

THE FALLACY OF CHOICE: THE DESTRUCTIVE EFFECT OF SCHOOL VOUCHERS ON CHILDREN WITH DISABILITIES

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This Article addresses the impact of school voucher programs on students with disabilities. We show that for children with disabilities, the price of admission into so-called “school choice” programs is so high that it is effectively no real choice at all. School voucher programs require students with disabilities to sign away their robust federal rights and protections in the public school system. Under the Individuals with Disabilities Education Act (IDEA)—the preeminent legislative safeguard for students with disabilities—these rights include the right to a “free and appropriate public education” delivered through an “individualized education plan.” By giving up these protections, children with disabilities are left at the mercy of private schools that have no legal obligation to provide them with an appropriate education, and, in the vast majority of cases, are not legally prohibited from discriminating against them on the basis of their disability. We argue that school voucher programs—including a proposed federal voucher program—put the education of students with disabilities back decades, and likely constitute a violation of the Equal Protection Clause of the U.S. Constitution.

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INTRODUCTION

In a nationally televised interview on March 11, 2017, the U.S. Secretary of Education Betsy DeVos advocated for the benefits of voucher programs, also called “school choice” programs by Secretary DeVos and other proponents.¹ School voucher programs have long been Secretary DeVos’s signature policy initiative, predating her tenure in the Trump administration and stretching back to her leadership roles in non-profit organizations.² School voucher programs allow qualifying students to attend private schools using public funds, in the form of “vouchers,” to pay for part or all of the private school tuition. Critics of school vouchers contend that these programs cause funding flight from public school systems and divert public resources into the coffers of private—and overwhelmingly religious—organizations.³ Supporters of school vouchers claim that vouchers provide two benefits. First, they claim that vouchers increase freedom of choice in education by allowing parents to place children in the schools of their choosing, rather than in underperforming public schools. Second, school voucher proponents claim that vouchers increase competition and efficiency in education.⁴ School choice advocates also claim that

1. Lesley Stahl, *Betsy DeVos on Guns, School Choice and Why People Don’t Like Her*, CBS NEWS: 60 MINUTES (Mar. 11, 2018), <https://www.cbsnews.com/news/secretary-of-education-betsy-devos-on-guns-school-choice-and-why-people-dont-like-her>.

2. *See id.*

3. *See id.*; *School Vouchers*, ACLU (2018), <https://www.aclu.org/issues/religious-liberty/religion-and-public-schools/school-vouchers> (arguing that school vouchers lead to taxpayers funding religious instruction).

4. *See generally* MILTON FRIEDMAN, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* (Robert A. Solo ed., 1955).

vouchers are especially beneficial for students with disabilities. Advocates of voucher programs have made this claim so often that students with disabilities have been described as the “poster children” of the voucher movement.⁵ This claim is difficult to reconcile with the legal and practical effects of voucher programs on these vulnerable students. To participate in school voucher programs, students with disabilities are required to give up most, if not all, of their rights under federal law. Giving up these rights entails giving up access to resources that allow them to fulfill their educational potential. These students must also give up the federal right to be free from discrimination on the basis of their disability.

These forfeitures are far from insubstantial. To alleviate these hardships, Congress passed the Individuals with Disabilities Education Act (IDEA).⁶ The IDEA guarantees every child a “free appropriate public education.”⁷ It contains comprehensive substantive and procedural mechanisms for delivering this right in a manner crafted to meet the individual needs of every student with a disability.⁸ Indeed, the prospect of a federal school voucher program comes at a time when the rights of students with disabilities under the IDEA are stronger than ever before. In 2017, the Supreme Court rejected the argument that the IDEA merely requires schools to provide a *de minimis* education.⁹ Instead, the Court read the IDEA as requiring schools to ensure students achieve appropriate progress in attainment of educational goals.¹⁰

This Article argues that existing school voucher programs have a profound negative effect on students with disabilities, and their parents, and that any future federal program modeled on state programs would be similarly detrimental. These parents have two options. One is a public school education with a legally enforceable guarantee of non-discrimination and genuine educational advancement. The other is participation in a voucher program that permits participating schools to discriminate on the basis of disability—including by simply refusing to enroll students with a disability. A choice that comes with such a

5. Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291, 295–96 (2010) (noting that students with disabilities are generally seen as having been somehow failed by the public education system).

6. 20 U.S.C. § 1400 (2012).

7. *Id.* § 1400(d).

8. *Id.* § 1400(c)(5)(C)–(H), (c)(9).

9. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017).

10. *Id.* at 999 (finding that a student’s Individualized Education Program (IEP) must be reasonable considering the student’s condition and must allow for progress in the student’s education).

price tag is, of course, no true choice at all. For parents whose children have a disability, in other words, voucher programs' supposed freedom of choice is a mirage. Furthermore, school voucher programs cause funding flight that leaves public schools without the resources required to adequately provide for the demanding individuated needs of students with disabilities—further harming students with disabilities whose parents had no real choice but to keep them in underfunded public schools.¹¹

This Article argues that a federal school voucher program would be, from a policy perspective, disastrous for students with disabilities. Further, this Article contends that, should a federal voucher program pass, courts should strike down the program as violating the Equal Protection Clause by discriminating against students with disabilities.

The Article proceeds as follows. Part I discusses the development and history of school voucher programs in the United States, including attempts to use voucher programs as vehicles of state-sponsored segregation in the wake of *Brown v. Board of Education*.¹² This Part also addresses the challenges that voucher programs have faced under the religion provisions of the federal and state constitutions, and the current push for voucher programs by both state governments and the Trump administration.

In Part II, the Article's focus switches from voucher programs specifically to the general policy and legal history of special education in the United States. This Part points out that in the 1970s, Congress found millions of children with disabilities were receiving no education and that millions more were receiving an inadequate education.¹³ This crucial finding became the catalyst for modern special education law. Part III describes in detail the substantive rights for children with disabilities that were subsequently enacted in federal law, including the IDEA, section 504 of the Rehabilitation Act of 1973 (section 504),¹⁴ and the Americans with Disabilities Act (ADA).¹⁵ This Part

11. See, e.g., Matthew Yglesias, *Betsy DeVos Tweeted a Bizarre Self-Own About Michigan's Public Schools*, VOX (Mar. 13, 2018, 10:30 AM), <https://www.vox.com/policy-and-politics/2018/3/13/17112392/devos-michigan-naep-tweet> (indicating that a graph tweeted by Secretary DeVos demonstrates that Michigan public school performance has significantly declined since Michigan's school voucher program redirected funding away from public schools).

12. 347 U.S. 483 (1954).

13. See 20 U.S.C. § 1400(c)(2) ("Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met.").

14. 34 C.F.R. § 104.1 (2012).

15. 42 U.S.C. § 12112 (2012).

describes the key provisions of the IDEA, most notably the robust guarantee of a “free appropriate public education”¹⁶ implemented via an “Individualized Education Program” (IEP).¹⁷ This Part then contrasts the protections of the IDEA, which students with disabilities must forego to participate in voucher programs, with the far more limited protections afforded to private school students—especially students in religious schools, which constitute the vast bulk of schools participating in voucher programs.

Part III of the Article presents the current Indiana school voucher program as a case study. The Indiana program has been strongly endorsed by the Trump administration and is therefore a likely model for a federal school voucher program.¹⁸

Part IV drills down on the detrimental effects that a federal voucher program would impose on students with disabilities. These include foregoing their right to a free appropriate public education; the lack of options for students with disabilities; and the ability of private schools to refuse admission to students with disabilities. Moreover, school vouchers would, if used by a student with disabilities, only cover a fraction of the high tuition charged by the small minority of private schools that provide adequate support for children with disabilities. Given these harms, this Article calls for political resistance to any federal voucher program and argues for rescinding current state voucher programs.

Finally, Part V of the Article uses these detrimental and disparate effects as the foundation for arguing that a federal school voucher program, if enacted, would violate the constitutional rights of students with disabilities. This Part concludes that the courts should strike down any federal voucher program as a violation of the Equal Protection Clause.

I. THE DEVELOPMENT AND LEGALITY OF SCHOOL VOUCHERS

School choice has been a controversial and well litigated issue for decades. In 1925, the Supreme Court held that parents have a constitutional right to send their children to private schools, including private schools with

16. 20 U.S.C. § 1400(d).

17. Hensel, *supra* note 5, at 292.

18. See Michelle Ye Hee Lee, *Mike Pence's Claim that Indiana Has the Largest School Voucher Program*, WASH. POST (Aug. 12, 2016), <https://www.washingtonpost.com/news/fact-checker/wp/2016/08/12/mike-pences-claim-that-indiana-has-the-largest-school-voucher-program> (noting that Vice President Mike Pence often touts that his home state of Indiana has the largest voucher program).

religious affiliations.¹⁹ In the ninety years since that decision, the debate over school choice has continued to permeate discussions about education in America, largely as part of a greater national conflict²⁰ over “immigration, religion, race, and national identity.”²¹

Despite this connection to deep national conflicts, “education is primarily a state and local responsibility.”²² The federal government, for example, provides only eight percent of total funding for public education at the elementary and secondary level.²³ The states’ education laws—including school voucher programs—do, of course, have to comply with the U.S. Constitution.²⁴ The few federal court challenges to school choice programs have primarily been challenges that this state involvement in religious education violates the Establishment Clause of the First Amendment.²⁵ At the state level, many challenges to state-run voucher programs have also centered on concerns about public funds going to religious schools despite state statutory and constitutional provisions that govern the state’s responsibility to educate its children.²⁶ Notwithstanding the success of such challenges, vouchers are gaining popularity across the country.²⁷

A. *The History and Legality of Voucher Programs*

The origins of school voucher programs demonstrate the paradox between theory and reality. The free market economist, Milton Friedman was the first to explore the concept of school voucher programs.²⁸ Friedman conceptualized a school voucher program in which the

19. *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534–35 (1925).

20. See Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 *YALE L.J.* 814, 816–19 (2011) (describing the conflict between the movement towards compulsory education and private, religious education).

21. *Id.* at 818.

22. *The Federal Role in Education*, U.S. DEP’T OF EDUC., <https://www.ed.gov/about/overview/fed/role.html> (last modified May 25, 2017).

23. *Id.* The eight percent includes funds from the Department of Education, the Department of Health and Human Services for the Head Start Program, and the Department of Agriculture for the School Lunch Program. *Id.*

24. U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

25. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 606–07 (1971) (invalidating state statutes that reimbursed or supplemented secular teachers’ salaries and reimbursed nonpublic schools for secular materials); Minow, *supra* note 20, at 829.

26. FRIEDMAN, *supra* note 4.

27. See *supra* notes 1–4 and accompanying text.

28. See generally FRIEDMAN, *supra* note 4.

government gives parents public funds to enroll their child in a school of their choosing, public or private.²⁹ He theorized that this program would improve schools by increasing market competition.³⁰ Under his model, the government's role in education is limited to disbursal of funds and "assuring that the schools met certain minimum standards."³¹

As Friedman fervently advocated for school vouchers, southern states started to use the concept as a means to avoid court ordered desegregation.³² For example, in Virginia, Prince Edward County ultimately "chose to close its entire public school system in 1959 rather than operate integrated schools."³³ While the County's schools were locked, white children used public funds to attend the all-white, private, Prince Edward Academy through a state-adopted "tuition grant program."³⁴ For five years, most of the County's 1700 black children had no educational opportunities until the Supreme Court finally held the closure of all public schools violated the Equal Protection Clause.³⁵

Even after Prince Edward County was ordered to re-open the schools, it used vouchers to perpetuate segregation³⁶ and spent twice the amount of funding on "tuition grants" as it did on court-mandated integrated schools.³⁷ Ultimately, the United States District Court for the Eastern

29. See *id.*; see also Kevin Carey, *Dismal Voucher Results Surprise Researchers as DeVos Era Begins*, N.Y. TIMES: UPSHOT (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/upshot/dismal-results-from-vouchers-surprise-researchers-as-devos-era-begins.html> (quoting Friedman's essay, which argues that "the government should pay for all children to go to school" through vouchers given to parents for "approved educational services").

30. FRIEDMAN, *supra* note 4.

31. *Id.*

32. Minow, *supra* note 20, at 822 (adding that white Southerners used both school choice and anti-*Brown* associations to evade integration).

33. Chris Ford et al., *The Racist Origins of Private School Vouchers*, CTR. FOR AM. PROGRESS (July 12, 2017, 11:59 PM), <https://www.americanprogress.org/issues/education-k-12/reports/2017/07/12/435629/racist-origins-private-school-vouchers/> (noting that the pushback against *Brown* and school integration in the South was known as "massive resistance").

34. *Id.*

35. *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 232 (1964); see also Ford et al., *supra* note 33 (discussing the "incredible lengths" black parents undertook to educate their children due to the school closure).

36. Ford et al., *supra* note 33.

37. *Id.* ("The County's board of supervisors devoted only \$189,000 in funding for integrated public schools. At the same time, they allocated \$375,000 that could effectively only be used by white students for 'tuition grants to students attending either private nonsectarian schools in the County or public schools charging tuition outside the County.'") (quoting Kara Miles Turner, *Both Victors and Victims: Prince Edward County, Virginia, the NAACP, and 'Brown'*, 90 VA. L. REV. 1667, 1690 (2004)).

District of Virginia held that allowing residents to use state funded voucher programs to perpetuate segregation violated the U.S. Constitution.³⁸

Although this program was ultimately struck down, Prince Edward County provided a blueprint for more than 200 southern communities to use public money to establish “private segregation academies.”³⁹ More than 200 private segregation academies were established across the South by 1969.⁴⁰ In the 1970–1971 school year, nearly 75,000 students in Alabama, Louisiana, and Mississippi alone attended segregation academies, which were made possible through public funds.⁴¹ The federal government initially led the charge against these segregation academies by challenging their operation under the Civil Rights Act of 1964⁴² and the Elementary and Secondary Education Act of 1965.⁴³

Despite the risk of re-segregating the American education system, current supporters of voucher programs argue that vouchers are “an instrument of educational opportunity” that properly promote religious freedom.⁴⁴ In the 1990s, school choice advocates joined forces with religious institutions which argued that the Supreme Court’s Establishment Clause analysis of voucher programs was “unfair and unpredictable.”⁴⁵ Federal courts had previously held that the Establishment Clause prohibited public funds from reimbursing private schools for secular textbooks and salaries⁴⁶ and from authorizing tax cuts or deductions for private school tuition.⁴⁷ So a newly formed

38. Griffin v. State Bd. of Educ., 296 F. Supp. 1178, 1181 (E.D. Va. 1969). Notably, the District Court rejected arguments that the constitutional violation required restitution grants or even termination of vouchers in that school year. *Id.* at 1182.

39. Ford et al., *supra* note 33.

40. *Id.*

41. See ROBERT E. ANDERSON JR., THE SOUTH AND HER CHILDREN: SCHOOL DESEGREGATION 1970–1971 79 (1971).

42. 42 U.S.C. § 2000d (2012).

43. 20 U.S.C. § 3414 (2012); Ford et al., *supra* note 33.

44. Minow, *supra* note 20, at 829–32.

45. *Id.* at 830.

46. Lemon v. Kurtzman, 403 U.S. 602, 606–07, 613–14 (1971) (finding that the relationship between the states and religious private schools through these programs involved “excessive entanglement between government and religion”).

47. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 797, 798 (1973) (internal quotations omitted) (holding that New York’s aid provision had a “primary effect that advances religion and offends the constitutional prohibition against laws respecting an establishment of religion”); Sloan v. Lemon, 413 U.S. 825, 827–28 (1973) (finding a Pennsylvania program reimbursing private school tuition to parents through public funds is unconstitutional under the Establishment Clause).

coalition sought to reframe the voucher program debate around the free exercise of religion.⁴⁸

Leading reformers filed amicus briefs in *Agostini v. Felton*,⁴⁹ arguing that by preventing religious private schools from receiving public funds, the Supreme Court's prior decisions contravened the Free Exercise Clause of the First Amendment.⁵⁰ The Supreme Court, in a 5–4 decision, held that public employees could provide remedial education at parochial schools so long as this “aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion.”⁵¹ The Supreme Court did not expressly address the Free Exercise Clause. Rather, it applied the Establishment Clause, concluding that the proper inquiry is “whether the government acted with the purpose of advancing *or inhibiting* religion.”⁵² Five years later, in *Zelman v. Simmons-Harris*,⁵³ the Court held voucher programs do not violate the Establishment Clause when they (1) are “neutral with respect to religion” and (2) “provide[] assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice.”⁵⁴

Although the Supreme Court held that vouchers did not run afoul of the religion clauses of U.S. Constitution,⁵⁵ several high state courts have struck down voucher programs under state constitutional provisions. For example, the Vermont Supreme Court struck down a voucher program under Article 3 of the Vermont State Constitution, which prohibits, in pertinent part, any individual from being compelled to “support any place of worship.”⁵⁶ The Vermont Supreme Court reasoned that “with no restrictions on the purpose or use of the tuition funds,” the program violated Article 3 by compelling taxpayers to support religious institutions through the use of public funds to pay tuition at private religious schools.⁵⁷ Furthermore, in 2006, the Florida Supreme Court struck down the state's voucher program for violating Article IX, section 1(a) of the Florida State Constitution, which created a state mandate to provide public education to all Florida children

48. Minow, *supra* note 20, at 830.

49. 521 U.S. 203 (1997).

50. Brief Amici Curiae Christian Legal Society at 6–15, *Agostini*, 521 U.S. 203 (No. 96-552).

51. *Felton*, 521 U.S. at 230–32.

52. *Id.* at 222–23 (emphasis added).

53. 536 U.S. 639 (2002).

54. *Id.* at 652.

55. *Id.*

56. *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 547 (Vt. 1999).

57. *Id.* at 563.

through a state-run school system.⁵⁸ The Florida Supreme Court found that the voucher program diverted state resources to the education of children within the state “through means other than a system of free public schools.”⁵⁹ Finally, in 2016, the Nevada Supreme Court also held that a program diverting public funds to education savings accounts to be used for private school tuition subverts the state’s constitutional provisions requiring funding for public.⁶⁰

In addition to provisions mandating the creation of public education systems, nearly forty state constitutions⁶¹ contain “Blaine

58. Article IX, Section 1(a) of the Florida Constitution provides: “The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require” FLA. CONST. art. IX, § 1(a); *Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006).

59. *Holmes*, 919 So. 2d at 407.

60. *Schwartz v. Lopez*, 382 P.3d 886, 891 (Nev. 2016) (en banc). Article 11, Section 2 of the Nevada State Constitution provides: “The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.” NEV. CONST. art. XI, § 2.

61. The following is a list of the forty states and their respective Blaine provisions: (1) ALA. CONST. art. XIV, § 263; (2) ALASKA CONST. art. VII, § 1; (3) ARIZ. CONST. art. II, § 12; *id.* art. IX, § 10; (4) ARK. CONST. art. XIV, § 2; (5) CAL. CONST. art. IX, §§ 8, 9(f); *id.* art. XVI, § 5; (6) COLO. CONST. art. IX, § 7; (7) DEL. CONST. art. X, § 3; (8) FLA. CONST. art. I, § 3; (9) GA. CONST. art. I, § 2, para. 7; (10) HAW. CONST. art. X, § 1; (11) IDAHO CONST. art. IX, §§ 5, 6; (12) ILL. CONST. art. X, § 3; (13) IND. CONST. art. 1, § 6; (14) KAN. CONST. art. VI, § 6(c); (15) KY. CONST. § 189; (16) MASS. CONST. art. XVIII, § 2; *id.* art. XLVIII, pt. II, § 2; (17) MICH. CONST. art. I, § 4; *id.* art. VIII, § 2; (18) MINN. CONST. art. I, § 16; (19) MISS. CONST. art. VIII, § 208; (20) MO. CONST. art. I, § 7; *id.* art. IX, § 8; (21) MONT. CONST. art. X, § 6; (22) NEB. CONST. art. VII, § 11; (23) NEV. CONST. art. XI, §§ 2, 9, 10; (24) N.H. CONST. pt. II, art. LXXXIII; (25) N.M. CONST. art. XII, § 3; *id.* art. XXI, § 4; (26) N.Y. CONST. art. XI, § 3; (27) N.D. CONST. art. VIII, §§ 1, 5; (28) OHIO CONST. art. VI, § 2; (29) OKLA. CONST. art. I, § 5; *id.* art. II, § 5; *id.* art. XI, § 5; (30) OR. CONST. art. I, § 5; (31) PA. CONST. art. III, §§ 15, 29; (32) S.C. CONST. art. XI, § 4; (33) S.D. CONST. art. VI, § 3; *id.* art. VIII, § 16; *id.* art. XXII, para. 4; (34) TEX. CONST. art. I, § 7; *id.* art. VII, § 5(c); (35) UTAH CONST. art. I, § 4; *id.* art. III, § 4; *id.* art. X, §§ 1, 9; (36) VA. CONST. art. IV, § 16; *id.* art. VIII, §§ 10, 11; (37) WASH. CONST. art. I, § 11; *id.* art. IX, § 4; *id.* art. XXVI, para. 4; (38) W. VA. CONST. art. III, § 15; (39) WIS. CONST. art. I, § 18; *id.* art. X, §§ 3, 6; (40) WYO. CONST. art. I, § 19; *id.* art. III, § 36; *id.* art. VII, § 8; *id.* art. XXI, § 28.

Amendments.”⁶² Although the language of these provisions varies slightly, Blaine Amendments prohibit states from distributing public education funds to religious schools.⁶³ Although Blaine’s proposed amendment failed at the national level, Congress began encouraging existing states to adopt similar provisions, and conditioned statehood on states including similar provisions in their new constitutions.⁶⁴

While Blaine Amendments have been the basis of several legal challenges to school choice, only a few states’ high courts have invalidated voucher programs under these provisions. In 2009, for example, the Arizona Supreme Court struck down two state voucher programs, one created for students with disabilities and the other for foster children, for violating Arizona’s Blaine provision.⁶⁵ In 2015, the Colorado Supreme Court held that a local school district’s voucher program violated Colorado’s version of the Blaine Amendment.⁶⁶ Furthermore, the Supreme Courts of Florida and Nevada each declined to address the challenges brought under the Blaine provisions of those states, deciding instead on the education mandate provisions discussed above.⁶⁷

62. These provisions are named for Representative James Blaine of Maine, who proposed an amendment to the U.S. Constitution. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL’Y 551, 556 (2003). Blaine’s proposed amendment stated: “No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.” *Id.* (quoting H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875)). Blaine sought to capitalize on President Grant’s agenda for “good common school education” and attack on “sectarian schools” to purportedly to protect the separation of Church and State. *Id.* at 558. In *Mitchell v. Helms*, the Supreme Court noted that Grant’s agenda, and the subsequent Blaine Amendment, arose from “pervasive hostility to the Catholic Church . . . and it was an open secret that ‘sectarian’ was code for ‘Catholic.’” 530 U.S. 793, 828 (2000) (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992)). See generally DeForrest, *supra* note 62, at 558–65. Ultimately, after significant debate, the proposed amendment fell short of the two-thirds majority necessary to pass the Senate. *Id.* at 569–73.

63. DeForrest, *supra* note 62, at 573–74.

64. Mercedes Schneider, *The Testing of States’ Blaine Amendments—No Public Funding of Religious Schools*, HUFFINGTON POST (Mar. 5, 2017, 11:10 PM), https://www.huffingtonpost.com/entry/the-testing-of-states-blaine-amendments-no-public_us_58bcdaf7e4b02eac8876d08a.

65. *Cain v. Horne*, 202 P.3d 1178, 1180, 1185 (Ariz. 2009) (en banc) (quoting ARIZ. CONST. art. 9, § 10).

66. *Colorado State Bd. of Educ. v. Taxpayers for Pub. Educ.*, 137 S. Ct. 2325, 2325 (2017).

67. See *Bush v. Holmes*, 919 So. 2d 392, 408–09 (Fla. 2006); *Schwartz v. Lopez*, 382 P.3d 886, 902 (Nev. 2016) (en banc).

On the other hand, the Indiana and Oklahoma Supreme Court upheld voucher programs against Blaine Amendment challenges. Echoing the reasoning of the Supreme Court in *Zelman v. Simmons-Harris*, the Indiana and Oklahoma Supreme Courts reasoned that parents and students, not private religious schools, were the direct beneficiaries of the public funds and were able to make an independent choice about where to spend those funds.⁶⁸ Despite this mixed record, voucher proponents, including Secretary DeVos's non-profit,⁶⁹ have vilified state Blaine provisions as antiquated, bigoted, and contrary to educational and religious freedom.⁷⁰

In 2017, the Supreme Court gave voucher proponents a significant boost when it held that a policy of Missouri's Department of Natural Resources—based on the state's Blaine provision—violated the Free Exercise Clause.⁷¹ Some members of the Court tried to narrow the opinion by including a footnote that states: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”⁷² However, this footnote did not carry the weight of the majority; although Chief Justice Roberts authored the majority opinion, he, Justice Gorsuch and Justice Thomas explicitly dissented from that part of the decision.⁷³ Moreover, on the following day, the Court vacated and remanded the Colorado Supreme Court decision striking down a voucher program under Colorado's Blaine provision for further consideration in light

68. *Meredith v. Pence*, 984 N.E.2d 1213, 1226 (Ind. 2013). Notably, the Indiana Supreme Court found that the voucher program did not violate educational mandates in the Indiana Constitution, contrary to the Florida and Nevada decisions, because the State General Assembly had “broad discretion” about how to fulfill this obligation. *Id.*; *Oliver v. Hofmeister*, 368 P.3d 1270, 1277 (Okla. 2016).

69. See *James G. Blaine: Who Was He, and How is He Affecting Children's Education Today?*, EDCHOICE (May 24, 2016), <https://www.edchoice.org/blog/james-g-blaine-affecting-childrens-education-today> (chastising “opponents of educational freedom” for using these “antiquated and historically bigoted amendments” to “thwart” school choice).

70. DeForrest, *supra* note 62, at 625; Erica Smith, *Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs*, 18 FEDERALIST SOC'Y REV. 48, 50 (2017); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 118 (2000); Richard D. Komer & Clark Neily, *School Choice and State Constitutions: A Guide to Designing School Choice Programs* INST. FOR JUST. & AM. LEGIS. EXCH. COUNCIL 4 (2007), https://www.ij.org/images/pdf_folder/school_choice/50staterreport/50stateSCreport.pdf.

71. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2024–25 (2017).

72. *Id.* at 2024 n.3.

73. *Id.* at 2025–26.

of *Trinity Lutheran*.⁷⁴ Thus, the case “may very well open the door” to voucher programs that include religious entities.⁷⁵

B. *The Current Push for Voucher Programs*

As of the 2017–2018 school year, there are twenty-six active state-funded voucher programs across fifteen states and the District of Columbia.⁷⁶ Many of these states have more than one program. For example, in Ohio, there are five different voucher programs.⁷⁷ Some of Ohio’s programs are statewide and serve a particular student population, such as students with autism, while other programs cover local areas within Ohio.⁷⁸ Of the fifteen states with school voucher programs, three allow only “Town Tuitioning Programs,” which provide public funds for students who live in a town without a public school to attend either a public school in another town or a non-religious private school.⁷⁹ The voucher programs of the remaining

74. *Colorado State Bd. of Educ. v. Taxpayers for Pub. Educ.*, 137 S. Ct. 2325, 2325 (2017). On remand, the Colorado Supreme Court dismissed the case as moot at the request of both parties after a newly-elected school board voted to end the voucher program. Erica Meltzer, *The Douglas County Voucher Case is Finally over*, CHALKBEAT (Jan. 26, 2018), <https://www.chalkbeat.org/posts/co/2018/01/26/the-douglas-county-voucher-case-is-finally-over/>; Marianne Goodland, *Douglas County School Board Ends Controversial Voucher Program*, COLORADOPOLITICS (Dec. 5, 2017), <https://coloradopolitics.com/douglas-county-school-board-ends-controversial-voucher-program/>.

75. See William S. Koski, *Trinity Lutheran Church v. Comer Decision: What Does It Mean for School Vouchers?*, STAN. L. SCH. BLOGS (July 4, 2017), <https://law.stanford.edu/2017/07/04/trinity-lutheran-church-v-comer-decision-what-does-it-mean-for-school-vouchers/> (arguing “*Trinity Lutheran* should provide cause for concern among those who oppose school vouchers generally and those who oppose vouchers for religious schools specifically”); Frank Ravitch, *Symposium: Trinity Lutheran and Zelman—Saved by Footnote 3 or a Dream Come True for Voucher Advocates?*, SCOTUSBLOG (Jun. 26, 2017, 10:59 PM), <http://www.scotusblog.com/2017/06/symposium-trinity-lutheran-church-v-comer-zelman-v-simmons-harris-saved-footnote-3-dream-come-true-voucher-advocates/>.

