



School Choice Series

Choice & Vouchers—Implications
for Students with Disabilities



National Council on Disability

November 15, 2018

National Council on Disability (NCD)
1331 F Street NW, Suite 850
Washington, DC 20004

School Choice Series: Choice & Vouchers—Implications for Students with Disabilities

National Council on Disability, November 15, 2018
Celebrating 30 years as an independent federal agency

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National Council on Disability

An independent federal agency making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families.

Letter of Transmittal

November 15, 2018

The President
The White House
Washington, DC 20500

Dear Mr. President:

On behalf of the National Council on Disability (NCD), I submit this report for your consideration entitled *Choice & Vouchers—Implications for Students with Disabilities*. The National Council on Disability is an independent federal agency mandated with the responsibility of providing the President and Congress policy recommendations that promote equal opportunity, economic self-sufficiency, independent living, and inclusion and integration into society for people with disabilities. This report is one of two independent analyses by NCD concerning school choice and its intersection with disability rights law. Considering the heightened interest of parents in school choice options and the current national dialogue regarding vouchers and school choice, we hope you find this report both pertinent and timely.

This report outlines the construct of vouchers, education savings accounts, and tax credits for students with disabilities. It also clarifies the effect on students with disabilities of programs of school choice that allow money for each eligible student to go directly to parents rather than to the public-school system. The paper explains how this adjustment in the flow of public funds results in critical and often misunderstood changes in protections for students with disabilities and their families, under not only the Individuals with Disabilities Education Act, but also federal nondiscrimination laws. Finally, this report makes multiple recommendations for federal and state departments of education and Congress to address problems that may deprive students with disabilities and their families of an equitable education.

NCD stands ready to work with federal agencies, state governments, the disability community, and other stakeholders to improve federal protection of the rights of students with disabilities in a manner consistent with parents' right to choose the method and venue of education that best fits their children's needs.

Sincerely,

A handwritten signature in black ink that reads "Neil Romano".

Neil Romano
Chairman

(The same letter of transmittal was sent to the President Pro Tempore of the U.S. Senate and the Speaker of the U.S. House of Representatives.)

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Executive Summary

At the core of the nation's laws that govern public education is the right to equity. The promise of equity is also at the core of the nation's laws to protect students with disabilities. The Individuals with Disabilities Education Act (IDEA) seeks to guarantee equity by assuring that parents are meaningful partners in their child's education; that educational programs are specifically designed to meet each child's unique needs; and that children with disabilities make progress in the general education curriculum alongside peers without disabilities. As of the 2015–2016 school year, 6.7 million students with disabilities are eligible under IDEA and are receiving education from public school systems. More than 88,000 families have chosen to take their children out of public school and utilize available state-funded choice options, which effectively take them out from under the protections of IDEA and other federal statutes while also promising to customize quality educational options for their children's individual needs.

Given the heightened interest of parents in school choice options and the current national dialogue regarding vouchers and school choice, the terms *vouchers* and *tax-credit scholarships* have entered the mainstream dialogue and are fueling an ongoing debate about what is considered "public" education in the United

States and whether private options should be part of the public educational system. The debate includes increasing tension over school choice options for students with disabilities.

Proponents of school choice reforms believe that vouchers, education savings accounts, and tax scholarships will ultimately improve public education through the introduction of market forces that expand consumer choice and competition between schools. They also believe that public schools and the special education system are often failing students with disabilities, and vouchers provide a way for the federal and state governments to support parents choosing better options for their children outside of the public educational system. Opponents see vouchers, education savings accounts, and tax scholarships as empty promises that will deplete public school funds. They also see students with disabilities and their families potentially making uninformed choices or decisions that may leave students vulnerable to discrimination, rejection, substandard educational programs, or hidden expenses. Meanwhile, parents feel caught in the crossfire, with many thankful for choice opportunities and others angry at the need to make a choice that may shrink the resources of public schools. Many state programs systematically exclude low-income families that cannot afford the additional costs and fail

to include students of color with disabilities. Available private schools push out students with disabilities who are hardest to serve.

The National Council on Disability (NCD), recognizing this emerging debate on the use of educational vouchers, education savings accounts, and tax credits, commissioned research to better understand the experiences and outcomes for students with disabilities and their families that make use of voucher and voucher-like programs in lieu of traditional public schools. The policy paper, *Choice & Vouchers—Implications for Students with Disabilities*, which resulted from this research outlines the construct of vouchers, education savings accounts, and tax credits for students with disabilities. It also explains the effect of programs that allow money for each eligible student to go directly to parents rather than to the public school system, enabling parents to choose the school or services that they feel will best meet their child's needs.

The paper outlines how this alteration in the flow of public funds results in critical and often misunderstood changes in protections for students with disabilities and their families, under not only IDEA, but also federal nondiscrimination laws.

In order to gain a better understanding of the experiences of students with disabilities with respect to voucher programs, the study utilized a mixed-methods approach that included focus groups, interviews, and analysis of existing policies and secondary literature. The second component of the study was an examination of descriptive, quantitative data pertaining to students with disabilities and voucher programs available from the National Center for Educational Statistics (NCES), state departments of education, and various state websites. Two case studies were developed to demonstrate different perspectives on vouchers and choice options for students with disabilities.

Summary of Key Findings

According to the 2016–2017 *School Choice Yearbook*, there are 52 private school choice programs in 26 states and Washington, DC, serving more than 442,000 students. Of these programs there are 11 state voucher programs that are exclusively for students with disabilities: Arkansas, Florida, Georgia, Indiana, Louisiana, Ohio, Oklahoma, Utah, Mississippi, North Carolina, and Wisconsin. Five states currently have targeted education savings accounts (ESAs) for students with disabilities: Arizona, Florida, Mississippi, North Carolina (scheduled to start in 2018–2019), and Tennessee. Two states, South Carolina and Arizona, have tax credits (scholarship or individual) for students with disabilities.

Impact on Families and Students with Disabilities

The present report documents the following issues for families and students with disabilities:

- **Concerns presented in the 2003 NCD report *School Vouchers and Students with Disabilities* continue to be critical problems in 2018:** Parents and families using vouchers can lose access to rights; accountability can suffer; vouchers might only cover a portion of private school cost, leaving a majority of families unable to access any choice at all; and the state

construct may profoundly affect rights and outcomes for students with disabilities.

- **Many students with disabilities and their families turn to choice options after experiencing intolerable conditions in public schools**, including the lack of services and the refusal or inability of public school districts to fulfill their obligations under IDEA; families decide to use choice options and enroll their children in private schools that may better meet their child's individualized needs.
- **Some families of students with disabilities seek other options despite being satisfied** with their child's individualized education program (IEP), especially private schools that have higher expectations for students and provide better services to children with a disability.
- **State departments of education and the U.S. Department of Education are not doing enough to ensure parents are making an informed decision** about giving up rights under IDEA and other federal statutes in exchange for public funds and vouchers, when a child with a disability is moved from public to private school.
- **Many families in this study are unconcerned about the loss of rights**

and are happy with their choices and the outcomes of their decision. Others are angry and frustrated about being forced to relinquish rights.

- **To benefit from a choice program, families need to be able to pay significant amounts from their own pockets for the cost of private school that vouchers do not cover**, including transportation and time to coordinate the educational program for their child.
- **Research on choice for students with disabilities is lacking.** Thus, in the absence of data on discrimination, discipline, segregation, length of time using vouchers, or other programs and outcomes, families, state officials, and advocates are unable to fully understand the consequence and impact of vouchers.

Impact on Rights under Federal and State Law

Regarding students with disabilities and their rights under federal and state law, the report found several concerning issues:

- **The Department of Education and the Office for Civil Rights have consistently stated that the use of vouchers constitutes a parental placement with no individual entitlement to free appropriate public education**, including special education and related services in connection with those placements.
- **For the majority of school voucher programs, if students attend a private school with the vouchers, they must relinquish their rights under IDEA**, including the right to assessments paid by the school district, an IEP, free appropriate

public education (FAPE), least restrictive environment (LRE), and procedural due process protections for them and their families.

- **Some parentally placed children with disabilities will not receive any special education services, and others will** because local education agencies (LEAs) are required to spend a proportionate amount of IDEA federal funds to provide equitable services to parentally placed children.
- **States continue to receive special education funding for voucher students and may require private schools using vouchers to carry out IDEA obligations.**
- **Voucher programs could include key components of special education services**, including procedural or substantive requirements, the right to an impartial due process hearing if the private school fails to comply, and IEPs.
- **States could require that private schools participating in voucher programs must be bound by the obligations of Title II of the Americans with Disabilities Act (ADA), judged according to the budget and resources of the state education agency (SEA) or local education agency (LEA), rather than to the particular private school's budget.**

As a result of these findings, this report makes multiple recommendations for federal and state departments of education and Congress to address problems that may deprive students with disabilities and their families of an equitable education. Voucher programs must address the civil rights of students with disabilities

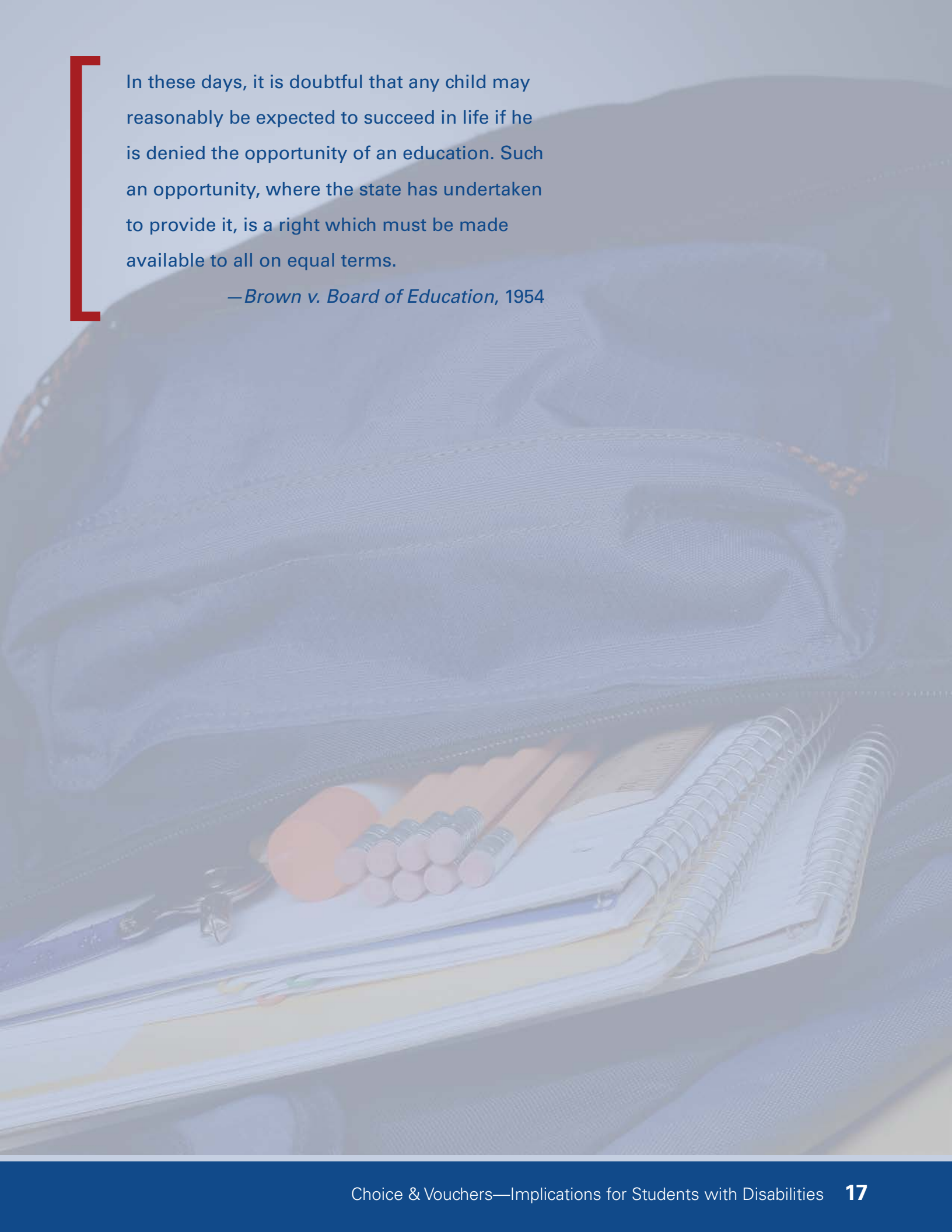
and address the extra costs often assumed by families when a child with a disability is attending private school. Parents must be fully informed about their options and rights when they are making a decision about their child's education, and additional research is needed to be sure that information is based on actual data and facts. Federal agencies can issue guidance on these issues, and Congress can enact legislation

to ensure that students with disabilities are protected from discrimination when using vouchers to attend private schools. State departments of education could be responsible for oversight of voucher programs and collection of data regarding students with disabilities. These changes would ensure that voucher systems are not only an educational choice, but also an equitable one.

List of Acronyms

ABA	applied behavior analysis
ACLU	American Civil Liberties Union
ADA	Americans with Disabilities Act
ADHD	attention-deficit/hyperactivity disorder
AFC	American Federation for Children
AFT	American Federation of Teachers
COPAA	Council of Parent Attorneys and Advocates
CRDC	Civil Rights Data Collection
DOE	Department of Education
DOJ	Department of Justice
DPI	Department of Public Instruction
ESA	Education Savings Account
ESEA	Elementary and Secondary Education Act
FAPE	free appropriate public education
FFA	federal financial assistance
GAO	(United States) Government Accountability Office
IDEA	Individuals with Disabilities Education Act
IEE	independent education evaluation
IEP	individualized education program
IES	Institute of Education Sciences
LEA	local education agency
LRE	least restrictive environment
LSP	Louisiana Scholarship Program
NAACP	National Association for the Advancement of Colored People
NCD	National Council on Disability
NCES	National Center for Educational Statistics
NCLB	No Child Left Behind Act of 2001
NCLD	National Center for Learning Disabilities
NCPE	National Coalition for Public Education
NDRN	National Disability Rights Network
NEA	National Education Association
NEPC	National Education Policy Center

OCR	United States Department of Education’s Office for Civil Rights
PCESE	President’s Commission on Excellence in Special Education
PECS	Picture Exchange Communication System
SEA	state education agency
Section 504	Section 504 of the Rehabilitation Act of 1973
SNAP	Supplemental Nutrition Assistance Program
SPED	special education
STO	school tuition organization
Title I	Title I of the Elementary and Secondary Education Act
Title VI	Title VI of the Civil Rights Act of 1964
USED	United States Department of Education



In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

—*Brown v. Board of Education*, 1954

Introduction

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹

—*Brown v. Board of Education*, 1954

At the core of the nation's laws that govern education is the right to equity. The promise of equity is also at the core of the nation's laws to protect students with disabilities.

The Individuals with Disabilities Education Act (IDEA) seeks to guarantee equity by ensuring that parents are meaningful partners in their child's education; that educational programs are specifically designed to meet each child's unique needs;

and that children with disabilities make progress in the general education curriculum alongside peers without disabilities.² As of the 2015–2016

school year, 6.7 million students with disabilities eligible under IDEA³ were receiving education from public school systems. More than 88,000

families of students with disabilities have chosen to take their children out of public school and utilize available state-funded choice options,⁴ which effectively take the student and parent(s) out from under the protections of IDEA and other federal statutes, while also promising to

customize education to meet a child's needs and make quality educational options available to every child.⁵

More than 88,000 families of students with disabilities have chosen to take their children out of public school and utilize available state-funded choice options, which effectively take the student and parent(s) out from under the protections of IDEA and other federal statutes . . .

Given the heightened interest of parents in school choice options and the current national dialogue regarding vouchers⁶ and school choice,⁷ the terms *vouchers*, *education savings accounts*, and *tax-credit scholarships* have entered the mainstream dialogue and are fueling an ongoing debate about what is considered “public” education in the United States.⁸

The National Council on Disability (NCD), an independent federal agency charged with advising the President, Congress, and other federal agencies regarding policies, programs, practices, and procedures

that affect people with disabilities, recognized this emerging debate on the use of educational vouchers, savings accounts, and tax credits, and commissioned research to gain a better understanding of the

experiences and outcomes for students with disabilities and their families that make use of voucher and voucher-like programs in lieu of traditional public schools. The policy paper, *Choice & Vouchers—Implications for Students with Disabilities*, that resulted outlines the construct of vouchers, education savings accounts, and tax credits for students with disabilities. It also explains the effect of having such programs where a determined amount of money for each eligible student goes directly to parents rather than to the public school system, enabling parents to choose the school or services they feel will

best meet their child’s needs. This alteration in the flow of public funds results in important and often misunderstood changes in protections for students with disabilities and their families, not only under IDEA, but also under federal nondiscrimination laws.

Key to this research are the educational experiences and educational outcomes of voucher programs and educational savings accounts used by students with disabilities and their families for private schools. Many families of students with disabilities choose vouchers and

voucher-like programs as viable options for their child’s education and are satisfied with the outcomes realized. Other families of students with disabilities and public school supporters oppose voucher programs and other choice options.

These opponents assert that these programs do nothing more than redirect public money to privately operated enterprises, risking the possibility that private schools will make empty promises while depleting public education funds, thereby leaving many schools and students without quality or equitable educational opportunities. Critics caution loudly against the hidden costs, limited availability to all families, loss of rights for students with disabilities, loss of accountability, and lack of evidence. This report examines these issues and the effects on students with disabilities and their families.

Key to this research are the educational experiences and educational outcomes of voucher programs and educational savings accounts used by students with disabilities and their families for private schools.

Research Methods

To understand the experiences of students with disabilities with respect to voucher programs, NCD used a mixed-methods design that involves analysis of existing policies and secondary literature, quantitative data, and qualitative data for this report.

A. Review of Policies and Secondary Literature

Relevant statutes, regulations, and administrative guidance on the topic at the federal and state levels were reviewed. At the federal level, these materials include statutory and regulatory language of the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and the Americans with Disabilities Act (ADA) as well as guidance by the U.S. Department of Education with respect to students with disabilities and voucher programs. State-level analyses focused primarily on review of state voucher laws and evaluations of available information and data. We did a cursory review of trends in case law and administrative due process hearings that pertain to students with disabilities and voucher programs. Additionally, we conducted a literature review of relevant published material in academic journals, books, government documents, and the popular media.

B. Review of Existing Quantitative Data

For the quantitative component of this research, we examined existing data at both national and state levels pertaining to students with disabilities and voucher programs. Researchers looked at data available from the National Center for Educational Statistics (NCES), the U.S. Civil Rights Data Collection (CRDC), American Federation for Children (AFC) and the websites of individual state education agencies (SEAs); along with data that is cited in the secondary literature.

C. Qualitative Research

Researchers completed focus groups in Arizona, California, the District of Columbia, and Florida. One-on-one interviews were held with families from Florida, California, Michigan, and Ohio. Families and students represented many races and ethnic groups; some students who received free or reduced lunch were identified by a broad range of disability labels, including autism, physical disabilities, Down syndrome, intellectual disabilities, attention-deficit/hyperactivity disorder, communication difficulties, learning disabilities, mental illness, dyslexia, dysgraphia, and complex medical issues. Researchers also interviewed

attorneys, advocates, researchers, former education officials, and state officials. Select findings from participants are incorporated throughout this report. NCD appreciates all stakeholders who participated. Although the sample was limited and not intended to

be representative of the whole population of families utilizing voucher programs or stakeholders interested in these programs, participants provided useful insight into the experiences and perspectives of the families impacted by voucher programs.

