that are more attractive to advantaged parents; they may be located in affluent neighborhoods; or the admission process may be complicated and taxing. Finally, disadvantaged families tend to forego the best educational possibilities because they do not feel their children are suitable for the best schools, and fear they might not fit in socially in schools outside of their neighborhood (Whitty 1997; Fuller and Elmore 1996; Ladd et al 2015).²

2. Non Creaming Religious Schools

A. General

Given certain conditions, creaming occurs also in religious schools. Not all religious schools, however, create these conditions. *Non-creaming religious schools* are schools that offer a comprehensive and robust religious education; the entire curriculum taught and the values the school follows are dictated by religious conventions and differ substantially from those of public schools. These schools may teach little or no secular studies, may focus heavily on religious studies, and may teach in a different language than public schools. Schools of this category do not reward their students with the same credentials as public schools, credentials that are crucial for accessing higher education. They may also fail to equip their students with capabilities that are instrumental in the modern job market and public life, focusing instead on capacities that are valuable for the lives of community members. The social and educational environment are also unique in these schools, they may be single-sex schools, employ different educational methods and strict disciplinary norms. The values they endorse reflect those of the religious community that sometimes contradict liberal values. While often a source for concern for the modern liberal state, these traits make non-creaming religious schools extremely valuable for religious communities, offering a service that is completely different than that provided by the state.³ For members of such communities, public education is insufficient, and may even contradict their deepest beliefs. Therefore, the sectarian schools are an important component of the community's religious life and vital for the flourishing of their way of life. At the same time, these exact characteristics make it highly unlikely that children from outside the religious community would ever consider attending them. The schools cannot offer them the instrumental value public schools have, and they would

probably feel out of place in them, perhaps even socially isolated. As a result, non-creaming religious schools do not attract advantaged students from public schools, and do not cause public schools the harm that ensues from creaming.

B. Amish One-Room Schools

There are several modern examples of non-creaming religious schools. One-room schools serving the Amish community in the US are one (Hurst and McConnell 2010; Kraybill et al 2013; Nye 2013; Dewalt 2001). In these schools, established and managed by Amish communities and guided by their elders, students of all ages from Kindergarten to eighth grade study together in one classroom. They are usually instructed by a single young woman from the community who herself has only acquired 8 years of schooling and does not have any formal training as a teacher.⁴ Amish schools aim to prepare the students for life in the Amish community, and therefore focus on imparting basic skills in English, Math and German. Some teach also courses in other subjects such as health and geography. Science is seldom taught, and limited to topics that can be useful for Amish way of life such as agriculture. Computers are not used at all. Some of the schools conduct most of their classes and activities in English, while others use Pennsylvania Dutch, a German dialect spoken by the Amish community, and English is taught as a second language (Kraybill 2013).⁵

In addition to the unique curriculum and structure of one room schools, they are also different from public education in the values they attach to learning and education. In the Amish community, schools are meant to teach children practical skills that will serve them for their work and trade. Critical thinking, higher levels of

knowledge, and individualism that are strongly encouraged by public schools, are disvalued in Amish schools (Ediger 2005).⁶

Amish parents express high levels of satisfaction with one-room schools. They feel that their children are getting the instruction they need for adult life in the community, and are satisfied that their schools protect their children from exposure to popular culture, television, computers, and modern music that represent values they oppose.⁷ As children get older, Amish schools also protect them from teen peer pressures and a sexually charged atmosphere. Evidently, one-room schools play an important part in preserving the Amish tradition and language and in resisting modernism and popular culture. The differences between these schools and traditional public schools are so vast that they would only be attractive to members of their community, or members of similar religious groups. Children from the general public and their parents would never consider enrolling in such a school, least of all children from a privileged background. As a result, although they definitely justify concerns as to their adequacy to impart basic skills required in a modern and democratic society (Gutmann 1995; Galstone 1995; Macedo 1995; Macedo 2000; Gilles 1997; Stolzenberg 1993), they do not create the process of creaming of advantaged children away from traditional public schools.⁸

C. Ultra-Orthodox Jewish High Schools in Israel

Another example of non-creaming religious schools is Ultra-Orthodox Jewish high schools for boys in Israel. The Jewish ultra-orthodox education in Israel is comprised of many different kinds of schools; I refer here to a specific kind of school – high schools for boys that are recognized under The Culturally Unique Schools Act (2008). These schools receive 60% of the public funding that state

schools receive and yet have almost full autonomy in every aspect of school life: they teach in Yiddish and not in Hebrew; they have control over hiring teachers and student assignment; and most importantly, are not under an obligation to teach any secular studies, including civic education. This creates great concern as to the adequacy of the education provided to children attending these schools, and whether this education enables them to exit the ultra-orthodox community (Maoz 2005; Dahan and Hammer, 2010;⁹ Additionally, the lack of civic studies and secular studies hinders the development of tolerant, self-sufficient citizens who will be able to participate and cooperate with others in civil society, politics and the market. Given that the Ultra-orthodox community enjoys robust state welfare services and is very influential in the political sphere, this is especially worrisome.¹⁰ Yet, worrying as this may be, these attributes also make it highly improbable that any child from the public education, let alone those most able, should choose this kind of school. Quite like Amish schools in the United States, these schools do not damage the public schools by ‘creaming’ good students. The only possible effect these schools may have on equality is by discriminating members of their own community, such as minorities within minorities, creating different tiers of schools for different groups within the community.¹¹

3. Creaming Religious Schools

A. General

The second category consists of religious schools that although they may serve a religious function for believers, their curricula are similar to those of public schools, and they teach in the dominant language in a given state. These schools credit their students with the certification required for higher education, and prepare their

students for successful participation in modern life. In other words, despite being religious schools, they supply quality education by any secular standard, granting their students all the instrumental benefits that public education does. The educational environment in these schools is also similar to that of traditional public schools, and is relatively moderate in religious terms.