76. *School Choice: School Choice in America Dashboard*, EDCHOICE, <https://www.edchoice.org/school-choice/school-choice-in-america/#map-overlay> (last modified June 26, 2018) [hereinafter *Dashboard*]. As of February 2018, Arkansas, Florida, Georgia, Indiana, Louisiana, Maryland, Maine, Mississippi, North Carolina, New Hampshire, Ohio, Oklahoma, Utah, Vermont, and Wisconsin all have voucher programs. *Id.*

77. *Id.*

78. See *id.*

79. These states are Maine, New Hampshire, and Vermont. *Id.*; *School Choice: New Hampshire—Town Tuitioning Program*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/new-hampshire-town-tuitioning-program/> (last visited Aug. 17, 2018) [hereinafter *New Hampshire—Town Tuitioning Program*]. New Hampshire added this program for the 2017 school year and data is not available yet, but in

twelve states, require students to: (1) be in a low-income family; (2) attend or be slated to attend a low performing school; (3) have an identified disability; (4) be in an active-duty military family; or (5) be in foster care.⁸⁰ For some voucher programs, students are eligible if they satisfy one of these factors;⁸¹ in other programs, students are only eligible if they satisfy two or more of these factors.⁸² Less than half of the voucher programs require a student be enrolled in a public school before receiving a voucher, but most provide a variety of ways to waive this requirement.⁸³ Furthermore, there are generally only minimal requirements for private schools to participate in the program. A school must prove financial stability, secure accreditation by the state or an approved accrediting agency, and participate in state assessments.⁸⁴

Of the twenty-six voucher programs, half are specifically tailored to students with identified disabilities.⁸⁵ Some of these programs are designed to address a particular disability, such as autism or dyslexia,⁸⁶ but most are generally available to students with any disability identified

Maine and Vermont only 3% and 4% of students statewide are eligible for Town Tuitioning Programs. *Id.*; *Dashboard*, *supra* note 76.

80. *School Choice: Vouchers*, NAT'L CONF. OF STATE LEGIS., <http://www.ncsl.org/research/education/school-choice-vouchers> (last visited Aug. 17, 2018).

81. *School Voucher Laws: State-by-State Comparison*, NAT'L CONF. OF STATE LEGIS., <http://www.ncsl.org/research/education/voucher-law-comparison> (last visited Aug. 17, 2018) [hereinafter *School Voucher Laws: State-by-State Comparison*] (showing that Vermont's Town Tuitioning Program only requires that the student live in a district where there is no operating school).

82. *Id.* (stating Oklahoma's Lindsey Nicole Henry Students with Disabilities Scholarship Program requires that the student with a disability have an IEP and have attended a public school during the previous school year).

83. *Id.* (stating that Arkansas waives the requirement if the student's parent is in the military on active duty, and that North Carolina does not apply this requirement to a student that is in foster care).

84. Josh Cunningham, *Interactive Guide to School Choice Laws*, NAT'L CONF. OF STATE LEGIS. (June 15, 2017), <http://www.ncsl.org/research/education/interactive-guide-to-school-choice.aspx> [hereinafter *School Choice Laws*].

85. Some programs include: Florida's John M. McKay Scholarships for Students with Disabilities Program, Georgia's Special Needs Scholarship Program, Louisiana's School Choice Program for Certain Students with Exceptionalities, Mississippi's Dyslexia Therapy Scholarship for Students with Dyslexia Program, and Wisconsin's Special Needs Scholarship Program. *Dashboard*, *supra* note 76.

86. *School Choice: Mississippi Dyslexia Therapy Scholarship for Students with Dyslexia Program*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/mississippi-dyslexia-therapy-scholarship-for-students-with-dyslexia-program> (last visited Aug. 17, 2018); *School Choice: Ohio—Autism Scholarship Program*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/ohio-autism-scholarship-program> (last visited Aug. 17, 2018).

under federal law.⁸⁷ Yet, to accept a voucher, these programs require parents to waive their child's rights under federal law.⁸⁸ The majority of these specialized programs also have fewer accountability requirements for participating private schools than the general voucher programs because they do not require students to take state assessments.⁸⁹ Three of these programs explicitly create segregated educational systems for students with disabilities by requiring the funds be spent at schools with specialized instruction.⁹⁰ Thus, these programs mandate that students with disabilities attend a specialized private school, which means that they will be at a school with only other students with disabilities. Therefore, these students with disabilities will be separated from—and unable to interact with—students without disabilities. Separate schools for students with disabilities is the very essence of segregation on the basis of disability.

87. See e.g., *School Voucher Laws: State-by-State Comparison*, *supra* note 81 (listing student eligibility requirements for voucher programs by state). Arkansas, Florida, Georgia, Indiana, Louisiana, North Carolina, Ohio, Oklahoma, and Utah all list having an IEP or “certain disabilities” as a characteristic making a student eligible for the state’s respective voucher program. *Id.*

88. NAT’L COUNCIL ON DISABILITY, *Nat’l Disability Policy: A Progress Report* 60 (2012). Although the NCD articulated several concerns regarding special voucher programs in this report, “[c]hief among these is that once students with disabilities use a voucher to attend a private school, they and their family relinquish rights under the IDEA . . .” *Id.*

89. See e.g., *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “LA” on interactive map). Louisiana’s general voucher program requires participating schools to administer an assessment to all voucher recipients, but they *cannot* administer standardized tests. The North Carolina Opportunity Scholarship Program requires that participating schools be accredited by a state or approved agency and administer state or approved national assessment, and allows schools to charge voucher students more tuition than non-voucher students. *Id.* (follow hyperlink; then click on “NC” on interactive map). North Carolina Special Education Scholarship Grants for Children with Disabilities only requires participating schools to: (1) meet with health and safety regulations and (2) comply with state and federal antidiscrimination laws. *Id.*

90. See *id.* (follow hyperlink; then click on “MS” on interactive map). Mississippi has two special education school voucher programs: the Nate Rogers Scholarship for Students with Disabilities Program and the Mississippi Dyslexia Therapy Scholarship for Students with Dyslexia Program. *Id.* These programs require that instruction be provided by a certified speech therapy pathologist or a licensed dyslexia therapist, respectively, by implication this means these students will be educated in segregated environments. *Id.* Additionally, Louisiana’s School Choice Program for Certain Students with Exceptionalities requires participating schools “must have been in operation and providing special education for at least two years.” *Id.* Consequently they are filtering these students out of the integrated public school system and into a segregated private system. *Id.* (follow hyperlink; then click “LA” on interactive map).

However, proponents of special education voucher programs argue that the programs allow dissatisfied parents an easier way to leave a public school than through the processes set forth under federal disabilities laws.⁹¹ These voucher advocates minimize the waiver of federal disability law protections, specifically the IDEA, equating it to waiving the right to use public school facilities, such as the school cafeteria.⁹² These arguments gloss over the significant procedural safeguards, due process rights, and school accountability contained in the IDEA.⁹³ Additionally, supporters argue that these programs also save money by preserving resources that would otherwise be spent on litigation.⁹⁴ Like most voucher advocates, these supporters tout freedom of choice and emphasize failures of the current educational system.⁹⁵

On the other hand, opponents argue that many of these special education voucher proponents have another legislative agenda: the advancement of general education voucher programs.⁹⁶ These opponents contend that children with disabilities have become “poster children for the voucher movement because it is difficult politically to argue against benefits that will serve this vulnerable group.”⁹⁷ National school choice organizations and religious organizations have both lobbied state legislators to pass special education voucher programs.⁹⁸ It is evident that these organizations use special needs as a front to pass voucher legislation,

91. Hensel, *supra* note 5, at 294–95; Stuart Buck, *Special Education Vouchers Are Beneficial: A Response to Hensel*, 41 J.L. & EDUC. 651, 654–56, 659 (2012); *see also Can School Choice Help Students with Special Needs?*, CHILDREN’S EDUC. SERVS. (Nov. 2, 2017), <https://www.ces-schools.net/can-school-choice-help-students-special-needs> (discussing purported “Myths” and “Facts” regarding vouchers for students with disabilities). The Children’s Educational Services asserts as “Fact” that “[e]vidence indicates that private schools better serve many students with special needs” because of studies into parent reported satisfaction with voucher programs. *Id.* These studies are tainted because private schools are not required to complete objective assessments and other accountability measures. Rather private school academic reports are subjective and they have an incentive to provide good reports to keep students enrolled. Hensel, *supra* note 5, at 334–35. “In Florida, for example, there are reports of McKay scholarship students who received high grades in private schools only to find that they were several grade levels behind when returning to public school.” *Id.* at 335.

92. *See* Buck, *supra* note 91, at 659 (stating that parents who use private school vouchers are free to return their children to public schools, at which time all of their rights will reappear).

93. *See* discussion *infra* Section III.B.

94. Hensel, *supra* note 5, at 295.

95. *See generally* Buck, *supra* note 91, at 653–60.

96. Hensel, *supra* note 5, at 295–96.

97. *Id.*

98. *Id.* at 296–97.

since legislatures enacting special education voucher program immediately introduced bills for universal school choice.⁹⁹

Additionally, several key disability advocacy groups oppose voucher programs,¹⁰⁰ which stands in stark contrast to the voucher proponents' narrative that these programs offer parents better choices to suit their children's needs.¹⁰¹ Most notably, the National Council on Disability (NCD)¹⁰² highlighted several concerns about special education voucher programs in its 2012 report to President Obama and Congress.¹⁰³ In the report, the NCD noted "several areas of concern." The NCD reported that private schools accepting vouchers (1) require students relinquish their rights under the IDEA; (2) have higher tuition than the dollar amount vouchers cover; (3) have a history of refusing admission to students with disabilities; and (4) lack a "demonstrable commitment to the IDEA principle of accountability in results."¹⁰⁴ To address the detrimental effects these programs have on students with disabilities, the NCD made two recommendations. First, recipients of vouchers should not be required to forfeit their rights under the IDEA and schools that accept state funds should be mandated to publish assessment scores, graduation

99. *Id.*

100. See Wendy F. Hensel, *Recent Developments in Voucher Programs for Students with Disabilities*, 59 LOY. L. REV. 323, 351–53 (2013); see also *Milwaukee Voucher Schools Still Discriminate Against Students with Disabilities*, ACLU OF WIS. (July 19, 2015), <http://www.aclu-wi.org/media/milwaukee-voucher-schools-still-discriminate-against-students-disabilities> (discussing continued discrimination after ACLU filed complaint with the U.S. Department of Justice Civil Rights Division because students with disabilities were told not to apply for vouchers because the schools could not serve them, or, if admitted, did not provide the support and accommodations these students required); *AGAINST House Bill 1335, "Special Education Vouchers," RAISE YOUR HAND TEX.* (Apr. 27, 2017), <https://www.raiseyourhandtexas.org/key-issues/testimony/house-bill-1335-special-education-vouchers> (testimony of Dr. Ann Smisko before the Texas House Committee on Public Education against special education vouchers); *Vouchers*, COUNCIL OF PARENT ATTYS & ADVOCs., INC., <http://www.copaa.org/page/Voucher> (last visited Aug. 17, 2018) (recommending against vouchers because "[f]ar too many students are being forced to relinquish important civil rights in order to access public education funds").

101. See CHILDREN'S EDUC. SERVS., *supra* note 91 (purporting to address the "myth" that "private schools cannot serve and exclude students with special needs").

102. The NCD is an independent federal agency tasked with annual reporting "on the nation's progress in achieving our national disability policy goals. NAT'L COUNCIL ON DISABILITY, *supra* note 88, at 1. The national disability policy goals are "equality of opportunity, independent living, full participation and economic self-sufficiency for an estimated 54 million Americans with disabilities." *Id.*

103. *Id.* at 60–61.

104. *Id.*

rates, and other outcomes concerning disabled students. students with disabilities.¹⁰⁵ The NCD cautioned that publicly-funded vouchers should not be used to create a “*segregated educational system* for students with disabilities.”¹⁰⁶ Second, the NCD called on the Department of Education (ED) and the Department of Justice (DOJ) to issue guidance “to clarify the civil rights violations that may be linked to creating a publicly financed . . . segregated educational system for students with disabilities,” including the creation of programs that segregate “on the basis of a specific disability or disability status more generally.”¹⁰⁷ As of 2018, neither department has acted on this request.¹⁰⁸

*C. Support for Federally Funded Vouchers
Under the Trump Administration*

Like many of the Trump administration’s other first-term priorities, the push to create a federally funded school voucher program began as a promise on the campaign trail.¹⁰⁹ Although then-candidate Trump was “all over the map” during the campaign on educational policies, his “signature education proposal” was to provide \$20 billion in federal funds to support a national voucher program with income-based eligibility.¹¹⁰ To demonstrate this commitment, President Trump nominated Betsy DeVos to lead the Department of Education (ED) although she never attended a public school, nor sent her own children to public schools. Secretary DeVos is a billionaire who spent decades lobbying for the expansion of taxpayer funded voucher programs.¹¹¹

Throughout its first year, the Trump administration continued efforts to divert public funds to school choice programs. In his first ever speech to Congress as President, Trump called for an education

105. *Id.* at 61.

106. *Id.* (emphasis added).

107. *Id.*

108. NCLD Policy Team, *President’s FY19 Budget Doesn’t Add Up to Student Success*, NCLD (2018), <https://www.nclد.org/archives/action-center/what-we-ve-done/presidents-fy19-budget-doesnt-add-up-to-student-success>.

109. Stephanie Saul, *Where Donald Trump Stands on School Choice, Student Debt and Common Core*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/us/where-trump-stands-on-school-choice-student-debt-and-common-core.html>; *Trump Promise Checker*, WASH. POST (Apr. 30, 2018), <https://www.washingtonpost.com/graphics/politics/trump-promise-tracker> [hereinafter *Trump Promise Checker*].

110. Saul, *supra* note 109.

111. U.S. DEP’T OF EDUC., AN OVERVIEW OF THE U.S. DEP’T OF EDUCATION (2010), <https://www.ed.gov/about/overview/focus/what.html>.

bill that funds school vouchers for disadvantaged youth.¹¹² However, other acts undertaken by the administration which were perceived to be more controversial overshadowed the calls for vouchers in the administration's first year.¹¹³ Furthermore, in her first budget plan for the ED, Secretary DeVos proposed to shift \$1.4 billion from federal funding of public school to private school vouchers and "other alternatives to traditional public schools."¹¹⁴ Although Congress ultimately rejected this proposal,¹¹⁵ Secretary DeVos has indicated she will continue to push for a federal voucher program.¹¹⁶

Secretary DeVos has also made it clear through her public remarks as Secretary of Education that she believes school vouchers are the best option for students with disabilities.¹¹⁷ This comes as no surprise; the voucher lobby organizations she launched and worked with previously have lobbied for special needs vouchers programs as part

112. Yamiche Alcindor, *Trump's Call for School Vouchers is a Return to a Campaign Pledge*, N.Y. TIMES (Mar. 1, 2017), <https://www.nytimes.com/2017/03/01/us/politics/trump-school-vouchers-campaign-pledge.html>.

113. Tessa Berenson, *Here Are the Promises President Trump Kept and Broke in His First Year*, TIME (Jan. 19, 2018), <http://time.com/5106302/donald-trump-first-year-promises>.

114. Emma Brown & Danielle Douglas-Gabriel, *Trump Seeks to Slash Education Department but Make Big Push for School Choice*, WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/local/education/trump-seeks-to-slash-education-department-but-make-big-push-for-school-choice/2017/03/15/63b8b6f8-09a1-11e7-b77c-0047d15a24e0_story.

115. Moriah Balingit & Danielle Douglas-Gabriel, *Congress Rejects Much of Betsy DeVos's Agenda in Spending Bill*, WASH. POST (Mar. 24, 2018), <https://www.washingtonpost.com/news/education/wp/2018/03/21/congress-rejects-much-of-betsy-devoss-agenda-in-spending-bill>.

116. See Erica L. Green, *Betsy DeVos Allies See New Obstacle to School Choice Efforts: Trump*, N.Y. TIMES (Dec. 2, 2017), <https://www.nytimes.com/2017/12/02/us/politics/betsy-devos-school-choice-vouchers-trump.html> (remarking how DeVos has reassured her supporters that she has not been deterred); Kimberly Hefling & Caitlin Emma, *How Betsy DeVos Softened her Message on School Choice*, POLITICO (Feb. 7, 2018, 7:01 PM), <https://www.politico.com/story/2018/02/07/betsy-devos-school-choice-education-397633> (discussing how DeVos is deliberately softening rhetoric on school choice to avoid detractors); see also Stahl, *supra* note 1 (stating that Secretary DeVos is striving for parents to be able to choose where to send their children to school); Erica L. Green, *In Her Words: Education Secretary Betsy DeVos Assesses a Year on the Job*, N.Y. TIMES (Feb. 9, 2018), <https://www.nytimes.com/2018/02/09/us/politics/betsy-devos.html> (discussing how Secretary DeVos has not stopped fighting for the expansion of school choice).

117. See Valerie Strauss, *The Deep Irony in Betsy DeVos's First Speech on Special Education*, WASH. POST (July 18, 2017), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/07/18/the-deep-irony-in-betsy-devoss-first-speech-on-special-education> (noting that Secretary DeVos ignored that most special education children attend public schools, which lack needed resources, and instead focused on school choice).

of their broader agenda.¹¹⁸ Ironically, Secretary DeVos championed the parents involved in the 2017 Supreme Court decision on the IDEA for their “courage” to enroll their son in a private school while touting the importance of school choice programs.¹¹⁹ In reality, if these parents had accepted a voucher instead of enforcing their son’s rights under the IDEA, they would have waived the right to litigate the issue and receive compensation for the entire cost of the private school tuition.¹²⁰

Thus, despite being championed as a free-market solution to the education of American children, vouchers have an ugly history in this country. The Supreme Court nonetheless concluded that these programs do not run afoul of the U.S. Constitution and recently indicated it will not uphold state Blaine provisions that state courts previously used to invalidate voucher programs. And, therefore, in the current climate, a federally funded voucher program will likely survive any challenges based on the separation of church and state.

II. SPECIAL EDUCATION POLICY AND LEGAL HISTORY

Over the past thirty years, the number of children requiring special education services in the United States has risen by over two million.¹²¹ This is largely due to the increase in identified developmental disabilities.¹²² As a result, by 2015, 6.7 million children, or thirteen percent of all public school students in America, received special education services.¹²³ These children enjoy a right to education under federal law;¹²⁴ however, special education voucher programs require children with disabilities to effectively waive these rights upon accepting a voucher because private schools are not accountable to the same federal disability laws as public schools. This section

118. *Background on Betsy DeVos from the ACLU of Michigan*, ACLU OF MICH., <https://www.aclu.org/other/background-betsy-devos-aclu-michigan> (last visited Aug. 17, 2018); NAT’L COUNCIL ON DISABILITY, *supra* note 88, at 61.

119. Strauss, *supra* note 117.

120. *See infra* Section III.

121. NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., CHILDREN AND YOUTH WITH DISABILITIES tbl. 204.30, https://nces.ed.gov/programs/coe/indicator_cgg.asp (last visited Aug. 17, 2018) (stating that the number of students who received special education services increased from 4,144,000 in the 2001–2002 school year to 6,677,000 in the 2015–2016 school year).

122. *Id.* (“In school year 2015–2016, a higher percentage of students ages [three]-[twenty-one] received special education services under the IDEA for specific learning disabilities [thirty-four percent] than for any other type of disability.”).

123. *Id.*

124. *See* 20 U.S.C. § 1400(d)(1)(A) (2012) (ensuring that all children with disabilities have access to free and appropriate public education).

provides a brief history of federal laws governing education, a discussion of special education law, an analysis of the Supreme Court's interpretation of the law, and an examination of how these laws are significantly limited in the realm of privatized education.

A. *The Origins of Federal Special Education Policy*

For most of the twentieth century, public school children with disabilities were denied legal protection. In 1954, the Supreme Court made the groundbreaking declaration that separating children of different races in public education is "inherently unequal."¹²⁵ However, it took another twenty years for the federal courts to address the exclusion of children with disabilities from public school systems across America.¹²⁶ Before the courts and Congress finally addressed the issue in the 1970s, millions of children with disabilities received little access—and often no access at all—to educational opportunities.¹²⁷ In 1967, state institutions housed nearly 200,000 individuals with disabilities.¹²⁸ These institutions provided "only minimal food, clothing, and shelter," and no education or rehabilitation services.¹²⁹ In 1970, only one in five children with a disability was educated at a public school.¹³⁰ Many states excluded all children who were blind, deaf, emotionally disturbed, or intellectually disabled.¹³¹ While Congress passed laws increasing educational opportunities for children with disabilities throughout the 1950s and 1960s,¹³² it was the federal courts that brought truly significant change in the early 1970s.¹³³ In *Pennsylvania Association for Retarded Children v. Commonwealth*, a federal district court held for the first time that children with intellectual disabilities who have been excluded from public education have a

125. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

126. *The IDEA 40th Anniversary*, U.S. DEP'T OF EDUC., <https://www.ed.gov/about/offices/list/osers/idea40> (last modified Dec. 1, 2015) (celebrating President Ford signing the Education for All Handicapped Children Act (Pub. L. 94-142) into law on November 29, 1975).

127. U.S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 3 (2010) [hereinafter THIRTY-FIVE YEARS].

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 4 (listing legislative efforts including the Training of Professional Personnel Act of 1959 (Pub. L. 86-158), the Teachers of the Deaf Act of 1961 (Pub. L. 87-276), and the Elementary and Secondary Education Act of 1965 (Pub. L. 89-10)).

133. *Id.* at 5.

colorable due process claim.¹³⁴ The panel concluded that excluding students with disabilities from public schools created “such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard.”¹³⁵

Later that year, the United States District Court for the District of Columbia held that the D.C. Board of Education violated the Due Process Clause when it expelled students with disabilities without a prior hearing.¹³⁶ In support of its holding,¹³⁷ the district court quoted lengthy passages from both *Brown v. Board of Education*¹³⁸ and *Bolling v. Sharpe*.¹³⁹ The judge evoked the Supreme Court’s reasoning that education “must be made available to all on equal terms”¹⁴⁰ because to do otherwise imposes on the excluded children “an arbitrary deprivation of their liberty in violation of the Due Process Clause.”¹⁴¹

In the wake of these decisions, Congress began examining the plight of children with disabilities in the American education system.¹⁴² The investigation found that millions of children were not receiving an appropriate education, resulting in long-term societal costs.¹⁴³ The investigation found that:

of the more than 8 million children . . . with [disabilities] requiring special education and related services, only 3.9 million such children are receiving an appropriate education. 1.75 million [children with disabilities] are receiving *no educational services* at all, and 2.5 million [children with disabilities] are receiving *an inappropriate education*.¹⁴⁴

134. *Pennsylvania Ass’n for Retarded Children v. Commonwealth*, 343 F. Supp. 279, 293 (E.D. Pa. 1972) (“We begin with the contention that due process requires a hearing before retarded children may be denied a public education. It is not disputed that prior to this suit, parents of retarded children who are plaintiffs were not afforded a hearing or, in many instances, even notice of their child’s exclusion from public school.”).

135. *Id.* at 295 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971)) (holding that it was a due process violation for the police to post a notice at all retail liquor establishments forbidding sales to a Mrs. Constantineau because of her “excessive drinking”).

136. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 868, 875 (D.D.C. 1972) (holding that children labeled as “behavioral problems, mentally retarded, emotionally disturbed or hyperactive” have a right to publicly supported education).

137. *Id.* at 874–75.

138. 347 U.S. 483 (1954).

139. 347 U.S. 497 (1954).

140. 348 F. Supp. at 875 (quoting *Brown*, 347 U.S. at 493).

141. *Id.* (quoting *Bolling*, 347 U.S. at 500).

142. See S. REP. NO. 94-168, at 7 (1975) (explaining that the Senate investigation will help ensure that new federal legislation “will result in maximum benefits to [children with disabilities] and their families”).

143. *Id.* at 9–10; see also PETER W.D. WRIGHT & PAMELA DARR WRIGHT, *WRIGHTSLAW: SPECIAL EDUCATION LAW* 14 (2d ed. 2007).

144. S. REP. NO. 94-168, at 9 (emphasis added).

The investigation further determined that, at best, it would cost taxpayers billions of dollars to maintain the children who were not being educated “in a minimally acceptable lifestyle.”¹⁴⁵ Furthermore, Congress determined that these children may be “needlessly . . . forced into institutional settings” where “billions of dollars are expended each year to maintain persons in these subhuman conditions.”¹⁴⁶ In response, Congress passed the Education of All Handicapped Children Act of 1975 (EAHCA),¹⁴⁷ the first iteration of what later became the IDEA, which codified the right to a free appropriate public education for every child with a disability across the country.¹⁴⁸

B. The Substantive Rights for Children with Disabilities in Federal Law

This section will first briefly describe federal protections for individuals with disabilities that intersect with education. Next, this section will discuss the rights bestowed by the IDEA on students with disabilities in public schools, and the IDEA’s process for resolving disputes about whether schools are respecting those rights. This section will then explain the crucial differences between the IDEA protections, and those provided by section 504 and the ADA. This section will also describe the extent these federal disability laws apply to private elementary and secondary schools.

1. Federal protections for individuals with disabilities that intersect with education

A year before Congress directly addressed disability discrimination in public education, it sought to protect individuals with disabilities from

145. *Id.* at 10.

146. *Id.*

147. Education for all Handicapped Children Act of 1975, Pub. L. 94-142 § 3(c), 89 Stat 733 (1975) (current version at 20 U.S.C. § 1400(d) (2012)). To improve the lack of access to education identified by Congress, EAHCA set forth four primary purposes of federal special education legislation. *Id.* First, to assure that children with disabilities have access to “a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.” *Id.* Second, “to assure that the rights of [children with disabilities] and their parents . . . are protected.” *Id.* Third, “to assist States and localities to provide for the education of all [children with disabilities].” *Id.* Fourth, “to assess and assure the effectiveness of efforts to educate [children with disabilities].” *Id.* As the law evolved through the 1980s and 1990s, provisions were added to govern the following: early intervention programs and services from birth to the age of three; transition services and planning from high school to adult living; integration of students with disabilities into general education classrooms; and disparities in the education of minority children with disabilities. THIRTY-FIVE YEARS, *supra* note 127, at 6–7.

148. Pub. L. 94-142 § 3(c), 89 Stat 733 (1975).

discrimination by any government agencies or programs receiving federal funds, by enacting the first major federal legislation to address disability discrimination in the United States.¹⁴⁹ Section 504 prohibits any agency that receives federal funding from discriminating against qualified persons with disabilities in its employment, programs, or services.¹⁵⁰ It applies to all institutions that receive federal funding, including public school districts, higher education institutions, and “other state and local education agencies”.¹⁵¹ However, it does not protect individuals with disabilities from acts of private discrimination by private employers, programs, or facilities.¹⁵² Disability rights advocates therefore continued to lobby for more comprehensive legislation.¹⁵³

Nearly twenty years later, these lobbying edits bore fruit in the form of the ADA. Modeled after the Civil Rights Act of 1964,¹⁵⁴ Congress passed the ADA “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹⁵⁵ The regulations under Title II of the ADA prohibit discrimination by state and local governments, and the regulations under Title III prohibit discrimination by public accommodations, including businesses and non-profit service providers.¹⁵⁶ Public schools, as a part of state or local government, are therefore prohibited from discriminating on the basis of disability under Title II. Moreover, the Title III definition of public accommodations includes “a nursery, elementary, secondary, undergraduate, or post-graduate private school, or other place of education.”¹⁵⁷

149. RANDY S. CHAPMAN, *THE EVERYDAY GUIDE TO SPECIAL EDUCATION LAW: A HANDBOOK FOR PARENTS, TEACHERS AND OTHER PROFESSIONALS* 81 (2d ed. 2008).

150. 29 U.S.C. § 794(a) (2012) (providing that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency”).

151. *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, U.S. DEP’T OF EDUC., <https://www.ed.gov/about/offices/list/ocr/504faq.html> (last visited Aug. 17, 2018) [hereinafter *Protecting Students with Disabilities*].

152. § 794(a).

153. See Americans with Disabilities Act, 42 U.S.C. § 12101 (2012) (extending more comprehensive legal protections to persons with disabilities in 1990).

154. *Introduction to the ADA*, DEP’T OF JUST., https://www.ada.gov/ada_intro.htm (last visited Aug. 17, 2018) [hereinafter *Introduction to the ADA*].

155. 42 U.S.C. § 12101(b)(1).

156. *Introduction to the ADA*, *supra* note 154.

157. 28 C.F.R. § 36.104 (2017).

While the ADA contains strong prohibitions against discrimination by public accommodations, religious entities—including religious private schools—are exempt from the ADA's requirements.¹⁵⁸ Under the ADA, a religious entity is defined broadly as “a religious organization, including a place of worship.”¹⁵⁹ According to a 2014 survey by the ED, approximately sixty-nine percent of private schools in the United States—enrolling roughly 3.6 million students—are religious and, therefore, exempt from the ADA.¹⁶⁰

2. *The IDEA*

While section 504 and the ADA provided important prohibitions against discrimination on the basis of disability, neither specifically addressed disability discrimination in education. Congress finally addressed this by passing the IDEA. The IDEA was specifically designed to combat the pervasive problems of exclusion and segregation inhibiting access to education for children with disabilities.¹⁶¹ It regulates the education of children with disabilities to ensure they have the equal access to public education due to them under the Fourteenth Amendment.¹⁶² The IDEA does this in four ways. First, it establishes the core right of a “free appropriate public education,” (FAPE) and defines associated key concepts.¹⁶³ Second, it abrogates state sovereign immunity from suit.¹⁶⁴ Third, the IDEA creates the Office of Special Education Programs within the ED to administer and carry out its functions and processes.¹⁶⁵ Finally, the IDEA allocates federal funding to supplement states' per-pupil spending for students with disabilities.¹⁶⁶

The IDEA applies to students who have a qualifying disability.¹⁶⁷ The law ensures children with disabilities have access to meaningful educational

158. § 36.102(e).