Chapter 1: Current Landscape

A. Changes over Time and the NCD 2003 Report on Vouchers

In 2003, NCD issued a policy paper on vouchers that included a detailed history of how previous administrations tried to advance voucher programs, though no administration has done so as vigorously as the current one. At the time NCD released the report *School Vouchers and Students with Disabilities*,⁹ there was just one voucher program for students with disabilities in the United States: the Florida McKay Scholarship Program, which began in 2000. The last 15 years have seen a sharp increase in the number of states with voucher programs,¹⁰ with the current number being 27: 26 states and the District of Columbia.¹¹

While many families support, use, and are satisfied with choice options (see Section VI.C of this work), in 2003 NCD warned of the possible problems that remain of concern today: Parents and families could lose access to rights; accountability could suffer; and vouchers might only cover a portion of private school cost, leaving a majority of families unable to access any choice at all. NCD was concerned that these state constructs might profoundly affect rights and outcomes for students with disabilities.¹² The policy paper also made a pointed reminder that

The enactment of the Individuals with Disabilities Education Act (IDEA) codified the Constitution's guarantee of equal protection under law for all children and youth with disabilities, providing them with a free appropriate public education [FAPE] that meets their education and related services needs in the least restrictive environment [LRE]. The implementation of IDEA has produced important improvements in the quality and effectiveness of the education received by more than six million children and youth with disabilities.¹³

In the last 15 years . . .

At the time NCD released the report *School Vouchers and Students with Disabilities* in 2003, there was just one voucher program for students with disabilities in the United States: the Florida McKay Scholarship Program, which began in 2000. The last 15 years have seen a sharp increase in the number of states with voucher programs, with the current number being 27: 26 states and the District of Columbia.

Under many of the state voucher programs, families must choose to give up rights under IDEA and other federal statutes in exchange for public funds.¹⁴ They often do so without understanding the loss of or change in rights and protections under the law when a child with a disability is moved from public to private school. In 2001, the U.S. Department of Education strongly encouraged states and school districts to notify parents of changes to their rights and protections under voucher programs in order to avoid any misunderstanding.¹⁵ However, the Government Accountability Office (GAO) released a report in 2017 showing that the information provided to parents on loss of rights and protections when accessing private school choice programs continues to be inconsistent and insufficient. The GAO found that an incredible 73 percent of private school choice programs provide no information at all.¹⁶ We found no discussion in the GAO report of whether states that do provide information to families, such as Georgia¹⁷ and Tennessee,¹⁸ provide the information translated into different languages. The Tennessee Department of Education does include a video in American Sign Language (ASL) on its

Under many of the state voucher programs, families must choose to give up rights under IDEA and other federal statutes in exchange for public funds.

[T]he Government Accountability Office (GAO) released a report in 2017 showing that the information provided to parents on loss of rights and protections when accessing private school choice programs continues to be inconsistent and insufficient. The GAO found that an incredible 73 percent of private school choice programs provide no information at all.

Individualized Education Account Program (IEA) resource page.¹⁹

Preceding the NCD policy paper, in June 2002 the President’s Commission on Excellence in Special Education (PCESE) released a report that laid out 33 specific recommendations,

some having to do with vouchers and IDEA. The “Increase Parental Empowerment and School Choice” section supported school choice but recommended that

IDEA should increase informed opportunities for parents to make choices about their children’s education. Consistent with the No Child Left Behind Act, IDEA funds should be available for parents to choose services or schools, particularly for parents whose children are in schools that have not made adequate yearly progress under IDEA for three consecutive years.²⁰

In another section of the PCESE report, the Commission linked its voucher recommendations to increase flexibility with

regard to the least restrictive environment (LRE) requirements of IDEA:²¹

Federal policy should also provide the flexibility states need in this area [and]

should make clear that families working with IEP teams can choose charter schools and other choice options that target students with disabilities, even if these offer relatively restrictive environments, as long as those programs can appropriately serve the student.²²

Echoing the PCESE report, some advocates fear that the use of vouchers will return us to the days of segregation of students with disabilities by promoting disability-specific schools.²³ In fact, in the 2003 Report, NCD pointed out that in Florida, the special education vouchers were apparently providing the stimulus for new schools to serve only students with disabilities. The end result of large-scale voucher extensions to students with disabilities could lead to a new kind of segregation at public expense. Families and advocates in focus groups indicated that students often, but not always, used scholarships or vouchers to attend segregated schools. State departments of education do not currently track where parents use their vouchers, thus making it impossible for respective state governments to determine whether school choice programs are leading to segregation of students with disabilities. However, given the LRE mandate of IDEA, this kind of transparency should be required.

In 2003, NCD also stated that when publicly financed and operated systems work well, people are satisfied, such as is the case with many

forms of public transportation, for which there is no particular request for privatization. When systems fail, however, as in the case of many urban schools, public sentiment swings toward policies of reform and public control.²⁴ Indeed, many of the parents who participated in this current NCD research expressed frustration over the lack of services and the refusal or inability of districts to fulfill their obligations under IDEA; and the resulting desire to choose a school that would meet their child's individualized needs.

Interestingly, the 2003 NCD paper suggested that the primary rationale for providing vouchers to general education students was to escape

low-performing schools. NCD hypothesized that students with disabilities would not flee public schools because students with disabilities did not participate in mandated standardized assessments at that time. With implementation of the No Child Left Behind

Act in 2001 and the 2004 amendment of IDEA, schools were required to assess and report the progress for students with disabilities.²⁵ Efforts to include and count students with disabilities in assessments have increased accountability but may also have provided another reason for families to seek out choice options.

NCD also predicted that parents of students with disabilities would not seek choice options because of "critical mass," meaning that school districts, with 28 years of experience in providing educational services and supports to students with disabilities, had acquired and

State departments of education do not currently track where parents use their vouchers, thus making it impossible for respective state governments to determine whether school choice programs are leading to segregation of students with disabilities.

maintained the infrastructure for specialized support that students with disabilities require.²⁶ Based on the responses of families that participated in this study, that sentiment has certainly shifted or has not proven to be true. Many believed that private schools had higher expectations and would provide better services to their child with a disability. Others sought relief from intolerable or unsatisfactory conditions in public schools.²⁷

In 2003, NCD also predicted that as options grew, many private schools would not want to serve students with disabilities or would not be able to provide the specialized services that students with disabilities needed. This is a legitimate fear

because students with disabilities are a vulnerable population that has routinely and indisputably been the target of discrimination and diminished opportunities in education.²⁸ Anecdotal

data from interviews and focus groups conducted for this report suggests that much like the experiences in public and charter schools, how well a private school serves a student with disabilities depends on the leadership and culture of that school.

IDEA requires districts to pay for private school when they have failed to provide FAPE or a student's IEP team has agreed the student would be best served in a segregated setting (an example would be a Deaf student attending a private school where ASL is the main mode of instruction). Some question whether private school vouchers should be treated the same

way. NCD answered this question in 2003, and the answer still holds true today: There are stark differences between local school district private placements and other proposals for special education voucher programs. Under IDEA, with regard to placements in private schools that are ultimately funded by the local or state agency

1. The IEP team, rather than parents alone, holds the power of choice;
2. The public school district still has the primary responsibility to provide FAPE;
3. The IEP must choose the private school so that the public school can fulfill its

requirement to provide FAPE; and

4. All IDEA substantive and procedural rights and requirements must still be met.²⁹

Under IDEA, private schools are provided

as part of a continuum of services to meet LRE and FAPE. The IEP team is required to consider all possible options, including the use of supplementary aids and services, resource rooms, and homebound services (where a student receives educational and special education services through one-to-one teaching at home or in a hospital setting). The "choice" between public school and vouchers is not an either-or decision, but rather represents two possible options in an array of possible placements. We fully explore the issue of effect on IDEA rights in the current constructs in Chapter 5.

IDEA requires districts to pay for private school when they have failed to provide FAPE or a student's IEP team has agreed the student would be best served in a segregated setting.

B. Overview of Choice Programs

1. Types of Programs

School voucher programs (i.e., “school choice programs”) vary widely. Vouchers, tax credits, and ESAs are state-funded programs that provide eligible students a specific amount toward the cost of attending a private rather than a public school. The only exception is the Opportunity Scholarship Program in Washington, DC, which is funded by the federal government. Although we discuss each of the program types, the main focus of our discussion is on vouchers and ESAs as well as on the impact on students with disabilities and their families.

School Vouchers—Vouchers give parents the option to send children to a private school using public funding to pay all or part of the tuition. Under such a program, funds typically expended by a school district for public schools are allocated to a participating family in the form of a voucher to pay partial or full tuition for the private school, which may be religious or secular.

Education Savings Accounts—Education savings accounts (ESAs) allow parents to receive a deposit of public funds into government-authorized savings accounts with restricted but multiple uses. The nature of the allowed expenditures varies by state.³⁰ ESAs allow families to customize their child’s education and pay for more than strictly the academics of education. Relative newcomers to educational savings accounts are 529 accounts. The ABLE Act of 2014³¹ amends Section 529 of the Internal Revenue Service Code of 1986 to

create tax-advantaged savings accounts for individuals with disabilities.

Tax-Credit Scholarships—Tax-credit scholarships allow full or partial tax credits when there is a donation to nonprofits (school tuition organizations [STOs] that provide private school scholarships). Eligible taxpayers can include both individuals and businesses. In some states, scholarship-giving nonprofits also provide innovation grants to public schools and/or transportation assistance to students choosing private or alternative public schools (such as a public school outside of the child’s district).

Types of school choice programs:

Vouchers give parents the option to send children to a private school using public funding to pay all or part of the tuition.

Education savings accounts (ESAs) allow parents to receive a deposit of public funds into government-authorized savings accounts with restricted but multiple uses.

Tax-credit scholarships allow full or partial tax credits when there is a donation to nonprofits (school tuition organizations [STOs] that provide private school scholarships).

Individual tax credits and deductions allow parents to receive state income tax relief for approved educational expenses, which may include public or private school tuition, books, supplies, computers, tutors, and transportation.

Individual Tax Credits and Deductions—

Individual tax credits and deductions allow parents to receive state income tax relief for approved educational expenses, which may include public or private school tuition, books, supplies, computers, tutors, and transportation. Tax-incentive programs provide mechanisms for any individuals (not only parents) or businesses to either (1) spend money on private school or educational expenses for their child; or (2) donate money to nonprofit organizations that are charged with issuing private school vouchers in the form of “scholarships” to students.

2. State Voucher Program Constructs for Students with Disabilities

According to the 2016–2017 *School Choice Yearbook*,³² there are 52 private school choice programs in 26 states and Washington, DC, serving more than

442,000 students. Eleven of those programs are state voucher programs that are intended *exclusively* for students with disabilities: Arkansas, Florida, Georgia, Indiana, Louisiana, Ohio, Oklahoma, Utah, Mississippi, North Carolina, and Wisconsin. Five states currently have targeted ESAs for students with disabilities: Arizona, Florida, Mississippi, North Carolina (which will start in 2018–2019), and Tennessee.³³ Only two states, South Carolina and Arizona, have tax credits (scholarship or individual) for students with disabilities.

All the states allow use of the funds for tuition, and some allow for the use of funds to pay for fees associated with the student’s

education. All states allow students to leave voucher programs and return to public schools at any time. Specific states have carve-outs in North Carolina, for example, students are treated as parentally placed under IDEA. However, prior to the start of each school semester, the parent of an eligible student may submit documentation of the special education, related services, or educational technology costs the parent anticipates incurring in that semester for preapproval of the authority. In Ohio, under its Autism Scholarship Program, schools must comply with nondiscrimination codes and may be entitled to transportation. The purpose of the scholarship is to give the parent of a qualified special education child the choice of sending

the child to a special education program instead of the one operated by or for the school district in which the child is entitled to attend school. This allows the parent to receive the

services prescribed in the child’s individualized education program once the individualized education program is finalized. The services provided under the scholarship shall include an educational component. Under Ohio’s Jon Peterson Special Needs Scholarship Program, students who receive the scholarship are considered unilaterally privately placed students (this is the same for all the scholarship programs discussed in Ohio for students with disabilities). Therefore, these students are not entitled to a FAPE. The public school is required to evaluate, implement the child’s IEP, annually review the IEP, and reevaluate it if necessary. The parent is entitled to mediation and independent education

Table 1: States with Choice Programs Designed Specifically for Students with Disabilities (See Appendix B for more detailed information.)

State	Voucher Programs	Education Savings Account	Tax Credits (Scholarship or Individual)
Arkansas	X		
Arizona		X	X
Florida	X	X	
Georgia	X		
Indiana	X		
Louisiana	X		
Mississippi	X	X	
North Carolina	X	X	
Ohio	X		
Oklahoma	X		
South Carolina			X
Tennessee		X	
Utah	X		
Wisconsin	X		

evaluation (IEE) related to the development, but not implementation, of the IEP. The Ohio Department of Education will investigate complaints about violation of scholarship rules, but not about implementation of IEP or FAPE. Families can file due process complaints related to evaluation or identification, not to whether the student has received FAPE.

In the District of Columbia, despite the fact that the statute states that nothing in this Act may be construed to alter or modify the provisions of IDEA (20 U.S.C. 1400 et seq.), students are also treated as unilaterally privately placed. Provision of necessary services for each student are limited in scope to a menu of options—transportation, fees, and tuition. In Virginia, the scholarship tax credit is means tested, and while not intended exclusively for

students with disabilities, it has a provision stating that the eligibility of students with disabilities must comply with the proscribed means tests.³⁴ Wisconsin’s program only requires private schools to offer services to assist students with special needs if they can provide them with minor adjustments. In South Carolina, schools need to provide specially designed programs or learning resources to provide accommodations to students who require them.

In Florida, Georgia, Arkansas, and Oklahoma, parents using vouchers must sign agreements to relieve public schools of any legal obligations, under IDEA or otherwise, to provide the student’s education. The private school is not required to implement the IEP or to provide services, supports, or accommodations.

Mississippi's Nate Rogers Scholarship for Students with Disabilities is the nation's only program that exclusively serves students with speech-language therapy needs. EdChoice experts state that this scholarship has very few children or schools participating because the program is very restrictive (K-6 only and speech impairment must be the primary disability) and is perceived to be too restrictive on student eligibility, funding, and school regulations.³⁵

While the push for vouchers has caused growth, the Colorado and Tennessee programs have been terminated. Until 2017, Colorado had a voucher program, the Douglas County Choice Scholarship Program, which was the country's first district-created, nearly universal school voucher program that included students with disabilities. It was enacted and launched in 2011. Although 271 parents applied for vouchers to be used at more than 30 private schools approved for the program, the Choice Scholarship program was enjoined by the District Court of Denver County on August 12, 2011, in a lawsuit filed by the American Civil Liberties Union, Americans United for Separation of Church and State, several Colorado organizations, and some taxpayers. Ongoing litigation made it impossible for children to utilize the program. The Colorado Supreme Court ruled the program unconstitutional in June 2015 because it

In Florida, Georgia, Arkansas, and Oklahoma, parents using vouchers must sign agreements to relieve public schools of any legal obligations, under IDEA or otherwise, to provide the student's education.

While the push for vouchers has caused growth, the Colorado and Tennessee programs have been terminated.

channeled public funds to religious schools.³⁶ The case was sent to the U.S. Supreme Court on appeal. In June 2017, the case *Taxpayers for Public Education v. Douglas County School District*³⁷ was sent back to the Colorado State Court,

following a ruling by the Court on a similar case in Missouri. In the case of *Trinity Lutheran Church v. Comer*,³⁸ a Missouri church sued after being denied state funding for a preschool playground because the Missouri state constitution forbids financially supporting a religious institution. The Supreme Court ruled 7-2 that the state's original decision violated the U.S. Constitution's protection of the free exercise of religion by excluding churches from state programs with a secular intent.³⁹ While the case was tied up in court, Colorado's Douglas County School Board voted to terminate its voucher program in December 2017. The vote was again

unanimous (6-0, with one member who had been a plaintiff in the lawsuit against the voucher program abstaining).⁴⁰ The program was started in an affluent section of town by parents who "reported serious or very serious problems in their public school" (fighting, drugs/alcohol), but the program was ultimately terminated by the very body that created it because of immense public and political pressure and the ongoing litigation.⁴¹ In January 2018, the Colorado Supreme Court dismissed the case as moot.⁴²

3. Education Savings Accounts

Education savings account programs give parents the power to use their children’s state education dollars on a variety of educational options and obtain a deposit of public funds into government-authorized savings accounts, with some restrictions, to cover private school tuition, private tutoring, and other types of customized learning materials and services.

According to the literature and as described in the focus groups, eligible families can use these private accounts to pay for educational expenses for their children. Like vouchers, ESAs can be used for private or religious school tuition. Unlike vouchers, ESAs may be used for a variety of other needs, including public school-related expenses such as tutoring, uniforms, textbooks, therapists, homeschooling expenses, and school supplies, often without accountability to or transparency for taxpayers.⁴³ Some states like North Carolina offer debit cards to families to use to pay for services not covered by the ESA program, although there are worries that this system may be open to fraud.⁴⁴

A report issued in January 2018 by National Education Policy Center (NEPC) describes the

creation of ESA programs that allocate the funds directly to the parents rather than directly to religious schools.⁴⁵ We will explore the effect of breaking the funding chain directly to private schools and the ensuing effects on rights in more depth in the legal analysis section below.

Although some states’ statutes, such as Arizona, are silent regarding the effect of a voucher on IDEA or other rights, in most states, parents sign contracts when they use vouchers, to take full legal responsibility for the education of the student and releasing the public school from educating the student.

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529 and ABLA Accounts

A relative newcomer to educational savings accounts are 529 accounts. The ABLA Act of

2014⁴⁶ amended Section 529 of the Internal Revenue Service Code of 1986 to create tax-advantaged savings accounts for individuals with disabilities. These tax-advantaged savings accounts are funded

solely by family assets and can be used to cover qualified disability expenses such as, but not limited to, education, housing, and transportation. Education expenses can include tuition, supplies, and the like for K–12 or postsecondary education. Individuals with disabilities and their families can

[I]n most states, parents sign contracts when they use vouchers, to take full legal responsibility for the education of the student and releasing the public school from educating the student.

save up to \$14,000 a year in an ABLE account, and importantly, these funds do not count toward the \$2,000 asset limit for many federal programs such as Social Security. As of May 2017, a total of 21 states had ABLE programs, and families did not need to be a resident to open an ABLE account in another state (meaning the program is available to those who do not have an ABLE program in their home state).⁴⁷

In 2017, the new tax law expanded the qualified use of 529 accounts by allowing withdrawals of up to \$10,000 per year (per child) for public, private, or religious K–12 schools.

Home schooling families are also allowed to use 529 funds toward educational expenses.

The new legislation also supports funding of ABLE accounts designed for use by people with disabilities. Under the new law, parents can roll over 529 plan assets to an ABLE account. Both accounts must have the same beneficiary or a member of the same family, but they can roll over up to \$15,000 in 2018. Now families will have more flexibility in planning for the futures of children with disabilities, where predicting possible needs can be a challenge.⁴⁸

These opportunities certainly may benefit those who can afford to put money into such an account, let the money grow, and avoid capital gains tax on what was earned over time.