For members of religious groups these schools have two important advantages. First, their children are educated according to their way of life; and second, they supply education that is equal to, or surpasses that of traditional public schools, in terms of educational achievement.

Creaming religious schools are attractive to a broad variety of potential students and not exclusively to members of the religious community. Families of ‘non-members’ are attracted to the school for reasons that are not connected to its religious identity, such as better academic standards; less violence; smaller classes, etc. Non-member parents see the religious aspect of the school as a side effect they are willing (and sometimes happy) to bear, in order to gain the other advantages the school has to offer, especially when the religious character of the school is relatively moderate. The fact that a school's potential clientele is not restricted to the respective religious community means that when such a school is successful and popular, it will compete with the public schools in its’ geographic proximity. As a result, students with high abilities and those from advantaged backgrounds are likely to leave traditional public schools in favor of the religious school. Creaming in religious schools creates segregation, along academic ability and social class rather than along religious boundaries. Creaming religious schools therefore pose different challenges than non-creaming religious schools. They do not raise any of the classical liberal concerns because the secular and civic education they offer is equal to that of public

schools, or superior to it. On the other hand, the better the quality of education they offer, the graver the concerns they raise in terms of distributive justice.

Creaming in religious schools is the result of the same factors that cause it in non-religious schools. The circumstances in each case may differ, and accordingly the extent and severity of creaming. Therefore, although creaming can be expected in all schools that have the abovementioned characteristics, individual examination of specific schools is indispensable in order to evaluate whether they indeed create these harms. This observation will have further implications for education policy made later in the paper.

B. Catholic Schools in France

Some examples can be illuminating. In France about 30% of students attend private schools at some stage of their K-12 education, a vast majority of whom in Catholic schools. Catholic schools receive 80% of the funding that state schools receive, and supplement these funds by charging tuition. All private schools in France are closely regulated by the state: they must teach the entire public curriculum and students' achievements are monitored by mandatory national tests. Any unique, religious content can be added to the public curriculum but cannot replace it. Catholic schools are required to accept non-Catholic children, and all religious activity in schools must be elective. As a result of this dense regulation, little difference remains between public and religious schools in France, pertaining mainly to control over hiring and discharging staff; determining the educational ethos of the school; and controlling additional educational programs (Ambler 1994; Meuret 2004; Dronkers 2004).

The similarity between state and Catholic schools and the fact that religious activity is voluntary makes Catholic schools a completely viable educational option for non-Catholic students, and enables Catholic schools to compete with state schools over students. The outcome is that Catholic schools disproportionately educate children from privileged families, have a strikingly low proportion of immigrant children, and are located mostly in wealthy areas. The choice to go to Catholic schools ceases to be a matter of religious conviction, but rather a matter of gaining better education, an option that is not truly accessible to all students on an equal basis.

France is not the only example. In other places in Europe too, such as Hungary and the Netherlands, evidence is accumulating that religious schools are being increasingly utilized by affluent parents for attaining educational advantage. Religious schools teach the entire curriculum of public schools, their students obtain higher achievements than students in the public system, and have better chances of being accepted to higher education. Therefore it should come as little surprise that studies show that an important factor in parents' favoring religious schools is their superior academic performance (Dronkers 2004). The ongoing increase in the popularity of religious schools alongside the persistent secularization of European society serves as another illustration of this trend (Merry 2014; Lohmann 2011).

C. Religious Charter Schools in The United States

Another recent example is the case of religious charter schools in the United States. Religious charter schools are charter schools established by a religious or cultural community with the aim of providing an education according to the values, historical context and culture of the specific group (Weinberg 2007). Some religious charter

schools bear a striking resemblance to religious schools, having replaced recently closed parochial schools, employing the same staff and enrolling the same students, and using the same building (Walters 2013; Horning 2013).

Considering that charter schools are, essentially, public schools (publicly funded and free, authorized by law, and open to all), religious charter schools are a surprising phenomenon in the American educational landscape. The First Amendment prohibits the establishment of religion and has been interpreted as excluding any religious education from public, or publicly funded, schools. The fact is, however, that religious communities that have been struggling for decades to support their parochial schools are taking advantage of the charter movement and establishing tens of charter schools with a religious, cultural or ethnic focus. In order to steer clear of legal problems, religious charter schools focus on the cultural aspects of religion rather than on religious indoctrination, and allow voluntary religious practices of their students.

Amidst the concerns that religious charter schools are actually religious schools in disguise, another concern has gone unnoticed, and that is that religious charter schools may also have a negative effect on educational equality, by creaming students. A charter school like the Eleanor Kolitz Hebrew Language Academy (EKHLA) is a good example: In addition to offering a strong cultural link to Judaism, and teaching Hebrew,¹² this charter school aims to offer a first class secular education, with high student achievement and preparation for higher education and the competitive job market. Because public and scholarly attention focuses exclusively on the religiousness of religious charter schools, proof of the secular educational mission alleviates the concerns. However according to the argument in this paper, excellent secular education gives rise to some other concerns, namely that

the religious school will induce creaming. When religious charter schools serve relatively privileged religious groups (as is the case with EKHLA), they succeed in emulating another characteristic of private religious schools – creating a schools with a homogeneous, high ability student body, and allowing middle class parents to avoid sending their children to public schools that must educate disadvantaged children (Harel Ben-Shahar, forthcoming). This characteristic, while perhaps not as openly discussed, is definitely appealing to many parents (Clotfelter 2006).¹³

Religious charter schools are likely also to enjoy relative financial advantage, because although they are not allowed to charge tuition, they are allowed (as all public schools) to accept donations. These elective payments are an extremely significant factor in the inequality of resources between schools. Charter schools are even more dependent than traditional public schools on private contributions for their establishment and operation. The commitment of a religious congregation to a charter school, including housing it in a shared campus with religious institutions will have a positive effect on the schools financial stability.