159. § 36.104.

160. *Statistics About Nonpublic Education in the United States*, OFF. OF NON-PUB. EDUC., www.ed.gov/about/offices/list/oii/nonpublic/statistics.html (last visited Aug. 17, 2018). In contrast, of the 31.3% nonsectarian private schools, only 4.8% focus on special education. *Id.*

161. THIRTY-FIVE YEARS, *supra* note 127, at 5–6.

162. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

163. 20 U.S.C. §§ 1400–01 (2012).

164. § 1403.

165. § 1402.

166. § 1411. Although Congress promised to fund “[forty] percent of the average cost to educate a child with disabilities” when it initially passed the law in 1975, as of February 2018, “the Federal Government pays less than half of what it originally promised in 1975.” NAT'L COUNCIL ON DISABILITY, *BROKEN PROMISES: THE UNDERFUNDING OF IDEA 1* (2018) [hereinafter *BROKEN PROMISES*].

167. 20 U.S.C. § 1401(3)(A)–(B).

opportunities through a number of requirements and protections. The IDEA requires schools to provide students with a “least restrictive” educational environment¹⁶⁸ and develop an IEP to address the specific needs of each qualifying student.¹⁶⁹ The IDEA also imposes strict rules governing suspensions and expulsions of students with a disability.¹⁷⁰ Moreover, although the IDEA does not expressly govern private schools,¹⁷¹ it does impose some responsibilities on public agencies for children with disabilities that attend private schools.¹⁷²

a. Key definitions, purpose, and process

The IDEA establishes several key requirements to achieve its mission of improving educational access for children with disabilities. These include creating the right to a free appropriate public education defining who is a “child with a disability.”¹⁷³ The IDEA’s stated purpose is ensuring a free appropriate public education for children with disabilities,¹⁷⁴ and defines a “free appropriate public education” as:

special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.¹⁷⁵

The term “child with a disability” refers to any child who (1) has a disability that falls in one of ten categories,¹⁷⁶ and (2) “by reason thereof, needs special education and related services.”¹⁷⁷ For children aged three through nine, the term may also include a child with any developmental

168. § 1412(a)(5)(A).

169. § 1414(d).

170. § 1415(k).

171. Elementary and Secondary Schools are nonprofit institutional day or residential schools, including charter schools, that provide the respective level of education as determined by state law. § 1401(6), (27). Although discussed in the Act, “private school” is not a defined term. § 1401.

172. § 1401(32) (defining “State educational agency”).

173. § 1401(3), (9).

174. § 1400(d)(1)(A).

175. § 1401(9).

176. The ten categories of disability set forth in the IDEA are: intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities. *Id.* § 1401(3)(A).

177. *Id.*

delay that requires “special education and related services” at the discretion of the State and local educational agency.¹⁷⁸

Under the IDEA, school districts and state educational agencies have an obligation to locate and identify all children with disabilities in the state through a process called “child find.”¹⁷⁹ The initial evaluation process has two goals. First, the school agency must determine whether the child has a disability that makes that child eligible for special education under the IDEA.¹⁸⁰ Second, the school agency must establish the content of the child’s IEP.¹⁸¹ To do this, the school agency must identify the child’s present levels of performance and the child’s needs in order to progress in a general education setting or other appropriate placement.¹⁸²

Before the initial evaluation takes place, the school must acquire the written informed consent of the child’s parents.¹⁸³ The school district is required to “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent” in the evaluation process.¹⁸⁴ Once the assessments are completed, a team of professionals and the parents of the child meet to determine whether the child has a disability under the IDEA and, if so, the educational needs of the child.¹⁸⁵ After the initial evaluation and commencement of services, the IDEA requires a school district to re-evaluate the child at least every three years, or whenever a member of the IEP team¹⁸⁶—such as a parent or school

178. *Id.* § 1401(3)(B).

179. § 1412(a)(3); *see also* Pamela Wright & Pete Wright, *The Child Find Mandate: What Does It Mean to You?*, WRIGHTSLAW, <http://www.wrightslaw.com/info/child.find.mandate.htm> (last revised Sept. 26, 2007).

180. § 1412(a)(3)(A).

181. Section 1412(a)(4) states that an IEP must meet the eight content requirements listed § 1436(d).

182. § 1412(a)(4).

183. § 1414(a)(1)(D)(i)(I). It is important to note that at this stage, the parent is consenting to the evaluation only. The school district must receive separate consent from parents after the IEP is drafted to deliver any special education services. CHAPMAN, *supra* note 149, at 21.

184. § 1414(b)(2)(A).

185. § 1414(b)(4)(A). Children that are referred before kindergarten are often evaluated by a “child find team” for the school district, consisting of educational and therapy professionals like speech pathologists, occupational therapists, and psychologists that can perform the multi-disciplinary assessments. *See* Wright & Wright, *supra* note 179 (describing the “child find” process for infants and children under three years of age).

186. Further, the IEP is crafted by an IEP team which must include the parents of the child with a disability, general and special education professionals, and a qualified representative for the school district who has knowledge regarding specially

administrator—requests it.¹⁸⁷ The school district must also re-evaluate a student before the IEP team can determine that the child no longer has a qualifying disability, which would render that child no longer eligible for special education, services, and other protections under the IDEA.¹⁸⁸

Once a child with a disability has been identified through the initial evaluation, the IDEA requires that the school provide the child with the “special education” and other “related services” and support that particular child needs in order to receive a free appropriate public education. These requirements are described in the child’s IEP.¹⁸⁹ Special education “means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”¹⁹⁰ The related services required by the IDEA consist of “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education.”¹⁹¹ For example, suppose a child cannot complete written work because she cannot properly grip a pencil. Occupational therapy that teaches the student how to grip a pencil would constitute a supportive service that is required

designed instruction, the general education curriculum, and the school district’s resources. Other individuals with special knowledge or expertise about the child may be included on the IEP team at the discretion of the parents or school. For example, the team could include the student’s private therapist and, whenever appropriate, the child herself. The statute specifies:

- (i) the parents of the child with the disability; (ii) not less than [one] regular education teacher . . . (if the child is, or may be participating in the regular [classroom]); (iii) not less than [one] special education teacher . . . ; (iv) a representative of the local educational agency who is qualified to provide, or supervise the provision of, specially designed instruction . . . is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources at the local educational agency; (v) an individual who can interpret the instructional implications of evaluation results; and (vi) other individuals with special knowledge or expertise regarding the child

§ 1414(d)(1)(B).

187. § 1414(a)(2)(A)–(B).

188. § 1414(c)(5)(A).

189. § 1401.

190. § 1401(29).

191. § 1401(26)(A). The definition provides a comprehensive list of “developmental, corrective, and other supportive services,” including: “speech-language pathology and audiology services; interpreting services; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; social work services; and school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child; counseling services, including rehabilitation counseling, orientation and mobility services; and medical services, except that such medical services shall be for diagnostic and evaluation purposes only.” *Id.*

for the child to benefit from her special education. This occupational therapy would therefore be part of the specially designed instruction that the school has to provide under the child's IEP.

A school district must also provide "supplementary aids and services" to enable students with disabilities to succeed in general education classrooms.¹⁹² These are "aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate."¹⁹³

School districts often provide "supplementary aids and services" in the form of "accommodations" and "modifications."¹⁹⁴ Although they are similar, accommodations and modifications serve distinct purposes. A "modification" changes the curriculum to enable a student to engage with the same subject matter as the rest of the class at a level appropriate for that child's cognitive ability.¹⁹⁵ For example, a student in a World History class may be given a shorter, easier reading assignment about Ancient Egypt than her peers.¹⁹⁶ "Accommodations," in contrast, are alterations in the classroom environment, content format, or equipment which enable a student with a disability to engage with the same curriculum as the rest of his or her peers.¹⁹⁷ Accommodations may include extra time for testing, sign-language interpretation services, or large print materials.¹⁹⁸ A child with a disability may also use an "assistive technology device," which is defined as "any item, piece of equipment, or product system . . . that is used to increase, maintain, or improve functional capabilities of a child with

192. *See id.* § 1412(a)(5) (requiring that schools receiving financial assistance place children with disabilities in the least restrictive environment).

193. § 1401(33).

194. *See* 34 C.F.R. § 300.320(a)(4)–(7) (2017) (mandating that the IEP be in writing and contain a description of the supplementary aids and services, modifications, and accommodations that are necessary for a child with disabilities to achieve his or her learning objectives).

195. *What is the Difference Between Accommodation and Modification for a Student with a Disability?*, DISABILITIES, OPPORTUNITIES, INTERNETWORKING, & TECH. (DO IT) (June 28, 2017), <https://www.washington.edu/doi/what-difference-between-accommodation-and-modification-student-disability> [hereinafter DO IT].

196. *See* Erich Strom, *The Difference Between Accommodations and Modifications*, UNDERSTOOD, <https://www.understood.org/en/learning-attention-issues/treatments-approaches/educational-strategies/the-difference-between-accommodations-and-modifications> (last visited Aug. 17, 2018) (providing examples of accommodations versus modifications in classroom instruction, classroom tests, standardized testing, and "special" classes like gym, music, and art).

197. DO IT, *supra* note 195.

198. *See id.* (listing computer text-to-speech systems and alternative keyboards as additional examples of accommodations).

a disability” as an accommodation.¹⁹⁹ For example, a child with a disability that impairs his handwriting may use the talk-to-text feature on a computer to complete assignments that are normally handwritten.

The specific mechanism for providing each child with his or her free appropriate public education is an Individualized Education Plan, or IEP. The IEP is a detailed and comprehensive document of a student’s individual educational needs that must include statements of:

- (1) the child’s present levels of academic achievement and functional performance;²⁰⁰
- (2) measurable annual goals, including academic and functional goals;²⁰¹
- (3) description of the child’s progress toward meeting the annual goals;²⁰²
- (4) the special education and related services, supplementary aids and services, and modifications the school will provide the child to “advance appropriately toward attaining the annual goals” and “to be involved in and make progress in the general education curriculum . . . and to participate in extracurricular and other nonacademic activities;²⁰³
- (5) the extent, if any, to which the child will not participate with nondisabled children in the regular class and extracurricular and other nonacademic activities;²⁰⁴
- (6) any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance on State and districtwide assessments;²⁰⁵ and
- (7) the projected date for the beginning of the services and modifications . . . and the anticipated frequency, location, and duration of those services and modifications.²⁰⁶

199. 20 U.S.C. § 1401(1)(A) (2012).

200. § 1414(d)(1)(A)(i)(I). This statement must include how the child’s disability affects their “involvement and progress in the general education curriculum.” § 1414(d)(1)(A)(i)(I)(aa).

201. § 1414(d)(1)(A)(i)(II). These goals must be crafted to “meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child’s other educational needs that result from the child’s disability.” *Id.*

202. *See id.* § 1414(d)(1)(A)(i)(III) (requiring that the IEP also establish when periodic reports on the child’s progress will be issued).

203. § 1414(d)(1)(A)(i)(IV).

204. § 1414(d)(1)(A)(i)(V).

205. *See* § 1414(d)(1)(A)(i)(VI) (mandating that the IEP also include any modifications to the standardized testing process, such as taking an alternate assessment).

206. § 1414(d)(1)(a)(i)(VII).

Finally, the IDEA outlines which agencies are responsible for implementing the law at the state and federal level. Because education systems vary from state to state, the IDEA uses generalized terms to describe the educational agencies at the local and state level responsible for providing free appropriate public education to children with disabilities.²⁰⁷ The “state educational agency” is the state’s highest governing agency, typically a state department of education, that is “primarily responsible for the State supervision of public elementary schools and secondary schools.”²⁰⁸ The state educational agency is responsible for ensuring state-wide procedural compliance with the IDEA and academic achievement consistent with the mission of the IDEA.²⁰⁹ A “local educational agency,” typically a school district, is a “public board of education or other public authority legally constituted within a State” to control or direct “public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State.”²¹⁰ The local educational agency is primarily responsible for identifying students with disabilities within its borders and developing and administering IEPs for each student with a disability who attends a school within its school system.²¹¹ “Educational service agency” is a broad term that encompasses any public administrative agency authorized by state law to manage and assist local educational agencies in overseeing a public school.²¹² At the federal level, the IDEA is enforced by the ED’s Office of Special Education Programs (OSEP).²¹³ OSEP is charged with “administering and carrying out [the IDEA] and other programs and activities concerning the education of children with disabilities.”²¹⁴

b. The least restrictive environment requirement

A core tenet of the IDEA is the principle that students with disabilities have the right to be educated in the “least restrictive environment”—attending their neighborhood schools and integrating into general

207. See § 1401(19)(A) (defining a “local educational agency” as a public board of education “or other public authority” involved in directing schools; see also *id.* § 1401(19)(B) (including “any other public institution or agency” directing education within the definition of an “educational service agency”).

208. § 1401(32).

209. § 1412(11).

210. § 1401(19)(A).

211. § 1412.

212. § 1401(5).

213. § 1402(a).

214. *Id.*

education classrooms—to the maximum extent possible.²¹⁵ Consequently, a school must first consider providing supplementary services in the regular classroom before it may separate a student from her peers.²¹⁶

Circuit courts are split three ways on how to apply the IDEA's least restrictive environment mandate. Firstly, the Third, Fifth, and Tenth Circuits use a two-part test first enunciated in *Daniel R.R. v. Board of Education*.²¹⁷ Under this test, the court first assesses whether a school can provide an appropriate education in a regular classroom through the use of supplemental aids and services. If the court concludes this is not possible, the court next determines whether the school district has "mainstreamed the child to the maximum extent appropriate."²¹⁸ In applying the second part of the test, the court considers the following non-exhaustive factors: first, steps the school district has taken to accommodate the child in the regular classroom; second, comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; third, the child's overall regular educational experience, including non-academic benefits; and finally, the effect that the disabled student's presence in the regular classroom will have on that classroom.²¹⁹

Secondly, the Ninth, Eleventh, and Seventh Circuits use a slight variant of the *Daniel R.R.* test. Courts in these circuits apply the two-part test described above, but when applying the second part of the

215. See *id.* § 1412(5). "To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* Furthermore, in *L.B. ex rel. K.B. v. Nebo School District*, the Tenth Circuit stated that, "[e]ducating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements." 379 F.3d 966, 976 (10th Cir. 2004) (citing *Murray v. Montrose Cty. Sch. Dist.*, 51 F.3d 921, 926 (10th Cir. 1995)).

216. CHAPMAN, *supra* note 149, at 13. The IDEA provides "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(A).

217. 874 F.2d 1036, 1048–49 (5th Cir. 1989).

218. *L.B.*, 379 F.3d at 976 (citing *Murray v. Montrose Cty. Sch. Dist.*, 51 F.3d 921, 926 n.10 (10th Cir. 1995)) (quoting *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1038 (5th Cir. 1989)).

219. *Id.* (citing *Murray*, 51 F.3d at 926 n.10; *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216–17 (3d Cir. 1993); *Daniel R.R.*, 874 F.2d at 1048–50)).

test, they also balance the educational benefits of the child with a disability against the cost to the school district of doing so.²²⁰

Finally, the Fourth, Sixth, and Eighth Circuits employ a single-part test for assessing the least restrictive environment requirement. In these circuits, “[i]n a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting.”²²¹ If these services can be provided in a regular classroom, then placing the student in a separate classroom violates the least restrictive environment requirement.²²²

As the Tenth Circuit points out, the test used by the Fourth, Sixth, and Eighth Circuits only applies when the segregated facility is considered superior, and is therefore at odds with the mission of the IDEA.²²³ Thus, the majority of Circuits appropriately use the *Daniel R.R.* test and accompanying factors to determine if a school district has complied with the least restrictive environment mandate.

c. The Individualized Education Program

The next vital component of the IDEA are the specific requirements that govern the process of creating and documenting an IEP. As discussed above, the IEP must include several components that capture the child’s current abilities and goals for the next academic year.²²⁴ When developing the IEP, the team must consider the child’s strengths, the parents’ concerns for “enhancing the education of their child,” the child’s most recent evaluation by the school district, and “the academic, developmental, and functional needs of the child.”²²⁵ The IEP must include a description of the supplementary aids and services that the school will provide for the student, along with any modifications or accommodations.²²⁶

The IDEA also sets forth clear guidelines regarding the IEP for transfer students, both within the same state and from out of state;²²⁷

220. See *id.* at 976–77 (referencing *Sch. Dist. of Wis. Dells v. Littlegeorge*, 295 F.3d 671 (7th Cir. 2002); *Sacramento City Unified Sch. District v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 697 (11th Cir. 1991)).

221. *DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989); *A.W. v. N.W. R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

222. *Roncker*, 700 F.2d at 1063.

223. See *id.* (noting that, alternatively, the *Daniel R.R.* test is applicable in all cases and conforms with the language and goals of IDEA).

224. 20 U.S.C. § 1414(d)(1)(A)(i)(I)–(II) (2012).

225. § 1414(d)(3)(A).

226. § 1414(d)(1)(A)(i)(IV).

227. § 1414(b)(3)(D).

transition services for matriculation planning;²²⁸ and the process for review, revising, and amending the IEP.²²⁹

d. Procedural and disciplinary protections

The IDEA provides procedural safeguards to ensure that schools do not deprive students with disabilities of a free appropriate public education.²³⁰ The school systems must give parents an opportunity to review all school records “with respect to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to such child.”²³¹ They require that parents receive “written prior notice,” in their native language, whenever the school system proposes or refuses to initiate or change “the identification, evaluation, or educational placement of the child, or the provision of free appropriate public education to the child.”²³² The IDEA also establishes procedures to protect children whose parents are not known, or cannot be located.²³³ The state may appoint a surrogate who is involved in the education or care of the child but does not work for any of the educational agencies, state or local.²³⁴ Finally, the IDEA requires that schools give parents a copy of these procedural safeguards in their native language annually, or upon a referral or initial request for evaluation, filing a complaint, or request by the parent.²³⁵

A child’s disability may inhibit the child’s ability to comply with school behavior and conduct rules. For example, the disability may impair the extent to which the child can exercise self-control, understand the rules, or maintain focus and attention throughout the school day. For a student facing these challenges to have an opportunity to flourish in an educational environment, it is therefore crucial that they be protected from adverse consequences that interfere with their education and which stem from behavior that is an instantiation of their disability.²³⁶ Thus, the IDEA shields students by prohibiting the school from taking disciplinary action against a student whose conduct is a manifestation of

228. § 1414(d)(4)(A)(i).

229. § 1414(a)(2).

230. § 1415(a).

231. § 1415(b)(1).

232. § 1415(b)(3)–(4).

233. § 1415(b)(2)(A).

234. *Id.*

235. § 1415(d).

236. *See Honig v. Doe*, 484 U.S. 305, 309–10 (1988) (explaining congressional intent to provide procedural safeguards for emotionally disturbed and disabled children who were unilaterally excluded from the educational process under previous iterations of the IDEA and related legislation).

his disability.²³⁷ School personnel may not move a child to another setting or suspend a child for more than ten consecutive school days in the same school year, even if for separate incidents of conduct, without first conducting a hearing to determine if the behavior at issue is a manifestation of the child's disability.²³⁸ These hearings, known as manifestation determination hearings, are also required if a child is removed from the school through suspensions or being sent home for more than ten school days during any one school year.²³⁹ Once the hearing process is triggered, the IEP team, including the student's parents, must meet within ten school days to determine if the behavior was a manifestation of the student's disability or the result of the school agency's failure to implement the IEP.²⁴⁰ If the team determines that the violation was a manifestation of the disability or failure to implement the IEP, the student is entitled to return to the same school with a behavioral plan and supplementary aids and services, unless the IEP team agrees that the child's placement should be changed.²⁴¹ In *Honig v. Doe*,²⁴² the Supreme Court recognized that by creating this disciplinary procedural protection, "Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students."²⁴³

e. The IDEA and private schools

The IDEA does not govern private schools. The IDEA does, however, impose some obligations on public school districts with respect to children with disabilities within the district attending private school. These obligations may arise under one of three situations. First, a public school may place a student with a disability in a private school as a way of

237. 20 U.S.C. § 1415(k)(1)(E).

238. 34 C.F.R. § 300.530(b)(1) (2017).

239. § 300.530(b)(2). School officials may remove a student to an "interim alternative education setting for not more than [forty-five] school days" regardless of whether the behavior is a manifestation of the student's disability under "special circumstances," including: (1) possession of a weapon at school, on school premises, or at a local school function; (2) knowingly possessing, using, selling, or soliciting illegal drugs or a controlled substance at school, on school premises, or at a school function; or (3) inflicting serious bodily injury upon another person while at school, on school premises, or at a school function." *Id.* § 300.530(g).

240. § 300.530(e)(1).

241. § 300.530(e)-(f).

242. 484 U.S. 305 (1988).

243. *Id.* at 323. Justice Brennan, writing for the majority, referenced the *Mills* decision, which held that the District of Columbia violated the Equal Protection Clause by excluding 12,000 to 18,000 disabled students from public education without due process due to exclusions, suspensions, and expulsions based on disciplinary ground. *Id.* at 324.

meeting its core obligation under the IDEA to provide the student with a free appropriate public education.²⁴⁴ If the IEP team concludes that placement in a private school is the most effective way to provide the child free appropriate public education in the least restrictive environment, it may place the student in the private school—and, crucially, cover the cost of tuition at the private school.²⁴⁵ If the IEP team places a student in a private school, “the student is entitled to the same rights and services the student would receive if the student was placed in a public school.”²⁴⁶

Second, parents may choose to place their child in a private school because they believe the public schools are contravening their child’s right to free appropriate public education.²⁴⁷ Under these circumstances, a court may order the school district to reimburse the parents for private school tuition after a due process hearing,²⁴⁸ if the parents establish that the school agency did not make a free appropriate public education available to the child in a timely manner prior to enrollment in the private school.²⁴⁹

On the other hand, if a parent chooses to enroll a child in a private school for reasons other than a dispute over free appropriate public education, the IDEA offers little to no protection. Under the “child find” mandate, the school district has an obligation to locate, identify, and evaluate all children within its borders.²⁵⁰ This includes children whose parents choose to place their children in private schools, rather than in the public school system.²⁵¹ After the school district meets its “child find” obligation, however, its obligations towards private school students with disabilities differs drastically from its obligations to children with disabilities in the public school system.

244. 20 U.S.C. § 1412(a)(10)(B)(i) (2012).

245. *Id.* The IDEA describes this circumstance of private school placement as a “means of carrying out the requirements” of the IDEA by the state. *Id.*

246. CHAPMAN, *supra* note 149, at 75–76.

247. *See id.* at 76 (discussing parental placement as opposed to agency placement in a private school).

248. *See* discussion *infra* Section III.D.3.

249. 20 U.S.C. § 1412(a)(10)(C)(ii). Further, a court may reduce or deny reimbursement if: (1) the parents did not inform the IEP team, at the last meeting or within ten days of enrollment, that they were rejecting the proposal to provide FAPE, including their concerns and intent to enroll the child in a private school; (2) the agency told parents it intended to evaluate the child and the parents did not make the child available for evaluation; or (3) “upon a judicial finding of unreasonableness with respect to actions taken by the parents.” *Id.* § 1412 (a)(10)(C)(iii).

250. *See* discussion *supra* Section III.D.2.a.

251. § 1412(a)(10)(A)(ii)(I).

Although the district is required to provide a proportionate amount of IDEA funds to support services for children with disabilities, it has no individual obligation to children with disabilities enrolled in private schools.²⁵² That is, *none* of the comprehensive procedures, obligations, and protections described in detail above, apply to students enrolled in a private school. This includes students who are enrolled in a private school through a voucher program.

If, after the initial evaluation process, the evaluators determine that a child who is parentally enrolled in a private school has a disability covered by the IDEA, that child does not have an individual right to free appropriate public education.²⁵³ Moreover, parents who choose to enroll their child in a private school do not have any of the IDEA's procedural protections or due process rights regarding the education of their child with a disability.²⁵⁴ These parents cannot file a complaint under any part of the IDEA other than the "child find" process.²⁵⁵ In fact, most state departments of education have no authority to evaluate or explore complaints of any kind against private schools.²⁵⁶ The profound implications of the lack of protections children with disabilities voluntarily enrolled in private schools is explored in further detail in Part II.D.

252. 34 C.F.R. § 300.137 (2017).

253. *Id.*

254. *Id.* § 300.140.

255. *Id.*

256. *See, e.g., Colorado Non-Public Schools*, COLO. DEP'T OF EDUC., https://www.cde.state.co.us/choice/nonpublic_index (last visited Aug. 17, 2018) ("A non-public school is considered a private business. If you would like to file a complaint against a non-public organization, please contact the Attorney General's Consumer Fraud Unit."); *Opening a Private School*, FLA. DEP'T OF EDUC., <http://www.fldoe.org/schools/school-choice/private-schools/opening-a-private-school.stml> (last visited Aug. 17, 2018) ("Private Schools in Florida are not licensed, approved, accredited, or regulated by the State Board of Education or the local (school district) education agency."); *Nonpublic School Services: FAQ*, N.J. DEP'T OF EDUC., https://www.state.nj.us/education/nonpublic/faq.htm#Parent_Complaints_and_NJDOE_Regulatory_Authority (last visited Aug. 17, 2018) ("The NJDOE regulates the provision of state and federally funded programs to students in nonpublic schools. The NJDOE does not have the authority to intervene in matters of internal policy or parental disputes that are unrelated to the provision of these programs."); *Private Schools Frequently Asked Questions*, CAL. DEP'T OF EDUC., <https://www.cde.ca.gov/sp/ps/psfaq.asp> (last visited Aug. 17, 2018) ("Private schools function outside the jurisdiction of the California Department of Education (CDE) and most state education regulations. Private schools do not participate in California's educational accountability system and are directly accountable to students and their parents or guardians, based on the terms of the private school enrollment period.").

3. *The IDEA's dispute resolution processes*

Disputes and conflicts may arise among members of the IEP team. Not surprisingly, such disagreements arise most commonly between the school district representatives and the child's parents. Conflicts may arise, for example, during the IEP evaluation or re-evaluation process, over differences about whether a student is eligible for services, the appropriate level of services, or the appropriate placement for the child may come to fruition or during manifest determination hearings.

To resolve these disputes and conflicts, the IDEA outlines three formal processes: a state education complaint process, mediation or a due process hearing.²⁵⁷ Congress added the mediation procedures, which includes a mandatory dispute resolution session prior to a due process hearing, in the most recent iteration of the IDEA.²⁵⁸ Mediation procedures were added to encourage alternative dispute resolution outside of the costly formal hearing processes.²⁵⁹ Generally, the primary purpose of the three dispute resolution processes is to remedy deficiencies in an IEP or services.²⁶⁰ Typically, the remedies sought are compensatory services designed to compensate the child for services due under the IDEA that were not provided in violation of the law.²⁶¹ For example, if a child's IEP requires the school to provide two hours of speech therapy a week and those services were not provided for the first half of the school year, the school may need to provide four hours of speech therapy a week for the second half of the year—the two hours required by the IEP and two hours of compensatory time. In limited circumstances, monetary compensation may also be awarded.²⁶² For example, if the parents in the above scenario paid for private speech therapy when the school failed to meet its obligation under the IEP, a school district would be required to reimburse the parents for these costs in lieu of compensatory services.²⁶³ A school district may also be required to take additional future actions to meet its obligation to provide a free appropriate public

257. See 20 U.S.C. § 1415(c)(2) (2012) (complaint process); § 1415(e) (mediation); § 1415(f) (impartial due process hearing).

258. See CHAPMAN, *supra* note 149, at 48.

259. See *id.* at 50, 61.

260. See *id.* at 47 (“The procedural safeguards notice provides parents with the information they need if they disagree with actions of the school district or decisions of the IEP team.”).

261. See discussion *infra* Section III.D.3.

262. See 34 C.F.R. § 300.151(b) (providing that remedies for denial of appropriate services may include compensatory services or monetary reimbursement).

263. *Id.*

education for a particular student.²⁶⁴ If a dispute is not resolved by either the state agency complaint process or mediation, and instead a due process hearing takes place, the hearing officer may impose additional remedies, such as those discussed below.

Under the IDEA, the first stage of the formal dispute resolution process is the state education agency complaint process.²⁶⁵ The IDEA requires that all state education agencies make available internal processes to receive and resolve complaints about IDEA violations.²⁶⁶ A complaint may be filed by any individual or organization within one year of the alleged violation and must include: (1) a statement that the public agency violated the IDEA; (2) facts that support the allegation; and (3) the complainant's signature and contact information.²⁶⁷ If the complaint is about the school's treatment of a specific child, it must also include the name and residence of the child, the school the child attends, and a proposed resolution to the problem alleged in the complaint.²⁶⁸ As a part of the mandate to resolve complaints, the state education agency may investigate the facts and circumstances underlying the complaint.²⁶⁹ If the state education agency determines that a child was denied appropriate services in violation of the IDEA, the agency may require a school to take corrective action, such as compensatory services or monetary reimbursement, and/or require appropriate future services for the child.²⁷⁰ The state complaint process provides parents with an option for resolution outside a formal hearing process. This option is most effective when the violation is objectively clear on the facts of the complaint.²⁷¹ When there are disagreements over the appropriateness of certain services or placement options, a formal due process hearing is a more effective forum for resolving the dispute, since this procedure has a due process hearing officer who can evaluate all the facts and circumstances.²⁷²

264. *Id.* § 300.151(b)(2) (requiring resolution of state complaint procedures to include both retrospective and prospective remedies as best practices for ensuring a free appropriate public education).