Other tax breaks exist too, as 35 states offer a tax deduction or credit when families deposit money into 529 plans.⁴⁹ While some families are celebrating this news, others see the opportunity gap continue to widen, not only because they don't have the funds to invest, but also because private schools might just raise tuition as a result and integrate 529s into the financial aid formula.⁵⁰

4. Federal Voucher Program

The nation's only federally funded school voucher initiative is in the District of Columbia, the Washington, DC Opportunity Scholarship Voucher

Program. This program is not targeted solely for students with disabilities. Programs funded and administered by the federal government must be consistent with and

uphold all provisions of applicable federal, state, and local laws. The U.S. Department of Education cannot create a program that attempts to avoid or lessen obligations under the law.

As of early 2018, the Department of Education asserts that there are no plans for a federal voucher program. Instead, it plans to provide money (\$250 million in FY 2018) through a competitive grant program.⁵¹

The legal implications of these voucher programs and educational savings account constructs are explored in more depth in Chapter 5.

The U.S. Department of Education cannot create a program that attempts to avoid or lessen obligations under the law.

Chapter 2: The Fiscal Impact of Vouchers and Scholarship Tax Credits on Public Education

A. Lack of Consensus

The debate about resources and costs of vouchers includes students with disabilities, since they often need services, technology, and accommodations. Often these resources can be provided at little to no cost, but some may involve considerable expense. If schools (public or private) are struggling to provide students' basic needs, students with disabilities may be disproportionately at risk of not receiving an equitable education. Many advocates oppose voucher programs based on the concern that they and other choice options redirect public money to privately operated education enterprises, which often operate for profit. They believe taking money from taxpayers for choice programs harms public schools by siphoning off students, resources, and funding while reducing the ability of public schools to serve the full range of student needs and interests because their hard costs, such as those for utilities, maintenance, transportation, and food service remain fixed even when public school enrollment drops.⁵² For example, the National Center for Learning Disabilities issued a report in 2017 asserting that state voucher, ESA, and tax incentive programs are "draining funding from public schools, leaving the public schools with far fewer resources with which to serve their students."⁵³

Conversely, EdChoice asserts that as enrollment declines, the per-student funding amount for the remaining public school students actually increases. This statement is backed up by research in some cities. Public data shows that states and cities typically increase their per-student spending in the years following the inception of school choice programs. Milwaukee and Cleveland are examples. By 1992, Milwaukee's school choice program had been in place for two years, and according to the U.S. Census Bureau, the city's public schools spent \$9,038 per student; by 2011, that figure had swelled to \$14,244—a 58 percent increase. Cleveland's school choice program launched in 1997, when the city was spending \$9,293 per student. Cleveland was spending \$15,072 per student in 2011—a 62 percent increase over 15 school years.⁵⁴

Others suggest that the net impact on taxpayers is actually twofold: (1) the savings that come from the difference between the voucher and the per-pupil revenue at district schools, for those who would have attended them in the absence of the voucher program, minus (2) the voucher costs for students who would have attended private schools anyway.⁵⁵ To many, vouchers seem to be a giveaway to the state's cash-strapped religious schools at the expense of struggling public schools.⁵⁶

As a result of the recent changes in the federal tax code, local schools and state governments may also change state rules to bring in additional revenue, but some feel it may actually increase the equity of the U.S. tax system. An opinion⁵⁷ in *Forbes* magazine recently asserted that “the national average annual cost of public schools exceeds \$11,000 per student and even the most frugal states spend \$7,000 per student. Even granting that the marginal cost of educating one additional student may be less than the average cost, when parents remove a kid from public school to enroll her in private school, they are saving the local school system and state government considerably more than after tax \$1000 per child.”⁵⁸

B. Increasing Tension—Who Should Get Resources

There is an ever-widening division about whether a national move toward privatization using public funds should occur. Critics such as the National Education Association (NEA) refer to voucher programs as “schemes” and assert that vouchers lack proper accountability and oversight and strip legal protections for parents and their children.⁵⁹ The National Coalition for Public Education (NCPE) states that private schools accepting voucher funds do not adequately serve students with disabilities, often denying them admission and subjecting them to inappropriate or excessive suspensions or expulsions. NCPE has also raised concerns about whether private schools provide the same quality and quantity of services available to students in public schools, including

those mandated under IDEA and Section 504. Advocates in Indiana frame vouchers as a “give-away” to cash-strapped religious schools at the expense of struggling public schools and worry that private schools do not accept students with disabilities.⁶⁰ The National Disability Rights Network (NDRN)⁶¹ believes that scarce and needed resources to maintain the quality of our public school system should not be diverted to publicly fund private school programs. Rather, limited public funds should focus on making sure that every public school and teacher has the resources they need to be effective in meeting the academic and behavioral needs of all

students, but particularly the needs of students with disabilities.⁶²

There are also valid concerns that private schools participating in voucher programs

are typically religious. Data from schools in Wisconsin shows that out of 28 schools accepting vouchers, 22 are parochial schools,⁶³ and studies of Louisiana schools show that private schools participating in the Louisiana Scholarship Program (LSP) are overwhelmingly Catholic.⁶⁴ One quarter of Indiana families that used vouchers said a religious environment was an important factor.⁶⁵ In contrast, families in this research study’s focus groups and interviews who indicated their child attended a religious school cited reasons having to do with services offered, proximity to home, and class size. No one in the focus groups cited a preference for religious schools as the reason for choosing that school. These findings suggest that while religion is a compelling factor for nondisabled families

There is an ever-widening division about whether a national move toward privatization using public funds should occur.

to use vouchers, it may not be as important to families of students with disabilities. More research is needed on this topic.

Many participants in the focus groups pushed back on the concept of “choice,” feeling that use of public funds for voucher programs is not a viable choice for those who do not have money to supplement the voucher amounts, who cannot provide transportation to the private school or programs purchased with a scholarship for their children, or who are uninformed about the educational options available to their children. Others have told stories of long delays in services, such as a mother who shared this story:

We waited a year without proper [special education] services to be eligible for the scholarship, we spent a year in a private school that did not provide appropriate services, and we transferred back to the public school and started the eligibility and evaluation process to begin again. Four years that we cannot get back in my child’s educational development.⁶⁶

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Still more families told stories of rejection from private schools and what they saw as a disincentive for private schools to serve students with disabilities—a disturbing trend in a program funded with public dollars. When the Texas

legislature was debating a school choice program, Rachel Gandy of Disability Rights Texas (the state’s mandated Protection and Advocacy program) said in an interview: “Those who have the choice might not be the families of kids with disabilities, especially severe disabilities and mental illness,” but she

says that it is “likely that choice may fall with the private school.” Gandy reported that a parent who testified before the legislature during the

regular session had been rejected by 13 private schools.⁶⁷ Others who participated in focus groups for this report poignantly reminded researchers that while it’s great that many children have parents or caregivers that can stay at home with children to locate or implement choice programs, finance

the remainder of private school tuition that is not covered by a voucher, or even know about their education options, others simply cannot. As a participant in one focus group stated:

[Many other families] literally cry because of the students that are abandoned in the public schools that can't take advantage of an ESA and can't have the one parent that they have quit their job to stay home [to locate or facilitate participation in a private school or coordinate private services and programs]. It's such a privilege. That is such a privilege that 90 percent of [the families in] this state cannot do. They can't quit their job to stay home and go to endless meetings. They give up. They can't access ESA because they don't have the right label, or they can't get it or whatever or they don't know it exists.

It makes me so angry because instead of fixing the problem, we're just creating two separate systems and it's not fair and it's not okay.⁶⁸

Typically, vouchers still leave parents with some tuition or fees they must cover out of pocket. Opponents to vouchers predict that the gap between who can and cannot afford to supplement voucher funds will never be completely bridged because as voucher amounts increase, so will the tuition and fees at the private school.⁶⁹

On the flip side of the issue, the current Administration and other pro-school choice organizations such as the Friedman Foundation for School Choice (now EdChoice) support vouchers, noting that many parents feel that the quality of public education is declining.⁷⁰ They believe that providing school choice to students with disabilities allows unhappy families to find a program that meets their children's individual

needs. They also assert that policies such as school vouchers and scholarship tax credits can save taxpayers money because, while total revenues to school districts may decrease, per pupil funding actually increases because districts keep a portion of funds for students no longer served.⁷¹ They also assert that school choice reforms will ultimately improve public education through the introduction of market forces that expand customer choice and competition between schools.⁷²

Also, in support of vouchers, many families interviewed shared intense feelings about the positive outcomes of voucher programs and

ESAs, such as a mother of a 13-year-old student with autism:

I had some success [with public school]

that was variable just based on the fact of who the teacher was and how well they knew what the expectations were from the law, what they should be providing. And then the next year, you know, you could go from heaven to hell fairly quickly, and so that's what was happening. There was this roller coaster of, Great teacher. Oh, my gosh, life is awesome. And then a teacher that's not as involved and, oh, my gosh, now my home life is destroyed. I've got temper tantrums for five or six hours a night, property destruction, can't go out to eat, you know what I mean. And it was all dependent on those hours that we're spending at school. It's been so life-altering, you know, going from where we were and not knowing if I was going to have to put him in an institution and not being able to go to family holidays, and you know,

just—you know, I get emotional when I talk about this, but just even getting undressed to go in the shower and looking like a battered woman, you know, and it's my beautiful son that's doing these things. And I know that he can be happy. And then having the ability to put him in an environment where he was appreciated, where he was respected, where he was given agency, which is what we all want. We all, we all want to be able to communicate. We all want to be spoken to with respect and with dignity and we all want some sort of agency over our physical bodies and over, you know, how we're taking in the information. The difference has been amazing.⁷³

Families are desperate for effective individualized services, positive school experiences, and satisfactory outcomes. Many are frustrated at the lack of actual choice, and their inability to receive quality services from either public schools or schools of choice. Others are adamant that choice is absolutely worth the risk. One theme that researchers heard over and over in focus groups and interviews is that parental control is important—even if there are no guarantees. Some parents are frustrated that special education and civil rights must be given up in order to use vouchers or ESAs and are adamant that civil and legal rights must be protected. Others see the loss as meaningless because they feel that they or their child did not actually receive any rights. The GAO report

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indicated similar views from families they interviewed.⁷⁴ Families that support and use vouchers are striving for outcomes for their children that include academic progress, but they also noted that equally and sometimes more important were self-esteem and acceptance.

I could make the school—dragging, kicking, screaming, do what the IEP said. But what I couldn't do was make them care about my daughter. I couldn't make them show empathy. And so she was so shut down. She didn't talk to anybody. She wouldn't talk to anybody who was typical. Like the

only friend she had; the only kids she would communicate with were other kids with disabilities and it was incredibly sad. She had no confidence at all. And now page forward. She attends a private school with ESA funds. She's a leader

in her peer group. She's like wanting to go and read, she is so excited about school and everybody knows her. She'll like go get a book and sit with another kid. Like everybody knows who she is as an individual. For us, it simply changed everything, like how assertive she is in the community now, like going places and she's talking to people. Things I never thought she would do.⁷⁵

Many families that had several children used different options for each child in traditional public

schools, private schools, and charter schools. The narrative of the focus group discussions brought to light a disturbing perception: that families are pitted against each other for scarce resources. On one hand, there are those who are able to access and benefit from vouchers, and there are those who cannot because of limits in eligibility requirements, lack of resources needed to pay for what the voucher does not cover, inability to provide transportation, or lack of available private schools.

A few national organizations, for example, the Council of Parent Attorneys and Advocates (COPAA)⁷⁶ and the National Center for Learning Disabilities,⁷⁷ do not have a formal position on vouchers in general, although both oppose the use of federal funds for school choice largely because of the loss of IDEA and other civil rights. The Center for American Progress and other such organizations don't take a position

on the use of vouchers, but they strongly caution that the use of school vouchers is equivalent to the student missing one-third of a year of classroom learning.⁷⁸ Moreover, they maintain that the focus on school choice through a voucher system may put the civil rights of students with disabilities at risk. If federal or state IDEA funding is used to fund vouchers for private schools, they recommend that public schools must remain accountable not only to parents and students, but to the government as well.⁷⁹ At the very least, a private school accepting a special education student through a voucher system should be required to show some proof that a special education program has been implemented at the school or for specific students. Ideally, a family could use a voucher and still receive the same individualized attention, planning, and detail required under IDEA.

Chapter 3: Issues Specific to Students with Disabilities

A. Eligibility

According to NCD’s survey and a review of state documents, school voucher and ESA programs consider various factors when determining whether students are eligible to participate. For example, 7 of the 20 existing voucher programs are limited to students who reside in specific areas or school districts, or those who are attending low-performing public schools, whereas the remaining voucher programs and all ESA programs are open to qualifying students statewide.⁸⁰ For instance, Wisconsin has a program specific to Milwaukee and another for Racine, and Ohio’s EdChoice Scholarship Program focuses on those students who attend low-performing schools. In contrast, Indiana’s Choice Program is open to eligible students across the state. In addition to students’ place of residence, almost all voucher and ESA programs used disability status or family income as eligibility criteria, according to GAO surveys.⁸¹

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Each state determines whether the student enrolled in public school is eligible for a designated time period, meets a geographic limit, or a specific diagnosis. There is also variation as to the amount of time for which the voucher is approved. Some individuals remain eligible for the remainder of their school career, while others must reapply every two to three years. Some of the ESAs, such as Florida’s Gardiner, allow unused funds to be rolled over and used

for postsecondary schools or programs in private or public institutions.

Recently, Arizona passed a bill to expand the targeted audience eligible for special needs scholarships to allow brothers and sisters to be eligible, and in 2017 it passed a bill that expanded eligibility to make any public school student eligible, up to limited numbers. The bill also includes a provision that allows families that can demonstrate low income to receive additional funding above the current formula of 90 percent of funds that would go to a traditional or charter public school.⁸²

Unlike public schools, a private school or program provider participating in a voucher or scholarship program is not required to accept a student who is eligible under the state program. Nor is it required to alter any of its business practices, policies, or curricula under the program. A parent/guardian must comply with all the provider's policies.

B. Enrollment of Students with Disabilities in Voucher Programs

The size of traditional voucher programs varies significantly. During the 2016–2017 school year, voucher systems enrolled between zero and 34,299 students, with the four largest programs in Florida (McKay Scholarship Programs for Students with Disabilities), Indiana (Choice Scholarship Program), Ohio (Educational Choice Scholarship Program), and Wisconsin (Milwaukee Parental Choice Program) serving 73 percent of the nation's students with disabilities who use vouchers.⁸³ The total number is 88,609 students across all programs serving exclusively students with disabilities.⁸⁴

States providing these school choice funds typically require that private schools meet minimum standards under state law in order to accept voucher funds. State law also sets parameters for student eligibility. Targets can be students who meet a specified income threshold, students who attend chronically low-performing schools, students with disabilities or specific types of disability, or students in military families or foster care.

C. The Reasons Parents Choose Vouchers

In the age of individualization and personalization, parents want the opportunity to decide how their children are taught, including the curriculum, the pedagogical approach used by teachers, and the services their children receive. A recent survey of parents conducted by the U.S. Department of Education reported high levels of parental satisfaction with their children's education, though the percentage of "very satisfied" parents varied by school type. Satisfaction levels

were the highest among private school parents and among parents whose children are at charter schools and public district schools of choice reporting lower but similar rates of satisfaction. Parents of students attending

district-assigned schools are the least likely to say they are "very satisfied" with their child's school.⁸⁵ Public perception and the media suggest that parents use vouchers primarily to permit their child to attend an academically stronger school. Focus group participants indicated that higher expectations of school for students with disabilities were in fact one reason they decided to use a choice program.

But an intriguing study from the Education Research Alliance for New Orleans suggests that parents' use of vouchers doesn't always work that way. Parents, especially low-income parents, actually show strong preferences for other school qualities such as the school's location or extracurricular activities.⁸⁶

Unlike public schools, a private school or program provider participating in a voucher or scholarship program is not required to accept a student who is eligible under the state program.

The study indicated that although parents may say they care about academics, this is not a critical factor when they actually choose a school. When researchers asked parents to rank schools, regardless of what they gave as preferences for their school, a school's distance from home most affected the parent rankings. Even if a parent assigned a letter grade of C to a school close to home, they would still choose that over a B school that was more than one mile away. Extended hours and extracurricular activities also mattered, especially for lower income families.⁸⁷

While many school choice proponents claim that vouchers are necessary for socioeconomic and educational equity, this study suggests that parents from the most economically disadvantaged families may make decisions differently from wealthier families. "Quality" of schools may include location or extracurricular offerings, and not just "academic quality," as wealthier families or state assessments may define *quality*. If this is true, vouchers may not diminish achievement gaps within a school district or city. For example, while wealthier families may use vouchers to move children to faraway schools with high academic achievement rates, lower income parents may not be able to reconcile moving a child to a school far from home if transportation or a lack of after-school programming would cause significant problems for the family.

[W]hile wealthier families may use vouchers to move children to faraway schools with high academic achievement rates, lower income parents may not be able to reconcile moving a child to a school far from home if transportation or a lack of after-school programming would cause significant problems for the family.

Similarly, parents of students with disabilities may not use vouchers in expected ways or make choices about schools based solely on traditional definitions of academic excellence. In the research for this report, parents of students with disabilities in focus groups described many other reasons for using vouchers or ESAs to choose their children's school, including the following:

- More involvement and control in decisions about their child's education.
- More equitable or thorough process of assessment of needed special education

services (e.g., children would be assessed for disabilities through schools in order to qualify services), including a willingness to acknowledge signs of less visible disabilities like dyslexia.

- Including and respecting parental involvement in the IEP team.
- Better special education services and willingness to implement individualized education programs (IEPs), including opportunities for direct instruction and research-based interventions.
- Safer schools, including schools with no bullying.
- Higher expectations for students with disabilities.
- Hope that children with disabilities would perform better academically, socially, or

behaviorally in a different setting or better school.

- Opportunity to match educational options with family lifestyle (e.g., homeschooling for religious reasons).

Many parents who use vouchers say that the powers and protections in IDEA statutes and regulations only existed for them in theory. Battling a school district over their child's education was either wearing them down, or they did not have the time, money, or knowledge to go to battle.⁸⁸ As one professional in the focus groups noted:

Parents tell me they feel they are not receiving the support and the services, or that their child's IEP is not being implemented as written in the public school system, the typical public school classroom, and therefore they utilize a voucher looking for better services. There is not one or two disability categories that use vouchers [; it ranges] from a child who has an attention disorder, autism, an[d] intellectual disability. Probably the most difficulty for placement or for finding appropriate services are [sic] for children who have emotional disorders.⁸⁹

Again, some choose schools for reasons such as proximity of school and availability of after-school programs or sports,⁹⁰ as these two parents noted:

I use ESA for one of my children. Ultimately, I got to a place where I didn't feel like—

I didn't feel like the public-school system would provide what she needed or could. I am an advocate for students with disabilities. I work with lots of families. And for me, even if what I do, even with all the litigation that I did with the school district, state complaints, federal complaints, due process complaints, OCR, no matter what I did, I could make them do it short term but then the follow-up would be horrible and then we would be back and it was like Groundhog Day.

We were in a rural preschool. Their model was ten typical students to five special needs students, and in that environment, he thrived. Then we moved up to the

city, and I tried to open enroll him into the school that we had chosen to buy a house near because of the quality of the school and the

fact that it appeared with five speech therapists on staff that they had the staff to manage his communication issues. And they wouldn't open enroll him, and I couldn't figure out why because they open enroll half of the kids in the school. And they said, oh, well, he needs a life skills program. He had already been included in a regular kindergarten, they didn't even know him.