As a result of these advantages, some non-member families, seeking better education for their children, are willing to tolerate the specialized curriculum taught in the charter school. Different religious charter schools report steady participation of non-members that are attracted to the academic quality and other benefits of the school (Siracusa-Hillman 2008). The Hellenic Classical Charter School in NYC, for example, is located in what used to be a Greek Orthodox private school, and now emphasizes classical studies, Greek and Latin, and Socratic questioning. It also aims to grant its students an excellent and competitive education (Harr-Bailey and Cooper 2009).¹⁴ The school's popularity transcends the Greek community; in fact, less than 50% of the school's students are Greek. All the others are attracted by the benefits

that the school has to offer in comparison to traditional public schools (Harr-Bailey and Cooper 2009).

The fact that the religious characteristics in religious charter schools are relatively mild, and that all religious activity is elective clearly makes it easier for students who do not belong to the community to integrate into them. If the specialized content is limited to history and culture and universal values, then this is a reasonable price for non-member families to pay for the benefit of receiving excellent education. When a foreign language is taught, research pointing out the benefits of bilingualism is used to persuade parents that this is an advantage, rather than a price (as is the case in EKHLA). As a result, going to one of these religious charter schools is beneficial, in educational terms, even for non-member families. Legislation prohibiting religious discrimination of prospective students applies to all charter schools, thus removing formal barriers that could prevent non-member children from applying to religious charter schools.

Still, it is clearly not the most natural decision for a non-member family, and one that only especially sophisticated and proactive parents would ever even consider. As a result, ‘secondary creaming’ – creaming of non-member students is potentially even more selective than the initial creaming of member students. Only the most advantaged and well-informed non-member parents are likely to choose a religious charter school for their children (whereas, within the community, there is likely to be at least some diversity with regard to socioeconomic status).

D. “Torani” Schools in Israel

The final example for creaming religious schools concerns “Torani” schools (literally meaning Byblical) in Israel. Torani schools are a unique kind of religious

state school that evolved within the state school system. In Israel, Jewish students within the state school system can attend either secular state schools or religious state schools. The religious state schools serve mostly the Zionist-orthodox community, and aim to offer both religious education and general secular education that enables full integration into modern society and the market economy (Gross 2003). Religious state schools must accept any student who wishes to enroll, whether religiously observant or not, therefore not all students in religious state schools share the same level of religious devoutness. Religious state schools often serve students from “traditionalist” background – families who are not observant but feel a connection to the Jewish tradition, and practice some religious rituals. In Israeli society, these are typically families from lower socioeconomic status. The religious state education have also absorbed large shares of immigrant students, these too belonging to lower socioeconomic status.

In the past three decades, processes within the Zionist-orthodox community have created a demand for schools that reflect a stronger religious commitment, expressed in things like modesty-related dress codes, separation of boys and girls, and enhancement of Jewish studies. The resources required in order to facilitate the uniqueness of these schools have led these schools to charge substantial fees from parents, thus creating barriers for families from lower socioeconomic status. Additionally, the schools have control over student assignment, creating an additional barrier for lower achievers and disadvantaged students (Harel Ben-Shahar, manuscript).

In addition to their religious character, *Torani* school have also become distinct from state schools in their socioeconomic composition. Recent research shows that they serve a larger share of students from high socioeconomic status than other religious

state schools and a lower share of students from low socioeconomic status. Additionally, *Torani* schools are less reflective of the population in the area in which they are located, maintaining a high socioeconomic average even in poor local authorities. Finally, *Torani* schools are more common in areas of low socioeconomic status (but serve, even in those areas, predominantly privileged students), suggesting that the motivation to exit regular state schools is especially strong in places in which local state schools are unsatisfactory, such as schools in the periphery (Harel Ben-Shahar, manuscript). Qualitative research examining parental motivation in choosing religious schools also supports the explanation according to which what motivates parents to choose this option is primarily considerations of educational advantage, and that religious motivations were secondary in the choice (Yablon 2009).

4. Normative Implications of the Distinction

So far, my analysis has been descriptive. I described the conditions in which religious schools might induce creaming and thus have negative effects for public schools and their students, and given several examples of such cases. It should be stressed, at this point, that the distinction suggested between the two types of religious schools does not claim to be clear-cut or binary. Religious schools in liberal states and their relations with public schools differ greatly. Therefore there will, inevitably, be schools that do not fall neatly into any category, and have characteristics of both categories; or schools that meet the conditions depicted above but do not trigger the processes described. The aim of the generalized distinction made above is not to suggest an exhaustive classification of religious schools. The distinction is merely instrumental in illuminating a normative consideration that is

missing from the moral and legal discussions concerning religious education. It is now time to explore the normative implications of the distinction between creaming and non-creaming religious schools.

Liberal anxiety usually focuses on schools of the first category – non-creaming religious schools – because they run the risk of impairing children’s autonomy, and impeding the development of a tolerant and self-sufficient citizenry. As a result, religious schools that give excellent secular and civic education have eluded public concern. This neglect is unfortunate: although creaming religious schools don’t raise the same concerns as non-creaming religious schools, they certainly have other negative effects that warrant serious discussion.