265. 20 U.S.C. § 1415(b)(6) (2012).

266. 34 C.F.R. § 300.151.

267. § 303.153.

268. § 303.153(b)(4).

269. *See* CHAPMAN, *supra* note 149, at 58 (describing the differences between a state education agency complaint and a due process hearing complaint).

270. 34 C.F.R. § 300.151(b).

271. *See* CHAPMAN, *supra* note 149, at 59 (providing scenarios with clear facts in which the state complaint process would be most useful).

272. *See id.*

Second, under the IDEA, every state and local education agency must establish procedures to allow parties to resolve any disputes through a mediation process.²⁷³ The mediation process must be: (1) voluntary on the part of both parties; (2) not used to deny or delay a parent's right to a due process hearing or other rights; and (3) is conducted by a qualified, impartial, trained mediator.²⁷⁴ The state must bear the cost of the mediation process and is responsible for maintaining a list of mediators knowledgeable in the special education laws and regulations.²⁷⁵ All mediation discussions are confidential and may not be used as evidence by either party in any subsequent due process or civil proceeding.²⁷⁶ If the parties reach an agreement through the mediation process, the parties then execute a legally binding agreement that sets forth the resolution.²⁷⁷ Mediation can be an excellent option for parents to resolve disputes under the IDEA because they can often navigate the mediation process without an attorney, they do not waive any rights to further proceedings, and the state bears the costs.²⁷⁸

Finally, if a dispute is not resolved by either the state complaint process or mediation, a parent also has a right to an impartial due process hearing to resolve disputes or complaints alleging a violation of the IDEA. A parent initiates the due process hearing procedures by providing the school with a due process complaint notice.²⁷⁹ Furthermore, a parent must file this notice within two years of the date the parent or agency has actual or constructive knowledge about the alleged action that gives rise to the complaint.²⁸⁰ The complaint notice must include: (1) the name, address, and school of the child who suffered the alleged violation; (2) "a description of the nature of such problem . . . including facts relating to the problem"; and (3) "a proposed resolution of the problem to the extent known and

273. 20 U.S.C. § 1415(e)(1) (2012).

274. § 1415(e)(2)(A).

275. § 1415(e)(2)(C)–(D).f

276. § 1415(e)(2)(G).

277. § 1415(e)(2)(F). The legally binding agreement must (1) state that all discussions that occurred during the mediation process are confidential and may not be used in subsequent hearings; (2) be signed by both the parent and a representative of the school district; and (3) be enforceable in any State or Federal court. *Id.*

278. See CHAPMAN, *supra* note 149, at 51 (outlining the mechanics of the mediation process when resolving disputes under the IDEA).

279. 20 U.S.C. § 1415(f).

280. § 1415(f)(3)(C).

available to the party at the time.”²⁸¹ The substance of this initial complaint is critical because a party is not allowed to raise any issues at a due process hearing that were not raised in the due process complaint notice.²⁸² The purpose of the complaint notice is to give the school district or the state education agency an opportunity to resolve the problem before a due process hearing convenes.²⁸³

Once a parent sends a due process complaint notice, the school district can respond by either responding to the specific issues outlined in the complaint or challenging its sufficiency.²⁸⁴ If the school district decides to respond to the substantive issues in the complaint, it must send the response within ten days of receiving the notice.²⁸⁵ On the other hand, if the school district alleges the complaint is legally insufficient, it has fifteen days from receiving the complaint to respond.²⁸⁶ A hearing officer must make a determination about the legal sufficiency of the complaint within five days of receiving a response from the school district.²⁸⁷ If a parent is concerned about the sufficiency of, or substantive issues contained in, the complaint, they may amend it if either the school district consents to resolve the issues through a resolution meeting; or the hearing officer grants permission to amend the complaint no later than five days before the due process hearing.²⁸⁸

Both sides have significant procedural rights and protections during an impartial due process hearing. These rights and protections consist of the following: (1) the right to be accompanied and advised by counsel and by individuals with specialized knowledge and training regarding children with disabilities; (2) the right to present evidence and confront, cross-examine, and compel attendance of witnesses; (3) the right to a written, or, at the option of the parents, electronic verbatim record of the hearing; (4) the right to written, or at the option of the parents, electronic findings of fact and

281. § 1415(b)(7)(A)(ii). State educational agencies are mandated to develop a model form to assist parents in filing these complaints in accordance with the statutory requirements. § 1415(b)(8).

282. § 1415(f)(3)(B).

283. See CHAPMAN, *supra* note 149, at 48 (explaining that the due process complaint notice is a mandatory prerequisite to having a due process hearing under the IDEA, whereas it was optional under prior versions).

284. See *id.* at 49 (noting that the school district must respond to the substantive issues of the complaint and may exercise the option to challenge its sufficiency at its discretion).

285. § 1415(c)(2)(B)(ii).

286. § 1415(c)(2)(A), (C).

287. § 1415(c)(2)(D).

288. § 1415(c)(2)(E)(i).

decisions.²⁸⁹ The IDEA is silent on burden of proof, but the Supreme Court has held that the party challenging the IEP bears the burden of proof,²⁹⁰ although some states have statutorily imposed the burden on the school district.²⁹¹ A hearing officer, who meets several qualifications under the IDEA,²⁹² must generally render a final determination of whether the child's right to free appropriate public education was violated, within forty-five calendar days.²⁹³

After the due process hearing concludes, either party can file an administrative appeal or a civil action in state or federal court under procedures outlined in the IDEA.²⁹⁴ States can opt for either a one tier hearing system, where the state education agency conducts the hearing, or a two tier system with an initial review by a local authority that can be appealed to the state education agency.²⁹⁵ After exhausting the administrative process, either side can contest the hearing officer's final decision in state or federal district court within ninety days of the final decision, or within the time frame explicitly provided by the state.²⁹⁶

Perhaps one of the most important provisions of the IDEA dispute resolution process is the requirement that a school district must continue to adhere to the IEP in place for the student at the time the complaint is filed throughout the entire hearing and appeals process.²⁹⁷ Known as the "stay-put" rule, this provides very strong protections for parents who are disputing a proposal to change an IEP to the student's detriment.²⁹⁸ For example, if a school district plans to move a child from an integrated

289. § 1415(h).

290. *See Schaffer v. Weast*, 546 U.S. 49, 56–58 (2005) (relying on traditional notions of the burden of proof and examining congressional intent).

291. CHAPMAN, *supra* note 149, at 54–55 (clarifying that while the burden of proof is typically on the parent, as the likely complaining party, there is no prohibition on state legislation that shifts the burden).

292. 20 U.S.C. § 1415(f)(3). The hearing officer must: (1) not be an employee of the state or local education agency involved in the education or care of the child; (2) not have a personal or professional interest that conflicts with the person's objectivity in the hearing; (3) possess knowledge of, and the ability to understand, the provisions of the IDEA, federal and state regulations pertaining to the IDEA; and legal interpretations of the IDEA by federal and state courts; (4) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice, and (5) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice. *Id.*

293. 34 C.F.R. § 300.515(a)(1) (2017).

294. § 1415(g), (i).

295. § 1415(g); *see also* CHAPMAN, *supra* note 149, at 56 (discussing the different ways states manage the appeal process under the IDEA).

296. § 1415(i)(2).

297. § 1415(j).

298. CHAPMAN, *supra* note 149, at 57–58.

classroom to a segregated placement, the student may not be moved until the due process hearing and all avenues of appeal have been exhausted. However, the “stay-put” rule does not always benefit parents and students, since it merely entrenches the status quo for the duration of the dispute resolution and appeals processes. If the parent is dissatisfied with the current IEP and therefore requests a change to the IEP, which the school district rejects, the “stay-put” rule means that the IEP remains in place and unchanged throughout the legal processes. This may cause significant frustration, as the parent may wait years for a legal resolution. The parent is, however, free at any time to move the child to a different school district or try to find a private placement through the dispute process.²⁹⁹

Through this impartial due process hearing, parents may be entitled to additional remedies beyond an order for services or a particular placement. Victorious parents may also be awarded attorney’s fees at the hearing level or on appeal, although they are not entitled to recover expenses related to expert witnesses.³⁰⁰ A court may reduce fee awards for a variety of reasons, including: (1) if the parent unreasonably protracted the case; (2) if the fees unreasonably exceeded prevailing community rates; or (3) if the parents rejected a settlement offer substantially similar to the hearing outcome.³⁰¹

4. *Key differences between the IDEA, section 504, and the ADA*

Two other federal laws—section 504³⁰² and the ADA³⁰³—touch on the rights of children with disabilities in a variety of settings. The degree to which a federally funded voucher program may trigger new obligations for private schools under either section 504 or the ADA has not fully been explored. However, neither of these laws is perfectly coextensive with the IDEA. To the contrary, both of these laws—even if they were to apply to private schools as part of a federal voucher program—offer fewer rights and protections than the IDEA provides to students with disabilities.³⁰⁴ These include key differences in what

299. *Id.*

300. § 1415(i)(3)(B); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 298–304 (2006) (suggesting that the legislative history does not permit expert fees to be recovered). Furthermore, attorney’s fees are generally not awarded for time an attorney spends in IEP meetings, unless the meeting is convened as a result of the administrative proceeding or judicial action. 20 U.S.C. § 1415(i)(3)(D)(ii).

301. *Id.* § 1415(i)(3)(F); 34 C.F.R. § 300.517(c)(2)(i)(C).

302. 29 U.S.C. § 794 (2012).

303. 42 U.S.C. § 12101 (2012).

304. *A Comparison of ADA, IDEA, and Section 504*, DISABILITY RIGHTS EDUC. & DEF. FUND, <https://dredf.org/legal-advocacy/laws/a-comparison-of-ada-idea-and-section-504> (last visited Aug. 17, 2018) [hereinafter DISABILITY RIGHTS EDUC. & DEF. FUND].

disabilities are covered, the educational requirements imposed, and the self-limiting provisions included in both section 504 and the ADA.³⁰⁵

Section 504 and the ADA are, at their core civil rights laws, designed to protect individuals with disabilities beyond the context of education, thus they contain a broader definition of an individual with a disability than the IDEA.³⁰⁶ Under both section 504 and the ADA, an individual with a disability is an individual with a physical or mental impairment that substantially limits one or more major life activities of that individual.³⁰⁷ The non-exhaustive definition of “major life activities” includes a spectrum of activities from caring for oneself, seeing, walking, learning, concentrating, thinking, and communicating.³⁰⁸ Consequently, under section 504 and the ADA, a child with a disability does not have to benefit from “special education and related services” to be protected by these statutes.³⁰⁹ All children eligible for the IDEA protections are covered by both section 504 and the ADA, but a child with a disability under section 504 and ADA may not qualify for IDEA protections.³¹⁰

Section 504 has some coextensive provisions to the IDEA, but these provisions have less force than those in the IDEA because the purpose of section 504 is equal access, rather than ensuring meaningful educational opportunities for children with disabilities. As a civil rights law, section 504 “is designed to *level the playing field* for individuals with disabilities” by removing barriers to their ability to

305. Pat Howey, *Key Differences Between Section 504 and IDEA*, WRIGHTSLAW, <http://www.wrightslaw.com/howey/504.idea> (last modified March 22, 2012).

306. 42 U.S.C. § 12102(4); *Compare Supreme Court Decisions’ Narrow Definition of “Disability,”* FINDLAW, <https://civilrights.findlaw.com/discrimination/supreme-court-decisions-narrow-definition-of-disability> (last visited Aug 17, 2018) (analyzing how judicial decisions have narrowed the definition of disability), *with Americans with Disabilities Act Amendments Act of 2008 (ADA AA)*, WRIGHTSLAW, <http://www.wrightslaw.com/info/sec504.adaaa.htm> (last visited Aug. 17, 2018) (discussing the purpose of the ADA AA and how it restored the act to its original inclusive coverage).

307. 29 U.S.C. § 705(9); 42 U.S.C. § 12102(1).

308. 42 U.S.C. § 12102(2). This definition also includes impairments of “major bodily functions” including “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” *Id.*

309. For example, a child with a vision impairment has a physical impairment that substantially limits one or more of the child’s life activities. However, with glasses the child likely does not special education or related services. This child would be covered by section 504 and the ADA, but not the IDEA.

310. *What is the difference between Section 540 and IDEA?*, NAT’L RESOURCE CTR. ON ADHD, <http://209.126.179.230/faq.cfm?fid=10&varLang=en> (last visited Aug. 17, 2018).

access a public education.³¹¹ Although this law uses similar language (e.g., free appropriate public education, accommodations, assistive technology), the protections are not nearly as robust as those of the IDEA.³¹² Section 504 lacks an IEP requirement with specially designed instruction to help the student access educational content, and also lacks therapeutic support time to help a child reach individualized goals. Both of these shortcomings make section 504 ill-suited to provide meaningful educational opportunities to children with significant disabilities. Consequently, this law will not protect the most vulnerable children with disabilities, namely those who need the most rigorous support and intervention. For many children with disabilities, merely removing barriers is not enough; these children need proactive supporting measures specifically tailored to their unique individual needs. The IDEA provides for such measures whereas section 504 falls short.

In contrast to section 504, the ADA does not apply only to entities that receive federal funding. Rather, the ADA applies to all public schools and non-religious private schools through Title II and Title III of the ADA.³¹³ Title II prohibits state and local governments from discriminating in all services, programs, and activities—this includes public schools.³¹⁴ Title III prohibits public accommodations—that is, businesses that are open to the general public—from discrimination but exempts religious entities.³¹⁵ Consequently, Title III governs secular private schools, but not parochial or religious private schools.

While the ADA prohibits discrimination generally, it does not require that schools provide an *appropriate education* to children with disabilities. To be sure, the ADA does require public entities, including school districts, to provide auxiliary aids and services to “ensure effective communication” such that individuals with disabilities have “an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity.”³¹⁶ However, these auxiliary aids and services pale in comparison to those identified by the IDEA.³¹⁷ This is not altogether

311. *Id.*

312. *Id.*

313. DEP'T OF JUST., AMERICANS WITH DISABILITIES ACT TITLE II REGULATIONS: NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES 2 (2010).

314. 42 U.S.C. § 12131 (2012) (defining public entity).

315. § 12181 (defining commerce as applied by the statute).

316. 28 C.F.R. § 35.160(b) (2017).

317. *A Comparison of IDEA, ADA, and Section 504*, MID-ATLANTIC ADA CTR., <http://www.adainfo.org/sites/default/files/A%20COMPARISON%20of%20ADA-IDEA-504.pdf>.

surprising, since the purpose of the ADA is merely to allow equal access to the entity—in this case, to the school—rather than to ensure a free appropriate public education.³¹⁸

Section 504 and the ADA provide inadequate protection for *the right to education* for children with disabilities. Both laws fail to include provisions for special education and related services tailored to meet the individual student's needs.³¹⁹ Neither law provides a mechanism for delivering education for eligible students, such as the IEP, nor does the federal government provide education funding to schools to ensure state compliance with the law.³²⁰ And of course, since neither law mandates a detailed IEP, neither law contains the kinds of rigorous mediation and due process procedures for challenging the adequacy of education provided, which are mandated under the IDEA. Most fundamentally, these laws are only designed to protect the right to access, not the right to educational benefits.³²¹ For example, if a child is confined to a wheelchair because of a disability, section 504 and the ADA protect that child from discrimination and even demand a public or non-religious private school to ensure physical access, such as by widening school doors and hallways.³²² However, if that same child has neurological deficits impacting the child's ability to learn, neither the ADA nor section 504 demand the child receive an educational benefit while physically accessing the school.³²³ Only the IDEA entitles a child to "specially designed instruction, at no cost to parents, to meet the unique needs"³²⁴ of the child to "enable a child to make [educational] progress appropriate in light of the child's circumstances."³²⁵ This is,

318. DISABILITY RIGHTS EDUC. & DEF. FUND, *supra* note 304.

319. *See, e.g.*, 29 U.S.C. § 701 (providing no individualized support and thus creating a large gap in educational opportunities); 42 U.S.C. § 12101.

320. *At a Glance: Which Laws Do What*, UNDERSTOOD, <https://www.understood.org/en/school-learning/your-childs-rights/basics-about-childs-rights/at-a-glance-which-laws-do-what> (last visited Aug. 17, 2018) (highlighting the absence of any mechanism to ensure the targeted students receive the intended result).

321. Peter Wright & Pamela Wright, *Key Differences Between Section 504, the ADA, and the IDEA*, WRIGHTSLAW, <http://www.wrightslaw.com/info/sec504.summ.rights> (last revised Jan. 31, 2017).

322. *Id.*

323. *Id.*

324. 20 U.S.C. § 1401(29) (2012).

325. *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) (noting that each child's educational needs are unique and will require some level of tailoring).

of course, because only the IDEA was enacted to specifically address the educational needs of children with disabilities.³²⁶

C. Supreme Court Decisions in Special Education

The Supreme Court first grappled with the initial version of the IDEA and its free appropriate public education mandate³²⁷ in *Board of Education v. Rowley*.³²⁸ After a lengthy statutory interpretation analysis, Justice Rehnquist determined that the IDEA required the state to comply with the procedures set forth in the IDEA and, substantively, to provide an educational program that is “reasonably calculated to enable the child to receive educational benefits[.]”³²⁹ Justice Rehnquist specifically noted that the IDEA did not require “that States maximize the potential of [children with disabilities],”³³⁰ but rather they must merely develop an IEP “reasonably calculated to enable a child to achieve passing marks and advance from grade to grade” regardless of the child’s potential.³³¹ In a dissent joined by Justice Brennan and Justice Marshall, Justice White rebuked the majority for narrowly interpreting “free appropriate public education” as requiring merely “some benefit” rather than the “full educational opportunity to all [children with disabilities]” announced in the purpose of the IDEA.³³²

While the Supreme Court has issued a handful of other decisions regarding the IDEA,³³³ it did not further clarify the substantive

326. *Id.*

327. Although Federal District Courts evaluated the obligations of the State to provide a public education to children with disabilities under the U.S. Constitution in *PARC* and *Mills*, the Supreme Court has only addressed the issue in the context of the IDEA. See Louie Li, *PARC v. Commonwealth of Pennsylvania and Mills v. Board of Education, DC, ROOTED IN RIGHTS* (Dec. 11, 2013), <https://www.rootedinrights.org/15321-revision-v1> (discussing the impact of *PARC* and *Mills* on a child’s right to education).

328. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 187–91 (1982). The case was brought by parents of a “child with only minimal residual hearing” after school administrators denied the parents’ request for a qualified sign-language interpreter for all her academic classes. *Id.* at 176. The lower courts held that “although the child performed better than the average child in her class and was advancing easily from grade to grade, she was not performing as well academically as she would without her [disability].” *Id.*

329. *Id.* at 207.

330. *Id.* at 189.

331. *Id.* at 204.

332. *Id.* at 212–14.

333. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007) (holding that “[p]arents enjoy rights under the IDEA; and they are, as a result, entitled to prosecute IDEA claims on their own behalf”); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 300 (2006) (determining that the prevailing parents may not recover non-attorney expert or consultant fees); *Schaffer v. Weast*, 546 U.S. 49,

requirement of free appropriate public education until thirty-five years later.³³⁴ In *Endrew F. v. Douglas County School District RE-1*,³³⁵ a unanimous Supreme Court infused the IDEA with renewed vitality.³³⁶ The Court rejected the Tenth Circuit's interpretation that an "IEP is adequate as long as it is calculated to confer an 'educational benefit [that is] merely . . . more than *de minimis*.'"³³⁷ Instead, the Supreme Court declared that "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make *progress appropriate in light of the child's circumstances*."³³⁸ In his reasoning, Chief Justice Roberts relied on the purpose of the IDEA and its origins as a Congressional response to the prior exclusion of children with disabilities from educational opportunities.³³⁹ Chief Justice Roberts argued that "[a] substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act."³⁴⁰

56 (2005) (holding that a student challenging a school under the IDEA in an administrative hearing bears the burden of proof as the party seeking relief); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73 (1999) (finding that continuous nursing service for a quadriplegic student qualifies as "related services" to access public education under IDEA); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 7 (1993) (concluding that "[a] court may order reimbursement for parents who unilaterally withdraw their child from a public school that provides an inappropriate education under IDEA and put the child in a private school that provides an education that is otherwise proper under IDEA," but does comply with all of the Act's procedures); *Honig v. Doe*, 484 U.S. 305, 323–26 (1988) (interpreting the "stay-put" provision to prohibit state or local school authorities from unilaterally excluding disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities during the pendency of review proceedings); *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 369–72 (1985) (holding that a reviewing court has the authority to order school authorities to reimburse parents for their expenditures on a private special education if the court determines such placement, rather than proposed IEP, is proper under the Act even if the parent changed the placement during proceedings); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 885, 895 (1984) (holding "clean intermittent catheterization" is a "related service" under the Act when medically necessary for a student to access FAPE).

334. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017).

335. 137 S. Ct. 988.

336. Amy Howe, *Opinion analysis: Court's Decision Rejecting Low Bar for Students with Disabilities, Under the Spotlight*, SCOTUSBLOG (Mar. 23, 2017 11:26 AM), <http://www.scotusblog.com/2017/03/opinion-analysis-courts-decision-rejecting-low-bar-students-disabilities-spotlight>.

337. *Endrew F.*, 137 S. Ct. at 997 (quoting *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015)).

338. *Id.* at 999 (emphasis added).

339. *Id.*

340. *Id.*

He concluded that a student offered an educational program under the Tenth Circuit's "merely more than *de minimis*" standard "can hardly be said to have been offered an education at all."³⁴¹ While the Supreme Court did not fully adopt the standard proposed by the petitioners,³⁴² advocates for children with disabilities celebrated the decision for rejecting "the 'bigotry of low expectations' that marked prior interpretations of *Rowley*."³⁴³

*D. The Limited Protections for Children with Disabilities
in Private Schools*

Children with disabilities whose parents voluntarily choose to enroll them in a private school through a voucher program have few protections under federal disability law. Federal laws apply differently to children with disabilities when their parents voluntarily choose to enroll them in a private school, rather than when a public school places children with disabilities in a private school through the two processes codified in the IDEA.³⁴⁴ First, the public school system is

341. *Id.* at 1000–01.

342. Reply Brief for Petitioner at 1, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 997 (2017) (No. 15-827) (declining the family's invitation to establish a more stringent standard that would require public schools to give children with disabilities an opportunity to (among other things) "achieve academic success" and "attain self-sufficiency").

343. *Endrew Decision Creates Important New Opportunities for Students with Disabilities*, BAZELON CENT., https://c.ymcdn.com/sites/www.copaa.org/resource/resmgr/docs/accessible_2017/Endrew_paper_LH_9-8-17-1.pdf (last visited Aug. 17, 2018) (quoting Brief of Former Officials of the U.S. Department of Education as Amici Curiae at 6, *Endrew F.*, 137 S. Ct. 988 (2017) ("[W]e should reject the soft bigotry of low expectations and expect all children, including children with disabilities, to achieve academic success . . .")).

344. Under the IDEA, a public school may place a child with a disability in a private program "as the means of carrying out the requirements of" the IDEA. 20 U.S.C. § 1412(a)(10)(B) (2012). The public school may do this because the tuition at the private program is cheaper than the facilities and staffing changes the public school would have to undertake to provide a FAPE for that particular child. This placement decision is made through the IEP team process and the IDEA still applies to these students while they are in private placement. A parent may also enroll their child in a private program without the consent of the public school system when they believe the public school system has not met their FAPE obligation. In these circumstances, the parents may seek tuition reimbursement through an IDEA due process hearing. *Id.* § 1412(a)(10)(C). In the due process hearing the parent must establish the program offered by the public school system "had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." *Id.* § 1412(a)(10)(C)(ii). If the parent is victorious at the hearing, the district would have to substantively modify its program to provide that particular child FAPE or agree to continue the child's enrollment at the private school under the private school placement by public agencies provision of the IDEA.

released of most of its substantive obligations to a child with a disability when the parent chooses to enroll that child in the private school system.³⁴⁵ Second, as described above, private schools—especially religious private schools—have very few obligations to children with disabilities under federal law.³⁴⁶ Third, there are limited educational and procedural protections for children with disabilities and their parents once they enroll in private school.³⁴⁷ Finally, parents of children with disabilities enrolled in private schools have fewer remedies.³⁴⁸

Under federal law, the public school system has minimal obligations to children with disabilities enrolled by their parents in private schools. The public school system is only required to evaluate private school children with disabilities within their boundaries and spend federal IDEA funds “to provide equitable services” to these children as a group.³⁴⁹ These students have no individual right to free appropriate public education.³⁵⁰ Therefore, they “do not have an individual entitlement to services they would receive if they were enrolled in . . . a public schools.”³⁵¹ Under the equitable funding requirement, “it is possible that *some* ‘parentally placed children with disabilities will not receive any services while others will.’”³⁵² If a child with a disability does receive services from the public school system while enrolled in a private school, those services are governed by a “services plan” that provides services based on the school district’s allocation of funds for private school students, and not on that child’s individual needs.³⁵³ This is a stark contrast to the IDEA’s expansive protections.

Moreover, parents who place their children in private schools do not have the due process hearing rights to contest the school

345. See 34 C.F.R. 300.137 (2017) (reducing the protections when the child is parentally placed).

346. 42 U.S.C. § 12181.

347. 34 C.F.R. § 300.140.

348. Sandhya Gopal, *Compensatory Education and the IDEA*, U.N.C. SCH. L. BULL. 15–19 (2004), <http://sogpubs.unc.edu/electronicversions/slb/slbspr04/article2.pdf>.

349. U.S. DEP’T OF EDUC., *THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: PROVISIONS RELATED TO CHILDREN WITH DISABILITIES ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS 1* (2011).

350. *Id.* (“Parentally placed children with disabilities do not have an individualized entitlement to services they would receive if they were enrolled in a public school.”).

351. *Id.*

352. *Id.* (emphasis added).

353. See 34 C.F.R. § 300.138(b) (2017); see also CHAPMAN, *supra* note 149, at 78–79 (“The services are provided based upon the school district’s allocation of funds for private school children and the plan the district has developed, in consultation with private school representative, to service private school children.”).

district's services or compliance with a services plan.³⁵⁴ They can only use the IDEA's due process procedures to contest a district's failure to meet its obligation under "child find" to identify, locate, and evaluate all children with disabilities within its boundaries.³⁵⁵

The minimal obligations of the public school system to serve children with disabilities placed by their parents in private schools is further compounded by the few, if any, duties that private schools owe to these children under federal law. As described above, the only federal laws that may apply to private schools are the ADA and section 504, which have limited scope because they are designed to ensure equal access, not confer a right to education.³⁵⁶ Additionally, as discussed above, religious private schools are exempt from the ADA.³⁵⁷ This is a significant, perhaps even overwhelming caveat, since religious schools comprise the vast majority of private elementary and secondary schools across America.³⁵⁸ Thus, only section 504 creates any substantive obligations for "all entities including private sectarian as well as non-sectarian schools that receive, directly or indirectly, federal funds."³⁵⁹

A federally funded voucher program would likely trigger section 504 obligations for private schools that choose to participate in the program. However, under section 504, private schools have negligible requirements to serve children with disabilities. Section 504 imposes requirements to serve children with disabilities under a broader definition of "individual with a disability" than the IDEA definition of a "child with a disability."³⁶⁰ In contrast to the public schools under the IDEA, private schools have only three obligations to children with disabilities under section 504: (1) educate the child in the least restrictive environment;³⁶¹ (2) provide the child an equal opportunity

354. 34 C.F.R. § 300.140(a).

355. § 300.140(b); *id.* § 300.131.

356. *See supra* Section II.B.4.

357. *See id.* (discussing the exemptions and providing an overview of the religious exceptions).

358. U.S. DEP'T OF EDUC., CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2015–16 PRIVATE SCHOOL UNIVERSE SURVEY 2 (2017) (finding that sixty-seven percent of private schools had a religious orientation or purpose).

359. *The Rehabilitation Act of 1973 (Section 504) as Applied to Private Schools*, FINDLAW, <http://corporate.findlaw.com/litigation-disputes/the-rehabilitation-act-of-1973-section-504-as-applied-to> (last visited Aug. 17, 2018) [hereinafter *Rehabilitation Act*].

360. *See supra* Section II.B.4.

361. 34 C.F.R. § 104.39(c) (2017) (subjecting recipients to the least restrictive environment mandate codified in 34 C.F.R. § 104.34).

to participate in extracurricular activities;³⁶² and (3) provide “minor adjustments” to accommodate students with disabilities.³⁶³

Private education institutions that receive federal funds are prohibited from excluding a qualified student their disability can be accommodated with only “*minor adjustments*.”³⁶⁴ There is relatively little case law on what constitutes a “minor adjustment,” likely because of the lack of procedural remedies for children with disabilities enrolled in private schools. However, the case law that does exist seems to establish a standard that is highly deferential to the private school program.³⁶⁵ Thus, under this minimal standard, private schools receiving federal funds can easily exclude children with disabilities because they would not be able to meet the program’s requirements in spite of their disability without more than mere “minor adjustments.”³⁶⁶ The children who benefit most from the IDEA can simply be excluded under section 504 from “school choice” programs. Needless to say, such exclusion is the antithesis of choice for parents of disabled children with significant needs.