Focus group and interview respondents overall indicated the following reasons for choosing to enroll in a voucher or ESA program: bullying or safety concerns in the public school; ignoring the signs of dyslexia and refusing to evaluate

Many parents who use vouchers say that the powers and protections in IDEA statutes and regulations only existed for them in theory.



or provide specific programs such as Barton (an Orton Gillingham-based intervention that can be implemented by people without training⁹¹), even though they have trained personnel; forcing parents to do a private evaluation that costs thousands of dollars, and then not accepting any of the recommendations; not implementing the IEP or 504 plan; refusing to involve parents meaningfully or listen to the parents' concerns and suggestions; their child being stressed out, refusing to go to school, acting out behaviorally; lack of research-based interventions; and as one parent in Florida put it: "I ran into wall, after wall, after wall in public school."

For students with more complex disabilities, parents and professionals in NCD's research suggested that vouchers may also be used to send students to segregated schools for students

with disabilities. Some parents participated in specific state programs targeting students with higher needs (i.e., Ohio's Jon Peterson Special Needs Scholarship Program, Arizona Empowerment Education Savings Account, and Florida's Gardiner Scholarship Program). They suggested that these programs also mainly support students attending schools designed specifically for students with disabilities. However, as the researchers recognized, it was clear that there was a lack of concrete data to back up this anecdotal evidence. There is no centralized repository for comparing data on students enrolled in voucher programs by disability category with the level of segregation or inclusion or by whether a private school only serves specific categories of students by disability label. Websites such as EdChoice or

state departments of education frequently share overall numbers of students enrolled using school choice programs, the number of private schools that students attend, or the amount of funds spent overall.⁹² This data may not be aggregated by type of disability, use of special education services or 504 plans, or whether the schools only serve students with disabilities.⁹³

D. School Choice Programs for Students of Color with Disabilities

Some proponents argue that students who will benefit from vouchers the most are students of color. The reality does

not necessarily support that assertion,⁹⁴ although, admittedly, the issue is complicated. The 2015 PDK/Gallup poll showed that 53 percent of the general population supports public school

choice, but the percentage was even higher for African Americans (64 percent). When asked if they would support using public funding to support families choosing private schools, levels of support dropped to only 31 percent of all respondents and 33 percent of African American respondents. These conflicting results indicate two things: (1) the evidence does not support a general assumption that vouchers are “extremely” popular with African Americans, and (2) when respondents understand that vouchers may divert public money to private schools, support for school choice proposals drops considerably.⁹⁵

Research on vouchers also shows that such programs often benefit wealthier white families,

even when they are intended to protect and uplift students of color or students at risk. One example is the Indiana School Choice Program. When it began in 2011, it was billed as a way to help poor and minority children escape “bad” public schools. Since then, the percentage of white voucher recipients has increased from 46 to 60 percent, and the percentage of black recipients has dropped from 24 to 12 percent. Students receiving vouchers are also increasingly suburban and middle class.⁹⁶ In another example, Florida recently published results from the McKay Scholarship Program, which showed enrollees were 46 percent white, 28 percent Hispanic/

Latino, and 20 percent black/African American.⁹⁷

Proponents of school choice programs assert that choice fosters “social justice” and equity.⁹⁸ Critics, however, point to the racist origins of vouchers. *Brown v. The*

*Board of Education*⁹⁹ deemed that the “separate but equal” standard was unacceptable in public education. At that time, pre-1954, “school choice” was a code for maintaining segregation, and it was only available to white families. For example, Prince Edward County in Virginia operated two high schools: a well-funded high school for white children and a severely underfunded high school for black children, which was overcrowded and lacked a cafeteria, a gymnasium, a locker room, and proper heating.¹⁰⁰ Rather than comply with *Brown*, the county closed all its public schools in 1959 in defiance of the Supreme Court’s decision. However, white children continued their education at the private Prince Edward Academy, a “segregation academy” that would serve as a

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model for other communities in the South. The county's black students were not permitted to attend Prince Edward Academy and could not receive tuition grants to attend other private schools.¹⁰¹

There is tension between national organizational stance and black parents on the use of vouchers, with the National Association for the Advancement of Colored People (NAACP) stating that the answer to inequity and inadequacy of the public schools does not lie in the school choice movement but rather in greater investment in traditional public schools; and black families asserting that families will flock to choice programs in pursuit of better educational opportunities.^{102,103}

While this debate is not specific to students with disabilities, it mirrors the rift outlined earlier between families of students with disabilities and national organizations serving their interests.

One reason disability advocates are concerned about voucher programs is the push-out of students of color. The National Disability Rights Network states that "we regularly hear from our network that students of color who are also students with disabilities are removed from voucher schools for disability related behaviors. We sadly are not surprised, as this practice would be consistent with the limited available data regarding removal of students in public and charter schools."¹⁰⁴

It is well documented that students of color and students with disabilities are suspended, expelled, and disciplined in public schools at

significantly disproportionate rates.¹⁰⁵ The U.S. Department of Education data for 2015–2016 reveals that students with disabilities represented 12 percent of the overall student enrollment. Yet school-level reported data show that

- 28 percent of students were referred to law enforcement or arrested.
- 51 percent of students were harassed or bullied based on their disability.
- 71 percent of all students were restrained.
- 66 percent of all students were secluded.
- 26 percent of students received an out-of-school suspension.
- 24 percent of those students were expelled.

Students of color with disabilities also represent two-thirds of students who are secluded from their classmates or restrained to prevent them from moving—even though they make up only 12 percent of the overall student population.

Students of color with disabilities also represent two-thirds of students who are secluded from their classmates or restrained to prevent them from

moving—even though they make up only 12 percent of the overall student population.¹⁰⁶ Students of color with disabilities experience the highest rates of exclusion. With the exception of Latino and Asian American students, more than one out of four boys of color with disabilities—and nearly one in five girls of color with disabilities—receives an out-of-school suspension. Notably, the vast majority of suspensions are for minor infractions of school rules, such as disrupting class, tardiness, and dress code violations rather than for serious violent or criminal behavior.¹⁰⁷

The glaring and well-documented disparity between students of color with disabilities and their nondisabled white peers has devastating consequences for this student cohort: from undermining learning to depriving students of instruction time to tragically altering the life trajectories of millions of students. We have long known that suspensions are associated with negative student outcomes such as lower academic performance, higher school dropout rates, failure to graduate on time, decreased academic engagement, future disciplinary exclusion, and entry into the juvenile justice system.¹⁰⁸

Excessive discipline causes many students to be held back in school and others to drop out, and it contributes to the school-to-prison pipeline. Students of color who are forced to repeat a grade or who drop out altogether have an increased likelihood of ending up in prison.¹⁰⁹

The Center for Civil Rights at UCLA's Civil Rights Project estimated days of missed instruction and found that, nationally, black students with disabilities lost 119 days of instruction (per 100 enrolled), which is 76 more days than the 43 estimated to have been lost by their white counterparts.

Finally, exclusionary discipline practices have an indirect adverse effect on nonsuspended students by negatively affecting their academic achievement. A three-year study of more than 17,000 students disclosed that high rates of school suspensions harmed math and reading

scores for nonsuspended students.¹¹⁰ In addition, such practices contribute to a negative school climate both in and outside the classroom.¹¹¹

We only know of these disproportions in discipline and exclusion because of the extensive data collected on public schools by the federal government. No similar data is collected on private schools. It is possible that private schools funded through choice programs may have less disproportionate discipline. However, in the absence of comprehensive monitoring and data collection, we will not know. The report cautions that policymakers must consider the origins of vouchers and their impact on

Most of the voucher programs provide limited or no disability-related services. ESAs typically do allow use of funds for services that vary widely in accordance with the student's needs.

segregation and support for public education. No matter how well intentioned, widespread voucher programs without oversight risk exacerbating segregation in schools and leaving the most vulnerable students

and the public schools they attend behind.¹¹²

E. Provision of Disability-Related Services

As explained earlier, providing disability-related services and describing what a program covers or allows vary across voucher type, state or private school. Most of the voucher programs provide limited or no disability-related services. ESAs typically do allow use of funds for services that vary widely in accordance with the student's needs.

Some families in the focus groups shared concerns that private schools were not providing specialized services, such as speech/language

therapy, and occupational or physical therapy to which the student was entitled, and at times, for which the state had already paid. However, other parents did not experience any loss in services and actually reported a greater ability to find and fund services recommended for their children that some public schools had refused to provide. Among these services were applied behavior analysis (ABA) or tutoring for dyslexia, services that are not available in the public schools (in both voucher programs that do implement the IEP or provide services or under ESA programs). These inconsistencies are highly problematic, with families essentially gambling that services will be the same or better in private schools, even if IDEA protections are not in place.

In Port St. Lucie, Florida, Lynn Ambert's 9-year-old son is eligible for a voucher under Florida's program that she wanted to use. However, no private school in her area will accept Ayden, who has autism and behavioral disabilities. Even the schools whose websites announced that they offered behavioral programs turned her away.¹¹³

In other cases, socioeconomic status may affect whether or not the loss of services is problematic. For example, transportation was a topic of conversation in the focus groups. Without IEPs, families may lose transportation services for their children with disabilities. This may mean families cannot utilize vouchers unless they are willing to drive several hours a day or pay for accessible private transportation. Many working parents or guardians simply

cannot afford these luxuries of time and money.

According to a report released by the GAO in 2016, federal laws and regulations for two key federal education grant programs require public school districts to provide "equitable services," which may include speech therapy or reading tutors, to eligible private school students. The Department of Education (Education) provides general guidance on these requirements. However, Education's guidance does not specifically address providing these services to students participating in private school choice programs. Education officials said they had not

received any recent inquiries on the subject, but officials in all four states GAO visited—comprising half of all private choice programs and two-thirds of participating students—

said that vouchers and ESAs complicate their efforts to implement these requirements. Further, although Education officials said that a student's participation in private school choice programs does not affect the federal equitable services requirements, officials GAO spoke to in two states expressed confusion about whether a student's participation in these programs changed their eligibility for these services. Providing quality information to clarify requirements and responsibilities—including adapting to emerging trends—is a key federal internal control. Providing such information would help clarify how to implement equitable services requirements in the context of growing private school choice programs.¹¹⁴

[T]ransportation was a topic of conversation in the focus groups. Without IEPs, families may lose transportation services for their children with disabilities.

Evaluation of Florida’s McKay program shows a different story; it was found that families reported obtaining higher-quality services in a private setting with a McKay voucher than they had received in public schools.¹¹⁵

F. Identification of Students with Disabilities

A study of Florida’s McKay voucher program shows that the program offers the promise of slowing growth in the percentage of students identified as having a disability: “The addition of 7.6 private schools that accept McKay funding within five miles of a public school, which is the average, reduces the probability that a student will be identified as having a specific learning disability by 15 percent.”¹¹⁶ When voucher programs specifically target students with disabilities, public schools are provided with a disincentive to find children eligible, as each student identified as disabled becomes a voucher-eligible student who could leave public schools and take all of the money devoted to her education with her.¹¹⁷

G. Procedural Protections

Under IDEA, when members of the IEP team, which includes parents, cannot agree on the services that a child should receive, the parents have the right to raise their concerns with a hearing officer and ultimately to take the school district to court if necessary (known as “due process”). Students who are parentally placed in a private school through a voucher do not have these due process protections.^{118,119}

My biggest problem with vouchers is the waiver of FAPE. If FAPE is a right under IDEA, our kids have a right to an education.

Then, you can’t waive a right. A waiver of your right to a FAPE is terrible for the student because they can’t possibly get the support services [they require]. And once you’ve waived FAPE, you’re done.¹²⁰

Parents often opt for use of a voucher program rather than initiating due process. They may save time and money upfront, however, and may also give up additional compensation if a hearing officer finds a denial of FAPE. Consider this example from a parent in Florida:

My child was self-injurious and would try to put his head through a wall and [bang it on the] floor, and I asked the school for a para [paraprofessional], so he would not hurt himself. They didn’t want to [provide one], so I had to threaten to due process. The public school could not give my child the support he needed to be safe, so I am not even talking about educational. I am just talking about keeping the child safe. You know, he would come home with bruises, lacerations, and he would also bite and attack other[s]. So, you couldn’t keep anybody in the classroom safe.¹²¹

In taking the voucher offered by the state, the parent was required to supplement the cost of a private education that exceeded the voucher amount. If a hearing officer found a denial of FAPE, the family may have received the full cost of the private placement paid for by the state. Attorneys in voucher states report that if parents obtain representation, voucher programs can serve as a catalyst for due process settlements for private placements because the district reimbursement amount

is less on a voucher than a litigated private placement would cost.¹²²

H. Cost of Private School Is Often a Barrier for Families, Even with a Voucher

Based on interviews with parents and focus groups, the following themes became apparent: Cost is a huge factor in whether families can afford to exercise choice options. Costs include tuition but also other costs. For example, if there are no private schools nearby and the family can't afford to move, one parent needs to assume responsibility for transportation, and often that involves loss of career or limited work options. Many families cannot afford to pay the difference between the voucher amount and the private school,¹²³ which can be as much as a \$7,000 to \$10,000 difference per year. Coupled with the need for one parent not to work in order to provide transportation or manage the process, it's a luxury many cannot afford. Some parents indicated that they took most of the money out of their retirement account to pay for it—feeling thankful they had those resources to use.¹²⁴

Not every parent can afford it and not every parent has the wherewithal to do what you all are doing. And so I think one of the major issues, whether it's a charter school, voucher school, or public school, because they all need the same level of advocacy and commitment and parent involvement, is we need to find a way to provide these

services to the under-served families. And the under-served families with children with disabilities is huge and it may not have to do with socioeconomic level because many of us have to work.¹²⁵

Voucher amounts vary by program. The sum of money received, or tax break provided, may not be equal to the state-funded portion of the cost of a student's education in a public school. In most cases, voucher amounts are not set at rates high enough to cover the full cost of education at a private school, and many of the programs do not cover critical costs to enable full access and participation, such as transportation or fees. The

The range for vouchers and/or savings accounts is from \$2,500 (in Louisiana) to \$27,000 (in Ohio, but only for students with autism). The median amount is between \$5,000 and \$7,000.

range for vouchers and/or savings accounts is from \$2,500 (in Louisiana) to \$27,000 (in Ohio, but only for students with autism). The median amount is between \$5,000 and \$7,000, which in many states is not enough to

cover the full cost of tuition, fees, and supplies for one year of private schooling. Louisiana, for example, provides tuition assistance at 50 percent of the state's per-pupil funding for the student's school district (approximately \$2,500) and cannot exceed the cost of the private school tuition. Families are responsible for paying the difference if tuition exceeds that amount.¹²⁶ For example, average private school tuition ranges from \$4,300 to \$10,000, while the average tuition for a specialized school for students with learning disabilities, according to the National Center for Learning Disabilities, ranges from \$9,000 to \$25,000.¹²⁷ If a private school does not provide disability-related services or does not provide

them in a sufficient amount for a particular student with a disability, a parent of a student with a disability will face even more costs to provide those services themselves.

Some states that offer special education vouchers distinguish the voucher amounts depending on the student's disability label, providing increased amounts for students with a specific diagnosis, such as autism. For example, Ohio's Jon Peterson Special Needs Scholarship Program provides students with disabilities with a range of maximum scholarships based on the student's disability. Ohio also has an Autism Scholarship Program that provides public funding for students with autism to attend their nondistrict school; the amount provided can be up to \$25,000. All students with disabilities are eligible for the Jon Peterson Scholarship, with the amount depending on their disability category.

Voucher amounts are determined through a complex funding formula that considers the average cost to educate a "typical student in a typical classroom" plus the estimated additional costs of providing special education and related services based on the child's disability.

Participants in the focus groups indicated that the vouchers or ESAs were not enough to cover the full cost of the private schools, unless they used a hybrid model (part-time school, part-time home school) or parochial school. Two individuals stated that they had to take money out of their

retirement accounts to cover the additional cost, and several others stated that one parent needed to stop work to manage the process or transport. Only families that can sustain that kind of financial impact can access services using one of the choice programs.

I. Voucher Programs Primarily or Entirely Serving Students with Disabilities

Because IDEA—which requires that students with disabilities be educated with their nondisabled peers to the maximum extent

possible—does not extend to private schools, voucher programs could potentially facilitate segregation of students with disabilities.¹²⁸

As the GAO noted in its 2017 report, almost all of the 27 private school choice program websites provide a directory of participating schools, and some provide guidance

on selecting schools. However, GAO estimates that no more than half of all schools participating in any type of voucher program mention students with disabilities anywhere on their websites. From our review of state department of education programs, that includes publicly available data on who is enrolled in what type of school by disability category; and how long they remain in the voucher program or return to public school.

Additional data needs to be tracked and reported. As one stakeholder interviewed

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for this research indicated, “we found that the states (such as Wisconsin) have a very hard time getting this data from the voucher schools—the state may know who left the public schools (but not in a timely way and not why they left), but they don’t know where they went.”¹²⁹ Given the use of public funds, policymakers, stakeholders, and families should have the data necessary to easily answer this question.

The National Center for Education Statistics (NCES) publishes *The Condition of Education* each year and provides the report to Congress.¹³⁰ This report, at minimum, should include statistics on the use of voucher programs for students with disabilities, by disability and race; and include information on reasons for exiting public schools and characteristics of private schools that they will attend using the voucher or educational savings account funds. NCES does publish fast facts for students with disabilities; the last year covered was 2013 in which they reported 95 percent of 6- to 21-year-old students with disabilities were served in regular schools; 3 percent were served in a separate school for students with disabilities; 1 percent were placed in regular private schools by their parents; and less than 1 percent each were served in one of the following environments: in a separate residential facility, homebound or in a hospital, or in a correctional facility. The data presented is by disability category but does not show whether the private school is only for students with disabilities or any other characteristic. This

Families that participated in this research noted that information about vouchers or available private schools is often conveyed by word of mouth from family to family.

is important information to add to data collection and reporting.

EdWeek provided a data snapshot of Florida schools and showed whether the schools are accredited or religious. However, this data snapshot did not indicate whether these schools are only for students with disabilities or whether they are segregated.¹³¹

J. Information Provided to Families

Families that participated in this research noted that information about vouchers or available private schools is often conveyed by word of mouth from family to family. Some families indicated that the process was easy and smooth, but others stated that they still needed to hire an attorney or an advocate to navigate between programs and access the best option for their child.