To be clear, I do not deny the need to regulate non-creaming religious schools. There may well be good reasons to restrict such religious education, many of which have been voiced before. My aim is, instead, to draw attention to the fact that other forms of religious education should be of concern to the state too. Moreover, in terms of distributive justice, creaming religious schools are the primary cause for concern, whereas non-creaming religious schools do not usually create any problem.

There are two related arguments that justify restricting creaming religious schools. One is a positive argument for restricting creaming religious schools; the second involves rejecting an argument that could be made supporting the operation of creaming religious schools.

The first argument concerns the negative effect that creaming religious schools have on traditional public schools, causing a deterioration of the objective quality of education that students receive in them deteriorates. In addition to the objective lowering of the quality of education, described in detail above, creaming religious schools also create relative disadvantage, deepening the gap in the quality of

education that different children receive. Since education has an important role in determining who gains access to lucrative jobs and influential positions, educational advantage for some children inevitably results in disadvantage for others.¹⁵

The concern according to which elitist schools will harm public schools in this way is clearly not unique to religious schools. Selective schools create creaming, whether they have a unique (religious or other) educational mission or whether they primarily boast academic excellence. The argument concerning creaming religious schools nonetheless justifies separate discussion because this aspect of religious education has been overlooked thus far. Highlighting that some religious schools cause the same educational processes as selective elitist schools, therefore, is in itself an important goal.

However, another, more pressing justification exists for a discussion of creaming religious schools separately from selective schools in general. It could be argued that creaming religious schools have a special claim to autonomy, because they realize important religious rights. The argument according to which creaming religious schools should be restricted must therefore respond to this possible counter-argument on behalf of creaming religious schools. This brings me to the second argument in favor of restricting creaming religious schools, which involves a rejection of this counter-argument.

It could be argued that despite their adverse effect on educational equality, creaming religious schools should be allowed to operate because they realize important interests that children and parents have in religious education.¹⁶

It is almost uncontested that parents' interest in directing the upbringing of their children should be protected (Galstone 1995), and that religious schools are one manifestation of this interest. According to some, the state is even required to

support parents in their choice by granting them autonomy in issues such as curriculum, hiring of teachers and enrolment, perhaps even by funding them.

I am willing to assume, *arguendo*, that parents do have a legitimate interest in religious schools (it also matters, I think, that most parents think they do). Even so, I argue that this interest cannot redeem creaming religious schools: The less distinct religious schools are, supplying education that is interchangeable with that of public schools, and the more parents choose them for academic and social reasons rather than religious reasons, the less persuasive this justification is, and the easier it becomes to defend state imposed restrictions on them. Creaming religious schools, almost by definition, are schools that are similar to public schools; this is what makes them able to cream. Therefore, there is no such strong argument in their favor that could justify the harm they inflict on public schools.

Moreover, given that creaming schools are characterized as schools that attract non-member students, there will almost always be students and parents within these schools who are not members of the relevant religious group and cannot make a *bona fide* religious claim regarding the school. Therefore, the religious justification, in the first place, is limited to only part of the parents and students in the creaming religious school.

But even parents belonging to the relevant religious community cannot make a persuasive religious argument in favor of creaming religious schools. If creaming religious schools are relatively similar to traditional public schools in curriculum and atmosphere, public schools cannot be that bad, even in the eyes of the religious parent. Therefore, the justification for a separate and autonomous school decreases, and priority may be given to considerations of equality. Inequality may be tolerated when it is truly crucial for a certain religious group, but if the differences between

traditional public schools and creaming religious schools are insignificant, the justification weakens significantly.

Furthermore, if the main difference between religious and public education is constrained to things such as ethos, celebrating religious holidays and educational environment, then these are precisely things that the family and religious community can supplement in the school's stead. We should keep in mind that parents have multiple ways to bequeath their values and beliefs to their children besides sending them to school. These include things such as having conversations, telling stories, celebrating holidays, disciplining them and setting them an example through parents' own behavior. Education, in the end, is a continuous project in which schools play only a partial role that must be fine-tuned by parents. Institutions such as schools are designed to serve multiple individuals, and since individuals and families differ from one another even when they belong to the same community, institutions are bound to suit individuals only approximately. Thus, in order to fulfill parents' rights to direct the education of their children, schools do not have to fully match each and every iota of their beliefs.

What follows is that although parents' religious rights may, at times, override considerations of equality, this should only be the case when a religious school is indeed a crucial and central manifestation of the parents' interests. This is usually the case when schools offer a robust religious education, and one that differs significantly from public schools.

Interestingly, this point shows that the schools that are most central to parental interest in religious education are also those that are least likely to have a negative effect on equality. There is an inverse relation, therefore, between the extent to which a school is religious and the extent to which it has a negative effect on

educational equality. Therefore, in terms of distributive justice, creaming religious schools raise far more serious concerns than non-creaming schools that are routinely criticized.

Two clarifications are in order. First, rejecting the religious justification for creaming religious schools does not necessarily entail that they have no justification at all. One may argue that choosing competitive schools and conferring educational advantage are still well within parents' right to direct the education of their children. I shall not discuss this argument fully, as it exceeds the scope of this paper. Suffice to say that I am of the opinion that not any preference that parents have regarding their children's education should be viewed as part of their parental rights. More specifically, actions granting one child educational advantage at the expense of another, should typically not be included within the scope of permissible parental partiality (Brighthouse and Swift 2009b; Brighthouse and Swift 2014; Harel Ben-Shahar 2015). Be that as it may, absent the religious justification, the argument for protection from state intervention is sufficiently weaker.