Moreover, even if the private school does enroll a child with a disability and makes accommodations for them, the school is allowed to charge higher tuition for that student than for students without a disability. Under section 504, a private school may charge more for the “provision of an appropriate education to [persons with disabilities] than to [persons without disabilities] . . . to the extent that any additional charge is justified by a substantial increase in cost to the recipient.”³⁶⁷ As a result, the school may profit from making accommodations for the child with a disability.³⁶⁸ More importantly, permitting private schools to charge a premium for students with disabilities—on top of the often already hefty tuition charged—runs completely counter to the IDEA’s key mandate of a *free* appropriate public education.

362. *Id.* (subjecting recipients to the extracurricular activities mandate codified in 34 C.F.R. § 104.37).

363. *Id.*; *Rehabilitation Act*, *supra* note 359.

364. 34 C.F.R. § 104.39(a) (emphasis added).

365. *See Rehabilitation Act*, *supra* note 359. In *Hunt v. St. Peter School*, a federal district court focused its inquiry on the student, determining that a child with severe asthma was not an “otherwise qualified” individual with a disability protected by section 504 because the accommodation she required far exceeded the “minor adjustment” mandate. 963 F. Supp. 843, 850–51 (W.D. Mo. 1997).

366. *See id.* at 850–53 (discussing the distinction between minor adjustments and the burden this particular case would place upon the administration).

367. 34 C.F.R. § 104.39(b) (2017).

368. There was no case law on this provision of the regulations to clarify or outline any limits on a private school for seeking additional costs to educate a child with a disability.

If private schools voluntarily choose to provide special education to a child with a disability, they have increased obligations under section 504.³⁶⁹ If the school provides special education it must comply with the evaluation procedures and procedural safeguards of section 504.³⁷⁰ The evaluation provision merely requires a school to evaluate a student prior to placing the student in special education services,³⁷¹ in contrast to the robust evaluation guidelines in the IDEA that require a school district to use a comprehensive assessment strategy to determine if a child has a disability and, if so, the content of the student's individualized education program.³⁷² Section 504 requires recipient schools to establish and implement procedural safeguards "with respect to actions regarding the identification, evaluation, or educational placement" of a child with a disability.³⁷³ These must include (1) notice; (2) an opportunity for the parents or guardian of the person to examine relevant records; (3) an impartial hearing; and (4) a review procedure.³⁷⁴ These extra requirements are vague and slight in comparison to the robust procedural protections codified in the IDEA,³⁷⁵ but more importantly, these provisions only apply if the private school voluntarily provides special education.³⁷⁶ That is, even when a private school admits a child with a disability, the procedural protections do not apply if the school simply does not provide the student with special education. The provisions therefore disincentivize private schools from providing special education services to children with disabilities.³⁷⁷

369. 34 C.F.R. § 104.39(c).

370. *Id.* (subjecting recipients that provide special education services to evaluation and placement provisions in § 104.35 and procedural safeguards provision in § 104.36).

371. *Id.* § 104.35.

372. 20 U.S.C. § 1414(b)(2)(A) (2012).

373. 34 C.F.R. § 104.36.

374. *Id.*

375. *See supra* Section II.B.3.

376. 34 C.F.R. § 104.39(c); *see The Rehabilitation Act, supra* note 359 (noting the various avenues through which schools can receive federal funding).

377. For example, the Catholic Diocese of Fort Wayne-South Bend in Indiana, issued a guidance document to its schools advising all employees not to write or sign any documents "agreeing to any specific accommodations" because it "may create a contractual duty." DIOCESE FORT WAYNE-SOUTH BEND CATH. SCHS., SECTION 504 AND ACCOMMODATIONS (2011), <http://www.marianhs.org> (last visited Aug. 17, 2018) (search in search bar for "special education"; then follow "Section 504 and Accommodations" hyperlink under results). Furthermore, the guidance instructs the school to create an "Individualized Catholic Education Plan" because "it does not grant legal rights to the student, parent, or guardian . . ." *Id.* This document demonstrates the careful steps private schools take under federal law to avoid substantive obligations to children with disabilities.

Moreover, because the IDEA does not apply, children with disabilities educated in private schools lack key protections that would ensure the school keeps track of the children's individual progress.³⁷⁸ Private schools are not required to provide "specialized instruction" developed and monitored through an IEP to ensure a child is making meaningful progress from year to year.³⁷⁹ Private schools are not bound to employ "highly qualified teachers" under the IDEA, which "requires teachers to have at least a bachelor's degree and either full certification as a special educator or successful completion of a state's special education licensing exam."³⁸⁰ Further, private schools are not required to be accountable for the academic achievement of children with disabilities because there is no oversight by state departments of education or the federal government.³⁸¹ Finally, a student with a disability does not have the same disciplinary protections under the IDEA, so they may be expelled for behaviors that are a manifestation of their disability.³⁸²

Finally, children with disabilities in private schools lack the significant legal remedies codified in the IDEA to protect the educational rights of this vulnerable population. The NCD cites the requirement that children and their families waive IDEA rights—including the right of parents to participate in meetings about whether the school is meeting their child's education needs—as its chief concern about special education voucher programs.³⁸³ Unlike public schools under the IDEA, private schools "are not obligated to provide a meaningful education and cannot legally be held accountable when a student makes no academic progress."³⁸⁴ As a result, children with disabilities enrolled in private schools by their parents likely will suffer the same plight as the undereducated millions of children with disabilities that prompted Congress to pass the IDEA in the first place.³⁸⁵

378. *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017); *see supra* Section II.B.4.

379. Hensel, *supra* note 5, at 322–23.

380. *Id.* at 325–26. "The complete absence of quality control over teaching, however, runs counter to wealth of evidence reflecting the significance of education, training, and professional development on teaching effectiveness." *Id.* at 326.

381. *Id.* at 327–30.

382. *See supra* Section II.D.

383. NAT'L COUNCIL ON DISABILITY, *supra* note 88, at 60.

384. Hensel, *supra* note 5, at 331.

385. *See id.* ("In the absence of discernable benchmarks of progress and clearly identified legal rights, there is a heightened chance that these children will face intentional discrimination or seemingly benign indifference."). *Id.*

III. INDIANA—A VOUCHER PROGRAM CASE STUDY

Enacted by the General Assembly in 2011, Indiana's Choice Scholarship Program is now the largest and fastest growing voucher program in the nation.³⁸⁶ The Indiana program provides an opportunity to evaluate the consequences of a voucher program that the Trump administration strongly favors and endorses.³⁸⁷

A. *The Indiana Choice Scholarship Program Policies*

The Choice Scholarship Program grants eligible students scholarships (i.e., vouchers) that they can use at participating private schools.³⁸⁸ A student must be a resident of Indiana, be between the ages of five and twenty-two, and be accepted for enrollment by a participating nonpublic "Choice School."³⁸⁹ If a student meets these initial eligibility thresholds, there are eight different pathways with additional criteria for eligibility: (1) Continuing Choice Scholarship Student Pathway,³⁹⁰ (2) Previous Choice Scholarship Student Pathway³⁹¹;

386. Lee, *supra* note 18 ("In 2015–2016, the latest statistics available for Indiana, there were 32,695 students participating in [Indiana's] program, [which] makes this program the single largest education voucher program in any state."). The program's success can be attributed to the Indiana Supreme Court's determination that the program did not violate the Blaine provision in the Indiana Constitution, in a dramatically different application of the provision from the nationwide trend of state high courts. *See Meredith v. Pence*, 984 N.E.2d 1213, 1227 (Ind. 2013) (holding that "the test for examining whether a government expenditure violates Article 1, Section 6, is not whether a religious or theological institution substantially benefits from the expenditure, but whether the expenditure directly benefits such an institution") (emphasis removed); *supra* Section II.B.

387. DeVos lobbied for the Indiana Voucher Program and Mike Pence "led the charge as the state's governor to loosen eligibility requirements and greatly expand the program's reach." Emma Brown & Mandy McLaren, *How Indiana's School Voucher Program Soared, and What It Says about Education in the Trump Era*, WASH. POST (Dec. 26, 2016), https://www.washingtonpost.com/local/education/how-indianas-school-voucher-program-soared-and-what-it-says-about-education-in-the-trump-era/2016/12/26/13d1d3ec-bc97-11e6-91ee-1adddfe36cbe_story; *see also* Mandy McLaren, *For Indiana Special Education Students, Choice Comes at a Cost*, WASH. POST (Dec. 26, 2016), <https://www.washingtonpost.com/local/education/for-indiana-special-education-students-choice-comes-at-a-cost/2016/12/26/3b875480-c3bc-11e6-9a51-cd56ea1c2bb7>.

388. IND. CODE §§ 20-51-1-4.3, 20-51-1-4.7, 20-51-1-5–8 (2017); *Meredith*, 984 N.E.2d at 1219.

389. IND. DEP'T OF EDUC., CHOICE SCHOLARSHIP PROGRAM: FREQUENTLY ASKED QUESTIONS FOR PARENTS AND STUDENTS, <https://www.doe.in.gov/sites/default/files/choice/1-choice-parent-faq-february-2018.pdf> (lasted visited Aug. 17, 2018) [hereinafter CHOICE SCHOLARSHIP PROGRAM FAQs]. A Choice School is a public or nonpublic school participating in the program that meets certain criteria. IND. CODE § 20-51-1-6.

390. *See* CHOICE SCHOLARSHIP PROGRAM FAQs, *supra* note 389. Eligibility Requirements:

(3) Previous Scholarship Granting Organization Award Pathway;³⁹² (4) Special Education Pathway;³⁹³ (5) “F” Public School Pathway;³⁹⁴ (6) Two

i. The student received a Choice Scholarship in the school year that immediately precedes the school year for which the student is applying for a Choice Scholarship, and ii. The student is required to have remained enrolled at the Choice [S]chool for the entirety of the immediately preceding school year, and iii. The student is a member of a household with an annual income equal to or below 200% of the amount to qualify for the federal free or reduced lunch program.

Id.

391. Eligibility Requirements:

Either: i. The student received a Choice Scholarship in a previous school year that does not immediately precede the school year for which the student is applying for Choice Scholarship; OR ii. The student received a Choice Scholarship in the immediately preceding school year but the student exited the Choice [S]chool prior to the end of the school year; AND: iii. The student is a member of a household with an annual income equal to or below 150% of the amount to qualify for the federal free or reduced lunch program.

Id.

392. Eligibility Requirements:

i. The student received a Scholarship Granting Organizations (SGO) Scholarship in a previous school year, including a school year that does not immediately precede the school year for which the student is applying for a Choice Scholarship.

ii. The approved SGOs are: Community Foundation of Elkhart County, Institute for Quality Education, Inc. (Formerly Educational Choice Charitable Trust), LaGrange County Community Foundation, Inc., Professional Athletes of Indiana, Sagamore Institute Scholarships for Education Choice, School Scholarship Granting Organization of Northeast Indiana, The Lutheran Scholarship Granting Organization of Indiana, Tuition Assistance Fund of Southwestern Indiana (Closed February 2013).

iii. The student is a member of a household with an annual income equal to or below 150% of the amount to qualify for the federal free or reduced lunch program.

Id.

393. Eligibility Requirements:

i. The student has a disability that requires special education and related services; ii. An IEP pursuant to IC 20-35 or a Service Plan (SP) pursuant to 511 IAC 7-34 has been developed for the student; and, iii. The student is a member of a household with an annual income equal to or below 200% of the amount to qualify for the federal free or reduced lunch program.

Id.

394. Eligibility Requirements:

i. The student would be required to attend a specific public school based on his/her residence that has been assigned an “F” grade. The list of F schools for Choice Scholarship eligibility is posted prior to the beginning of the school year. Note: This pathway does not require prior attendance at the school. ii. The student is a member of a household with an annual income

Semesters in Public School Pathway;³⁹⁵ (7) Sibling Pathway;³⁹⁶ and (8) Pre-K Pathway.³⁹⁷ A student must satisfy the financial and situational criteria of one of the eight pathways to receive the scholarship funds.³⁹⁸ Notably, there is no requirement that a child attend a public school prior to applying for the private school program. Furthermore, the scholarship award is the lesser of: (1) tuition and fees at the participating private school chosen; or, (2) “an amount based off the per-student State funding formula for the student’s school corporation of residence,” depending on the family income.³⁹⁹ The Indiana Department of Education pays the scholarship directly to the school, but requires the child’s parent or guardian to endorse the award.⁴⁰⁰ Based on these requirements, in 2016, roughly sixty percent of Indiana school children were eligible for the program.⁴⁰¹

equal to or below 150% of the amount to qualify for the federal free or reduced lunch program.

Id.

395. Eligibility Requirements:

- i. The student was enrolled in kindergarten through grade 12 in a public school, including a charter school, in Indiana for at least two semesters immediately preceding the first semester for which the individual receives a Choice Scholarship, and
- ii. The student is a member of a household with an annual income equal to or below 150% of the amount to qualify for the federal free or reduced lunch program.

Id.

396. Eligibility Requirements:

- i. The sibling of the newly applying student received either a Choice Scholarship or an SGO Scholarship in a previous school year, including a school year that does not immediately precede the school year for which the student is applying for a Choice Scholarship; and
- ii. The student is a member of a household with an annual income equal to or below 150% of the amount to qualify for the federal free or reduced lunch program.

Id.

397. Eligibility Requirements:

- i. The student received and used an Early Education Grant under IC 12-17.2-7.2 to attend Pre-K at an eligible Choice [S]chool.
- ii. The student is applying for a Choice Scholarship at the same Choice [S]chool in which they attended Pre-K with an Early Education Grant.
- iii. The student is a member of a household with annual income equal to or below 69% of the reduced lunch eligibility (127% of the federal poverty level).

Id.

398. *Id.*

399. *Id.*

400. *Id.* This arrangement is likely to comply with the *Zelman-Harris* decision that vouchers are permissible because they indirectly aid religious institutions because they directly aid the parent/students. See *supra* note 54 and accompanying text.

401. Brown & McLaren, *supra* note 387.

In addition to the students meeting certain eligibility requirements, participating schools also have threshold requirements. The Indiana Choice Program requires a participating school to meet minimal requirements and prohibits any state agency, including the Indiana Department of Education, from regulating the educational program of private schools receiving state funds from the program.⁴⁰² A nonpublic school is eligible to receive state funds if it: (1) is located in Indiana; (2) requires an eligible student to pay tuition; (3) voluntarily agrees to enroll the student; (4) is accredited by either the state board or a national or regional accreditation agency; (5) administers statewide assessments, at state expense; (6) is not a school that an eligible student has a legal settlement with; and (7) submits required student performance data to the state.⁴⁰³ State law expressly prohibits the Indiana Department of Education, or any other state agency, from regulating the educational programs of participating schools. This includes the curriculum, religious instruction or activities, classroom teaching, and hiring of teachers.⁴⁰⁴

Indiana has adopted few provisions to govern the Special Education Pathway program.⁴⁰⁵ First, Indiana has not adopted express non-discrimination requirements for participating schools, so the private schools have a significant amount of agency and independence in admissions decisions.⁴⁰⁶ Private schools are only limited in discrimination against students with special needs by the public accommodations provision under Title III of the ADA.⁴⁰⁷ Since *religious* private schools are exempt from the ADA,⁴⁰⁸ these schools are free to discriminate against students with disabilities in their admission decisions.⁴⁰⁹ Since ninety-seven percent of the private schools that will participate in the Indiana program in 2018–2019 are religious entities, the ADA

402. IND. CODE § 20-51-4-1(a) (2017).

403. *Id.* § 20-51-4-4.7.

404. *Id.* § 20-51-4-1.

405. *See id.* § 20-51-4. The only sections addressing special education are Sections 20-51-4-4(2), 20-51-4-4.5, and 20-51-4-4.6. *Id.*

406. *See id.* § 20-51-4-3 (requiring schools to not discriminate based only on “race, color, or national origin”); Cory Turner, *Indiana’s School Choice Program Often Underserves Special Needs Students*, NAT’L PUB. RADIO (May 15, 2017, 4:34 PM), <https://www.npr.org/2017/05/15/528502918/indianas-school-choice-program-often-underserves-special-needs-students> (noting that private schools can base admissions on grade point average, religion, or the sexual orientation of the student’s parents).

407. *See* discussion *infra* Part IV.

408. 28 C.F.R. § 36.102(e) (2017).

409. *See* Turner, *supra* note 406.

protections are, for practical purposes, essentially nonexistent for students who participate in the program.⁴¹⁰

Second, because the IDEA does not apply to private schools, the Indiana Department of Education created a skeletal counterpart to the IEP,⁴¹¹ which is a Choice Scholarship Education Plan (CSEP), that governs a Choice School acting as the child's special education service provider.⁴¹² However, Indiana has not extended any of the procedural protections to students of disabilities and their parents that are codified in the IDEA.⁴¹³ For example, the Indiana Department of Education's web site for special education services deceptively outlines the rights that parents waive under the voucher program.⁴¹⁴ The Indiana Department of Education minimizes the loss as merely the right to "specific notices for case conference committee meetings" and to "established timelines within which the public school must do various things."⁴¹⁵ It does not mention the loss of the right to free appropriate public education, and it glosses over the due process protections in the IDEA.⁴¹⁶ Moreover, the program requires parents to first file any complaint regarding the CSEP with the Choice School before they can file the complaint with the Indiana Department of Education.⁴¹⁷

B. *The Indiana Program: Realities for Disabled Children*

For the 2018–2019 school year, the Indiana Department of Education lists 306 participating private schools in the Choice Scholarship

410. IND. DEP'T OF EDUC., 2018–2019 PARTICIPATING CHOICE SCHOOLS (Jan. 26, 2018), <https://www.doe.in.gov/choice/2018-2019-participating-choice-schools>.

411. According to the Indiana Department of Education:

An IEP is much more comprehensive, contains more details, and is designed to ensure that a student receives a [FAPE] . . . An SP is similar to an IEP, but is not required to include all the components of an IEP. For example, an IEP must include statements about how and when the students will participate with nondisabled students and the student's need for an extended school year, as well as identify the student's placement in the least restrictive environment. An SP does not require these components.

CHOICE SCHOLARSHIP PROGRAM FAQs, *supra* note 389.

412. *Id.*

413. *Id.*; see also Dana Goldstein, *Special Ed School Vouchers May Come with Hidden Costs*, N.Y. TIMES (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/us/school-vouchers-disability.html>.

414. See CHOICE SCHOLARSHIP PROGRAM FAQs, *supra* note 389.

415. *Id.*

416. *Id.*; *supra* note 411; see Goldstein, *supra* note 413 (stating that voucher users lose the right to a hearing to challenge disciplinary conduct toward a child).

417. 511 IND. ADMIN. CODE 7-49-7 (West 2016).

Program.⁴¹⁸ Fewer than ten are non-religious or faith-based.⁴¹⁹ Of the non-religious affiliated schools, only one, the Independence Academy of Indiana, was explicitly created to serve children with disabilities.⁴²⁰ This school is designed to serve “middle school and high school students with high-functioning autism and Asperger syndrome.”⁴²¹ The tuition for Independence Academy is over \$14,000 per year, so a Choice Scholarship Voucher through the Special Education Program would cover less than half the tuition for this school.⁴²²

None of Indiana’s top private special needs schools participate in the state’s voucher program.⁴²³ Notably, Indiana’s Fortune Academy,⁴²⁴ listed as one of the best fifty private special needs schools by special education professionals,⁴²⁵ is not a participating school. The Academy offers a variety of private financial aid opportunities for families to pay the tuition, but the Choice Scholarship is not one of them.⁴²⁶ Two of the other private schools designed to serve children with disabilities, Indiana—Midwest Academy and Worthmore Academy, do not disclose the cost of tuition on their websites, but do caution parents of the onerous cost.⁴²⁷

418. 2018–2019 PARTICIPATING CHOICE SCHOOLS, *supra* note 410.

419. *Id.*

420. *Id.*

421. *About*, INDEPENDENCE ACAD., <https://www.iaindiana.org/about-ia> (last visited Aug. 17, 2018).

422. *Tuition + Fees*, INDEPENDENCE ACAD., <https://www.iaindiana.org/tuition-fees/> (last visited Aug. 17, 2018).

423. *Indiana Special Education Private Schools*, PRIV. SCH. REV., <https://www.privateschoolreview.com/indiana/special-education-private-schools> (last visited Aug. 17, 2018); *see* 2018–2019 PARTICIPATING CHOICE SCHOOLS, *supra* note 410.

424. Fortune Academy is committed to serving students with a variety of disabilities, including Attention Deficit Disorder, Attention Deficit Hyperactive Disorder, dyslexia, and anxiety disorders. *Who We Are*, FORTUNE ACAD., <https://www.thefortuneacademy.org/who-we-are> (last visited Aug. 5, 2018). Fortune Academy’s annual tuition is \$17,250 for first through eighth grade, and \$19,250 for ninth through twelfth grade. *Tuition*, FORTUNE ACAD., <https://www.thefortuneacademy.org/tuition> (last visited Aug. 17, 2018).

425. *The 50 Best Private Special Needs Schools in the U.S.*, MASTERS IN SPECIAL EDUC. PROGRAM GUIDE, <https://www.masters-in-special-education.com/50-best-private-special-needs-schools> (last visited Aug. 17, 2018) [hereinafter MASTERS PROGRAM].

426. *Id.*

427. *Financial Assistance*, MIDWEST ACAD., <https://www.mymwa.org/admissions/financial-assistance> (last visited Aug. 17, 2018) (noting that although its tuition is “set at approximately \$10,000 less than the national average of schools serving children with learning style differences, the cost of a private education is an [onerous] obligation for many families”); *About Us*, WORTHMORE ACAD., <http://www.worthmoreacademy.org/about-us.html> (last visited Aug. 17, 2018).

An examination of the websites of participating private schools reveals that an overwhelming number of these schools are free to discriminate against children with disabilities by excluding them from admission.⁴²⁸ Approximately ninety-seven percent of the private schools participating in the Indiana Choice Program for the 2017–2018 school year are exempt from the non-discrimination provisions of the ADA because they identify as a religious organization.⁴²⁹ Some of these schools already accept federal funds from the U.S. Department of Agriculture (USDA) to support school lunch programs,⁴³⁰ and are

428. See 2018–2019 PARTICIPATING CHOICE SCHOOLS, *supra* note 410; Turner, *supra* note 406. Many private schools impose academic requirements, standardized test scores, and interview requirements for admission that may bar some students with disabilities. See, e.g., *Admissions Checklist (Grades 7–12)*, BLACKHAWK CHRISTIAN SCH., <http://www.blackhawkchristian.org/downloads/Admissions-Philosophy-Expectations-Policies-7-12.pdf> (last visited Aug. 17, 2018) (discussing how “high academic standards and equally challenging expectations” means that the Blackhawk Christian School “is not the best learning environment for every student”); *Enrollment Policy*, EMMANUEL-ST. MICHAEL LUTHERAN SCH., <https://www.esmeagles.com/enrollment/steps-to-enroll> (last visited Aug. 17, 2018) (“The transfer student’s records (report cards, standardized test results, individual education plans) must be provided to Emmanuel-St. Michael Lutheran School for enrollment and must indicate that the student has a reasonable expectation for success at Emmanuel-St. Michael. Additional academic screening may be required.”); *Admissions Policy*, ST. PETER’S LUTHERAN CHURCH & SCH., <http://www.stpetersfw.org/school/admissions/825-admissions-policy> (last visited Aug. 17, 2018) (“Admission to St. Peter’s Lutheran School is dependent upon St. Peter’s having the appropriate academic program/educational plan that fits the student. St. Peter’s Lutheran School may or may not be equipped to service the educational needs of students with disabilities. Students with Individualized Education Plans require individualized review and approval for admission.”); *Application for Enrollment Concordia Lutheran School*, CONCORDIA LUTHERAN HIGH SCHOOL, https://www.clhscadets.com/apps/pages/index.jsp?uREC_ID=303585&type=d&pREC_ID=867926 (last visited Aug. 17, 2018) (requiring disclosure of special education status and records on first page of application). Notably, the Concordia Lutheran School Handbook describes how resource teachers will help families receive “auxiliary services” through the support of the public school district in the following areas: “learning disabilities service, psychological services, and speech correction,” inferring that students with other special needs would not be admitted. See *2017–2018 School Handbook*, CONCORDIA LUTHERAN SCHOOL, https://docs.wixstatic.com/ugd/b7a825_a42aae2d9fef4a5ebb151e4c64033e3c.pdf (last visited Aug. 17, 2018).

429. 28 C.F.R. § 36.102(e) (2017).

430. *Compare Community Eligibility Provision (CEP)*, IND. DEP’T OF EDUC. (May 30, 2018), <https://www.doe.in.gov/nutrition/community-eligibility-provision-cep> (click on “CEP Site List SY 17–18”) (displaying the schools that participate in the National School Lunch and School Breakfast Programs), with 2018–2019 PARTICIPATING CHOICE SCHOOLS, *supra* note 410 (listing the schools that accept vouchers).

therefore subject to section 504's non-discrimination provisions.⁴³¹ Some of the religious schools accepting these funds solely mention disability in the generic anti-discrimination disclaimer on their school lunch pages.⁴³² These schools do not discuss or list any special education personnel or programming.⁴³³

Furthermore, the admission policies and practices of many private schools participating in the Choice Scholarships Program involve either explicit or implicit discrimination against students with disabilities. One school's admissions policy explicitly states that students with disabilities face a more rigorous admissions process.⁴³⁴ The school's website states, "St. Peter's Lutheran School may or may not be equipped to service the educational needs of students with disabilities. Students with [IEPs] require individualized review and approval for admission."⁴³⁵ Several other schools employ an admission process that is biased against children with disabilities due to onerous application requirements. For instance, schools may require a certain score on an entrance exam, disclosure of an IEP, or an in-person interview.⁴³⁶ These admissions requirements likely allow the school to weed out students with disabilities because they may not meet certain admission criteria, such as standardized test score thresholds.⁴³⁷

431. Suzanne E. Eckes et al., *Dollars to Discriminate: The (Un)intended Consequences of School Vouchers*, 91 PEABODY J. EDUC. 537, 543–52 (2016) (stating that section 504 forbids federal funds recipients from discriminating against persons with disabilities).

432. See, e.g., *Lunch Menus*, SAINT PETER-IMMANUEL LUTHERAN SCH., <http://www.stpeterimmanuelutheran.org/lunch-menus> (last visited Aug 17, 2018) ("In accordance with Federal Law and U.S. Department of Agriculture Policy, this institution is prohibited from discriminating on the basis of race, color, national origin, sex, age, or disability.").

433. *Id.*

434. See *Admissions Policy*, ST. PETER'S LUTHERAN CHURCH & SCH., <http://www.stpetersfw.org/school/admissions/825-admissions-policy> (last visited Aug 17, 2018) (explaining that admission is dependent upon the student fitting into St. Peter's current academic program).

435. *Id.*

436. See, e.g., *School Admission Policy for Diocese of Fort Wayne-South Bend (Diocesan Policy #4060)*, BISHOP DWENGER HIGH SCH., <http://www.bishopdwenger.com/Data/Accounts/Files/1/AdmittancePolcy6-21-17-AddedHomeschoolTransfer.pdf> (requiring that applicants take school-specific placement exams, disclose IEPs, interview with a school administrator (if applying as a transfer student), and submit recommendation forms from prior teachers).

437. See, e.g., *Admissions FAQ*, BREBEUF JESUIT PREPARATORY SCH., <https://brebeuf.org/admissions/faq> (last visited Aug 17, 2018) (noting that a student must score at the 60th percentile on the High School Placement Test, a standardized test that all private Catholic schools use in Indianapolis, to gain admission).

While some participating schools decry the argument that they “only pick the cream of the crop,”⁴³⁸ evidence suggests that these participating schools are using these admissions criteria to exclude children with disabilities.⁴³⁹ Some participating private schools still allege “public schools are just better equipped to work with special education students.”⁴⁴⁰ This practice of telling families of children with disabilities that their school cannot serve the child’s needs may account for the disparate enrollment rates of special education students in public versus private schools in Indiana, despite the Special Education Pathway voucher program. Across the state, public schools are serving special education students at a rate of two-to-one over their private school counterparts within the same district.⁴⁴¹

The fact that special education students continue to enroll in voucher schools at low rates is evidence that “choice” for children with disabilities is just a fallacy. The 2016–2017 Choice Program Annual Report reveals that less than four percent of participating voucher students are using the Special Education Pathway.⁴⁴² Further, almost half of these students had never attended an Indiana Public School. Thus, it is unlikely that parents of children with special needs are choosing private schools because public schools failed their children.⁴⁴³ Moreover, while enrollment in other voucher pathways is increasing year over year, participation in the Special Education Pathway has decreased every year since it was enacted in 2011.⁴⁴⁴

One reason for the decline in numbers could be the lack of accountability participating Choice Schools have for the education they are providing to students with disabilities.⁴⁴⁵ The IDEA’s mission was to

438. McLaren, *supra* note 387.

439. See Turner, *supra* note 406 (stating that although seventeen percent of public school students in Indianapolis receive special education services, only seven percent of Indianapolis students in voucher schools do).