Parents find out the information that they need to make a choice through [state] website, but mostly [by] word-of-mouth. Also, they go to advocates, to organizations, and then they could go to the State Department of Education website but most of them don’t know how [to] navigate it. It’s not the friendliest website. And the DOE does not return phone calls and they are not good about e-mails. It’s hard to get accurate information.¹³²

The cumulative effect of this lack of information is that parents are making choices while being totally in the dark about the school

to which they are sending their child. They are simply hoping for the best, and as some stated in focus groups:

They sign up for a private school, thinking that they are getting all of the benefits one expects of that: better instruction, lower class size. But when they visit

their child might be in the back of the classroom without enough support and not really getting any sort of an education. Or there's like a lower-level untrained person that's supporting the child. That's not what they thought they signed up for. So, then they end up going back to public schools.¹³³

Chapter 4: Outcomes of Students with Disabilities in Voucher Programs

A recent National Public Radio feature asserted that though vouchers bring choices, they do not bring guarantees of educational outcomes.¹³⁴ Certainly, there are no guarantees in public education either; however, there is ample data. In contrast, there is no public data collection showing how well private schools are serving students with disabilities. As indicated previously, parents have to waive their rights under IDEA, including the requirement to demonstrate that the child is receiving a meaningful benefit from their education. Some states require testing, while others do not. The GAO stated that “academic testing and reporting requirements can help the public compare the academic achievement of private school choice students with students in public schools. Two-thirds of private choice programs (18 of 27)—which represented 78 percent of all students participating in voucher and ESA programs in school year 2016–17—require[d] private schools to test voucher or ESA students. Nine of the 18 programs that require testing, nine programs require participating schools to administer their state’s standardized test and six require schools to administer some type of norm-referenced test.”¹³⁵

States vary considerably in terms of academic accountability. Almost half of the voucher programs do not have any testing requirement

or only have to provide parents with a progress report about their children. In other voucher programs, schools must administer a state or a nationally standardized assessment to their voucher recipients; in some programs, participant schools are included in the state school grading system. Among the five states with ESA programs, three states—Florida, Nevada, and Tennessee—require participants to take a standardized test; however, in Florida and possibly other states, students for whom testing is determined not to be appropriate are exempt. In terms of scholarship tax credits, only 8 of the 21 programs require students to take a state or national test.¹³⁶

The results on outcomes overall is mixed. A recent study of DC voucher students found that math scores were 10 percentage points lower for students who used vouchers compared with students who applied but were not selected through the lottery.¹³⁷ Students in Indianapolis who left public schools to attend private Catholic schools, for example, experienced no gains in reading but “moderate and statistically significant average annual losses in mathematics compared with the gains they experienced while attending traditional public schools.”¹³⁸ A study of the effectiveness of Ohio’s ESA program found similar negative effects in math scores that persist over time and cannot be attributed to

“setbacks that typically accompany any change in schools.”¹³⁹

Previous evidence¹⁴⁰ revealed that the Louisiana Scholarship Program (LSP) had large negative effects on student outcomes in both English and math after one year, but researchers say that by the third year, the performance of LSP scholarship users was statistically similar to that of their counterparts in both English and math. Perhaps most surprisingly, the study also concluded that LSP scholarship users were more likely to lose their special education status after two years and less likely to be newly identified as a student with a disability by their third year in the program.¹⁴¹ However,

as a September 2017 study states: “These large and statistically significant negative findings, especially in mathematics, are unprecedented among experimental evaluations of school voucher programs in the United States.”¹⁴²

Focus groups and interviews reveal that although there are families frustrated with the experience, or unable to access services and supports, there are many families that are very happy with the outcomes. Several participants in multiple states indicate that they participated in the study specifically to counter media and research reports that dismiss the benefits of vouchers. They describe students who are learning, thriving, and showing an increase in hard-to-measure outcomes, such as confidence and self-esteem. Participants gave many examples of innovative hybrid programs

(part campus based or online, part homeschool or tutoring) and greater choice over curriculum (such as in the case of dyslexia), which has made incredible differences.

And I have to say it’s given us not only the individual, you know, my teachable moments and being able to access or get a Kindle and buy audio books or whatever it is, flashcards, I mean, everything, as long as it’s educationally relatable, you know, it’s been a blessing. But he’s been able to take advantage of the other programs, too, even though they may be short term. For

example, my son is in a monthly program at the local university, which is an awesome opportunity and it’s reimbursed by the education savings account, and it’s the education master students, the physical fitness and Pre-K

students, and the psychology master’s and counseling students. They’re learning mindfulness, they’re learning about their bodies. They have different levels. They have folks that come in that help with speech facilitation, with the learning. It’s geared specifically for intellectual disability. You know, they have enough staff from three different departments, so they’re learning to collaborate. And then the students are getting the benefit of that collaborative education model, and then they modify what they learned [in] one session and that adjusts the next session. So the teachers

Focus groups and interviews reveal that although there are families frustrated with the experience, or unable to access services and supports, there are many families that are very happy with the outcomes.



are learning, the students are learning. It's just been absolutely fantastic.¹⁴³

Compared to public school, there is little to no oversight, aside from the minimum regarding health and safety. The GAO reports that of the 27 taxpayer-funded private school voucher and ESA programs studied by GAO in school year 2016–2017, only 8 of these programs required private schools to comply with annual financial audits, meaning that the states funding these schools often have no clear picture of where their investment is actually going.

The American Federation for Children Growth Fund and the American Federation for Children wrote in the 2016–2017 Yearbook that “quality program design transparency and accountability in educational choice programs are crucial for

program effectiveness, growth and longevity.”¹⁴⁴

These sister organizations “work to ensure that private school choice programs include effective policy and program design, including common sense academic, administrative and financial accountability provisions.”¹⁴⁵ Of note in their recent publication is the number of programs (overall not simply choice programs for students with disabilities) that now have testing and reporting requirements has nearly tripled since 2010. The American Federation for Children (AFC) states that they encourage transparency and accountability as smart public policy that provides educational choice advocates with readily available data and information to showcase program successes. All of the states with voucher programs were marked with strong accountability in health,

safety, and nondiscrimination. Voucher programs did not score as well in the financial section and showed even less accountability in the academic indicators. The weakest accountability ratings were found in the ESA programs. As the report states, increasing transparency and accountability, with readily available data, is essential.

This lack of oversight and transparency can have troubling consequences for students with disabilities and their families. Take this student from Florida: After receiving a \$6,000 scholarship under the McKay program, the family had new hope but found it difficult for their daughter to get an education. The first school she attended closed down. Another refused to enroll her because she was too far behind academically. And a third school expelled her midyear in a dispute over bullying. The family tried to file a complaint and fingers were pointed regarding responsibility, but no action was taken. After three years, the student is back in public school, and with a proper diagnosis and supports, she is thriving.¹⁴⁶

Private schools receiving state aid don't have to track students or tell the state how many students graduate from their schools. Nor need they tell how many are bullied, suspended, expelled, or drop out—some of which are the most basic measures of student success. They don't have to report Civil Rights Data Collection (CRDC) information for inclusion in the national data collection on numbers of students who are suspended and families indicate that can create problems because suspension or expulsion is easier in private schools. If a student is served under IDEA, it is much harder to suspend long term or to expel a student with a disability from a public school than a student without a disability.

Except in certain serious cases, public schools must go through a process to determine if a student's misbehavior is a manifestation of his or her disability.¹⁴⁷ Private schools have no such obligation. A recent *Orlando Sentinel* investigation found several instances of private schools fudging health and safety records and hiring staff with criminal backgrounds. The state was often slow to catch the misdeeds and respond.¹⁴⁸

Others feel that regulations over private schools, such as the requirement of many states that the private school be in operation for a specified period of time before it can enroll students, create unnecessary barriers to new schools.¹⁴⁹ Parents in focus groups often told competing tales of schools that were shut down for fraud on the one hand; and of schools with very strict oversight of uses permitted for educational savings accounts, on the other hand. For example, one focus group parent stated the following:

And let me say that with the Gardiner, we're not out there just willy-nilly as parents picking stuff. I mean, we have to submit everything. It has to be approved. Everything we do has to be submitted with a paragraph or a few sentences or more sometimes that explains the educational benefit tailored to your child.¹⁵⁰

As a recent GAO¹⁵¹ report showed,

- One-third of the taxpayer-funded private school voucher and ESA programs in 2016–2017 had no academic testing requirement. Officials in two of the programs GAO studied in greater depth indicated that some private schools were unfamiliar with or unequipped to administer standardized tests, and stakeholders told GAO this was

especially true at some of the smaller private schools.

- Only one-third of the programs require that schools publicly report test results, making it difficult for parents to fully understand the quality of school to which they are sending their child.
- GAO estimates that 13 percent of all private voucher schools provide student and school performance data on their websites.
- Only 4 of the 27 private school voucher and ESA programs in 2016–2017 provided information on the graduation rates of private schools.

Chapter 5: Legal Protections for Students with Disabilities in Voucher Programs

A. Concern with Waiver of Rights

Students with disabilities are guaranteed various rights through a network of federal laws. One of those statutes, IDEA, has guaranteed critical protections for more than four decades. In the past school year, it has served 6.5 million students and provided more than \$11 billion in federal funding to the nation's schools, making it the second-largest K–12 program in the U.S. Department of Education.¹⁵² Through the research and focus group participants, these potential harms for students with disabilities were noted:

1. In the majority of school voucher programs, when students use vouchers to attend a private school, they relinquish their rights under IDEA, including the right to an IEP, FAPE, and procedural protections.¹⁵³
2. State programs and private schools fail to notify parents of students with disabilities that they are waiving rights and what that means.
3. Some parents report feeling unprepared to make an informed decision.
4. Other parents report knowingly waiving their rights and were not worried about doing so.

The 2017 GAO report found that private school choice programs inconsistently provide

information on changes in rights and protections under IDEA when parents move a child with a disability from public to private school. In the 2016–2017 school year, 83 percent of students enrolled in a private school choice program specifically designed for students with disabilities were enrolled in a program that either provided no information or inaccurate information about the changes in their IDEA rights.

In the following sections, we discuss the interaction of school choice programs with constitutional, federal, and state rights.

B. The Federal Establishment Clause of the U.S. Constitution

Although some school voucher programs have been challenged for violating the Establishment Clause of the U.S. Constitution, the Supreme Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)¹⁵⁴ held that Ohio's school voucher program did not violate the First Amendment's establishment of religion clause, despite the large number of students attending religious schools with school vouchers. The Court reasoned that the program did not violate the Establishment Clause because the program (1) was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system, and (2) was a

program of true private choice that did not have the effect of advancing religion.

C. The Fourteenth Amendment of the U.S. Constitution

Brumfield v. Dodd is a 1975 case in Louisiana that challenged the state Board of Education's provision of books and other materials to racially segregated private schools under the Constitution's Equal Protection Clause of the Fourteenth Amendment. The order issued in that case had no expiration, and currently the federal government is using that order to look into the state's new school voucher program.¹⁵⁵ In 2013, the judge concluded that the federal government was authorized to review the possible racial segregation of the state's voucher system, not only because of the possibility of segregated private schools, but also because the case implicates the state's obligation not to promote segregation in public schools. "This case is about the Constitution and *Brown v. Board of Education*," the judge said, referring to the U.S. Supreme Court's landmark 1954 decision outlawing "separate but equal" public schools. "The court has an obligation . . . to take reasonable steps in the process whereby the voucher program is not being used to promote segregation."¹⁵⁶

D. Federal Legal Requirements Under Voucher Programs

Title I, Part A, of the Elementary and Secondary Education Act (ESEA) mandates that all public school students shall be provided with a rigorous curriculum aligned to state-adopted standards for college- and career-readiness; and that the academic achievement standards include the same knowledge, skills, and levels

of achievement expected of all public school students in the state, with the sole exception of those students who are identified with the most significant cognitive disabilities.¹⁵⁷ These academic standards do not apply to the vast majority of students with disabilities in voucher programs.¹⁵⁸ Title I also requires each state to establish an accountability system that includes ambitious state-designed long-term goals. Regular measurements of interim progress toward meeting such goals are to be made for all students and separately for each subgroup of students in the state for improved academic achievement, as measured by proficiency on the annual assessments and high school graduation rates.

Students with disabilities are guaranteed various rights through a collection of federal laws, including IDEA, Section 504 of the Rehabilitation Act (Section 504), and the Americans with Disabilities Act (ADA).

E. School Vouchers and the Individuals with Disabilities Education Act

IDEA, enacted in 1973, provides federal funding to states for the purpose of assisting them to provide special education and related services to students with certain disabilities.¹⁵⁹ Generally, the funding formula is based on the number of children with disabilities in the state who are receiving special education and related services.¹⁶⁰ The states are required to distribute that funding to local educational agencies.¹⁶¹ The states are eligible for IDEA funding only if they agree to submit a plan for providing FAPE for students with disabilities in the least restrictive environment through an IEP, and to apply IDEA procedural safeguards.¹⁶²

IDEA arose from court decisions evaluating the constitutional obligations of public schools to serve students with disabilities.¹⁶³ Congress incorporated these constitutional requirements into IDEA and provided federal funding to support implementation by the states. Under IDEA, schools must provide each eligible student with a FAPE that meets the standards of the SEA and is consistent with the student's IEP.¹⁶⁴ The right to FAPE ensures these students full and meaningful opportunities to participate in the same curriculum that is being taught to students without disabilities and to meet the same high academic standards that are set for all students.¹⁶⁵ Multiple provisions, including those regarding IEP development and implementation, ensure that each student shall be involved and make progress in the general education curriculum—that is, the same curriculum as that provided to students without disabilities.¹⁶⁶ Moreover, consistent with IDEA's LRE requirement, students with disabilities are to be educated to the maximum extent appropriate with students without disabilities; removal from the regular education environment is to occur "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."¹⁶⁷

IEP teams must determine each student's LRE based on the student's unique disability-related needs as set forth in her IEP, not based on a diagnosis, a specific disability

label, or because the student requires needed modifications in the general education curriculum.¹⁶⁸ Such placement decisions cannot be based on the availability of placement options, administrative convenience, institutional barriers to providing supportive, related services in charter school settings, or based on the nature of students' particular disabilities rather than their individual needs.

IDEA has guaranteed critical protections to students with disabilities for more than four decades. In the 2016–2017 school year, it served 6.5 million students and provided more than \$11 billion in funding to the nation's schools, making it the second-largest K–12 program in

the U.S. Department of Education.¹⁶⁹ As the current Administration and Education Secretary Betsy DeVos push for expansion of voucher programs, risks for students with disabilities are often left out of

pro-voucher narratives.¹⁷⁰ Parents of students with disabilities have mixed understandings and opinions about any possible loss of special education rights for themselves or their children. In focus groups and interviews, NCD research showed that state programs and private schools often fail to notify parents of students with disabilities about their rights and about how those rights may be forfeited in voucher programs; other parents received information but still felt unprepared to make a fully informed decision. Other parents felt the voucher programs were worth any risks and knowingly gave up special education rights without concerns about it. The fact is, however, that

NCD research showed that state programs and private schools often fail to notify parents of students with disabilities about their rights and about how those rights may be forfeited in voucher programs.

for the majority of school voucher programs, if students attend a private school with the vouchers, they must relinquish their rights under IDEA,¹⁷¹ including the right to assessments paid by the school district, an IEP, FAPE, LRE, and procedural due process protections for them and their families.¹⁷² When a voucher is used for a school that does not provide sufficient services, parents have no recourse. If a private school fails to meet a

student's needs, the student will not be entitled to compensatory services. Private schools do not have to follow the IEP and are able to easily remove the student

from the program. COPAA members indicate that in order to accept a voucher, there can be no outstanding complaint by the family against the district, making it impossible to pursue any sort of compensatory

remedy for past, present, or future claims. Denying IDEA protections in the name of choice is potentially a way for states to skirt accountability for

individual access to a free and appropriate public education. Under a voucher, disability-related services may or may not be free (as many parents have to cover the cost with personal funds), and the education may or may not be appropriate for the particular student. In sum, as a general rule, IDEA rights have not been viewed as extended to children and youth with disabilities who participate in voucher programs. Some states, however, have chosen either to

align with IDEA or to protect certain rights under IDEA.

In addition, as stated previously, the GAO found that when parents move a child with a disability from public to private school, school choice programs inconsistently provide information on changes in rights and protections under IDEA. In the 2016–2017 academic year, 83 percent of students enrolled using vouchers

specifically designed for students with disabilities received no information or inaccurate information about the changes in their IDEA rights when they chose a private school. Families should

have easy-to-understand, accurate information in a format that is accessible to people with disabilities and presented in the family's primary language. As explained later, this information

must also explain the risks of waiving rights and how it may affect services.

Whether or not the state requires parents and students to explicitly relinquish rights under

[F]or the majority of school voucher programs, if students attend a private school with the vouchers, they must relinquish their rights under IDEA.

Families should have easy-to-understand, accurate information in a format that is accessible to people with disabilities and presented in the family's primary language.

IDEA as a condition of accepting a voucher varies considerably. Nevada voucher law is silent. Arizona doesn't specifically state that rights are terminated, but it does say that the state department will not monitor schools to ensure that procedural or substantive rights are upheld. Parents in Arizona who feel rights are being violated have to file a complaint with the U.S. Office for Civil Rights (OCR). In Florida, when parents opt to apply for the McKay Scholarship

specifically for a child with a disability, their child's rights under IDEA are then explicitly revoked. Laws in Georgia and Oklahoma also explicitly revoke IDEA rights. Louisiana requires that the student's IEP be followed, and in Ohio parents and students retain all rights except the right to due process for denial of FAPE. Florida and Mississippi programs require that families waive all IDEA rights, while other states, such as Utah and Ohio, allow parents to retain limited rights. In Ohio, the guidelines state that the district will no longer be responsible for FAPE; while a child is receiving a scholarship, the participating school is required to maintain an IEP for the student, and all records and documentation relating to the IEP and progress must also be provided to the public school district, as is also the case in Utah. Any school wishing to provide services under the scholarship program must sign an affidavit also stating that they will comply with laws regarding the delivery of services to children with disabilities.

A 1990 OCR staff memorandum states that students who are placed in private schools through the Milwaukee Choice Program are considered to be parentally placed in private schools and are not covered by IDEA's protections.¹⁷³ A 2001 OCR letter, *Letter to Bowen*, reiterated this point, stating that participating students in Florida's McKay Program "are considered 'private school children with disabilities' enrolled by their parents. . . . [S]uch parentally placed private school students with disabilities have no individual entitlement to a free appropriate public education including special education and related services in connection with those placements."^{174,175}

Many states, including the District of Columbia, despite having language in its statute

that says "(c) CHILDREN WITH DISABILITIES.— Nothing in this Act may be construed to alter or modify the provisions of the Individuals with Disabilities Education Act (20 17 U.S.C. 1400 et seq.),"¹⁷⁶ require parents to waive their rights to IDEA protections.