The second clarification concerns the applicability of the argument to specific cases. The argument I make doesn't apply automatically to any specific school, categorizing it *a priori* as a creaming religious school and condoning it. There may be cases in which a moderately religious school, with fine secular education does not create creaming, and does not have a negative effect on public schools in their vicinity. Additionally, the extent of the negative influence may vary from school to school, and be insignificant in some cases and very severe in others. This depends on social, educational and legal circumstances: The demographics of a neighborhood or city can affect a religious school's ability to cream. A religious school is more likely to cream students from an integrated public school that serves also students from

disadvantaged groups than from a public school with a homogeneous privileged student body. Educational matters can affect the school's ability to attract too: a religious school may fail to cream students from a public school if the public school has a very good reputation, or an admired principal. Enrollment policy and norms regarding parents' payments and donations are also a prime predictor of whether a school will serve predominantly advantaged children or be accessible to children from diverse backgrounds. Law also plays a pivotal role in determining these factors because things like enrolment policy, tuition, and curriculum are all subject to legal regulation. This shall be further developed in the next section.

It is important to stress, however, that anecdotal evidence of schools that do not cream despite having the relevant characteristics (or even whole education systems in which religious schools do not cream) does not refute the general argument, any more than an unsuccessful private school rebuts the egalitarian aversion toward private schools in general. It does imply, however, that education policy and law should be nuanced enough to reflect the differences between schools, restricting primarily those that have negative influence. Religious schools with excellent secular education that do not create creaming should serve as important examples that demonstrate how parental interests in religious education can be realized without harming public schools around them.

I now move on to the paper's final part, examining the effect that education law and policy has on creaming religious schools, and the possibility for its reform in accordance with the argument presented above.

5. The Legal Regulation of Education

Education policy and law can shape the way schools operate, can determine the content they teach and, importantly for the issue at hand, can influence schools' social composition. Unfortunately, instead of solving the problems related to creaming religious schools, regulation implemented in several countries has, in fact, aggravated them. A different approach is therefore necessary. Before proceeding in this inquiry, two preliminary comments are called for.

First, it might be thought that when discussing the appropriate regulation of religious schools one of the pivotal distinctions is between private and public schools as it, supposedly, makes a difference in issues such as funding, curriculum and student enrollment. Public education is roughly thought to be common education, free and publicly funded, open to all, and based on a universal curriculum, whereas private education is taken to be privately funded and non-free, elitist and selective (Boyd 2003). Religious education belongs, according to these rough distinctions, in the private domain, whereas public education is identified with secular and religiously neutral education. In reality, though, such a straightforward distinction does not exist, and instead, schools are comprised of a blend of private and public characteristics. Schools may be owned and run by a private entity yet provide free, state funded education that is open to all (such as charter schools). On the other hand, state-owned schools may be selective, charge tuition and teach specialized curricula (like many *Torani* schools). Some public schools can be saturated with religious content or accommodate the needs of specific religious denominations, and private schools can be completely secular. The institutional distinction between private and public education is, therefore, ambiguous and often unhelpful in describing educational reality and designing education policy. When seeking to discuss the appropriate response to different educational phenomena, it is therefore

often more useful to discuss specific rules and their effects, rather than try to generalize regulation along the public/private distinction.

The second comment concerns the limitations of this project. Analyzing education law requires sensitivity to each education system's intricate characteristics. Different issues such as the current structure of the education system and the processes that shaped it; social factors such as relations between social groups, residential patterns; financial factors of society and of the education system; the legal and constitutional framework; and others, could all bear significantly on education policy. Additionally, there are significant differences between cases in which the law is deeply involved in regulation, through legislation and courts, and cases in which policy measures are created and enforced through the administrative process (Gibton, 2013). The analysis conducted in this section does not purport to undertake such an ambitious task. It does not present a comprehensive and detailed description of the rules that apply to creaming religious schools in different countries, nor does it put forward a definitive and well-worked out formula for future regulation, or any uniform rule that can be applied in every case. It does, however, sketch preliminary guidelines for reform that can then be developed and adapted to the requirements of each specific case.

I begin my analysis by singling out a legal rule, namely the antidiscrimination principle, that when applied to creaming religious schools has the unexpected effect of aggravating inequality instead of reducing it. I then examine other kinds of rules that could, potentially, decrease creaming: Limiting public funding; limiting tuition and fees; mindful location of schools; and requiring schools to reflect the social composition of the general population. While each of these may be effective in decreasing creaming in some cases, there are reasons to doubt whether they can

solve the problem of creaming religious schools. Finally, I suggest that, as a condition for establishing religious schools or as a part of their periodic supervision, the influence on traditional public schools should be examined. If a school is expected to cause creaming or actually causes it, it should not be allowed to operate.

A. Antidiscrimination rules

Of the different forms of legal regulation that apply to religious schools, rules prohibiting discrimination are perhaps the most common. Many legal systems prohibit religious discrimination in admission to religious schools and in teacher employment, especially when the schools are supported by public money. Applying antidiscrimination rules expresses the recognition that religious schools bestow special benefits on their students, and these benefits should be accessible to all prospective students, regardless of their religious affiliation.

Catholic schools in France, for example, despite being privately owned are not allowed to limit admission to Catholic students, and must enroll students from all faiths (Meuret 2004). The same applies to religious schools in the Netherlands (Dronkers 2004). Religious charter schools in the US are also prohibited from religious discrimination of prospective students (Parker 2011; Green and Oluwole 2008).