440. *Id.*

441. *Id.* (reporting that in Indianapolis the ratio of public schools servicing special education students to private schools is 2.4-to-1 (17%-to-7%), and in Fort Wayne the ratio is 2.3-to-1 (15%-to-6.5%).

442. IND. DEP’T OF EDUC., CHOICE SCHOLARSHIP PROGRAM ANNUAL REPORT: PARTICIPATION AND PAYMENT DATA 13 (2017) [hereinafter CSP ANNUAL REPORT].

443. *Id.* at 16 (documenting that of the 1140 students receiving vouchers through the Special Education Pathway in the 2016–2017 school year, 525 students—or 46.05%—never attended an Indiana public school).

444. *Id.* at 13 (documenting that enrollment in the Special Education Pathway fell from 1262 students in the 2014–2015 school year, to 1166 students in the 2015–2016 school year, and finally to 1140 students in the 2016–2017 school year).

445. U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-94, PRIVATE SCHOOL CHOICE: FEDERAL ACTIONS NEEDED TO ENSURE PARENTS ARE NOTIFIED ABOUT CHANGES IN RIGHTS

ensure students with disabilities not only received access to education, but were also appropriately educated.⁴⁴⁶ There are no additional accountability measures under the Special Education Pathway for schools that agree to take state special education funding to serve students with disabilities. Although the Choice Program provides state special education funding to participating schools selected as the “service provider,”—whether they use the Special Education Pathway or any other pathway to access the voucher program—less than twenty percent of participating students in 2016–2017 received special education services at their private school.⁴⁴⁷ In other words, only one in five children with disabilities who attend private school on vouchers are actually receiving special education at the private school. This may be because these schools are not adding the resources necessary to support students with disabilities, despite the excess funding, because they have no standards with which to comply.⁴⁴⁸

Regardless of which school is the designated service provider, the performance of students with disabilities participating in the Choice Program demonstrates a lack of meaningful educational opportunity. Researchers from the University of Notre Dame and the University of Kentucky studying the Indiana Choice Program found that special education students receiving a voucher suffered significant losses in reading and writing.⁴⁴⁹ Although the Indiana Department of Education does not include information about specific reasons for retention, studies of other voucher programs indicate that parents withdraw their students from the private schools because of the lack of special

FOR STUDENTS WITH DISABILITIES 29 (2017) (“[I]n 2016–[20]17, more than [eighty] percent of students in private choice programs designed for students with disabilities were enrolled in a program that either provided no information about changes in IDEA rights or provided some inaccurate information about these changes.”).

446. 20 U.S.C. § 1400(d)(1)(A) (2012) (“[The purpose of this act is] to ensure that all children with disabilities have available to them a free appropriate public education . . .”).

447. CSP ANNUAL REPORT, *supra* note 442, at 17.

448. *See id.* (noting that a private school may receive state special education funding if the school agrees to provide special education services to eligible Choice Scholarship students, but the state legislation fails to specify the nature of those special education services). Of the participating schools surveyed by the authors, only one of the non-special needs participating Choice Schools’ websites discusses a special education program. St. Charles Borromeo School has one special education teacher. *Faculty and Staff*, St. Charles Borromeo Cath. Sch., www.stcharlesschoolfw.org/faculty-and-staff.php (last visited Aug. 17, 2018).

449. Marty Lueken, *School Voucher Programs in Indiana and Louisiana*, EDUC. NEXT (June 28, 2017), <http://educationnext.org/school-voucher-programs-indiana-louisiana> (“Special Education voucher students experience a loss of 0.13 standard deviations in [English Language Arts] relative to their matched comparison students.”).

education and related services offered.⁴⁵⁰ One mother of a child with a disability who enrolled her daughter in a private school, withdrew her daughter because her grades continued to fall, despite receiving special education services from her local school district.⁴⁵¹ The mother expected the private school to use teaching methods and accommodations specified in the program-mandated equivalent of an IEP, but without oversight and accountability measures, the private school did not comply with the plan.⁴⁵² Moreover, the Indiana Department of Education's own review of the only federally funded voucher program, the D.C. Opportunity Scholarship Program, found that "lack of special needs services" was a paramount concern cited by parents that did not continue in the program.⁴⁵³

Finally, in practice, the Choice Program is taking precious resources away from public school districts charged with the mandates of the IDEA. In Fort Wayne alone, Indiana spends \$20 million a year on tuition for voucher students.⁴⁵⁴ In the 2016–2017 school year, \$1.1 million of the \$20 million went to a single private K–8 school, St. Jude Catholic.⁴⁵⁵ In a 2014 formal presentation, the

450. See THE MANHATTAN INST., VOUCHERS FOR SPECIAL EDUCATION STUDENTS: AN EVALUATION OF FLORIDA'S MCKAY SCHOLARSHIP PROGRAM, 21 (2003), https://www.manhattan-institute.org/pdf/cr_38.pdf (recording that only 49.3% of former participants in the Florida McKay Scholarship program responded that their private school provided all the special education services it promised to provide); U.S. DEP'T OF EDUC., EVALUATION OF THE DC OPPORTUNITY SCHOLARSHIP PROGRAM 24–26 (2010), <https://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf> (finding that 22% of parents were unable to find a participating school that offered services for their child's special needs) [hereinafter DC OSP].

451. Mindy McLaren, *For Indiana Special-Education Students, Choice Comes at a Cost*, WASH. POST (Dec. 26, 2016), <https://www.washingtonpost.com/local/education/for-indiana-special-education-students-choice-comes-at-a-cost/2016/12/26/3b875480-c3bc-11e6-9a51-cd56ea1c2bb7>.

452. See *id.* The private school posted the child's confidential education plan on the wall to encourage compliance. *Id.* This action itself shows the lack of official oversight in private schools because the Family Education Rights and Privacy Act prohibits schools receiving federal funds from making public student education records without parental permission. *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP'T OF EDUC. <https://www.ed.gov/policy/gen/guid/fpco/ferpa> (last visited Aug. 17, 2018). Ultimately, the mother concluded a public program with teachers trained in special education was the best place to serve her daughter's educational needs. McLaren, *supra* note 451.

453. DC OSP, *supra* note 450 (revealing that 12.3% of parents cited "lack of special needs services" as their initial reason for leaving the scholarship program).

454. Cory Turner, *The Promise and Peril of School Vouchers*, NAT'L PUB. RADIO (May 12, 2017, 6:00 AM), <https://www.npr.org/sections/ed/2017/05/12/520111511/the-promise-and-peril-of-school-vouchers>.

455. *Id.*

head of the church championed the voucher program as a solution to the church's budgetary hardships.⁴⁵⁶ Furthermore, in 2011, the first year of the Choice Program, less than six percent of the students enrolled at St. Jude participated in the voucher program. As of 2017, over sixty percent of the school is on a Choice Program voucher.⁴⁵⁷ In 2016–2017, nearly fifty-five percent of Choice students had never attended an Indiana public school.⁴⁵⁸ Thus, Indiana Choice Program is diverting the funds of the notoriously-strapped state education budget⁴⁵⁹ away from public schools—and therefore public school students—to pay for the religious-based education of students who were never a part of the public school system.

In conclusion, the Indiana Choice Program demonstrates that the promises of school choice proponents do not actualize for students with disabilities. These children are easily excluded from private schools on the basis of their disability. Many private schools specializing in special education do not participate in the program. Moreover, even if they did, a voucher would cover a fraction of the tuition. Most importantly, the limited evidence available on student performance reveals that students with disabilities who participate in the voucher programs—at a significantly higher cost than the value of the vouchers—are academically disadvantaged by the Choice Scholarship Program.

Indiana's voucher program is therefore not a feasible option for any parent who cares about the educational well-being of their disabled child. These parents have no choice but to keep their children in the state public education system, and the current voucher system continually funnels public school funds to private schools which do not service students with disabilities. Therefore, parents of children with disabilities will find it more and more difficult to find schools adequately prepared to provide the intensive resources their children need.

456. *Id.* The video of the presentation was later removed from the parish's website. *Id.*

457. *Id.* ("This year [2017], according to state data, nearly two-thirds of St. Jude's students now receive public dollars to help pay for their private school tuition.").

458. CSP ANNUAL REPORT, *supra* note 442, at 15 (recording that 18,732 of 34,299 students in the program during the 2016–2017 school year had "No Record of Attending an Indiana Public School").

459. Indiana received a "C+" in state funding for education in 2018 Education Week Quality Points report. *Quality Counts*, EDUC. WK. (Jan. 17, 2018), <https://www.edweek.org/ew/collections/quality-counts-2018-state-grades/report-card-map-rankings.html>.

IV. THE DETRIMENTAL EFFECTS OF FEDERAL VOUCHERS ON STUDENTS WITH DISABILITIES

The realities of the Indiana Choice Program demonstrate the harm that voucher programs can do to students with disabilities.⁴⁶⁰ Federally funded vouchers would be a disaster for the education of children with disabilities both on an individual and national level because it would undermine the progress made under the IDEA over the last forty years. If the federal government models a voucher program on the Indiana system, private schools would be free to openly discriminate against children with disabilities—both in their admissions policies and in reduction in services for students who are admitted. Moreover, evidence indicates that children with disabilities who participate in a federal voucher program will not have improved access to private special needs programs.⁴⁶¹ The evidence also shows that even if children with disabilities do have access to a private special needs program via a federal voucher program, they will likely regress academically—presumably because such private special needs programs do not have to comply with the IDEA’s strict mandates.⁴⁶² At a national level, students with disabilities will be injured by segregation, further reductions in funding, and removal of the IDEA protections.

A. *Children with Disabilities will Suffer Harm Under a Federally Funded Voucher Program*

First, a federally funded voucher program will hurt students with disabilities because private schools have significant authority to exclude these students from their programs. As discussed above, private schools are exempt from the IDEA and have only minimal obligations under section 504 and under the ADA. Under either section 504 or the ADA, even non-religious private schools may exclude a child with a disability if doing so would fundamentally alter their program or would cause an undue hardship to the school.⁴⁶³ Moreover, nearly eighty percent of the private schools in America are exempt from these laws because they fit under the definition of “religious organizations.”⁴⁶⁴

460. See *supra* Section III.B.

461. Lex Frieden, *School Vouchers and Students with Disabilities*, NAT’L COUNCIL ON DISABILITY (Apr. 15, 2003), <https://ncd.gov/publications/2003/April152003> (identifying potential consequences of a federal voucher program, including the lack of access to this type of program for disadvantaged families).

462. *Id.*

463. 28 C.F.R. § 36.303 (2016).

464. See *supra* note 160 and accompanying text (citing an ED survey detailing the number of “religious” private schools in the United States).

Second, students with disabilities can only access a federally funded voucher if they waive all the procedural safeguards and disciplinary protections set forth in the IDEA. Although *Andrew F.* revitalized the IDEA, this is a Pyrrhic victory for any child with a disability who accepts a voucher. In accepting a voucher, a child with a disability loses the right to free appropriate public education, the right to special education and related services they would have in the public school system, the right to a highly qualified special education instructor, and the right to a hearing to dispute disciplinary actions.⁴⁶⁵ Moreover, evidence indicates most parents do not realize what they are implicitly waiving by accepting a voucher.⁴⁶⁶ There is no procedural notice requirement to gain informed consent of the parents before giving them a voucher that terminates their IDEA rights.

Third, most private schools created specifically to serve students with particular disabilities are cost prohibitive. Advocates for vouchers argue that they help children with disabilities access private schools created to serve special needs students without a lengthy due process hearing to gain reimbursement. But most of these schools are prohibitively expensive, if they even participate in a voucher program. As discussed above, the preeminent private special needs schools in Indiana do not participate in the Choice Program.⁴⁶⁷ The single participating school for children with high-functioning autism would cost roughly \$10,000 a year after a voucher,⁴⁶⁸ a significant hurdle considering eighty percent of participating families have a household income of \$75,000 or less annually,⁴⁶⁹ and the costs of raising a child with a disability are quadruple the cost of a typically developing child.⁴⁷⁰

Furthermore, private schools designed for children with significant support needs are often four times more expensive than other special needs private schools. The current tuition for Denver's excellent Firefly Autism—the private school whose tuition the plaintiffs sought

465. See Goldstein, *supra* note 413 (detailing the rights given up, often unknowingly, by parents participating in the voucher programs).

466. See *id.* (“By accepting the vouchers, families may be unknowingly giving up their rights to the very help they were hoping to gain.”).

467. See *supra* notes 418–420 and accompanying text (detailing the small number of private schools in Indiana participating in the Choice Program, and of those only one is a non-religious school focusing on Special Needs children).

468. See *supra* notes 421–422 and accompanying text (examining Indiana's Independence Academy, a school serving children with Autism).

469. CSP ANNUAL REPORT, *supra* note 442, at 23.

470. Craig Guillot, *The Cost of Raising a Special Needs Child*, MINT LIFE BLOG (July 23, 2013), <https://blog.mint.com/planning/the-cost-of-raising-a-special-needs-child-0713>.

reimbursement for in *Endrew F.*—is \$70,000 a year.⁴⁷¹ The Joshua School, a nationally-acclaimed school serving children with Autism Spectrum Disorder, has a similar tuition rate.⁴⁷² Both programs are designed to serve children with more significant needs, which requires highly trained staff, highly individualized classrooms, very small teacher to child ratios, and other therapeutic professionals.⁴⁷³ Even if a federally funded voucher covered ten percent of that cost, the majority of families in America could not afford to cover the rest of the cost of these therapeutic programs. This is why it is imperative to maintain the IDEA provision that allows parents to request that the public school district pay the child's tuition at one of these schools. The cost of tuition at private schools with established special education programs will often be less than the cost of the district providing all the necessary specialized services and staff within the public school system.

Fourth, a voucher program would further harm students with disabilities by taking more students with disabilities out of an inclusive environment. Students with disabilities make the most progress when they are in an inclusive environment—that is, when they are integrated into classrooms with students without disabilities.⁴⁷⁴ Ending the segregation of children with disabilities in the American education system was the primary purpose behind the IDEA.⁴⁷⁵ Congress recognized that students with disabilities learn better when they are integrated with their peers—just as the Supreme Court found over seventy years ago in *Brown v. Board of Education*⁴⁷⁶ that black students receive a better education when they are not segregated from their

471. John Aguilar, *Douglas County Schools Must Pay the Private Education Costs of Student who has Autism, Judge Rules*, DENVER POST (Feb. 12, 2018, 4:54 PM), <https://www.denverpost.com/2018/02/12/douglas-county-schools-private-education-costs> (noting that in total, the *Endrew* plaintiffs may be entitled to upwards of seven figures in education reimbursement by the state).

472. Amy Bounds, *Boulder's Joshua School for Students with Autism Opens*, DAILY CAMERA (Jan. 19, 2013, 12:00 PM), www.dailycamera.com/ci_22405355/boulders-joshua-school-students-autism-opens.

473. *Joshua School: School-Age Program*, JOSHUA SCH., <https://joshuaschool.org/school-age-program> (last visited Aug. 17, 2018).

474. Thomas Hehir, *A Summary of the Evidence on Inclusive Education*, INSTITUTION ALANA (2016), https://alana.org.br/wp-content/uploads/2016/12/A_Summary_of_the_evidence_on_inclusive_education.pdf (“A large body of research indicates that included students develop stronger skills in reading and mathematics, have higher rates of attendance, are less likely to have behavioral problems, and are more likely to complete secondary school than students who have not been included.”).

475. See *supra* note 161 and accompanying text (recognizing the main goal in enacting IDEA was to combat the segregation of disabled children).

476. 347 U.S. 483 (1954).

white peers.⁴⁷⁷ As special education and legal expert Wendy Hensel points out, “daily interaction . . . with their typical peers diminishes the stigma of otherness associated with disability and normalizes children’s understanding of impairments.”⁴⁷⁸ Inclusive opportunities for children with disabilities has such profound positive results for student achievement that even intensive needs institutions that cater specifically to students with a particular disability work to create interaction with typical peers whenever possible.⁴⁷⁹

B. National Harm of Federally Funded Vouchers

A federally funded voucher program will re-segregate education in America, leaving the children with the most significant needs in the ever-more-underfunded public school system. The history of vouchers is tied to a desire to segregate students from those perceived to be the “other.”⁴⁸⁰ Due to the ability to discriminate against children with disabilities and lack of accountability for private participating schools to properly educate children with disabilities under the IDEA, a voucher program will likely leave children with moderate to severe disabilities relegated to the public school system. This concern is evocatively encapsulated by Senator Maggie Hassan, the mother of child with a disability and vocal opponent of Secretary DeVos, who warns against vouchers having “the potential for turning our public schools into warehouses for the most challenging kids with disabilities.”⁴⁸¹ In fact, a McKay Scholarship official remarked he was not concerned by the lack of special education resources in private schools accepting this voucher “because about 85% of McKay voucher recipients have only a mild learning disability.”⁴⁸²

Additionally, diverting the limited federal funds from the public school system lessens the resources these schools have to serve students with disabilities. The federal government provides less than ten percent of the funding for public education across the country.⁴⁸³

477. *Id.* at 495.

478. Hensel, *supra* note 5, at 341.

479. See Aubyn C. Stahmer et al., *Inclusion for Toddlers with Autism Spectrum Disorders*, AUTISM (Apr. 12, 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4031244>. Firefly Autism and The Joshua School Early Childhood Center both run inclusion programs.

480. See *supra* Section I.A (discussing “Segregation Academies”).

481. Turner, *supra* note 406.

482. Hensel, *supra* note 5, at 323.

483. See *The Federal Role in Education*, U.S. DEP’T OF EDUC., <https://www.ed.gov/about/overview/fed/role.html> (last modified May 25, 2017) (estimating the “[f]ederal contribution to elementary and secondary education” to

Moreover, the federal government has not fully funded the IDEA since it was enacted⁴⁸⁴ and has received a “C” grade by influential quality analysts, “reflect[ing] continued struggles with achievement and funding gaps.”⁴⁸⁵ State school funding is often based on a combination of local property taxes and any additional funding that a strapped legislature can find in its budget; it is not derived from the estimated costs of providing an adequate education to children across America.⁴⁸⁶ If private schools need additional funding to provide a proper education, they can increase tuition. Public schools do not have that luxury.

Finally, encouraging parents to use a voucher, rather than assert their rights under the IDEA, allows systemic problems in public school systems to go unchecked. After Douglas County Public Schools lost the *Andrew F.* case, the Board of Education finally took years of complaints from special education parents seriously.⁴⁸⁷ The School Board recently created a Special Education Advisory Task Force, made up of staff, parents, and community members, to identify “strengths, needs and goals of current special education services” with recommendations for the future.⁴⁸⁸ Additionally, the ED Office of Civil Rights investigated and resolved thirty cases of systemic disability discrimination in the public school system since 2009.⁴⁸⁹ If parents are encouraged to take a voucher, systemic maltreatment of students with disabilities by school districts across the country will go unhampered.

C. *Lack of Options for Children with Disabilities*

Given the significant individual and global consequences a federally funded voucher program imposes on students with disabilities, it is

be eight percent, including funding from the ED and other federal agencies, such as the Department of Agriculture’s School Lunch program).

484. BROKEN PROMISES, *supra* note 166, at 20.

485. *Quality Counts 2018 Redoubles Focus on State-by-State K–12 Systems*, EDUC. WK. RES. CTR. (Jan. 17, 2018), <https://www.edweek.org/ew/collections/quality-counts-2018-state-grades/report-card-map-rankings.html>.

486. Cory Turner et al., *Why America’s Schools Have a Money Problem*, NAT’L PUB. RADIO (Apr. 18, 2016, 5:00 AM), <https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem>.

487. Alex DeWind, *School Board Approves Special Education Task Force*, CASTLE ROCK NEWS-PRESS (Jan. 24, 2018, 10:15 AM), <http://castlerocknewspress.net/stories/school-board-approves-special-education-task-force,258102>.

488. *Id.*

489. *More Case Resolutions Regarding Disability Discrimination*, U.S. DEP’T OF EDUC., <https://www.ed.gov/about/offices/list/ocr/frontpage/casesolutions/m-disability-cr.html> (last modified Nov. 4, 2016).

important to explore the potential outcomes for these children. While the optimum outcome, from the perspective of children with disabilities, would be for the Trump administration to drop its pursuit of a federally funded voucher program, this seems highly unlikely. The Trump administration could attempt to create some extended protections for children with disabilities; however, these would likely fail. Or the legislature could override any policy change the Trump administration takes, although this is not likely given the current stagnation of Congress. That leaves the pursuit of litigation as a potential path for children with disabilities to block federally funded vouchers. This section explores each of the above options in turn.

First, there is the possibility the Trump administration will realize the conflict a federally funded voucher program creates with IDEA enforcement and will decline to move forward with a federally funded program. However, this is not a likely outcome given the policy decisions and public comments made by Secretary DeVos.⁴⁹⁰ Most notably, Secretary DeVos has pushed a free-market agenda for education by lessening regulations put in place by the Obama administration to protect students from for-profit universities, and by freezing regulations designed to forgive student loans based on fraudulent promises by a college or university.⁴⁹¹ Additionally, Secretary DeVos has continued to undermine civil rights protections in the education system by rescinding Obama-era guidance to protect transgender student rights and sexual assault victims on college campuses and reducing staffing and investigations at the ED Office of Civil Rights.⁴⁹² While these decisions do not directly affect students with disabilities, this removal of protections for other vulnerable students does raise the question of whether she will similarly decline to protect students with disabilities—especially when she views those

490. See *infra* note 527 and accompanying text (detailing Secretary DeVos' push for a free-market education system); *infra* note 493 and accompanying text (exploring Secretary DeVos' comments on the privatization of American education).

491. See, e.g., Erica L. Green, *DeVos to Eliminate Rules Aimed at Abuses by For-Profit Colleges*, N.Y. TIMES (July 26, 2018), <https://www.nytimes.com/2018/07/26/us/politics/betsy-devos-for-profit-colleges.html>; Erica L. Green, *DeVos Proposes to Curtail Debt Relief for Defrauded Students*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/us/politics/betsy-devos-debt-relief-for-profit-colleges.html>; Ella Nilsen & Carly Sitrin, *How Betsy DeVos is Quietly Erasing Obama's Education Legacy*, VOX (Oct. 2, 2017, 8:30 AM), <https://www.vox.com/policy-and-politics/2017/10/2/16229474/devos-erasing-obamas-education-legacy>.

492. *Id.*

protections as getting in the way of her single-minded agenda to privatize education.⁴⁹³

Second, the Trump administration could rescind earlier guidance that exempts private schools from the IDEA and other disability laws, and extend the entire portfolio of rights enshrined in the IDEA to any private school accepting federal voucher funding. While Secretary DeVos seemed to assert a belief that federal law should follow federal funds in her confirmation hearing⁴⁹⁴—after demonstrating, it must be noted, a fundamental lack of knowledge about the IDEA—her continued rollback of protections indicates this is an unlikely path.⁴⁹⁵ Given that President Trump celebrates his unprecedented reduction of regulations on the private sector, extending any regulations is unlikely in this administration. To support this initiative, Secretary DeVos pledged to rescind 600 guidance documents by the ED, including seventy-two guidance documents by the Office of Special Education and Rehabilitative Services explicitly outlining the rights of students with disabilities.⁴⁹⁶ While the Trump administration argued that all of the 672 guidance documents were “out of date,” many advocates argued that the move undermines critical protections for minority and disabled students.⁴⁹⁷

493. Stahl, *supra* note 1.

494. Michelle Diamant, *Trump Education Pick Seemingly ‘Confused’ About IDEA*, DISABILITY SCOOP (Jan. 18, 2017), <https://www.disabilityscoop.com/2017/01/18/trump-education-pick-idea/23198> (“Federal law must be followed where federal dollars are in play.”); Katie Reilly, *Here’s a Look at the Education Questions Betsy DeVos Struggled to Answer*, TIME (Jan. 18, 2017), <http://time.com/4637642/betsy-devos-confirmation-education-policy>.

495. Valerie Strauss, *Six Astonishing Things Betsy DeVos Said—and Refused to Say—at Her Confirmation Hearing*, WASH. POST (Jan. 18, 2017), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/18/six-astonishing-things-betsy-devos-said-and-refused-to-say-at-her-confirmation-hearing> (describing the interaction between Secretary-to-be DeVos and Senator Hassan when Hassan stated that she was “upset that [DeVos] didn’t understand the [IDEA] and urged her to learn more about it”).

496. Lauren Camera, *Education Department to Withdraw 600 ‘Out-of-Date’ Guidance Documents*, U.S. NEWS & WORLD REP. (Oct. 27, 2017, 2:36 PM), <https://www.usnews.com/news/education-news/articles/2017-10-27/education-department-to-withdraw-600-out-of-date-guidance-documents>; *see also* Moriah Balingit, *DeVos Rescinds 72 Guidance Documents Outlining Rights for Disabled Students*, WASH. POST (Oct. 21, 2017), <https://www.washingtonpost.com/news/education/wp/2017/10/21/devos-rescinds-72-guidance-documents-outlining-rights-for-disabled-students>.

497.

There can be no further question: Secretary DeVos is dead set on rolling back all the progress we’ve made for our children of color and students with disabilities If Secretary DeVos indeed moves forward with this action, she will be pushing IDEA’s promise of educational equity further

Given the likelihood a federally funded voucher program will move forward without extending the protections for students with disabilities, what options, if any, do these children have in the courts? Although the United Nations recognizes education as a fundamental human right,⁴⁹⁸ the Supreme Court held in *San Antonio v. Rodriguez*⁴⁹⁹ that there is no fundamental right to education under the U.S. Constitution.⁵⁰⁰ The best option for students with disabilities could be to return to the argument that helped create the IDEA in the first place: equal protection of the laws under the U.S. Constitution. Children with disabilities and their families could challenge a federally funded voucher program that does not extend the protections of the IDEA to private schools under the Equal Protection Clause. This option is discussed in detail in Part V below.

The Supreme Court has accepted equal protection claims brought on behalf of children in a variety of contexts. The landmark case on educational rights and equality in the United States, *Brown v. Board of Education*,⁵⁰¹ addressed the inequitable treatment of children of color in public schools, and the harmful effects of a segregated school system.⁵⁰² The Supreme Court has also held that laws treating children differently based on the non-marital status of their parents violated the Equal Protection Clause, because these laws discriminate against children on the basis of a characteristic entirely beyond their control.⁵⁰³ The Supreme Court applied similar reasoning in another education case, *Plyler v. Doe*,⁵⁰⁴ striking down a Texas law that sought to prohibit the children of immigrants from attending public schools.⁵⁰⁵ In *Plyler*, the Supreme Court recognized that although education is not a fundamental right, a policy that prohibits children from schools

out of reach, worsening the school to prison pipeline, and so much more—
with students of all ages and backgrounds paying the price.

Camera, *supra* note 496.

498. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 26 (Dec. 10, 1948) (“Everyone has the right to education.”).

499. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973).

500. *Id.* at 35 (holding that “[e]ducation . . . is not among the rights afforded explicit protection under [the] Federal Constitution”).

501. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

502. *Id.* at 494–95.

503. *King v. Smith*, 392 U.S. 309, 336 (1968) (holding the Equal Protection Clause protects “illegitimate” children from discrimination); *see also* *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

504. *Plyler v. Doe*, 457 U.S. 202 (1982).

505. *Id.* at 220.

because of circumstances entirely beyond the child's control is an impermissible violation of the Equal Protection Clause.⁵⁰⁶

Based on these precedents and absent a change in the current political climate, an equal protection claim brought on behalf of children with disabilities could be the only plausible way to block a federally funded voucher program, and thereby ensure these children continue to have equal access to educational opportunities. A federally funded voucher program purporting to improve educational outcomes for U.S. children that does not extend IDEA protections to private schools participating in the program inherently excludes children with disabilities from meaningful access to these opportunities.

V. EQUAL PROTECTION CLAIMS AGAINST FEDERALLY FUNDED VOUCHERS

An alternative to political resistance to school vouchers programs is a constitutional challenge. Though the Supreme Court has rejected arguments that voucher programs involving religious schools violate the Establishment Clause, the de facto exclusion of children with disabilities provides another avenue for constitutional challenge. Parents could argue that requiring students with disabilities to give up their educational rights as a precondition to joining a school voucher program—either state or federal—is a violation of fundamental rights and of equal protection under the U.S. Constitution.

Such challenges would face significant obstacles, however, at least under a traditional application of the Supreme Court's fundamental rights and equal protection jurisprudence. For the most part, a claim under either the Due Process Clause or the Equal Protection Clause lives or dies by the standard of review applied.⁵⁰⁷ If the court applies traditional rational basis review, the challenged action is "overwhelmingly likely to be upheld," as it need only be rationally related to serve a legitimate government purpose.⁵⁰⁸ The Supreme Court has invalidated only a small number of government actions under this test.⁵⁰⁹ Conversely,

506. *Id.*

507. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 727, 732 (5th ed. 2017).

508. *Id.* at 732.