Weber (2007) asserts that under the current IDEA, there is not an explicitly established individual entitlement to special education services for any private school child. Nor does it require that services provided to private school children be delivered on the site of the private schools or by means of private school personnel. IDEA affords few procedural rights to parents of private school children to challenge decisions about services.¹⁷⁷ Weber's premise is tied to IDEA provisions (changed in 2004) relating to services for children placed voluntarily by their parents in private schools. The Department of Education's 2011 guidance supports Weber's view:¹⁷⁸

The LEA's obligations to parentally placed private school children with disabilities are different from its responsibilities to those enrolled in public schools or to children with disabilities placed in a private school by a public agency (rather than by parents) as a means of providing FAPE. Parentally placed children with disabilities do not have an individual entitlement to services they would receive if they were enrolled in a public school. Instead, the LEA is required to spend a proportionate amount of IDEA federal funds to provide equitable services to this group of children. Therefore, it is possible that some parentally placed children with disabilities will not receive any services while others will.¹⁷⁹

The Department of Education’s guidance/ publication, released in 2011, reminds local education agencies with jurisdiction over the school district where the private school is located that they remain the responsible agency for implementing IDEA’s “child find” provision: “the obligation that the LEA locate, identify, evaluate, and spend a proportionate share of IDEA funds for equitable services for children with disabilities enrolled by their parents in private, including religious, elementary and secondary schools located in that district.”¹⁸⁰

IDEA itself does not provide for FAPE and LRE in private schools, even if those schools receive funding from the state. Rather, under IDEA, a state must provide for the equitable participation of children who are parentally placed in private schools, as a group, by allocating a “proportionate amount” of federal IDEA funding to the group.¹⁸¹ The state is then responsible for ensuring that parentally placed students in private schools have opportunities for equitable participation in special education and related services within that proportional amount.¹⁸² The equitable services must be provided by the state, either directly or through contracts.¹⁸³ However, IDEA “does not require a [LEA] to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a [FAPE] available to the child and the parents elected to place the child in such private school or facility.”¹⁸⁴ Thus, as shown by the U.S. Supreme Court in *Zobrest v. Catalina Foothills School District*,¹⁸⁵ *Board of Education of Kiryas Joel v. Grumet*,¹⁸⁶

and *Agostini v. Felton*,¹⁸⁷ the district does have an IDEA mandate to provide limited services to students enrolled in private schools. However, they are not required to provide the same level of special education services the child would receive if enrolled in a public school. As noted earlier, under Child Find requirements, the district is required to assess all students within the district, even those homeschooled or in private school settings. There are limitations on the other services: (1) these services must be only supplemental services, not the student’s primary services for education; (2) the amount provided is limited to a small proportion of the federal IDEA funds provided to the district, and when those funds are expended, the district is not required to spend more; (3) the district may choose to not serve all parentally placed students; (4) the full range of special education services may not be available; and (5) the provisions of FAPE are not available.¹⁸⁸

Notably, this does not make the private school responsible for providing special education and related services, but the responsibility remains with the state, which may decide “how, where, and by whom special education and related services will be provided.”¹⁸⁹ Nor does it provide an individual right to any particular parentally placed child to receive FAPE.¹⁹⁰ As explained by the Department of Education, “Therefore, it is possible that some parentally placed children with disabilities will not receive any services while others will. For those who receive services, the amount and type of services also may differ from the services the child would receive if placed in a public school by the parents or in a

IDEA itself does not provide for FAPE and LRE in private schools, even if those schools receive funding from the state.

private school by a public agency.”¹⁹¹ An individual parentally placed child with a disability who is designated by the state or LEA to receive special education and related services must have a services plan, which shares some parent participation considerations similar to the IEP process.¹⁹² Special education and related services may be provided at the private school or at an alternate site.¹⁹³ Private schools, rather than parents, have the right to complain about a failure of the state to give due consideration to the views of the private school in determining how to allocate the proportionate amount of funding for parentally placed students.¹⁹⁴

For a student eligible under IDEA and under the parentally placed provision, acceptance of a voucher is a withdrawal and a relinquishment of individual rights under IDEA, including special education and related services. Vouchers, however, represent a school choice initiative that authorizes use of government resources to allow parents to send their child to a school other than the one to which the child would be assigned in the family’s home community. Often, the reason for the voucher is the acknowledged failure of the public school to adequately provide an education.

When a school district offers a school placement that cannot implement the required instruction and services at the time that the parents have to decide whether to accept or reject the school placement offer, in this case at the IEP meeting, courts have found that the school district failed to offer the child a FAPE.^{195,196}

Denying rights under IDEA as a condition of accepting a scholarship counters both the theoretical purpose of vouchers and IDEA’s stated intent, for both vouchers and IDEA assert that their purpose is to ensure that the student’s specific individualized needs are met in a placement that will best serve the educational needs of the child. IDEA promises meaningful parent participation, as do vouchers, but vouchers in theory go a step further in enabling families to make independent private choices to direct their resources to appropriate schools. This promise of “choice” is hollow, however, for many families who cannot afford the cost above the allowable voucher funds, cannot provide transportation, or may have to give up all procedural safeguards and

rights to benefit from the voucher.

In sum, federal IDEA rights, as a general rule, have not been viewed as being extended to children and youth with disabilities who

participate in voucher programs. All the same, states continue to receive special education funding for voucher students and have the ability to require voucher schools to carry out IDEA obligations through contract or as a condition of receiving voucher funding.

The express purpose of IDEA is to “ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs.”¹⁹⁷ Under IDEA, in exchange for receipt of federal funds, the state agrees to guarantee a FAPE to every child who has a disability.¹⁹⁸ A FAPE is provided to a child with disabilities through the development of an IEP,

[F]ederal IDEA rights, as a general rule, have not been viewed as being extended to children and youth with disabilities who participate in voucher programs.

which is both a “comprehensive statement of the educational needs of a handicapped [sic] child and the specially designed instruction and related services to be employed to meet those needs.”¹⁹⁹ An IEP must be reasonably calculated to enable the child to receive educational benefits.²⁰⁰ The IEP is required to identify both the services and a particular school at which the offered instruction and services are to be implemented.²⁰¹ An IEP that fails to offer a school, “as a matter of law . . . [is] not reasonably calculated to enable [the child] to receive educational benefits.”²⁰²

Some scholars suggest that state and federal laws should consider tying IDEA rights to the role of the IEP team in making the placement decision. If the IEP team together, including the parents, makes the placement choice of a voucher school, not the parents alone, and if the team chooses the private school as a means to provide FAPE, the public school district should retain the primary responsibility to provide FAPE and stay in a working relationship with the private school. In addition, the child should retain all IDEA rights, and all substantive requirements (such as development of an IEP) must be followed.²⁰³

Any allowable choice in this context must only require that the parents and the school agree that the voucher will allow school funds to follow the child to the school of his or her choice. Parents or students should not have to give up either procedural or substantive requirements under IDEA, or their right to an impartial due process hearing if the private school fails to comply. The IEP should remain the cornerstone of providing individualized special education and related services designed to meet the unique needs of students with disabilities.

Although the loss of meaningful protection under IDEA is problematic for parents accepting vouchers, the consequences of such waivers are limited to the extent that § 504 or the ADA provides similar protection to students with disabilities, either through direct regulation of the private schools or through regulation of the state agencies administering voucher programs. Upon closer examination, however, it becomes evident that the protection these statutes extend to private school students is relatively minimal.²⁰⁴

F. Section 504

Under Section 504 of the Rehabilitation Act of 1973, any federal funding to a SEA or LEA triggers antidiscrimination requirements for their educational programs. For public schools receiving federal funds from the Department of Education (DOE), these requirements include the provision of an appropriate education, including regular and special education and related aids and services that (1) are designed to meet the individual educational needs of disabled persons as adequately as the needs of nondisabled persons are met and (2) are based upon adherence to regulatory procedures (34 C.F.R. § 104.31 et seq.). In addition, both public and private schools receiving federal funding must meet nondiscrimination requirements. For example, they are prohibited from excluding or limiting the participation of students with disabilities and from segregating students with disabilities. They are also required to provide physical accessibility (program access for existing facilities and complete access for new facilities or alterations); reasonable modifications to policies, practices, and procedures when necessary to

allow a student with a disability to participate; and auxiliary aids and services to ensure effective communication with students with disabilities (34 C.F.R. § 104.4).

The Section 504 requirements apply to all stakeholders, including parents, companions, and students with disabilities. Section 504's nondiscrimination requirements, unlike IDEA's FAPE, are subject to the defense that providing a reasonable modification or effective communication would cause an undue burden or fundamental alteration to the program.²⁰⁵

However, these limitations on the obligations still require a good deal

from school districts

because, as the

Department of Education

has explained, “[An

undue burden] defense

would rarely, if ever,

prevail in the context

of extracurricular

athletics. . . . Moreover,

whenever IDEA

would impose a duty

to provide aids and services needed for

participation in extracurricular athletics . . . ,

OCR would likewise rarely, if ever, find that

providing the same needed aids and services

for extracurricular athletics constitutes a

fundamental alteration under Section 504 for

students not eligible under IDEA.”²⁰⁶

The *Letter to Bowen* stated that because a Florida SEA received federal financial assistance, Section 504 applied to SEA's administration of the program. “The SEA must ensure that participating private schools do not exclude a Scholarship Program student with a disability

‘if the person can, with minor adjustments, be provided an appropriate education within the school's program. . . . However, the SEA would not be required to ensure that the participating private schools ‘provide an appropriate education to . . . students [with disabilities] with special educational needs if [the participating private schools do] not offer programs designed to meet those needs.”

IDEA contains a statutory FAPE provision and allows private causes of action only for prospective relief and only after administrative proceedings have been exhausted. Section

504 contains a broadly worded prohibition on discrimination, exclusion, and denial of benefits, under which the U.S. DOE has promulgated regulations containing a FAPE requirement for public schools that is worded somewhat differently from IDEA's FAPE requirement.

Section 504 can be privately enforced in federal court to provide, in addition to prospective relief, compensatory but not punitive damages for past violations.²⁰⁷

FAPE under Section 504 is defined to require a comparison between the manner in which the needs of children with and without disabilities are met and focuses on the “design” of a child's educational program.²⁰⁸ FAPE requires education and services “designed to meet individual educational needs of handicapped [sic] persons *as adequately as* the needs of non-handicapped persons are met” (emphasis added).²⁰⁹

Section 504's nondiscrimination requirements, unlike IDEA's FAPE, are subject to the defense that providing a reasonable modification or effective communication would cause an undue burden or fundamental alteration to the program.

State or local education agencies that receive federal funding, as well as private schools that receive federal funding, either directly or indirectly, are covered by Section 504. Thus, if private schools receive federal funding from SEAs or LEAs, they are obligated to comply with Section 504. In addition, if SEAs or LEAs contract with private schools to operate schools, the Section 504 obligations will flow to the private schools.

However, because voucher and ESA funding is provided to parents, who are arguably the end beneficiaries of the funding, rather than directly to private schools, this could break the chain of federal funding, and thus the chain of Section 504 obligations, before it reaches the private schools. Because the framework of Section 504 is based on the framework of Title VI of the Civil Rights Act of 1964, the Department of Justice's Title VI Manual is instructive, as is case law under Title IX, which uses the same framework:

Finally, Title VI does not apply to direct, unconditional assistance to ultimate beneficiaries, the intended class of private citizens receiving federal aid. For example, social security payments and veterans' pensions are not federal financial assistance. . . . During debate preceding passage of the Civil Rights Act, members of Congress responded to concerns about the scope of Title VI by explaining that Title VI would not apply to direct benefit programs: "The title does not provide for action

against individuals receiving funds under federally assisted programs—for example, widows, children of veterans, homeowners, farmers, or elderly persons living on social security benefits."²¹⁰

Cases in the higher education context indicate that Section 504 obligations will attach to voucher funding and will bind private schools receiving tuition through vouchers, if the voucher funding to the parent is conditioned on the student participating in an educational program. Thus, in *Grove City College v. Bell*, the Supreme Court found that the college, which did not receive any direct federal funding, nevertheless was subject

to Title IX of the Civil Rights Act by virtue of its students' receipt of federal financial aid.²¹¹ The Court explained, "The linchpin of *Grove City's* argument that none of its programs receives any federal assistance

is a perceived distinction between direct and indirect aid, a distinction that finds no support in the text of [Title IX]. Nothing in [Title IX] suggests that Congress elevated form over substance by making application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance. There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulation. . . . [B]y its all inclusive terminology [Title IX] appears to encompass *all* forms of federal aid to education, direct or indirect."²¹² In distinguishing between recipients and beneficiaries, the courts have

State or local education agencies that receive federal funding, as well as private schools that receive federal funding, either directly or indirectly, are covered by Section 504.

considered both the intent of Congress and a party's ability to accept or reject the federal financial assistance.²¹³

Importantly, however, tax credits, such as those sometimes used to provide voucher funding to parents, are not necessarily considered to be federal financial assistance.²¹⁴ While some federal laws, such as the Affordable Care Act, explicitly provide that tax credits are considered federal financial assistance,²¹⁵ others are silent on the subject. As the U.S. Treasury²¹⁶ has noted, "While tax credits are generally not considered FFA, we recognize that, as the commenters have pointed out, some aspects of LIHTCs [low income housing tax credits] resemble programs that constitute FFA [federal financial assistance]. Though we are not including LIHTCs in the Appendix, we emphasize that the Appendix does not purport to be exhaustive, and the absence of a program or activity from the list does not by such absence limit the applicability of Title VI to that program or activity."

Even if Section 504 coverage applies to private schools funded through vouchers, the extent of the Section 504 obligations applicable to private schools may differ from those applicable to public schools. In the current public school system, in determining whether a particular educational or related service, reasonable modification, or auxiliary aid is reasonable or an undue burden, the cost of the accommodation is compared to the entire SEA or LEA budget. When a particular private school is responsible for providing the accommodation, that school's individual budget, which is presumably smaller than the

SEA or LEA budget, will determine whether the cost is an undue burden. In addition, the Department of Education regulation governing private schools that are covered by Section 504 provides that such schools are not allowed to exclude students with disabilities "if the person can, with minor adjustments, be provided an appropriate education" and "may not charge more for the provision of appropriate education to . . . persons [with disabilities] than to persons [without disabilities] except to the extent that any additional charge is justified by a substantial increase in cost to the recipient."²¹⁷ This may limit voucher schools' obligations to serve students who need high-cost accommodations and may

allow them to increase tuition for such students.

In a voucher system, the SEA and LEA still retain the Section 504 obligations attached to the federal funding they receive. As a

result, they may be obligated to ensure that the private schools funded through vouchers provide equal opportunity and appropriate education to students with disabilities, even if the private schools themselves have different obligations based on their own budgets. In addition, Department of Education Section 504 regulations preclude states from "providing significant assistance to an agency . . . that discriminates on the basis of handicap [sic] in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity."²¹⁸ If private schools that receive vouchers discriminate on the basis of disability, states, SEAs, and LEAs that provide those vouchers could be held liable under Section 504 (see Figure 1).

If private schools that receive vouchers discriminate on the basis of disability, states, SEAs, and LEAs that provide those vouchers could be held liable under Section 504.

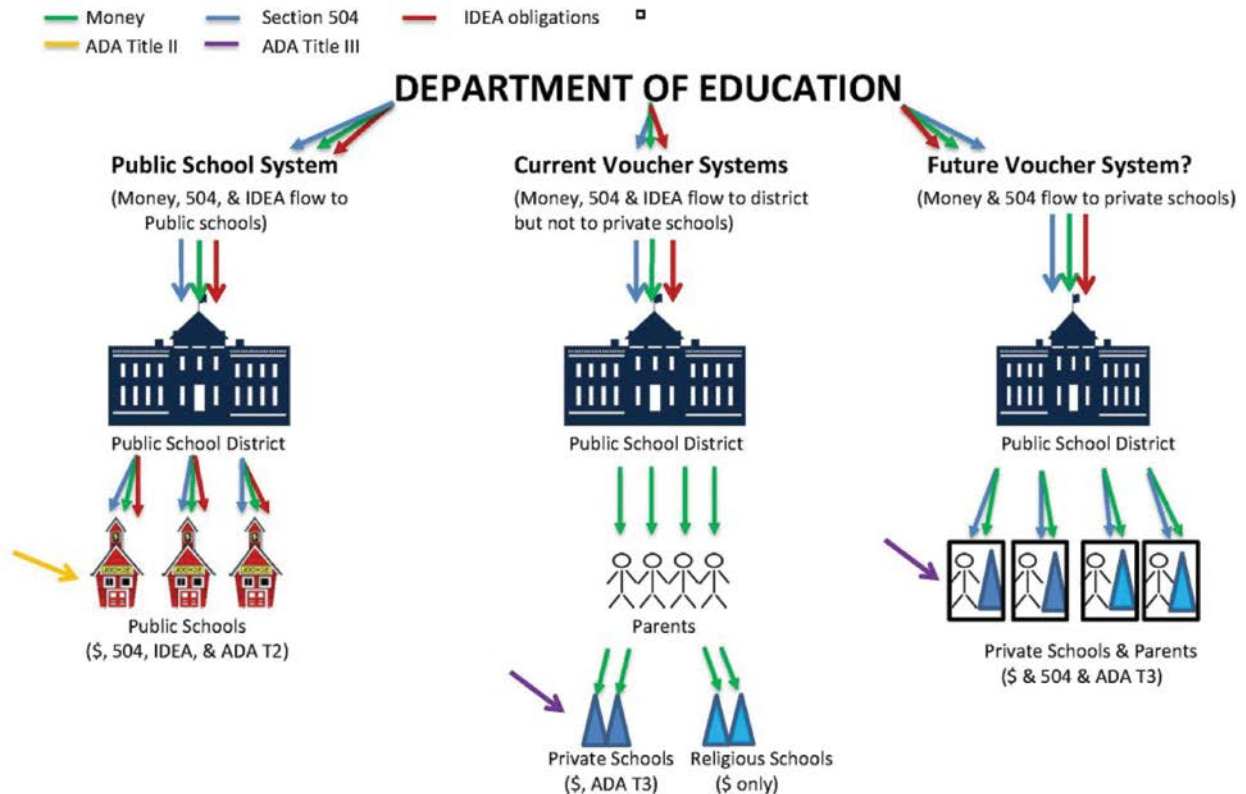


Figure 1: Funding Flow

G. The Americans with Disabilities Act

Under Title II of the Americans with Disabilities Education Act (ADA), state and local government agencies, including SEAs, LEAs, and public schools, are prohibited from discrimination against students and other participants with disabilities. They may not exclude or limit the participation of students with disabilities; must not segregate students with disabilities; must provide physical accessibility (program access for existing facilities and complete access for new facilities or alterations); must provide reasonable modifications to policies, practices, and procedures when necessary to allow a student with a disability to participate;

and must provide auxiliary aids and services to ensure equally effective communication with students with disabilities.²¹⁹ The requirements of ADA's Title II, unlike the FAPE requirements of IDEA, are subject to the defense that providing a reasonable modification or effective communication would cause an undue burden or fundamental alteration to the program in light of the SEAs, LEAs, and school's entire available budget.²²⁰ Title II can be enforced privately through lawsuits or through complaints to the federal Department of Education (DOE) or Department of Justice (DOJ); remedies include requiring accommodations and, in some circumstances, compensatory damages for past violations.

Private schools are not covered under Title II of the ADA, even if they receive state or local funding. Rather, they are covered under Title III of the ADA. All nonreligious private schools are covered as “public accommodations” under Title III of the ADA and as such, are precluded from discriminating on the basis of disability. Among other things, this prohibition requires private schools to make reasonable modifications to policies, practices, and procedures where such modifications are necessary for students with disabilities and do not represent a

fundamental alteration of the academic program. Title III also precludes private schools from refusing

to allow a qualified student with a disability to participate in their programs or from imposing unnecessary eligibility requirements that tend to screen out such students. To ensure inclusion, private schools must provide auxiliary aids and services where necessary to facilitate communication with students with disabilities, and architectural barriers must be removed where it is readily achievable to do so.

The defense of undue burden, as applicable to a private school, will be determined based on the particular private

school’s budget rather than the resources of the school district or state. Title III can be enforced by filing a private lawsuit or by filing a complaint with the DOJ. However, remedies for violation of Title III do not include damages for harm caused by a private school’s discrimination.

Private schools are not covered under Title II of the ADA, even if they receive state or local funding.

Title III of the ADA explicitly exempts religious organizations, including religious schools, from all its obligations.

In addition, Title III of the ADA explicitly exempts religious organizations, including religious schools, from all its obligations.²²¹ Therefore, private religious schools, regardless of their receipt of state funding, are not prohibited from discriminating on the basis of disability. The only federal law that could subject private religious schools to nondiscrimination requirements is Section 504, if the voucher is treated as federal financial assistance, as discussed earlier (see Figure 1).

States could require, as a condition of participation in a voucher program, that private schools agree to be bound by the obligations

of Title II of the ADA, judged according to the budget and resources of the SEA or LEA, rather than to the particular private school’s budget.