Antidiscrimination rules bring about religious diversity within creaming religious schools. In order to accommodate non-member students and to avoid infringement upon their religious freedom, antidiscrimination rules are supplemented with rules requiring all religious activities in schools to be elective.¹⁷ Thinning the religious curriculum and diversifying the student body dilutes the school's religious character, making it even more attractive to non-member students. Thus creaming is worsened.

Creaming may be even further exacerbated if alongside antidiscrimination rules religious schools maintain autonomy in designing their enrolment policies. When schools are allowed to select their students but may not consider religious affiliation, the criterion they are most likely to rely upon is academic ability. Selecting students according to their academic ability ensures that creaming religious schools will serve only the very best students exiting public schools. The students in the creaming school will enjoy positive peer effects, and the public schools will be worse off as a result. Considering the correlation between social class and academic achievement, these schools are also most likely to serve children from wealthy families.

Therefore antidiscrimination measures, meant to equalize opportunities for all students, ironically end up worsening inequality by enabling creaming. They replace one kind of segregation (religious) with another, arguably worse kind of segregation (class-based and ability based).

Allowing religious schools to maintain a more robust religious character and (religiously) homogenous student body would therefore be advantageous in terms of educational equality. The practical implication of this argument would be to reintroduce religion as the appropriate criterion for admission to a religious school.¹⁸ It would reduce religious schools' ability to cream non-member students and by strengthening the religious character of schools, ensure that parents choose religious education for the right reasons – namely in order to realize their interest in directing the upbringing of their children rather than in order to obtain educational advantage. At the same time, criteria such as financial ability and academic achievement that have negative effects on equality should be ruled out. This would ensure that no creaming is created within religious communities.

Admittedly, when a religious group is relatively advantaged, establishing a religious school may cause damage to public schools even when the only students who leave them are members of the community. Therefore there may be cases in which merely instating religious admission rules would not suffice in order to contend with inequality caused by religious schools. Some of the suggestions discussed next may be appropriate; in other cases the religious justification would be powerful enough to override the inequality caused. In any case, creaming is undeniably worse when religious schools are open to students of all faiths. Another problem with reintroducing religion as a criterion is that there may be jurisdictions in which it would be incompatible with antidiscrimination doctrine, especially when religious schools are publicly funded. Given the negative effect of antidiscrimination rules in this case, however, if religious schools cannot be exempt from them (for example, at the price of waiving public funding), the solution may have to be restricting their operation altogether. This possibility is discussed in section 5.C.

B. Reducing the Ability to Cream

There are several other policy measures that may possibly promote equality and integration, depending on the circumstances, allowing religious schools to grant their communities a valuable service without the negative side-effects. When this is the case, these measures should definitely be adopted. However, if, as I suspect, these measures are unable to offer a general solution to the problem, the restrictive approach described in the next section will be inescapable.

As was described in detail above, creaming ensues from schools' ability to attract the advantaged students, causing them to leave the school they are currently enrolled in. The measures that would limit the possibility to cream should, therefore,

be aimed at either decreasing their attractiveness, or limiting the mobility of students.

One option is to restrict the financial advantage that creaming religious schools have relative to public schools, either by withholding public funding or by limiting the tuition they are allowed to charge and the donations they are allowed to receive. Limiting public funding might, however, prove counterproductive as creaming religious schools would have to charge higher tuition in order to sustain themselves, thus limiting access only to wealthy children.

Restricting tuition could, on the other hand, have a positive effect, allowing children of diverse backgrounds to enter the school. However this measure would probably be insufficient, on its own, to prevent creaming altogether. As was explained earlier, creaming occurs even in the absence of formal barriers, and privileged children are more likely to take advantage of advantageous possibilities and to enroll in such a school, even if it is free.

Another approach towards reducing creaming involves directly trying to influence the student composition of the school. One factor is the location of the school – schools that are located in wealthy neighborhoods or near them are less accessible to children from disadvantaged backgrounds. The main barrier for disadvantaged children is transportation, however other barriers include access to information regarding educational options beyond the default neighborhood school, and the self-confidence to pursue these options. Legal rules could sanction the consideration of equality when determining the location of schools. The location of charter schools is referred to explicitly in the charter legislation of several US states in the United States, granting priority to charter schools established in areas of lower socioeconomic status (Parker 2011; Green and Oluwole 2008; Harel Ben-Shahar

forthcoming). Note, however, that the effect such a measure would have in terms of equality would not necessarily be positive in all cases. Establishing a creaming religious school in a poor neighborhood (and even granting local students priority in admission) would indeed make it more accessible to children from the neighborhood. However, as long as the existing schools in the neighborhood do not close, these existing schools would be very negatively affected by the departure of many of their students to the newly established schools. The students remaining in these impoverished public schools would, in all likelihood, be only the most disadvantaged students in the community – those unable to leave.