509. *Id.* (explaining that the strong deference to a government action under the rational basis test is due to the low burden on the government to prove a legitimate government purpose); *see, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (holding that the criminalization of sodomy failed the rational basis test and served no legitimate government purpose); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (invalidating a zoning ordinance that discriminated against persons with mental disabilities after finding the ordinance served no legitimate government purpose).

if the court applied heightened scrutiny—especially strict scrutiny—the challenged law was doomed to fall.⁵¹⁰ As has been often repeated, the highest level of scrutiny is “strict in theory and fatal in fact.”⁵¹¹

A. *Heightened Scrutiny*

A challenge to the school voucher programs by students with disabilities would therefore have a very high chance of success if a court could be persuaded to apply strict scrutiny with respect to either fundamental rights or equal protection. Neither of these is likely, however. Take fundamental rights first. In order for strict scrutiny to apply to a claimed violation of the substantive Due Process Clause, the challenged law must infringe upon a fundamental right; otherwise, rational basis review applies.⁵¹² Unfortunately for disability rights advocates, and the students themselves, the Supreme Court has ruled that education is *not* a fundamental right.⁵¹³ In order for strict scrutiny to apply to a fundamental rights challenge, the Court would have to overrule its own precedent and hold that education is, in fact, a fundamental constitutional right.

1. *Classification of vouchers as discriminatory*

The duty to provide equal protection of the law also extends to equally conferring benefits on citizens. However, the likelihood of courts applying heightened scrutiny to de facto exclusionary school voucher programs under an equal protection challenge is also slim, for several reasons. First, while the school voucher programs place a greater burden on children with disabilities, the programs do not expressly exclude children with disabilities. For a law to be characterized as discriminatory on the basis of a particular characteristic—in this case,

510. CHERMINSKY, *supra* note 507, at 727.

511. Gerald Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection Clause*, 86 HARV. L. REV. 1, 8 (1972).

512. See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297–98 (2006) (concluding that parents do not have the right to reimbursement all costs resulting from litigation against a child’s school district); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37–39 (1973) (holding that because education is not a fundamental right, funding to a school district does not need to be analyzed under a strict scrutiny analysis); CHERMINSKY, *supra* note 507, at 727–32 (identifying the differing levels of scrutiny that the Supreme Court may apply).

513. *Rodriguez*, 411 U.S. at 35.

disability—the law must either (1) be facially discriminatory, or (2) have *both* a disparate effect *and* a discriminatory purpose.⁵¹⁴

As described above, school voucher programs that require students with disabilities to sign away most, if not all, of their educational rights have a substantial disparate impact on these students.⁵¹⁵ To describe the disparate impact, this section will use the Indiana voucher program as a proxy for a federally funded voucher program because it is the largest in the nation and most closely connected to the Trump administration—and therefore likely to be used as a model for a federal voucher program.⁵¹⁶

A federally funded voucher program akin to Indiana’s Choice Program will have a disparate impact on students with disabilities for a variety of reasons that are described above.⁵¹⁷ Several of these burdens are worth emphasizing here, because they are tantamount to *de facto* exclusion of students with disabilities. First, the Indiana program prohibits participating schools from discriminating in their admission requirements. However, the bases on which discrimination is prohibited are limited to “race, color, or national origin.”⁵¹⁸ In other

514. See, e.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that a discriminatory effect by itself is not enough to invalidate a government action); see also CHEMERINSKY, *supra* note 507, at 754 (explaining that different constitutional analyses are required depending on whether the law is facially neutral or not); Mitchell F. Rice, *The Discriminatory Purpose Standard in Racial Discrimination Litigation: From Yick Wo to Arlington Heights*, 10 S.U. L. REV. 219, 231, 234 (1983) (quoting in part Frank I. Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 33 (1969) (“[The] ‘Equal protection’ radar . . . blips whenever a government seems (a) to be ‘classifying’ persons so as to extend to them unequal treatments, or (b) otherwise to be acting in a way which results in systematic inequality in treatments received by definable groups of persons.”); see generally Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1080–83 (2011) (noting that requiring a discriminatory purpose on top of a discriminatory effect greatly limits a court’s ability to deal with inequities in government actions).

515. See GOLDSTEIN, *supra* note 413 (explaining the effects that school voucher programs have on students with disabilities).

516. Valerie Strauss, *How Mike Pence Expanded Indiana’s Controversial Voucher Program when he was Governor*, WASH. POST (Jan. 28, 2018), <https://www.washingtonpost.com/news/answer-sheet/wp/2018/01/28/how-mike-pence-expanded-indianas-controversial-voucher-program-when-he-was-governor> (discussing how Vice President Pence expanded Indiana’s voucher program while Governor).

517. See *supra* Section II.B (analyzing the Indiana Choice Program and its effect on disabled children).

518. IND. CODE § 20-51-4-3(a) (2017) (“An eligible school may not discriminate on the basis of race, color, or national origin.”).

words, private schools are permitted to refuse to enroll voucher students because they have a disability.

Second, the administration of the Indiana Choice Scholarship Program has a disparate effect on children with disabilities. It requires these children to waive the very rights Congress crafted—via the IDEA—to assure that children with disabilities were provided educational opportunities their typical peers already received.⁵¹⁹ Many state laws explicitly provide that parents who accept vouchers must voluntarily waive their child’s right to free appropriate public education under the IDEA.⁵²⁰ The D.C. Code includes a provision that nothing in the federally funded voucher program “alter[s] or modif[ies] the provisions of the Individuals with Disabilities Education Act,”⁵²¹ signifying that a federally funded voucher program does not require private schools to comply with the IDEA.⁵²² Moreover, the ED has explicitly issued guidance that the IDEA does not govern private schools, even in the context of a voucher program.⁵²³ Consequently, children with disabilities must waive their legal right to a ‘free appropriate public education’ in order to access the vouchers that the Trump administration claims is so imperative for educational excellence.⁵²⁴

Third, students with disabilities who enter the voucher program would have to give up not only their rights and protections under the IDEA, but their rights and protections under both the ADA and section 504 as well. Over ninety-five percent of schools participating in the Indiana program are exempt from the anti-discrimination

519. Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d) (2012).

520. GA. CODE ANN. § 20-2-2114(f) (2016); LA. STAT. ANN. § 4016(B) (Supp. 2018); MISS. CODE ANN. § 37-181-5 (Supp. 2017); OHIO REV. CODE ANN. §§ 3310.41(B), 3310.53(A) (LexisNexis 2013); TENN. CODE ANN. § 49-10-1403(a)(2) (Supp. 2017); UTAH CODE ANN. § 53A-1a-704(5)(a)(3) (LexisNexis Supp. 2017); Eckes et al., *supra* note 431, at 548.

521. D.C. CODE § 38-1853.08(c) (2001).

522. Eckes et al., *supra* note 431, at 546.

523. Letter from Stephanie S. Lee, Director, Office of Special Education Programs, to Individual (July 1, 2003) (quoting Letter from Office of Special Education Programs, to Reedy, 16 IDELR 1364 (OSEP 1990) (asserting that private schools are not “bound by the same admission and discipline policies that apply to public schools [under the IDEA]” and that private schools participating in a Choice program are no bound by the IDEA to “provide special education and related services that meet the needs of all students with disabilities”) (quoting Letter from Office of Special Education Programs, to Reedy, 16 IDELR 1364 (OSEP 1990)), <https://www.ed.gov/policy/speced/guid/idea/letters/2003-3/redact070103lre3q2003.pdf>.

524. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 993 (2017).

provisions in the ADA and section 504.⁵²⁵ A survey of voucher programs across the country reveals that none of the programs have explicit nondiscrimination provisions that include disability as a prohibited basis of discrimination.⁵²⁶

Finally, the lifelong stigma that results from inequities in educational opportunity has long been recognized by the Supreme Court. In *Brown v. Board of Education*, the court decried segregation with the sanction of law in public schools for the detrimental effect it has on “the educational and mental development” of the children in the minority group.⁵²⁷ The severity of this concern led to years of judicial oversight of public school desegregation. The judiciary even oversaw desegregation in districts that had no official policies expressly supporting segregation, but “through its actions over a period of years, intentionally created and maintained the segregated character of [city schools].”⁵²⁸ Additionally, the Court noted that inequity in educational benefits stigmatizes an individual “each and every day of his life.”⁵²⁹ Justice Brennan opined, “denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”⁵³⁰

525. See *supra* note 410 and accompanying text (detailing exempt schools in the Indiana program).

526. Eckes et al., *supra* note 431, at 547 (holding that programs that incorporate 42 U.S.C. 2000d protect students from exclusion from participation in, denial of benefits of, and discrimination under Federally-assisted programs on ground of race, color, or national origin, and although Mississippi requires compliance with 42 U.S.C. § 1981, which has general nondiscrimination language, courts have held that this nondiscrimination provision does not extend to disability); see also *Greggs v. Autism Speaks, Inc.*, 935 F. Supp. 2d 9, 12 (D.D.C. 2013) (finding that disability does not fall under § 1981 as a protected class and dismissing plaintiff’s claims of employment discrimination); *Davies v. Polyscience, Inc.*, 126 F. Supp. 2d 391, 392–93 (E.D. Pa. 2001) (same); *Duncan v. AT&T Commc’ns, Inc.*, 668 F. Supp. 232, 235 (S.D.N.Y. 1987) (same).

527. 347 U.S. 483, 494 (1954) (citing several contemporaneous authorities that detail the negative lifelong effects of prejudice and discrimination on the development of the minority group).

528. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 206 (1973). The United States District Court for the District of Colorado oversaw forced busing in an attempt to desegregate Denver public schools for 21 years. See James Brooke, *Court Says Denver Can End Forced Busing*, N.Y. TIMES (Sept. 17, 1995), <http://www.nytimes.com/1995/09/17/us/court-says-denver-can-end-forced-busing.html>.

529. *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (emphasizing that “[i]lliteracy is an enduring disability”).

530. *Id.* at 221–22.

Two key indicators suggest that a federally funded voucher program would continue this trend of permitting schools to discriminate against children with disabilities in their admission policies, thereby forcing parents to choose between participating in the voucher program or giving up their child's disability education rights. First, the current federally funded voucher program, the D.C. Opportunity Scholarship Program, does not include disability in its nondiscrimination provision.⁵³¹ Second, the nondiscrimination provision in the model voucher legislation developed by the non-profit formally led by Secretary DeVos requires compliance with 42 U.S.C. § 1981, which courts have consistently held prevents racial discrimination and does not extend to disability.⁵³²

Several decades ago, Congress found systemic discrimination against children with disabilities pervasive throughout the United States.⁵³³ The exclusion and lack of appropriate education for these children resulted in lifelong consequences, including dependence on government assistance as a result of the lack of meaningful educational opportunities.⁵³⁴ Congress determined that the only way to resolve the treatment of these children was to pass the IDEA to guarantee a free appropriate public education and protect the rights of children with disabilities and their families.⁵³⁵ In recent public remarks, Secretary DeVos claimed that “[e]qual access to a quality education should be a right for every American and every parent should have the right to choose how their child is educated,” advocating a reduction of federal control and choice programs as the mechanism for achieving that path.⁵³⁶ However, history demonstrates that without federal oversight and protection, children with disabilities do not receive a quality education.⁵³⁷ Therefore, a federally funded voucher program

531. D.C. CODE § 38-1853.08 (2001); *see also* Eckes et al., *supra* note 431, at 546–47.

532. *Greggs v. Autism Speaks, Inc.*, 935 F. Supp. 2d 9, 12 (D.D.C. 2013); *Davies v. Polyscience, Inc.*, 126 F. Supp. 2d 391, 392–93 (E.D. Pa. 2001); *Duncan v. AT&T Commc'ns, Inc.*, 668 F. Supp. 232, 235 (S.D.N.Y. 1987).

533. *See supra* Section II.A (examining the Congressional research that eventually led to the enactment of IDEA).

534. *See supra* note 143 and accompanying text; *supra* note 145 and accompanying text.

535. *The IDEA 40th Anniversary*, *supra* note 126.

536. Prepared Remarks by Betsy DeVos, Secretary, U.S. Department of Education, to the American Enterprise Institute (Jan. 16, 2018), <https://www.ed.gov/news/speeches/prepared-remarks-us-education-secretary-betsy-devos-american-enterprise-institute>.

537. *See, e.g.*, Brian M. Rosenthal, *Texas Illegally Excluded Thousands from Special Education, Federal Officials Say*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/texas-special-education.html> (identifying a situation in Texas where thousands were kept out of special education programs due to a lack of federal oversight).

that requires parents to waive all of the protections created by Congress to ensure their children access to a meaningful education imposes a substantial and disparate burden on children with disabilities.

2. *Discriminatory purpose*

For a facially neutral law to be characterized as discriminatory against students with disabilities, a disparate effect is not sufficient. In *Washington v. Davis*,⁵³⁸ the Supreme Court held that facially neutral government action must be “undertaken with a ‘discriminatory purpose’” to violate the Equal Protection Clause.⁵³⁹ To be deemed purposefully discriminatory, a government act must be taken because of, not merely in spite of, its adverse effects upon an identifiable group.⁵⁴⁰ Any kind of evidence, including past history surrounding the government action, legislative history, a departure from normal procedure, or the impact itself, may be used to prove the government act was taken because of its adverse effects.⁵⁴¹ Challengers to a federally funded voucher program may therefore prove intentional discrimination against students with disabilities through public comments, the Trump administration’s departure from normal procedure in education governance, the history surrounding children with disabilities’ access to educational institutions, and the impact itself.

a. *Evidence of discriminatory purpose in the decision making process*

Although proving discriminatory purpose is traditionally a very high bar, challengers to voucher programs can point to the historic exclusion of students with disabilities from equal educational opportunities, including current state voucher programs, and the public record of the Trump administration’s positions averse to—or at least wholly ignorant of—disability rights. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁵⁴² the Supreme Court asserted that “[t]he specific sequence of events leading up to the challenged decision” and the “administrative history” are examples of evidence that is “highly relevant” to an inquiry about discriminatory purpose.⁵⁴³

538. 426 U.S. 229 (1976).

539. Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 541 (1977) (quoting *Davis*, 426 U.S. at 230).

540. *Id.* at 541.

541. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 253 (1977).

542. *Id.*

543. *Id.* at 267–68 (citing *Reitman v. Mulkey*, 387 U.S. 369, 373–76 (1967); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)).

Educational scholars have posited that legislatures deliberately exclude children with disabilities because “these students might be too expensive to educate.”⁵⁴⁴ If there is evidence that the architects of a federal voucher program deliberately chose to impose the disparate impacts described above to discourage—and hence exclude—students with disabilities from participating in the program, this would show that the government action was taken because of, not merely in spite of, its adverse effects upon students with disabilities.

In her Senate confirmation hearing, Secretary DeVos repeatedly emphasized the decision-making authority of states and parents when challenged to address federal civil rights law compliance.⁵⁴⁵ When pressed about enforcement of the IDEA, Secretary DeVos suggested it was up to states whether or not to comply with the law and seemed unaware it was federal law.⁵⁴⁶ After several senators criticized her responses as demonstrating lack of competence for the position, Secretary DeVos wrote a letter to the Senate trying to assuage them of their doubts about her knowledge of the law.⁵⁴⁷ Notably, the letter did not suggest any mechanisms for enforcement and completely failed to discuss the procedural rights bestowed by the law, while taking the opportunity to push a school choice agenda for students with disabilities.⁵⁴⁸

One year into her tenure, Secretary DeVos continued issuing statements pushing for vouchers and against taking protective action, evincing an intent to push for vouchers without extending the protections Congress found to be vital to meaningful education opportunity in 1972.⁵⁴⁹ In a speech at an OSEP leadership conference in the spring of 2017, Secretary DeVos discussed the *Andrew F.*

544. Eckes et al., *supra* note 431, at 552.

545. Joy Resmovits, *Betsy DeVos Would Not Agree to Bar Discrimination by Private Schools that Get Federal Money*, L.A. TIMES (May 24, 2017, 11:24 AM), <http://www.latimes.com/local/education/la-essential-education-updates-southern-more-than-100-days-into-this-1495643939-htmllstory.html>.

546. Diament, *supra* note 494; Reilly, *supra* note 494.

547. Jordan Davidson, *Betsy DeVos Writes Letter to Sen. Johnny Isakson Stating She Will Protect IDEA*, THE MIGHTY (Jan. 26, 2017), <https://themighty.com/2017/01/betsy-devos-idea>; Letter from Betsy DeVos, Secretary of Education, to Sen. Johnny Isakson on IDEA (Jan. 24, 2017), https://www.isakson.senate.gov/public/_cache/files/b11010c9-3b6f-47eb-b665-b3a7c9e2bcfb/01-24-17%20DeVos%20letter%20to%20Isakson%20re%20IDEA%20IEP.pdf [hereinafter Letter to Sen. Isakson].

548. *Id.*

549. *See supra* Section I.C (describing the push by the Trump administration for voucher programs that require parents to give up their child’s right to an adequate education under IDEA).

decision.⁵⁵⁰ She asserted that parents of children with disabilities “should be the ones to decide where and how their children are educated” after calling the Supreme Court’s ruling “common sense.”⁵⁵¹ Her comments illustrate her lack of understanding on these issues: were it not for the IDEA protections, Andrew F.’s family would not have had the ability to challenge the inferior educational plan for their child.

As troubling as Secretary DeVos’s comments may be to disability rights proponents, they nonetheless do not rise to the level of demonstrating discriminatory intent against students with disabilities. Secretary DeVos’s statements and positions are indicative of ignorance of disability law, or simply an intent to move forward with a voucher program that does not protect children with disabilities. This falls short of establishing an intent to exclude students with disabilities or impose greater burdens on them *because* they are students with disabilities. In fact, at least as far as Secretary DeVos’s public statements are concerned, quite the opposite is true. As we described above,⁵⁵² Secretary DeVos has consistently claimed that school vouchers are the best option for students with disabilities, and advocated for voucher programs *because* they are, she claims, beneficial for students with disabilities.⁵⁵³

While Secretary DeVos has engaged in the rhetoric of supporting students with disabilities, President Trump explicitly made disparaging remarks against individuals with disabilities during his 2016 presidential campaign. At a campaign event, for example, then-candidate Donald Trump openly mocked a journalist with a physical disability.⁵⁵⁴ In the Travel Ban cases of 2017, Federal District and Appellate Courts held that a president’s campaign statements could be used to evince discriminatory purpose of the administration although made prior to his inauguration.⁵⁵⁵ However, for the discriminatory

550. Betsy DeVos, Sec. of Educ., U.S. Dep’t of Educ., Address at the Office of Special Education Programs Leadership Conference (July 17, 2017), <https://www.ed.gov/news/speeches/office-special-education-programs-leadership-conference>.

551. Michelle Diamant, *DeVos Wants More Options for Students in Special Education*, DISABILITY SCOOP (July 18, 2017), <https://www.disabilitycoop.com/2017/07/18/devos-options-special-education/23926>.

552. See *supra* note 117 and accompanying text.

553. *Id.*

554. Jose A. DelReal, *Trump Draws Scornful Rebuke for Mocking Reporter with Disability*, WASH. POST (Nov. 26, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/11/25/trump-blasted-by-new-york-times-after-mocking-reporter-with-disability>.

555. *Hawaii v. Trump*, 859 F.3d 741, 772–73 n.14 (9th Cir. 2017), *vacated*, 138 S. Ct. 377 (2017). In *Trump v. Hawaii*, No. 17-965 (U.S. June 26, 2018), the Supreme

purpose requirement to be satisfied, a closer link would be required between a discriminatory attitude towards people with disabilities in general and a decision to create a federal voucher program free from disability rights protections.⁵⁵⁶ There is little—at this nascent stage of advocacy for a federal voucher program—to demonstrate any concrete purpose to exclude students with disabilities from a federally funded school voucher program.

b. Departure from normal procedures as evidence of discriminatory purpose

In *Arlington Heights*,⁵⁵⁷ the Supreme Court held that departures from normal procedures “might afford evidence that improper purposes are playing a role.”⁵⁵⁸ Secretary DeVos has departed from normal procedures in matters affecting students with disabilities on a number of occasions. Less than nine months into her tenure as Secretary of Education, Secretary DeVos rescinded seventy-two guidance documents “outlining rights for disabled students” from the Office of Special Education Programs and the Rehabilitation Services Administration.⁵⁵⁹ A former director of the Office of Special Education Programs noted that despite the Administration’s position that this was part of a general effort to clean up regulations, the move does not

Court reversed the Ninth Circuit’s grant of preliminary injunction. *Id.* at 39. The Court came to this conclusion by applying rational basis review to President Trump’s executive order because both immigration and national security are core executive functions that enjoy substantial deference from the judiciary. *Id.* at 32–34. Chief Justice Roberts’ majority opinion points out that “the admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’” *Id.* at 30 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). This deferential standard of review is particularly appropriate “in admission and immigration cases that overlap with ‘the area of national security.’” *Id.* at 31 (quoting *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in judgment)). Applying this deferential standard, said Chief Justice Roberts, required the court to uphold the challenged immigration policy “so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” *Id.* at 32. The Court concluded that “because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.” *Id.* at 33–34. Consequently, the majority did not address whether President Trump’s social media messages and other statements, whether before or after his inauguration, were sufficient to establish discriminatory purpose.

556. *Cf.* *Malone v. Greco*, No. 92-CV-178S, 1995 WL 222052, at *11–12 (W.D.N.Y. Jan. 21, 1995) (granting summary judgment for defendants because statements were insufficiently tied to alleged discrimination).

557. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

558. *Id.* at 267.

559. *Balingit*, *supra* note 496.

purport with standard procedures for handling guidance documents.⁵⁶⁰ Moreover, during her short tenure, Secretary DeVos has changed the mission of the Office of Civil Rights by charging investigators to quickly close out individual cases rather than look for systemic discriminatory practices across educational institutions.⁵⁶¹ Additionally, in December of 2017, Secretary DeVos proposed to delay an Obama-era rule compelling states to address racial disparities in special education.⁵⁶² The IDEA requires states to protect against overclassifying minority students as special needs.⁵⁶³ Secretary DeVos acknowledged that nearly half of school districts in America are likely violating this provision of the IDEA.⁵⁶⁴ However, she maintained that requiring districts to implement the rule without revision would be too costly.⁵⁶⁵

However, as with President Trump's mocking of a person with disabilities, the departures from normal procedures by the ED are not directly related to the implementation of a federal school voucher program, and therefore likely fall short of demonstrating the discriminatory intent required for a federal voucher program to be classified as discriminatory against students with disabilities.

c. Suspect and quasi-suspect classes

The second reason that courts are unlikely to apply heightened scrutiny under an equal protection challenge is that, even if arguendo, the law is treated as discriminatory on the basis of disability, the Supreme Court has declined to treat people with disabilities as a suspect or quasi-suspect class.

The Supreme Court has formally created two levels of heightened scrutiny: strict scrutiny and intermediate scrutiny. Strict scrutiny requires the government to prove there is a "compelling state interest" behind the action, and that the action is "narrowly tailored"

560. Casey Bayer, *DeVos Rescinds Guidance Documents for Disabled Students: What Does it Mean?*, HARV. GRADUATE SCH. OF EDUC. (Oct. 24, 2017, 5:02 PM), <https://www.gse.harvard.edu/news/17/10/devos-rescinds-guidance-documents-disabled-students-what-does-it-mean>.

561. Nilsen & Sitrin, *supra* note 491.

562. Erica L. Green, *DeVos Delays Rule on Racial Disparities in Special Education*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/us/politics/devos-obama-special-education-racial-disparities.html>.

563. *See id.* (explaining that rule was designed to address concerns about the overrepresentation of minority students in special education).

564. *Id.*

565. *See id.* ("The [Department of Education] . . . estimated that it would cost districts between \$50 million and \$91 million to implement the rule.")

to achieving that compelling state interest.⁵⁶⁶ The intermediate scrutiny standard has evolved from requiring the government to prove that an “important governmental objective”⁵⁶⁷ underlies the act to an “exceedingly persuasive justification” requirement.⁵⁶⁸

Strict scrutiny applies only when the law discriminates against a “suspect class.”⁵⁶⁹ To date, the Court has only recognized race, national origin, and alienage as suspect classes deserving of strict scrutiny.⁵⁷⁰ The Court has only recognized two additional categories—namely gender⁵⁷¹ and a child’s birth status⁵⁷²—as quasi-suspect classes deserving intermediate scrutiny.

The Supreme Court has not recognized that people with disabilities are either a suspect or quasi-suspect class. In *City of Cleburne v. Cleburne Living Center, Inc.*,⁵⁷³ the Court expressly held that mental retardation is not a quasi-suspect classification calling for

566. CHEMERINSKY, *supra* note 507, at 727, 730.

567. *Craig v. Boren*, 429 U.S. 190, 199–200 (1976).

568. *See United States v. Virginia*, 518 U.S. 515, 524 (1996) (holding gender classification must serve an important governmental objective to be valid).

569. *See Plyler v. Doe*, 457 U.S. 202, 216–17 (1982).

570. *See Toll v. Moreno*, 458 U.S. 1, 9 (1982); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971); *Van Staden v. St. Martin*, 664 F.3d 56, 58–59 (5th Cir. 2011); *LeClerc v. Webb*, 419 F.3d 405, 415–19 (5th Cir. 2005).

571. *See Virginia*, 518 U.S. at 555–56 (holding equal protection requires gender-based government action must demonstrate exceedingly persuasive justification for that action); *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (holding registration of men and not women under the Military Selective Service Act to be constitutional); *Michael M. v. Superior Court*, 450 U.S. 464, 474–76 (1981) (concluding legislatures may not make overbroad generalizations based on sex that are entirely unrelated to differences between men and women or which demean the social status of the affected class); *Craig*, 429 U.S. at 208–10 (finding classifications by gender must serve important government objectives and must be substantially related to attainment of those objectives).

572. *See Plyler*, 457 U.S. at 230 (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that *it furthers some substantial state interest.*”) (emphasis added) (holding a state law that denied education to undocumented children violated the Equal Protection Clause); *Trimble v. Gordon*, 430 U.S. 762, 776 (1977) (holding a probate law that distinguished between legitimate and illegitimate children violated the Equal Protection Clause); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972) (concluding classifying a child based on non-marital status is “illogical and unjust,” and holding that law precluding children from collecting workers’ compensation benefits because their mother was unmarried violated the Equal Protection Clause); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding that classifying children based on parents’ non-marital status is an Equal Protection violation).

573. 473 U.S. 432 (1985).

heightened scrutiny,⁵⁷⁴ and no decision of the Court has recognized disability of any kind as either a suspect or quasi-suspect class. One could argue that the Court should treat disability as a quasi-suspect class. Children with disabilities are in a similar position to the children of undocumented immigrants, the most recent classification to which the Court has applied intermediate scrutiny. Further, in *Plyler v. Doe*,⁵⁷⁵ the Supreme Court applied intermediate scrutiny, invalidating a Texas statute that withheld state funds from school districts that enrolled children who had entered the country without documentation. The Court held that the law “imposes a lifetime of hardship on a discrete class of children not accountable for their disabling status.”⁵⁷⁶ The *Plyler* Court further expounded that “[i]f the State is to deny a discrete group of innocent children the free public education that it offers to other children . . . that denial must be justified by a showing that it furthers some substantial state interest.”⁵⁷⁷ Like the immigration status of the students in *Plyler*, disability is an immutable characteristic for which children with disabilities are not responsible. Therefore, school voucher challengers could potentially cite *Plyler* in support of a claim that intermediate scrutiny applies to any deprivation of education to innocent children based on disability.

However, even if the Court could be convinced to recognize that children with disabilities were a quasi-suspect class, school voucher challengers would nonetheless still fail to have heightened scrutiny apply for the reasons set out in the previous section above.⁵⁷⁸ That is, unlike the express exclusion of undocumented children in *Plyler*,⁵⁷⁹ state voucher programs, on which a federal program is likely to be modeled, do not expressly exclude students with disabilities. These programs do have a disparate and adverse impact on students with disabilities, but absent evidence of discriminatory intent, the voucher programs would not be classified as discriminating on the basis of disability.

574. *See id.* at 442 (holding that persons with disabilities lack the necessary uniformity to be jointly classified as a group deserving of intermediate scrutiny).

575. 457 U.S. 202 (1982).

576. *Id.* at 223; *see also id.* at 231 (Marshall, J., concurring) (noting that “a class-based denial of public education is utterly incompatible with the Equal Protection Clause”).

577. *Id.* at 230.

578. *See supra* notes 573–577 and accompanying text (discussing how the Court has not held that persons with disabilities are a suspect or quasi-suspect class).

579. 457 U.S. at 206, 229.

B. Rational Basis with Bite

Although a court is unlikely to apply either strict or intermediate scrutiny under a traditional analysis of fundamental rights and due process. This does not mean, however, that a challenge to school voucher programs by students with disabilities will necessarily fail.

Traditionally, the only alternative to either strict or intermediate scrutiny was a radically permissive form of rational basis review. Under this version of rational basis review, a law would be upheld with even the most tenuous and hypothetical relationship to a legitimate government interest.⁵⁸⁰ However, the Supreme Court has demonstrated an increasing willingness to apply a more rigorous and exacting standard of review even in cases where the Court purports to be applying mere rational basis review. Many commentators have come to describe this standard as rational basis “with bite.”⁵⁸¹

The Court seems to apply rational basis with bite when it is unwilling to identify a fundamental right or suspect class, but nonetheless finds evidence of a history of discrimination or animus against a class of persons adversely affected by the law. The two most prominent examples are sexual orientation and—fortuitously for present purposes—mental disability.