1. Interplay of ADA Title II and Title III in Voucher Programs

A 2013 letter from the U.S. Department of Justice (DOJ) to the Wisconsin Department of

Public Instruction (DPI) states that because the school choice program is funded and administered by the state, the program itself is subject to

Title II requirements of the ADA. “[T]he state cannot, by delegating the education function to private voucher schools, place MPCP [Milwaukee Parental Choice Program] students beyond the reach of federal laws that require Wisconsin to eliminate disability discrimination

in its administration of public programs.” DPI is required to collect accurate information about participating schools and ensure that services are provided in a manner that does not discriminate.²²² DOJ reasoned that government agencies are obligated under Title II to “take appropriate steps . . . to prohibit discrimination against individuals with disabilities, regardless of whether services are delivered directly by a public entity or provided through a third party.”

DOJ’s position in the letter walks a careful line between state and federal precedent holding that students are “parentally placed” when they participate in voucher programs, such that state and federal laws applicable to governmental entities do not apply to private voucher schools, and the obligations the state has to ensure that its voucher program, as a whole, does not discriminate. The DOJ stated:

Title II’s nondiscrimination requirements do not compel DPI to require that voucher schools affirmatively provide students with disabilities special education and related services pursuant to the Individuals with Disabilities Education Act (“IDEA”). See 20 U.S.C. §1400, et seq. However, a student with a disability who meets income requirements for the school choice program, and voluntarily foregoes IDEA services in order to attend a voucher school, is entitled to the same opportunity as her non-disabled peers to attend the voucher school of her choice and to meaningfully access the general education curriculum offered by that school.

The letter also explicitly states that Title II’s nondiscrimination requirements do not compel the DPI to provide students with special

education and related services pursuant to IDEA. However, a student with a disability who is eligible for a voucher and attends a private school with that voucher is entitled to the same opportunity as their peers without disabilities to attend the voucher school of their choice and meaningfully access the general education. The DOJ’s letter, in apparent recognition of the limitations on states’ power to force private voucher schools to accommodate students with disabilities, limited the state’s corrective obligations to

1. Ensure that its administration of the voucher program does not discriminate against students with disabilities.
2. Establish and publicize a procedure for individuals to complain to the state about disability discrimination in the school choice program.
3. Collect data about the number of students with disabilities who (a) are enrolled in voucher schools, (b) are denied admission to voucher schools, (c) leave voucher schools, or (d) are suspended or expelled from voucher schools.
4. Conduct outreach to families of students with disabilities about school choice programs and provide specific and accurate information about the rights of students with disabilities and services available at voucher schools.
5. Monitor voucher schools’ rejections of, discouragement of applications from, and expulsions of students with disabilities.
6. Provide ADA training and guidance for voucher schools.

In short, while the DOJ letter requires the state to oversee its voucher program in order to ensure that the program, as a whole, is available to students with disabilities, it does not apply the requirements of Title II to particular private voucher schools themselves. The DOJ closed its investigation of the Wisconsin voucher program in 2015 without finding a violation.

The possible limits on the ability of ADA Title II to hold states responsible for the private entities that receive vouchers are further illustrated by *Liberty Resources, Inc. v. Philadelphia Housing Authority*.²²³ That case involved a challenge under Title II and Section 504 to a housing voucher program providing vouchers to low-income families to subsidize rent payments to private landlords. The vouchers were funded in part by federal money, and the housing authority imposed some obligations on the private landlords who accepted the vouchers. However, the housing authority did not require landlords to make their facilities accessible. The federal court rejected the challenge, finding that the housing authority was only required to provide meaningful access to the voucher program. Therefore, as long as the housing authority was evenhanded

in its issuance of vouchers to people with and without disabilities, it complied with federal law and was not responsible for the actions of private entities.²²⁴

H. State Law

Most states prohibit disability discrimination by public schools under state law. Many states, including some of those with school choice programs, also have state laws prohibiting discrimination on the basis of disability by public accommodations, such as private schools. Generally, these state public accommodation laws are interpreted to provide requirements similar to Title III of the ADA. Some states also have laws prohibiting discrimination by recipients of state funding, which could be helpful to states seeking to ensure that voucher schools meet each state's obligations to its students with disabilities. As noted in Section E, states could require, as a condition of participation in a voucher program, that private schools agree to be bound by the obligations of Title II of the ADA, judged according to the budget and resources of the SEA or LEA, rather than to the particular private school's budget.

Chapter 6: Court Challenges

The construct of vouchers in general, not specific to students with disabilities, is contentious and has been challenged in court at both federal and state levels. Some examples of challenges to school voucher programs include *Zelman v. Simmons-Harris* in which the Supreme Court held that Ohio's school voucher program did not violate the First Amendment's establishment of religion clause, despite the large number of students attending religious schools with school vouchers.²²⁵ The recent Supreme Court case, *Trinity Lutheran Church of Columbia v. Comer*,²²⁶ may add to the debate on the use of public funds for religious private schools. The Court determined that the First Amendment did not bar a church an otherwise public benefit because of its religious status. The ruling was a narrow one: viewing eligibility to participate in Missouri's playground program as akin to eligibility for generally available public services such as police and fire protection.

In 2012, school districts in Oklahoma sued to prevent the voucher legislation that served students with disabilities under IDEA but excluded students with disabilities with accommodation plans developed under Section 504 of the Rehabilitation Act of 1973. On March 27, 2012, a Tulsa district court agreed with the school districts and struck down the Lindsey

Nicole Henry Scholarships for Students with Disabilities Program as unconstitutional. The Oklahoma Supreme Court, on February 16, 2016, upheld the constitutionality of the Lindsey Nicole Henry Scholarships for Students with Disabilities Program stating: "Because the parent receives and directs the funds to the private school, sectarian or non-sectarian, we are satisfied that the state is not actively involved in the adoption of sectarian principles or directing monetary support to a sectarian institution."

When Nevada adopted a school voucher program, there were challenges based on the state constitution.²²⁷ The American Civil Liberties Union (ACLU) challenged the Nevada voucher program on constitutional grounds, arguing in a lawsuit filed on August 27, 2015, that the program violates the state's prohibition against using public money for religious purposes.²²⁸ The Nevada program creates "educational savings accounts" that would allow any parent, regardless of income, to pull a child from the state's public schools and take tax dollars with them to pay for private or parochial school. Other states increasingly have allowed tax dollars to be used for private school tuition, but most limit the programs to students with disabilities or from low-income families. Nevada's law is unique because all of the state's 450,000 K–12 public school children are eligible to take the money to

whatever school they choose. In January 2016, Judge James Wilson of the First Judicial District Court of Nevada (Carson City) ruled in *Lopez v. Schwartz* that the state's school voucher law (SB 302) enacted in 2015 by the legislature violates two provisions of Nevada's constitution. Judge Wilson issued a preliminary injunction to prevent the state from implementing the law. The case challenging the voucher law was filed by parents of Nevada public school children from across the state. They argued that the program would divert scarce funding from public schools, triggering cuts to essential programs and services for their children and all other children attending Nevada's public schools.²²⁹ In September 2016, the court ruled that Nevada's ESA program was constitutional but required the creation of a new funding mechanism by the legislature.

Challenges to vouchers have also been made based on equal protection under the Fourteenth Amendment. In *Brumfield v. Dodd* (1975), families of black students successfully sued Louisiana's Board of Education and a handful of school boards for providing funding to private schools that discriminated against the black students on the basis of race. Finding a violation of Equal Protection Clause of the Fourteenth Amendment, the court ordered the state and local defendants to recoup the materials and funds. Ten years after the initial ruling, the court issued a Consent Decree, reiterating that "the [State] Department [of Education] will not provide any monies or assistance to any private school which the subject of any court order or injunction under which any local

school district or parish or any other entity is enjoined from providing assistance to the private school because of reasons related to racial discrimination."²³⁰

In 2013, a year after the Louisiana legislature implemented a voucher program, the DOJ sought to rely on the court's orders in *Brumfield*, which alleged that "most of the private schools participating in the [voucher] program have student enrollments that are all or almost all one race."²³¹ The DOJ moved to enjoin the state from awarding school vouchers to students attending school in districts operating under federal desegregation orders unless the state received authorization from the court. The Fifth Circuit Court of Appeals ruled that the DOJ did

not have the authority to regulate Louisiana's school voucher program and that the district court had no jurisdiction to let DOJ collect data and monitor the voucher

Challenges to vouchers have also been made based on equal protection under the Fourteenth Amendment.

program.²³²

Florida the Citizens for Strong Schools v. Florida State Board of Education was first filed in 2009 and amended in 2014. The suit alleged that Florida was violating its constitution by failing to provide a high-quality public education or adequate education funding. Plaintiffs are seeking a declaration that the state is in fact breaching its paramount constitutional duty to provide a high-quality, free public school system. They also hope to secure supplemental relief for K-12 public schools, beginning with a study to determine the actual cost of providing a high-quality education. The suit was amended in 2014 and added the challenge to the McKay Scholarship Program for Students with disabilities (alleging

that the state failed to administer a “uniform” system of education because two school choice programs—the Florida Tax Credit Scholarship Program and the John M. McKay Scholarship Program for Students with Disabilities or the McKay Scholarship Program—divert public funds to private schools that are not subject to the same requirements as public schools). The case

is pending before the Florida Supreme Court as of this writing.

As new programs are constructed, and if federal funds are used, creating “quasi-public” schools through use of voucher and voucher-like certificates (e.g., tax savings, tax-credit scholarships, or educational savings accounts), the legal challenges are likely to continue.²³³

Chapter 7: Preliminary Recommendations

A. Recommendations for Education Leaders and State Departments of Education

a. Maintaining IDEA Rights

- For vouchers for students with identified disabilities covered by IDEA, ensure that voucher amounts are based on the cost of individual special education and related service needs of the individual student, including transportation. This can be accomplished by setting voucher amounts for students with disabilities based on individual student needs or by allowing LEAs to provide and pay directly for special education and related services at voucher schools.
- Require private schools receiving increased vouchers to fully implement the child's IEP.
- Require private schools receiving increased vouchers to be subject to the administrative due process proceedings provided by the LEA.
- Ensure that parents who accept vouchers are fully informed of any changes to their IDEA, Section 504, ADA, or state law rights regarding students with disabilities and explicitly acknowledge acceptance of those changes.

b. Maintaining Nondiscrimination Rights

- Model vouchers on financial aid in higher education, by making vouchers payable to parents conditioned on the student participating in an approved educational program, thus making clear that federal funding is flowing to the private schools, along with its associated Section 504 obligations.
- Protect the legal rights of children and ensure that voucher programs do not result in liability for the state, by requiring, by contract or statute, that private schools receiving voucher programs implement the requirements of Section 504 and Title II of the ADA.

(continued)

A. Recommendations for Education Leaders and State Departments of Education, *continued*

- Provide oversight, data collection, monitoring, and reporting on participating private schools to ensure accountability for nondiscrimination, including disproportionate discipline, segregation, and academic equity, as well as administrative functions, financial viability, health and safety, academic assessment, and the provision of services.
- Collect and make publicly available data on students with disabilities accessing vouchers by disability, race, gender, and income; reasons for exiting public schools; type of placement (private, parochial, or school solely serving students with disabilities), and tenure in the placement.
- Conduct studies to evaluate the test scores, retention and graduation rates, harassment reports, and similar measures of success, both for students accepting vouchers and for those who remain in public schools.

c. Facilitating Academic Equity and Informed Choice

- Require private schools that accept vouchers to administer state assessments to students, including students with disabilities and publish data showing comparisons among private schools and public schools.
- Assess and publish information about the academic outcomes of each private school participating in a voucher program, including retention and graduation rates for students with disabilities.

B. Recommendations for Congress and/or Federal Agencies

a. Maintaining IDEA Rights

- The United States Department of Education (ED) should issue guidance to states making clear that use of vouchers does not mean that students are treated as parentally placed and no longer have the protections of IDEA.
- In the interim, ED should issue guidance to states and require that all parents should have notice that IDEA rights are waived and should be able to provide informed consent to that waiver.
- ED should issue guidance to states reminding them of their obligation to provide FAPE to all students with disabilities, including those using vouchers.
- ED should issue guidance to states clarifying that students using vouchers are entitled to pursue their IDEA rights through the state’s established administrative due process proceedings.

b. Maintaining Nondiscrimination Rights

- Congress and ED should adopt legislation or regulations making clear that federal funding to schools that is distributed to parents via tax credits or vouchers for use in private schools, including religious schools, constitutes federal financial assistance for purposes of federal civil rights law, including Section 504’s nondiscrimination and FAPE requirements.
- The U.S. Departments of Education and Justice should issue guidance or regulations to
 - Clarify that states and LEAs that implement voucher programs remain responsible for ensuring that students with disabilities participating in the program receive FAPE and equal access under Section 504 and the ADA and must provide appropriate oversight, data collection, enforcement, and resources to accomplish that responsibility.
 - Require that states not use an ESA program to educate students with disabilities unless it allows parents to keep their IDEA rights.
 - Require that states implement oversight, accountability, and monitoring to ensure that voucher programs do not result in loss of IDEA or nondiscrimination rights and do not result in segregation or disproportionate discipline, for students with disabilities, and implement remedial measures to address deficiencies.

Appendix A

Student Experiences

This appendix provides an in-depth examination of the differing experiences of two students with disabilities and their families as reported in the focus groups. Student A, Andy (not real name), utilizes an ESA, while Student B, Bonnie (not real name), uses a voucher program to attend a private school.

Andy

Andy is a 12-year-old with Down syndrome and intellectual disabilities. He receives a scholarship through the state's ESA program. Andy attended his home school prior to enrolling in the ESA. He attended that school for several years, and he seemed to fit in well and was well liked by other students. Many members of the school community know Andy because he's been at the same school since he was 3 years old.

Andy's public elementary school was inclusive and has an excellent rating—so much so that families that do not live in this school's area try to transfer their child if there are any openings. Andy's family was satisfied; they felt they were in a good school and were getting decent help for Andy. It did not start out that way, however. Andy's mom worked at building a relationship with school staff and administrators, and after the first IEP or two, she was able to get what she felt Andy needed because "they knew I would compromise on some things and other things I wouldn't." The school was a good fit for the family.

And then life changed unexpectedly, and so the family was trying to find its footing; finances had to change, as did caregiving. Andy's mom was offered a position that was financially lucrative, but it would require travel. At this point, she heard about ESAs and decided to apply for one. Andy was approved and has used the program for three years; the family feels that it is a fantastic aid. Andy's mom indicated that the application process was easy, and once proof of residency and diagnosis were provided, Andy was approved. The family now homeschools Andy and states that they are able to "just do what we think [our] son needs and have the ability to get reimbursed for it, or sometimes direct pay for it through providers." Andy's family reports that they feel participating in the ESA program has eliminated 95 percent of the stress involved in educating a child with a disability.

Andy's mom was nervous at first but then as she gained confidence, she realized she and her husband knew as much as anyone else did, and likely more, about their son. She started researching the learning curriculum and modalities and felt that by combining the main points of the curriculum with life experiences she could catch those teachable moments. Andy's parents, in collaboration with tutors and other service providers, learned that this arrangement worked in some circumstances and settings, but not in others. They felt that the program's flexibility empowered them to make what would correlate to an IEP that was, for perhaps the first time, genuinely individualized.

Andy's family reports that he is learning much more than they expected, though perhaps as is the case with any learning disability, the learning does not occur in a linear fashion. For example, Andy does not necessarily learn his letters first and then make progress on reading. He works on each of those skills continuously and learning increases as he finds subjects of interest. For example, Andy's family had the flexibility of scheduling and control over the educational programming to make plans to see the recent solar eclipse. Andy was fascinated by the phenomenon and is now reading more about the subject and can talk endlessly about the moon, the sun, eclipse, and shadows. The family states that he is probably years ahead in science than in reading in many regards. What is important to them is that he is in fact learning about something that is of interest to him. Andy is an experiential learner, and his mom and tutor pick his curriculum, build in trips to museums, go to parks, and the like. Then the tutor relates his learning to those experiences. This methodology has really worked for Andy. He remembers interesting facts and articulates words about those experiences more clearly than he articulates anything else. In retrospect, the family feels that Andy was in a good public school that was trying to help him, but it was unable to individualize or catch those teachable moments for Andy that would make a difference in how he learns.

Andy is also now in a unique program at a local university part-time and remains homeschooled for the other part. His family is required to turn in forms once a year from a licensed teacher that reports he is learning and making adequate progress. The teacher and Andy's parents decide what is adequate. Andy's mom stressed that it is important for decision makers to realize the lifestyle and pressures of families of children with disabilities, especially medical, learning, and financial pressures. School choice is vital in trying to meet the needs of some families and students.

Bonnie

Bonnie's parents chose to use a state voucher program because they felt that the public school system was not keeping their child safe. Bonnie was 5 years old and in pre-K and was self-injurious. She would try to put her head through a wall and would often bang her head on the floor. Bonnie has complex disabilities. The family requested a paraprofessional to be assigned to Bonnie in the public school in order to keep her safe. But the district refused.

Bonnie's parents stated that it was sad to have to worry first and foremost for their child's safety; that there was certainly more that parents typically hope for in school; and that parents hope for engaging classrooms, individualized attention, achievement and learning, and also, quite frankly, love and affection. But the fact was that the public school was not giving their child the support she needed to be safe. As the parents stated, "we aren't even talking about education. Keeping her safe became the first priority." In the public school she would come home with bruises and lacerations. She would also bite and attack other children. So, the situation became one in which no one in the classroom was safe.

Bonnie's parents wanted to put her in a school that would address her disabilities and that would have a staff properly trained in the state-approved crisis management program. When they were in the public school, they became worried that even if the school were to approve a paraprofessional for Bonnie, the person would likely be paid minimum wage and not be trained or professional.

After much discussion and investigation, the parents decided to apply for the state's voucher program. Their daughter scored the maximum amount allowed and found that the LEA would not allow her to receive the maximum funding. The parents were shocked, feeling that the LEA had "no problem getting rid of a child but [didn't] want to give a child what they are[sic] entitled to receive." The LEA staffing specialist said that she had never given a score so high in almost 10 years and she didn't know how this was even possible. The parents were stunned, as their child had significant disabilities, exhibited serious self-injurious and aggressive behavior, and required constant supervision. The score was arrived at through a valid assessment by professionals. Bonnie's parents had to hire an advocate to appeal to the state, making note of the fact that many parents still have to hire an advocate to get past the barriers.

The state agreed with the parents and instructed the LEA to pay the maximum amount. The monetary amount was much less than the cost of a private school (which generally costs more than \$40,000), so the family was grateful that they were able to have assistance with tuition. Even though they have to pay tens of thousands of dollars per year to make up the difference, the parents are satisfied because without the funds from the state they wouldn't be able to put Bonnie in an environment that could keep her safe.

Once the voucher amount was settled, Bonnie's family felt fortunate to find a school that met her needs, even though the school is 35 miles from their home, which means that Bonnie's mom has to travel 70 miles each day. Bonnie also has two siblings, and all three go to different schools. Not surprisingly, her mom spends a great deal of time each day on transportation.

Bonnie's parents said that they know many families who, even if they get properly funded, have a great deal of trouble finding a school that will accept or keep their child. This reality makes them nervous because if something does not work out for Bonnie or if she is expelled from the school for behaviors or any other reason, they will have no other option in the near vicinity. They don't have the resources to pick up and move, and although they could refuse the voucher and go back to public school, that is not a viable option due to safety concerns.

The state in which Bonnie and her family lives offers other options: notably transferring to another public school with voucher funds, if the school will accept the student. They explored this option and were told that the public school would not accept Bonnie unless the family paid for a paraprofessional out of pocket. They then explored using their private health insurance to cover that cost but were told that they would have a co-pay of \$50 a day.