Law could explicitly require that student composition in a certain school reflect that of the general population. Ensuring a reflective student body prevents creaming because it entails that each school must educate the same share of disadvantaged students as the rest, and does not allow certain schools to become enclaves of privilege. Several US states have enacted provisions of this kind as a part of their charter legislation. South Carolina, for example, requires that the racial composition not differ by more than 20 percent ‘from that of the local school district in which the charter school is located or that of the targeted student population of that school district that the charter school proposed to serve’.¹⁹

Unfortunately, there are several reasons to doubt whether even this measure can solve the problem entirely. First, it is unclear that this kind of provision can be effective in the case of religious schools. The South Carolina legislation, for example, requires schools to reflect the general population *or the specific population that the school serves*. This option renders the provision ineffective when applied to religious schools. Other state legislation softens the requirements by focusing on the efforts rather than the outcome. Religious charter schools, more than other schools,

could easily comply with such a standard by showing reasonable efforts to reach out to a diverse population. Additionally, current legal doctrine in the United States entails that while being required to pursue the aim of a reflective student body, schools are not permitted to use race as the primary consideration with regard to the placement of any specific child. This may limit the possible measures that schools have in order to comply with such requirements.²⁰

Moreover, a school can demonstrate diversity and even reflect the racial and socioeconomic composition of the general population by attracting the highest performing members of each category. Categories of race and class are not fine-grained enough to capture these nuances, whereas these differences may still have influence on peer effects in schools, and as a result on the quality of education in public schools.

It is unclear, therefore, whether these measures can fully capture the problems of creaming. The final measure contends with this concern.

C. Restricting Creaming Religious Schools

According to the normative argument presented above, restriction of creaming religious is justified. When policy measures such as those above can solve the problem, religious schools should be allowed to serve their communities, however when all other measures fail, resorting to prohibition should be seriously considered.

The restriction of creaming religious schools must be based on evidence regarding the negative effect that the school has on its educational environment, or in other words on the consequences of its establishment and operation on the schools in its geographic area and on the students attending them.

Delaware's charter legislation is an interesting example of such a measure:

An authorizer considering an application [for a charter school]... shall also *consider the potential positive and negative impact of the proposed new school... on the schools and the community from which the charter school's new students will likely be drawn....* determining whether the proposed new school or expansion is contrary to the best interests of the community to be served, including both those students likely to attend the charter school *and those students likely to attend traditional public schools in the community.*²¹

This measure directly targets the problem of creaming. It expresses an understanding of the process of creaming, and does not confuse the concern of creaming with similar concerns of social integration and diversity within the prospective charter school. Therefore it requires checking the influence of the proposed charter school on traditional public schools. Another important advantage of the measure suggested is that it is not overly restrictive. It requires a case-by-case determination rather than a sweeping restriction of religious schools. This ensures that religious schools that do not cause creaming, or at least no severe creaming, are allowed to operate to the benefit of their communities.²²

The threat of closing creaming religious schools would likely encourage educational leaders from religious schools to seek cooperation with public schools to ensure their mutual flourishing. Linking the fate of creaming religious schools with the traditional public schools they affect is quite fitting, since it causes them to internalize the effect they already have on them.

It might seem almost trivial that education administrators are required to consider, when deciding whether to establish a new school, what effects it will have on other, existing schools. Opening a second school in a neighborhood that hardly has enough children for one is bad policy, even without the problems related to creaming. Notice however, that this is where the religious identity of the school can potentially confuse decision makers. While a new school without a unique cultural or religious mission would rarely be authorized if doing so entailed causing damage to an existing school, decision makers might believe they should allow it in the case of a religious one. They might think that the religious interests that the school realizes justify its authorization, or that the new school offers an education that is significantly different from the old one, and that these differences tip the scales in the new school's favor. The paper argues that this line of thought is mistaken, and that creaming religious schools lack the kind of justification necessary to vindicate the harm they cause to public schools.

6. Conclusion

Some religious schools are extremely central in the lives of religious families and communities, and offer a service that is incomparable with traditional public education. Others play a more peripheral role in religious upbringing and are quite similar to public schools, granting their students all the instrumental benefits required for their lives in the modern world. We have grown accustomed to thinking that liberal states should be concerned exclusively with the former category, namely with non-creaming religious schools. This paper set out to accentuate the challenges posed by the latter, creaming religious schools, due to their negative effect on educational equality.

Before concluding, I would like to highlight two issues raised earlier that may have more general implications than those discussed in the paper.

First, the argument concerning two types of religious schools brings out a more general observation regarding the relations between the value of educational diversity on the one hand and considerations of justice on the other. The ideal of educational equality is sometimes criticized as necessarily involving curtailing diversity in education and sanctioning stagnant uniformity between schools. What should now be evident is that when schools are sufficiently different from one another in content, values, educational methods and ideology, they may be, in fact, *less* likely to create inequality. Non-creaming religious schools with their robust religious character create educational diversity because they offer an option that is completely different than that of public education. It is the source of their value for the community, but also for those who value diversity in education. It is also the reason they do not raise concerns of equality. It is when schools are exceedingly similar to one another, ultimately differing from one another in student composition and achievement rather than offering any true diversity, that issues of inequality are most acute. This observation may help defend equality against objections in the name of diversity, and may possibly be a starting point for thinking about education policy that can promote educational equality without jeopardizing educational diversity.

The second general point concerns the surprising consequences of antidiscrimination rules. Antidiscrimination rules are often criticized for offering merely formal equality of opportunity in the pursuit of a certain reward but not dealing with the unequal rewards involved in the distribution. It is argued that having

a chance at winning cannot justify the disadvantages that follow losing and therefore that antidiscrimination rules do not do enough to promote equality.

The case of creaming religious schools uncovers an even more severe criticism of antidiscrimination rules. The special nature of creaming religious schools, described in the paper, makes it the case that removing the formal barriers by instating the antidiscrimination rule is *itself* one of the mechanisms that are responsible for causing inequality. The price of being given the opportunity to enroll to a creaming religious school is that those who do not (or cannot), end up receiving an education that is worse than they would have received if the opportunity had not been granted them at all. The fact that the most disadvantaged children are the ones systematically excluded from creaming religious schools makes this injustice even cogent. The argument against antidiscrimination, therefore, is not merely that it does not do *enough* to promote equality, but rather that it is to *blame* for inequality. This surprising conclusion may hold significance for the general study of antidiscrimination doctrine, inviting further thought to determine whether there are other cases in which social processes triggered by antidiscrimination rules have negative effects on equality.