In *Romer v. Evans*,⁵⁸² the Supreme Court struck down “Amendment 2” to the Colorado State Constitution, which prohibits any state or local government actions designed to protect persons from discrimination on the basis of their sexual orientation.⁵⁸³ Despite declining to designate sexual orientation as a suspect or quasi-suspect classification, the Court nonetheless held that Amendment 2 violated the federal Equal Protection Clause.⁵⁸⁴ Referring to rational basis review, the Court declared that “Amendment 2 fails, indeed defies, even this conventional inquiry” because “it lacks a rational relationship to legitimate state interests.”⁵⁸⁵ The Court further explained that laws which treat a minority group differently and lack a clear relationship to a government interest “raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of person affected.”⁵⁸⁶

580. See, e.g., *Williamson v. Lee Optical, of Okla., Inc.* 348 U.S. 483, 487–88 (1955).

581. CHEMERINSKY, *supra* note 507, at 732–33.

582. 517 U.S. 620 (1996).

583. See *id.* at 626 (holding it is implausible to find Amendment 2 puts homosexuals in a similar position as other similarly situated citizens).

584. See *id.* at 635–36 (striking down the Colorado provision because it does not promote a legitimate state interest).

585. See *id.* at 632.

586. *Id.* at 634.

Similarly, in *Cleburne*, the Court declared that mental retardation is not “a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation.”⁵⁸⁷ Yet despite this declaration, the Court held that requiring a special building permit for the operation of a home for the mentally retarded violated equal protection. The Court explained that:

Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as “a bare . . . desire to harm a politically unpopular group” are not legitimate state interests. Beyond that, the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.⁵⁸⁸

Individuals with disabilities in general are, of course, disadvantaged, ostracized, and subjected to negative stereotypes. Their experience is often similar to that of persons with mental retardation. Therefore, a prospective government action uniquely affecting children with disabilities is just as likely to be prompted by animus as the permit requirement struck down in *Cleburne*. As the Court points out in both *Romer* and *Cleburne*, the government action will be struck down—and the inference of animus is strongest—when the relationship between the distinction and the asserted goal is so attenuated as to be arbitrary or irrational.⁵⁸⁹ According to the ED and other advocates of voucher programs, the primary goal of the programs is to provide parents with more choices for how and where to educate their children.⁵⁹⁰ However, as we explain above,⁵⁹¹ the fact that the rights and protections of the IDEA and other federal

587. *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 442 (1985).

588. *Id.* at 446–47.

589. *Id.* at 446; *Romer*, 517 U.S. at 630.

590. *Dashboard*, *supra* note 76.

591. *See supra* notes 319–321 and accompanying text.

antidiscrimination legislation do not apply to private schools that participate in voucher programs. This effectively means that parents of students with disabilities do not have the freedom to choose to participate in a voucher program; they are arbitrarily excluded from goal of the voucher programs.

Furthermore, another one of the asserted goals of the ED, as we describe above, is specifically to improve the education of students with disabilities.⁵⁹² Requiring students with disabilities to give up their rights under the IDEA—and in most cases, the ADA and section 504 to boot—is not merely attenuated to this goal; it is wholly at odds with it. Students with disabilities must give up their legally guaranteed right to a free appropriate public education—and all the procedural and substantive requirements for delivering that right—as a precondition of participating in a voucher program. A more irrational approach to improving the education of students with disabilities is difficult to conceive. Provided that the ED continues to assert the benefits to students with disabilities as a major justification school vouchers programs, critics will have a viable claim that placing a voucher program beyond the protection of the IDEA fails the robust rational basis review of *Cleburne* and *Romer*.

CONCLUSION

The Trump administration, and especially the ED under the leadership of Secretary DeVos, has clearly signaled its desire to implement a federal school voucher program along the lines of the program currently in effect in Indiana. In order to participate in such a program, students with disabilities have to forego the substantial rights and protections against discrimination that are afforded them in public schools under the IDEA and other federal laws. This is an unreasonable cost to place on participation in voucher programs and makes a fallacy of the claim that so-called “school choice” programs provide parents with greater freedom of choice in the education of their children with disabilities. Disability advocates should resist the adoption of voucher programs by the federal government on the basis of their harmful and disparate effects on students with disabilities. If this political resistance proves futile, federal courts should strike down a federal voucher program as discriminating against students with disabilities in violation of the Equal Protection Clause.

592. See *supra* notes 173–175 and accompanying text; see also Section II.B.2.

APPENDICES

Appendix A: The Current Landscape of School Voucher Programs

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
AR	Succeed Scholarship Program for Students with Disabilities	(1) Have an IEP or live in foster care; (2) Enrolled in Arkansas public school the previous year, unless a child of active duty military or has a school district waiver; and (3) Accepted for admission into an eligible, participating private school ⁵⁹⁴	(1) Meet accreditation requirements; (2) Demonstrate fiscal soundness; (3) Comply with antidiscrimination provisions of 42 U.S.C. § 2000d; (4) Meet state and local health and safety requirements; (5) Be academically accountable to parents for meeting students' needs; (6) Publish school's disciplinary procedures; and (7) Employ or contract with at least one teacher who has a current, valid license in special education issued by the State Board of Education ⁵⁹⁵	\$6,713

593. *Dashboard*, *supra* note 76.

594. *Succeed Scholarship*, ARK. DEP'T OF EDUC., <https://arksped.k12.ar.us/documents/policyAndRegulations/SucceedScholarship/SucceedScholarshipProgramExplanatoryPowerPoint.pdf> (last visited Aug. 17, 2018).

595. *See id.*

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
DC	Opportunity Scholarship Program	(1) Household incomes no more than 185% of the federal poverty guideline or receives SNAP benefits; and (2) Current resident of D.C. ⁵⁹⁶	(1) Have a main campus in D.C.; (2) Be accredited by an accepted accrediting agency; (3) Have a valid Certificate of Occupancy listing education as a purpose; and (4) Be in “good” financial standing ⁵⁹⁷	\$9,570

596. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “DC” on interactive map).

597. *Join the OSP*, SERVING OUR CHILDREN, <https://servingourchildrenc.org/for-schools/join-the-osp> (last visited Aug. 17, 2018) (discussing eligibility requirements for the DC SOC scholarship program).

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
FL	John M. McKay Scholarships for Students with Disabilities Program	(1) Have an IEP or section 504 Plan; and (2) Enrolled in Florida public school or Florida School for the Deaf and Blind the prior year; or (3) Received Specialized Instructional Services the prior year; or (4) Is a foster child or has a parent that is on active duty with the military ⁵⁹⁸	(1) Comply with antidiscrimination provisions of 42 U.S.C. § 2000d; (2) Demonstrate fiscal soundness and accountability; (3) Meet applicable state and local health, safety, and welfare laws; (4) Provide to the department all documentation required for a student's participation (5) Be academically accountable to parents for meeting the educational needs of the student; and (6) Maintain a physical location the student regularly attends ⁵⁹⁹	\$7,193

598. *McKay Scholarships: McKay Scholarship Program FAQs*, FLA. DEP'T OF EDUC., <http://www.fldoe.org/schools/school-choice/k-12-scholarshipprograms/mckay/mckay-faqs.shtml> (last visited Aug. 17, 2018).

599. FLA. STAT. § 1002.39(8) (2017); FLA. STAT. § 1002.421.

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
GA	Special Needs Scholarship Program	(1) Resident of Georgia; (2) Enrolled in Georgia public school the prior year; and (3) Received special education services at some point during prior school year ⁶⁰⁰	(1) Be fully or provisionally accredited by an approved accrediting agency; (2) Have a physical location in Georgia where students physically attend classes; (3) Offer minimum core subjects of math, science, language arts, reading, and social studies; (4) Demonstrate the school is financially secure; (5) Meet all applicable state and local health, safety, and welfare laws; (6) Comply with 42 U.S.C. § 2000d, section 504, and the ADA; (7) Administer pre- and post-academic assessments and report to parents and Georgia Department of Education; and (8) Provide clear written quarterly descriptions of academic progress to parents, e.g. report cards ⁶⁰¹	\$5,606

600. *Special Needs Scholarship Program*, GA. DEP'T OF EDUC., www.gadoe.org/External-Affairs-and-Policy/Policy/Pages/Special-Needs-Scholarship-Program.aspx (last visited Aug. 5, 2018).

601. GA. DEP'T OF EDUC., GEORGIA SPECIAL NEEDS SCHOLARSHIP PROGRAM PRIVATE SCHOOL APPLICATION: 2018–2019 SCHOOL YEAR (2018).

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
IN	Choice Scholarship Program	(1) Attended public school for two previous semesters; (2) Has an IEP; (3) Lives in the attendance zone and would be assigned to attend a school that received an F on the state school grading system; or (4) Previously received a scholarship under the scholarship tax credit program ⁶⁰²	(1) Located in Indiana; (2) Requires an eligible student to pay tuition; (3) Voluntarily agrees to enroll the student; (4) Accredited by either the state board or a national or regional accreditation agency; (5) Administers statewide assessments, at state expense; (6) Is not a school that an eligible student has a legal settlement with; and (7) Submit required student performance data to the state ⁶⁰³	\$4,342

602. *School Choice Laws*, *supra* note 84 (following hyperlink; then click on “IN”).

603. *See* notes 402–404 and accompanying text (outlining the requirements of the Indiana Choice Scholarship Program).

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
LA	Scholarship Program	(1) Have a family income that does not exceed 250% of the federal poverty line; and (2) Be enrolled or entering kindergarten at a public school with a C, D, or F letter grade ⁶⁰⁴	(1) Use an open admission process that does not require additional eligibility criteria than those specified in state statute; (2) Notify Department of Education of students enrolled within ten days of the first day of school; (3) Submit an independent financial audit conducted by an approved certified public accountant to the Department of Education; (4) Accept scholarship amounts as full payment of all educational costs, including incidental or supplementary fees; and (5) Inform parents of all rules, policies, and procedures of the school, including but not limited to academic policies, disciplinary rules, and school procedures ⁶⁰⁵	\$5,869

604. *Id.*

605. LA. STAT. ANN. § 4022 (2013).

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
LA	School Choice Program for Certain Students with Exceptionalities	(1) Evaluated by a Louisiana public school district and determined to have any one of the following exceptionalities: autism, developmental delay, mental disability, other health impairment, specific learning disability, or traumatic brain injury; AND (2) Have an IEP, district provided services plan or a nonpublic school created service plan ⁶⁰⁶	Same as Louisiana Scholarship Program ⁶⁰⁷	\$2,328

606. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “LA” on interactive map).

607. LA. STAT. ANN. § 4022.

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
MD	Broadening Options and Opportunities for Students Today Program	(1) Have a family income not exceeding 100% of the federal free and reduced-price lunch program ⁶⁰⁸	(1) Participate in Aid to Non-Public Schools Program administered by the Maryland Department of Education; (2) Administer one of the state-approved academic assessments annually for all students in grades 3–8 in English/language arts and mathematics and a science assessment once for students in grades 3–5; 6–9; and 10–12; and (3) Comply with Title VI of the Civil Rights Act of 1964 ⁶⁰⁹	\$2,294 ⁶¹⁰

608. *Id.* (follow hyperlink; then click on “MD” on interactive map).

609. S.B. 185, 2018 Leg., 435th Sess. (Md. 2018).

610. Limited based on funds available.

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
ME	Town Tuitioning Program	(1) Reside in a town that does not have a public school at the student's grade level ⁶¹¹	(1) Meet the requirements for basic school approval under state law; (2) Is nonsectarian; (3) Is incorporated under state law; (4) Comply with reporting and auditing requirements under state law; (5) Participate in statewide assessment program if 60% or more of enrolled students are publicly funded; and (6) Release student records to any school unit for the student to transfer into that unit ⁶¹²	\$11,162

611. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on "ME" on interactive map).

612. ME. STAT. tit. 20-A, § 2951 (2005).

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
MS	Dyslexia Therapy Scholarship for Students with Dyslexia Program	(1) Diagnosed with dyslexia; (2) In grades 1–6; and (3) Attended a public school or qualifying private school specializing in dyslexia instruction the prior year ⁶¹³	(1) Accredited by the state as a special purpose nonpublic school; (2) Use licensed dyslexia therapists to provide therapy to students; (3) Use daily Orton-Gillingham-based therapy; (4) Have school leadership trained in dyslexia; (5) Have a current School Program Verification and Assurances form on file with the state ⁶¹⁴	\$4,980

613. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “MS” on interactive map).

614. *Dyslexia*, MISS. DEP’T OF EDUC., <http://www.mdek12.org/OAE/OEER/Dyslexia> (last visited Aug. 17, 2018).

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
MS	Nate Rogers Scholarship for Students with Disabilities Program	(1) Diagnosed with a speech-language impairment; (2) In grades 1–6; and (3) Enrolled in a public school or qualifying speech therapy school the prior year ⁶¹⁵	(1) Accredited by the state to provide comprehensive speech-language therapy instruction and interventions; (2) Use qualified speech-language pathologist; (3) Use a specialized speech-language instructional program that is scientific and research-based; (4) Have a current School Program Verification and Assurances form on file with the DOE (5) Provide the DOE all documentation required for student's participation; (6) Notify the DOE when a parent removes the student within ten days; (7) Be academically accountable to parent for meeting the educational needs of the student, annually, at a minimum; (8) Maintain a physical location in the state where the student regularly attends classes; and (9) Maintain current Letter of Accreditation on file with the state ⁶¹⁶	\$0 ⁶¹⁷

615. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “MS” on interactive map).

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
NC	Special Education Scholarship Grants for Children with Disabilities	(1) Child with a disability who requires special education, as documented by an IEP; (2) Resident of North Carolina; and (3) Was enrolled in public school the prior year; or (4) Has a parent on active military duty; or (5) Received a grant the prior year; or (6) Is entering kindergarten or first grade ⁶¹⁸	(1) Meet health and safety regulations; and (2) Comply with state and federal nondiscrimination laws. ⁶¹⁹	\$6,401
NC	Opportunity Scholarships	(1) Have a household income up to 133% of the free and reduced price lunch program; and (2) Attended a public school the prior semester; or (3) Is in foster care; (4) Was adopted in the past year; or (5) Will be enrolling in kindergarten or first grade ⁶²⁰	(1) Accredited by the state or approved accrediting agency; and (2) Administer state assessment or approved national assessment voucher recipients and report results to the state; and (3) Cannot charge voucher students more tuition than non-voucher students. ⁶²¹	\$3,740

616. *Guidance for Nonpublic Schools*, MISS. DEP'T OF EDUC., <http://mdek12.org/OSE/funding/special-education-speech-language-therapy-scholarship> (last visited Aug. 17, 2018) (informing non-public schools about resources and requirements related to speech-language therapy).

617. No current enrolled students.

618. *Rules Governing the Special Education Grants for Children with Disabilities Program*, N.C. STATE EDUC. ASSISTANCE AUTH., http://www.ncseaa.edu/pdf/rules_cdg.pdf (last visited Aug. 17, 2018) (navigate to the document through "Program Rules" link).

619. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on "NC" on interactive map).

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
NH	Town Tuitioning Program	(1) Reside in New Hampshire; and (2) Reside in an identified a “tuition town” that lacks a district school that offers the grade levels students need ⁶²²	None Found	None Found
OH	Cleveland Scholarship Program	(1) Lives in Cleveland Metropolitan School District; and (2) Will be entering kindergarten through twelfth grade; and (3) Students with a household income below 200% of the federal poverty guideline are given preference in receiving vouchers. ⁶²³	(1) Designated as a nonpublic school under Ohio state law, by completing application, submitting an Affidavit of Intent Not to Discriminate and adopting states Racial Nondiscriminatory policies, and developing a Plan of Compliance to align with Operating Standards for Ohio’s schools; (2) Administer state assessments to all voucher students; and (3) Accept all voucher applicants unless applicants exceed school’s capacity. ⁶²⁴	\$4,620

620. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “NC” on interactive map).

621. *Id.*

622. *New Hampshire—Town Tuitioning Program*, *supra* note 79.

623. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “OH” on interactive map).

624. *Nonpublic School Charter Checklist*, OHIO DEP’T OF EDUC. (Mar. 14, 2018), <http://education.ohio.gov/getattachment/Topics/Quality-School-Choice/Private-Schools/Forms-and-Program-Information-for-Nonpublic-School/NonpublicChecklistCharterinOhio.pdf>

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
OH	Educational Choice Scholarship Program	(1) Enrolled in OR would otherwise be assigned to a low-performing school within their resident school district ⁶²⁵	Same as Cleveland Scholarship Program ⁶²⁶	\$4,705
OH	Educational Choice Scholarship Expansion Program	(1) Entering grades K–3; (2) Have a household income up to 400% of the poverty guideline; and (3) Priority is given to students with household income below 200% of the poverty guideline. ⁶²⁷	Same as Cleveland Scholarship Program ⁶²⁸	\$4,084
OH	Autism Scholarship Program	(1) Identified by their district as a child with autism; (2) Has a current IEP finalized by all parties; and (3) Is three years of age or older ⁶²⁹	(1) Approved by the state; (2) Implement the student’s IEP and report progress to the student’s resident school district (although the law explicitly excuses the school district from FAPE obligation under the IDEA); and (3) Employ staff with appropriate special education credentials for services provided. ⁶³⁰	\$22,748

625. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “OH” on interactive map).

626. *Nonpublic School Charter Checklist*, *supra* note 624.

627. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “OH” on interactive map).

628. *Nonpublic School Charter Checklist*, *supra* note 624.

629. *Autism Scholarship Program*, OHIO DEP’T OF EDUC., <http://education.ohio.gov/Topics/Other-Resources/Scholarships/Autism-Scholarship-Program> (last visited Aug. 17, 2018) (outlining the IEP requirements for children interested in the Autism Scholarship).

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
OH	Jon Peterson Special Needs Scholarship Program	(1) Have an established IEP; and (2) Is eligible to attend kindergarten through twelfth grade ⁶³¹	Same as Autism Scholarship Program ⁶³²	\$9,818
OK	Lindsey Nicole Henry Scholarships for Students with Disabilities	(1) Have an IEP; and (2) Have attended public school in Oklahoma the prior year ⁶³³	(1) Accredited by the state or other approved accrediting association; (2) Demonstrate fiscal soundness; (3) Comply with antidiscrimination provisions in 42 U.S.C. § 2000d; (4) Meet state and local health and safety laws; (5) Academically accountable to the parents for meeting the educational needs of the student; (6) Comply with all state laws regulating private schools; (7) Adhere to published disciplinary procedures prior to expelling scholarship students ⁶³⁴	\$6,161

630. OHIO ADMIN. CODE § 3301-103-04 (2017); *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “OH” on interactive map).

631. *Jon Peterson Special Needs Scholarship Program*, OHIO DEP’T OF EDUC., <http://education.ohio.gov/Topics/Other-Resources/Scholarships/Special-Needs-Scholarship> (last visited Aug. 17, 2018).

632. OHIO ADMIN. CODE § 3301-101-02; *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “OH” on interactive map).

633. *Lindsey Nicole Henry (LNH) Scholarship Program for Children with Disabilities*, OKLA. DEP’T OF EDUC. (June 20, 2018), <http://sde.ok.gov/sde/lindsey-nicole-henry-lnh-scholarship-program-children-disabilities>.

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
UT	Carson Smith Special Needs Scholarship Program	(1) Must reside in Utah; (2) Must have one or more of the following disabilities: autism, developmental delay, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech/language impairment, traumatic brain injury, visual impairment; (3) Must be at least three years old and less than nineteen, unless has not graduated high school, then less than twenty-two; and (4) Enrolled in a Utah public school or received special education services in a private school the prior year ⁶³⁵	(1) Have a physical location in Utah where students regularly attend classes; (3) Obtain an audit and report from a licensed, independent certified public accountant; (4) Comply with the antidiscrimination provisions of 42 U.S.C. § 2000d (5) Meet state and local health and safety laws; (6) Disclose to the parents of each prospective student, before the student is enrolled, the special education services that will be provided and the costs of those services; and (7) Administer an annual assessment of each student's academic progress, report the results to the parents, and make the results available to the assessment team evaluating the student ⁶³⁶	\$5,905

634. *AFFIDAVIT (Private School Compliance Statement)*, OKLA. DEP'T OF EDUC., http://sde.ok.gov/sde/sites/ok.gov.sde/files/AFFIDAVIT_0.PDF (last visited Aug. 17, 2018).

635. *Carson Smith Scholarship Program: General Overview*, UTAH ST. BD. OF EDUC., <https://www.schools.utah.gov/file/558ca44d-ce02-4343-84a5-bc82d5c6f159> (last visited Aug. 17, 2018).

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
VT	Town Tuitioning Program	(1) Must live in a district that does not operate either an elementary or a high school, and where voters have approved the use of public funds for private school tuition ⁶³⁷	(1) Cannot be used at religious schools ⁶³⁸	\$13,152
WI	Milwaukee Parental Choice Program	(1) Resident of Milwaukee; and (2) Family income at or below 300% of the federal poverty level ⁶³⁹	(1) Administer the state assessment to voucher students in certain grades; (2) Allow voucher students to opt out of religious programs and activities; (3) Employ teachers with licenses or bachelor's degrees; (4) Cannot reject applicants for any reason other than lack of space; (5) Cannot charge any tuition on top of the voucher for students in grades K–8, or for students in grades 9–12 with household incomes up to 220% of the poverty guideline ⁶⁴⁰	\$7,503

636. *Carson Smith Special Needs Scholarship: Information for Private Schools Considering Becoming a Carson Smith Eligible School*, UTAH ST. Bd. OF EDUC., <https://www.schools.utah.gov/file/4202fbce-7b2c-476fb98e-2503e5e680a4> (last visited Aug. 17, 2018).

637. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “VT” on interactive map).g

638. *Id.*

639. *Private School Choice Programs: Frequently Asked Questions for Parents—2018–19 School Year*, WIS. DEP’T OF PUB. INSTRUCTION, <https://dpi.wi.gov/sites/default/files/>

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
WI	Parental Private School Choice Program (Racine)	(1) Resident of Racine; (2) Family income at or below 300% of the federal poverty level; and (3) Applying to grades K4, K5, 1 or 9; or (4) Attended a public school in Wisconsin, or in another state, or was not enrolled in school, or participated in a School Choice Program, or was on a School Choice Program waitlist the prior year ⁶⁴¹	Same as Milwaukee Parental Choice Program ⁶⁴²	\$7,447

imce/sms/Choice/Student_Application_Webpage/PSCP_FAQ_2018-19_Final.pdf (last visited Aug. 17, 2018) [hereinafter *Private School Choice Programs*].

640. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “WI” on interactive map).

641. *Private School Choice Programs*, *supra* note 639.

642. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on “WI” on interactive map).

STATE	PROGRAM	STUDENT ELIGIBILITY CRITERIA	PRIVATE SCHOOL REQUIREMENTS	AVERAGE VOUCHER VALUE ⁵⁹³
WI	Parental Choice Program (Statewide)	(1) Reside in a Wisconsin school district other than in the city of Milwaukee or Racine; and (2) Applying to grades K4, K5, 1 or 9; or (3) Attended a public school in Wisconsin, or in another state, or was not enrolled in school, or participated in a School Choice Program, or was on a School Choice Program waitlist the prior year ⁶⁴³	(1) Administer the state assessment to voucher students in certain grades; (2) Allow voucher students to opt out of religious programs and activities; and (3) Employ teachers that are licensed or have a bachelor's degree ⁶⁴⁴	\$7,512
WI	Special Needs Scholarship Program	(1) Wisconsin resident; (2) Enrolled in Wisconsin public school for the entire prior year; (3) Have an IEP or services plan in effect at the time of application; and (4) Denied all open enrollment applications and all appeals of denial upheld for prior school year ⁶⁴⁵	(1) Implement the student's public school IEP and report student's progress to the resident district; (2) Employ teachers with a license or a bachelor's degree; and (3) Provide prospective students with information about the special education services the school offers ⁶⁴⁶	\$12,129

643. *Private School Choice Programs*, *supra* note 639.

644. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on "WI" on interactive map).

645. *Special Needs Scholarship Program (SNSP): 2017-18 Student Applications*, WIS. DEP'T OF PUB. INSTRUCTION, <https://dpi.wi.gov/sms/special-needs-scholarship/student-applications-18-19> (last visited Aug. 17, 2018).

646. *School Choice Laws*, *supra* note 84 (follow hyperlink; then click on "WI" on interactive map).

*Appendix B: The IDEA, section 504, and the ADA:
A Comparative Reference*

	THE IDEA	SECTION 504	THE ADA
PURPOSE?	To provide a free, appropriate public education in the least restrictive environment; protect the rights of children with disabilities and their families; assist States with efforts to educate all children with disabilities; and assess and assure effectiveness of those efforts. ⁶⁴⁷	A civil rights law prohibiting any program that receives Federal funds from discriminating against, excluding, or denying benefits to an individual with a disability. ⁶⁴⁸	A civil rights law prohibiting discrimination and guaranteeing equal opportunity for individuals with disabilities. ⁶⁴⁹
PROTECTS?	Children age 3–21 who have a qualifying disability under the IDEA that requires special education and related services. ⁶⁵⁰	Any individual with a physical or mental impairment that substantially limits one or more major life activities. ⁶⁵¹	The ADA uses the same definition of individual with a disability as section 504.
APPLIES TO?	All public elementary and secondary schools, including charters. ⁶⁵²	Any program or activity that receives federal funding. ⁶⁵³	All services, programs, and activities provided to the public by state and local governments, businesses and non-profit service providers. ⁶⁵⁴

647. 20 U.S.C. § 1400(d) (2012).

648. *Protecting Students with Disabilities*, *supra* note 151.

649. *Introduction to the ADA*, *supra* note 154.

650. *Id.* § 1401.

651. 42 U.S.C. § 12102(2) (2012).

652. 20 U.S.C. § 1401(6), (27) (2012).

653. *Protecting Students with Disabilities*, *supra* note 151.

654. *See Introduction to the ADA*, *supra* note 154.

	THE IDEA	SECTION 504	THE ADA
PROVIDES FOR A FREE, APPROPRIATE PUBLIC EDUCATION?	Yes. The IDEA was passed to assure children with disabilities have a “free appropriate public education . . . designed to meet their unique needs.” ⁶⁵⁵	Yes. Section 504 uses this term to describe an education comparable to their peers without disabilities. ⁶⁵⁶ The right is about leveling the playing field not providing educational benefit. ⁶⁵⁷	None.
PROCEDURAL SAFEGUARDS?	The IDEA includes a rigorous set of explicit procedural safeguards, including, but not limited to, written prior notice in parents native language, a right to review records, and a right to an independent educational evaluation. ⁶⁵⁸	Section 504 includes limited procedural safeguards, including, notice, parent right to review records, a review procedure, and an impartial hearing under limited circumstances. ⁶⁵⁹	None.
DISPUTE RESOLUTION PROCESS?	The IDEA details specific requirements for complaints, mediations, impartial hearings, and appeals to resolve disagreements between schools and parents. ⁶⁶⁰	Section 504 provides for impartial hearings to resolve disputes but leaves the administrative details to the discretion of the school. ⁶⁶¹	None.

655. 20 U.S.C. § 1400(d) (2012).

656. DISABILITY RIGHTS EDUC. & DEF. FUND, *supra* note 304 (discussing the primary differences in the rights of students and parents under IDEA and section 504).

657. Wright & Wright, *supra* note 321.

658. *Id.*

659. See 34 C.F.R. § 104.36 (2017).

660. See *supra* Section II.B.3.

661. See Wright & Wright, *supra* note 321.

	THE IDEA	SECTION 504	THE ADA
DISCIPLINARY PROTECTIONS?	Under the IDEA, if a school removes a child for more than ten days in one school year, the IEP team must meet to determine the most appropriate educational placement and supports for the child. The IDEA protects a child's right to FAPE despite disciplinary action. ⁶⁶²	There is no explicit protection in the statute. However, the Office of Civil Rights has issued guidance that schools may not discriminate against students with disabilities in disciplinary actions without additional safeguards. ⁶⁶³	None.
ENFORCEMENT?	The IDEA is enforced on an individual level through dispute resolution procedures and on a systemic level by the Office of Special Education Programs, part of the U.S. Department of Education. ⁶⁶⁴	Section 504 is enforced by The Office for Civil Rights for the U.S. Department of Education. ⁶⁶⁵	The DOJ enforces the ADA through settlements and lawsuits. ⁶⁶⁶

662. See *supra* Section II.B.3; see also *supra* notes 239–41 and accompanying text.

663. See U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON HOW TO ADMINISTER STUDENT DISCIPLINE WITHOUT DISCRIMINATING 1, 20 (Jan. 8, 2014), <https://www.ed.gov/about/offices/list/ocr/index.html> (stating that the ED will examine school disciplinary policies to ensure that they are clear and nondiscriminatory).

664. See 20 U.S.C. § 1402 (2012); see also *supra* Section II.B.3; *supra* notes 239–41 and accompanying text.

665. *Protecting Students with Disabilities*, *supra* note 151.

666. *ADA Responsibilities: ADA Enforcement*, DEP'T OF JUST., https://www.ada.gov/enforce_footer.htm (last visited Aug. 17, 2018).