¹ I do not refer to the decline in average educational achievement, but rather to the decline in individual students' educational achievement compared to their achievement prior to creaming, due to the loss of favorable peer effects.

² However, there are findings to the contrary, indicating that the design of choice can significantly affect the composition of students and the access of students from disadvantaged groups (Ritter et al 2010).

³ Not all cases of public concern are justified. Islamic schools in European and North American countries, for example, have created extreme anxiety despite the fact that official inspections and research concerning their attitude toward democratic values and their effect on students' test scores do not indicate that there is serious cause for concern (Merry and Driessen 2005; Merry and Driessen 2016).

⁴ Amish children (attending both public and private schools) are exempt from compulsory education after the eighth grade following the famous Supreme Court case: *Wisconsin v. Yoder*, 406 US 205 (1972).

⁵ Interestingly, Amish schools do not teach religion, although they do pray and read from the bible. One explanation for this is that one-room schools often teach children from different orders and churches. Another explanation is that the social role of the school (and of the teacher) in the community is limited to giving children basic skills whereas religious education is undertaken by the church (Hurst and McConnell 2010; Nye 2013; Erbay 2013)

⁶ A study of a Mennonite one-room school showed that the teacher seldom praised students or offered other reinforcing feedback on students' work. This was explained as a part of the resistance of the individualist ethos, and viewing education as a communal and cooperative project (Dewalt and Troxell 1989).

⁷ Parents also commented that public school children were less disciplined and well behaved and respectful (Hurst and McConnell 2010).

⁸ Although when public school funding depends on enrolment and Amish children comprise a large share of the school district, the mere exit of Amish children can have a detrimental effect on public schools.

⁹ The Israeli High Court of Justice recently affirmed the constitutionality of the law, stating that the law did not violate Ultra-Orthodox students' right to education. H CJ 3752/10 Rubinstein v. The Knesset (2014) [Hebrew].

¹⁰ Ultra-Orthodox schools are therefore different from Amish schools. The latter do not usually raise concerns for public interest because the Amish community have a long history of being a peaceful and law abiding community that does not seek political power nor financial benefits from the public (Spinner, 1994). On the other hand, Amish and Ultra-Orthodox schools alike raise worries regarding the rights of children to an adequate education and right of exit.

¹¹ This is a pressing issue with regard to Israeli Ultra-orthodox schools as they systematically discriminate against children of "Mizrachi" origin (Jews that originate from middle-eastern and North African countries) (Bitton 2012).

¹² The choice to specialize in Hebrew is explained in strictly secular terms: EKHLA's website informs us that 'many studies have shown that learning a second language increases both cognitive and creative ability' and that 'Hebrew is the official language of Israel, a growing nation of significant geo-political importance and an important world player especially in the area of technology'.
<http://www.ekhla.org/about-us/>

¹³ This study shows that the percentage of minority students in a specific public school district is most dominant in determining the rate of private school enrollment.

¹⁴ See also: http://www.hccs-nys.org/site_res_view_template.aspx?id=da70a75f-402b-4ec2-a0eb-daea943ce48a.

¹⁵ Education is a 'positional good', the value of which is determined, at least partly, according to one's relative position. Therefore, inequality in education is especially

harmful for the worse-off. On education's positional value and its consequence for justice in education (Brighouse and Swift 2009a).

¹⁶ Note that this argument is parallel to the argument concerning secular and civic education, namely that despite the liberal concerns, religious education should nonetheless be allowed because it realizes religious rights.

¹⁷ *Torani* schools are different in that although they are not allowed to discriminate students, they are allowed to regulate behavior within the schools, thus imposing a certain cost on students who are not religious. Accordingly, they appeal mostly to students from regular religious state schools, and cream students from them, and not from secular schools (reference omitted).

¹⁸ In England, religious schools are allowed to design admission criteria that include religious affiliation (*R v. Governing Board of the JFS*, 2009) but not an ethnic one (Weiler 2010; Barber 2010). In Ontario, Canada, Catholic schools enroll only Catholic students. Accordingly, loss of enrolment correlates the share of Catholic families in each area (Card et al 2008). Religious admission policies can raise other problems such as disagreements concerning the criteria for belonging to the religious community (as was the case in the JFS case cited above). In Israel, private religious schools are allowed to reject students based on religious but not ethnic affiliation (Bitton 2006).

¹⁹ S.C. CODE ANN. § 59-40-50(B)(7).

²⁰ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 US 701 (2007). See also: US Department of Justice and US Department of Education, *Guidance on The Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*.

²¹ 14 DEL C. §511 (b)(3). This section was amended in June 2013 and has yet to be put to the test. Delaware's legislation is the most comprehensive measure of its sort. Some other states, while not going as far as Delaware, have created an institutional setting in which such concerns may be raised: a public hearing in which school districts and other stake holders have the right to be heard (reference omitted).

²² A similar provision exists in Israel's regulation of non-state schools. According to section 3a to the National Education (Recognized Schools) Regulations, if a recognized school is likely to cause damage to state schools, the minister may decline to grant recognized status. Denying such status is tantamount to closing a school. Damage is defined as one of the following: causing the closure of classes or schools; causing a significant decline in number of students; or upsetting integration. However, this regulation does not apply to state schools, including *Torani* schools, thus creating an anomaly according to which non-state schools are subject to more exacting standards than state schools.

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