In the end, they chose the state voucher program and a private school. Bonnie's parents report that she is doing fine at the school, though they feel that some barriers and issues remain. The funding goes to the private school; however, it is not allocated to the student, nor does the school guarantee that Bonnie will get what she needs. For example, Bonnie is nonverbal and uses the Picture Exchange Communication System (PECS), a language program using squares with pictures. The parents reported that the school was using black-and-white pictures for items, which were hard to identify, because the school did not have a color printer. Bonnie's mom lamented: "that's unfair and they are getting all of this funding. They couldn't spend \$60 on a printer? I bought the classroom a printer. How is it that they have

a new playground, but there is no printer for the children? The principal could have chosen to use the money that way, but he did not until I pushed.”

In the public school Bonnie was receiving language therapy and physical therapy. The family had to give up those services for Bonnie to obtain the voucher. Nonetheless, the family still feels the voucher program is important and that it allows students to be served better in a place that will meet their priority needs.

Bonnie is now in a school just for students with disabilities. She isn’t tested using state tests because of the severity of her disabilities. The parents are satisfied with her placement, stating that she “is in a school where she is loved and kept safe. Is she flourishing academically? I don’t know. Is she [toilet] trained? No. She is 7 now, but that’s okay. She is not hurting herself and is learning and enjoying life.”

Appendix B

In the pages that follow, Appendix B provides an overview of voucher programs, targeted educational savings accounts and individual tax credits/deductions for students with disabilities by state.

Programs for Students with Disabilities

State	Program	Enrolled (2017–2018)	Per-Pupil Funding	Eligibility	Testing	Statutory Language Regarding Rights
AR	Succeed Scholarship Program for Students with Disabilities Ark. Code Ann. §§ 6-18-1901 through 1908	151	Average \$6,713	Be accepted to eligible private school. Be in foster care or have an IEP. Additional pre-requisites.	Nationally recognized norm-referenced test	Statute is silent; however, to participate must sign a waiver that releases state and residential district from any liability to provide services to or educate child.
FL	John M. McKay Scholarships Program Fla. Stat. §§ 1002.39; 1002.421	30,378	Average \$7,287	Students with disabilities—who have IEPs or a 504 plan—enrolled for at least 1 year. The voucher amount is determined through a matrix formula based on the amount of services a child received in public school.	No testing mandates	Requires parents to opt out of all the due process rights and services to which their child is entitled under IDEA.
GA	Georgia Special Needs Scholarship O.C.G.A. §§ 20-2-2110 through 20-2-2118	4,408	Average \$5,606	Have an IEP. Parent must have lived in state for a year.	Pre- and postassessment testing	Acceptance of scholarship shall have the same effect as a parental refusal to consent to services pursuant to the Individuals with Disabilities Education Act, 20 U.S.C.A. Section 1400, et seq.

Programs for Students with Disabilities (continued)

State	Program	Enrolled (2017–2018)	Per-Pupil Funding	Eligibility	Testing	Statutory Language Regarding Rights
IN	Indiana Choice Scholarship Program Ind. Code §§ 20-51-1 through 4	34,299	\$4,024	Students have an IEP and are from families that earn up to (but not exceeding) 200 percent of FRL.	State testing mandates	Nonpublic eligible school is not an agent of the state or federal government, and therefore it is not subject to the U.S. or State of Indiana Constitution, Declaration of Independence, Supreme Court Decisions, Executive Orders. State may not regulate in any way.
LA	School Choice Pilot Program for Certain Students with Exceptionalities La. Rev. Stat. § 17:4031	311	\$ 50% of state per pupil funding (average \$2,500)	Student has autism, developmental delay, mental disability, other health impairment, specific learning disability, TBI. Has an IEP or a district-provided service plan or a nonpublic school service plan.	No testing mandates	Silent on IDEA specifically, does say “In accordance with time lines as determined by the department, each eligible nonpublic school choosing to participate in the program shall inform the department of the types of student exceptionalities as defined in R.S. 17:1942 that the school is willing to serve. Each school may determine the number of eligible students it will accept in any year of program participation and may establish criteria for enrollment of students. Each school shall have discretion in enrolling eligible students for participation in the program and no school shall be required to accept any eligible student.”

(continued)

Programs for Students with Disabilities (continued)

State	Program	Enrolled (2017–2018)	Per-Pupil Funding	Eligibility	Testing	Statutory Language Regarding Rights
MS	Equal Opportunity for Students with Special Needs Miss. Code Ann. §§ 37-181-1 through 21	153	Average \$6,500	Students must have had an IEP within the past 5 years.	No testing mandates	Cannot enroll student in a public school and must waive individual entitlement to a FAPE, including special education and related services.
MS	Mississippi Dyslexia Therapy Scholarship Miss. Code Ann. §§ 37-175-1 through 29	119	Average \$4,980	Students diagnosed with dyslexia, 1–12th grade.	No testing mandates	A parent or legal guardian who applies for a Mississippi Dyslexia Therapy Scholarship is exercising his or her parental option to place his or her child in a nonpublic school.
MS	Nate Rogers Scholarship Miss. Code Ann. §§ 37-175-1 through 29	1	Capped at \$5,358	K–6 and have a diagnosed impairment and attended speech-language therapy and intervention.	No testing mandates	A parent or legal guardian who applies for a Mississippi Speech-Language Therapy Scholarship is exercising his or her parental option to place his or her child in a nonpublic school. No liability shall arise on the part of the state based on the award or use of a Mississippi Speech-Language Therapy Scholarship.

Programs for Students with Disabilities (continued)

State	Program	Enrolled (2017–2018)	Per-Pupil Funding	Eligibility	Testing	Statutory Language Regarding Rights
NC	Special Education Scholarship Grants N.C. Rev. Stat. §§ 115C-112.5–9	1,323	Average \$6,508 per year	Require an IEP, additional enrollment prerequisites.	National testing mandated	Treated as parentally placed. Scholarship reimbursements for costs. Scholarship reimbursement for costs incurred shall be provided as follows: a. Preapproval process. Prior to the start of each school semester, the parent of an eligible student may submit documentation of the special education, related services, or educational technology the parent anticipates incurring costs in that semester for preapproval by the Authority. Under specified conditions.
OH	Autism Scholarship Program Ohio Rev. Code §§ 3310.41 through 44	3,522	Average \$22,748	Autism spectrum disorder, registered and have a current IEP.	No testing mandates	Schools must comply with nondiscrimination codes. Entitled to transportation. Purpose of the scholarship is to attend a special education program that implements the child's IEP.

(continued)

Programs for Students with Disabilities (continued)

State	Program	Enrolled (2017–2018)	Per-Pupil Funding	Eligibility	Testing	Statutory Language Regarding Rights
OH	Jon Peterson Special Needs Scholarship Program Ohio Rev. Code §§ 3310.51 through 64	3,470	Average \$9,818	Must be eligible for IDEA and have a completed, uncontested IEP in place. Limit—5% Students with Disabilities.	State testing mandates	Schools must comply with nondiscrimination laws. Unilaterally privately placed student not entitled to FAPE. Public school required to evaluate, implement the IEP, annually review IEP, and reevaluate. Parent entitled to IEE, mediation surrounding development, not implementation of IEP. ODE will investigate complaints about violation of scholarship rules, but not implementation of IEP or FAPE. Can file due process related to evaluation or identification, not whether received FAPE.
OK	Lindsey Nicole Henry Scholarships Okla. Stat. §§ 70-13-101.1 and 101.2	669	\$6,161	Any student with an IEP in effect. Additional enrollment prerequisites.	No testing mandates	Acceptance of a Lindsey Nicole Henry Scholarship shall have the same effect as a parental revocation of consent to service pursuant to 20 U.S.C., Sections 1414(a)(1)(D) and 1414(C) of the IDEA.

Programs for Students with Disabilities (continued)

State	Program	Enrolled (2017–2018)	Per-Pupil Funding	Eligibility	Testing	Statutory Language Regarding Rights
UT	Carson Smith Special Needs Scholarship Program	882	\$5,905	Ages 3 and 21 identified IDEA or 504; and students with special needs in private schools that served students with disabilities prior to participating in the program.	Annual assessment and reporting	Comply with federal nondiscrimination requirements, disclose special education services to be provided and cost of those services.
WI	Special Needs Scholarship Program	246	\$12,129 per FTE	Participating students must have an active IEP. Students may continue participating in the program as long as they have an IEP and attend an eligible school until they turn 21 or graduate high school, whichever comes first.	Testing mandates State Civics Exam for high school graduation, unless IEP exempts student from participation	A choice school may not discriminate against a child with special needs. Only required to offer those services to assist students with special needs that it can provide with minor adjustments.
DC*	Opportunity Scholarships (Vouchers)	1,154	\$9,570	Not exclusively for, but does include, students with disabilities. Receive Supplemental Nutrition Assistance Program (SNAP) or earn no more than 185 percent of the federal poverty level.	State testing mandates	Includes, tuition, fees, and transportation Statute says: Nothing in this Act may be construed to alter or modify the provisions of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.). Treated as parentally placed.

Sources: GAO (2016) Report, Ed Choice and State Department of Education websites, state statutes.

* Voucher program not limited to, but includes, students with disabilities.

Targeted Educational Savings Accounts

State	Program	#s (2017–2018)	Per Pupil	Eligibility	Testing	Statutory Language on Rights
AZ	Empowerment Scholarship Accounts Ariz. Rev. Stat. §§ 15-2401 through 2404	1,311	\$12,400	Attended public school for at least 100 days of prior year. Limited to students with special need. Other conditions apply.	Required to take state test or a nationally norm-referenced test	Statute is silent on IDEA; however, the contract requires parents to release public school from liability for education or providing services. Specifies school that accepts payment is not an agent of the state.
FL	Gardiner Scholarship Program Fla. Stat. §§ 393.063 & 1002.385	1,655	10,311	Have an IEP and have been diagnosed with one of the following: Autism, Down syndrome, intellectual disability, Prader-Willi syndrome, spina bifida, Williams syndrome, and kindergartners who are considered high risk.	Testing mandates—state and national; however, students with disabilities for whom testing is not appropriate are exempt.	Parents must sign an agreement to accept scholarship that the school is not responsible.
MS	Equal Opportunity for Students with Special Needs Program Miss. Code Ann. §§ 37-181-1 through 21	153	\$6637	Students must have had an IEP within the past five years.	No testing mandate—school provides parents the option of taking a standardized test.	Schools need to comply with nondiscrimination policies in 42 USC § 1981. Parents must agree student has no individual entitlement to a FAPE for as long as student is participating in the program.

State	Program	#s (2017–2018)	Per Pupil	Eligibility	Testing	Statutory Language on Rights
NC	Personal ESA	Will begin in 2018–2019 1,430 have enrolled	Max will be \$9,000	Child with a Disability; (c) Satisfies the disability determination requirements in Rule .0202; And meeting one of criteria: received scholarship previously, in NC school or DoD for at least 75 days, adopted, entering K or First Grade, Foster Care, Active Duty Military. Enrolled part-time in public school/ part-time in nonpublic school.	At least once a year, each eligible school shall administer a nationally standardized test, selected by the chief administrative officer of the eligible school, to all students in grades 3 and higher whose tuition and fees are paid in whole or in part by the program.	Parents do not have a right to receive all of the special education and related services that they would receive if enrolled in the public schools. Likewise, a private school does not have a legal obligation to provide special education and related services to students with disabilities.
TN	Individualized Education Account Program Tenn. Code Ann. §§ 49-10-1401 through 1406	87	\$6,721	Student K–12 with an IEP with specific disabilities. Other prerequisites apply.	Either state-approved or national testing	Parent must release LEA from all obligations to education of the student.

Individual Tax Credits/Deductions

State	Program	#s (2017–18)	Per Pupil	Eligibility	Details	Effect on Rights
AZ	Student Tuition Organization (STO) scholarships may be used by all students. Collectively, Arizona refers to these programs as “Switcher.”	Do not have numbers for students with disabilities. 20,956 total	Average \$1,360	Original Program open to K–12 students attending one of AZTO’s nine partner schools. The PLUS (Private Learning Uplifting Students) student attended an Arizona governmental primary or secondary school as a full-time student for at least 90 days of the prior fiscal year and transferred to a private school. Kindergarten student. Military dependent. Prior corporate tax credit recipient.	Statewide; no enrollment cap; state and national testing mandates	A credit is allowed against individual’s taxes for the amount of voluntary cash contributions by the taxpayer or on the taxpayer’s behalf during the taxable year to a school tuition organization that is certified pursuant to Chapter 16 of this title at the time of donation.
SC	Refundable Educational Credit for Exceptional Needs Children S.C. State Budget Proviso 109.15	N/A	Up to \$11,000 per student or actual cost of school	Parents are eligible if their child has been designated by the South Carolina Department of Education as meeting the federal definition of a “child with a disability” (34 CFR 300.8) diagnosed within past 3 years. Additionally, a student’s parents must believe that the assigned public school district does not sufficiently meet the student’s needs.	Statewide; no enrollment cap; state and national testing mandates	Funding sent directly to approved school through parents once confirm eligibility. Does not discriminate on the basis of race, color, or national origin; located in state that has an educational curriculum that includes courses set forth in the state’s diploma requirements, graduation certificate requirements (for special needs children), school facilities are subject to applicable federal, state, and local laws.

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- 157 20 U.S.C. §§ 6301 et seq.
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- 160 Id. at §1411(a)(2).
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- 163 *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. PA 1971) (finding unconstitutional under the Fourteenth Amendment a state law that allowed schools to refuse to serve students with disabilities and creating the FAPE and LRE standards); *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972) (finding that the Constitution prohibits excluding students with disabilities owing to budget constraints and requires due process protections before a change of school placement for a student with a disability).
- 164 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. FAPE consists of "specially designed instruction" that adapts the content, methodology, or delivery of instruction "[t]o address the unique needs of the child that result from the child's disability; and . . . [t]o ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3).

- 165 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.17(b), (c); 20 U.S.C. § 6311(b)(1), 34 C.F.R. § 200.1(a), (b), (c).
Also see 34 C.F.R. § 104.33(a).
- 166 34 C.F.R. § 300.320(a)(1)(i), (a)(4).
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- 171 The "child find" provision of the IDEA and Section 504 remain intact. The local education agency still has the obligation to locate, identify, and evaluate students in private schools. 20 U.S.C. 1412(a)(3) and 34 C.F.R. § 104.32.
- 172 National Council on Disability, *National Disability Policy: A Progress Report*, 60 (2012); Hensel, *supra* note 1, at 330.
- 173 OCR Staff Memorandum, 22 IDELR 666 (July 27, 1990).
- 174 Letter to Bowen, 35 IDELR 129 (OCR, March 23, 2001).
- 175 Compare: *Lower Merion School District v. Doe* reaffirmed that private school students [in PA] have the right to seek services under IDEA from their LEA as dually enrolled students. 593 Pa. 437 (2007). See *Lower Merion School District v. Doe*, 593 Pa. 437 (2007).
- 176 See <https://ies.ed.gov/ncee/pubs/20174022/pdf/20174022.pdf>; see p. 17.
- 177 Mark C. Weber. 2007. *Services for Private School Students under the Individuals with Disabilities Education Improvement Act: Issues of Statutory Entitlement, Religious Liberty, and Procedural Regularity*, p. 3.
- 178 See <https://www2.ed.gov/admins/lead/speced/privateschools/idea.pdf>.
- 179 *Id.* at 1.
- 180 *Id.* at 4.
- 181 20 U.S.C. § 1412(A)(10).
- 182 *Id.*
- 183 20 U.S.C. § 1412(a)(10)(A)(vi).
- 184 20 U.S.C. § 1412(a)(10)(C).
- 185 509 U.S. 1 (1993).
- 186 512 U.S. 687 (1994).
- 187 521 U.S. 203 (1991).
- 188 20 U.S.C. § 1412 (a)(10)(A)(iii)(IV).
- 189 *Id.*
- 190 See IDEA: *Provisions Related to Children with Disabilities Enrolled by Their Parents in Private Schools*. Available at <https://www2.ed.gov/admins/lead/speced/privateschools/idea.pdf>, at 1 on March 2011.
- 191 *Id.* at 1.
- 192 *Id.* at 11.
- 193 *Id.* at 11–12.
- 194 *Id.* at 12.
- 195 *R.E.*, 694 F.3d at 191–192.
- 196 Cases in the Second Circuit are analogous because, while that Circuit has held that the IEP need not list a specific school, school districts are still required to recommend a school that can implement the instruction and services on the IEP. See *id.*; *D.C. v. N.Y.C. Dep't of Educ.*, 950 F.Supp.2d 494 (S.D.N.Y. 2013) (holding that

- Department of Education failed to offer the student a FAPE where the recommended school placement told the mother that it could not implement a medical mandate on her son's IEP that he be educated in a seafood-free environment); *B.R. v. N.Y.C. Dep't of Educ.*, 910 F. Supp. 2d 670 (S.D.N.Y. 2012) (holding that DOE failed in its burden to show that the proposed public school placement could implement the student's IEP).
- 197 20 U.S.C. § 1400(d)(1)(A); see *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 367 (1985).
- 198 20 U.S.C. § 1412(a)(1)(A).
- 199 *Burlington*, 471 U.S. at 367.
- 200 *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 187–188, 203 (1982).
- 201 *A.K. ex. Rel. J.K. & A.S. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 681 (4th Cir. 2007).
- 202 *Id.* (citing *Rowley*, 458 U.S. at 207).
- 203 S. S. Taylor, "School Vouchers: Views from a Special Education Perspective," *Journal of School Choice* 1, no. 3(2006): 29–53, 37–38.
- 204 Wendy F. Hensel, "Vouchers for Students with Disabilities: The Future of Special Education?" *Journal of Law and Education* 39, no. 291(2010): 12–13.
- 205 See *Alexander v. Choate*, 469 U.S. 287, 300-01 (1985) (Section 504 may require reasonable modifications to a program or benefit to assure meaningful access to qualified persons with disabilities); *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979) (Section 504 does not prohibit a college from excluding a person with a serious hearing impairment as not qualified where accommodating the impairment would require a fundamental alteration in the college's program). As the Department of Education has explained, "To be clear, however, neither the fundamental alteration nor undue burden defense is available in the context of a school district's obligation to provide a FAPE under the IDEA or Section 504. See 20 U.S.C. § 1414(d)(1); 34 C.F.R. § 104.33." See Department of Education Dear Colleague Letter, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html#ftn8>, at fn. 17.
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- 207 *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008).
- 208 34 C.F.R. § 104.33(b)(1).
- 209 cf. 20 U.S.C. §§ 1401(9), 1414(d)(1)(A)(i)(II).
- 210 Title VI Manual, available at <https://www.justice.gov/crt/fcs/T6manual5>, at Chapter V §C.2.f. (internal citations omitted).
- 211 *Grove City College v. Bell*, 104 S.Ct. 1211 (1984).
- 212 *Id.* at 1216–1217.
- 213 *Alfano v. Bridgeport Airport Servs.*, 373 F. Supp. 2d 1, 5 (D. Conn. 2005) (citing *Paralyzed Veterans*, 477 U.S. at 605–606).
- 214 See Title VI Manual at Chapter V § C.1.d.
- 215 45 C.F.R. § 92.4.
- 216 U.S. Treasury, Preamble to Regulation Regarding Nondiscrimination on the Basis of Race, Color, or National Origin in Programs or Activities Receiving Federal Financial Assistance from the Department of Treasury, 31 C.F.R. Part 22 at B.2, 81 Fed. Reg. 89853-54.
- 217 34 C.F.R. § 104.39.
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- 219 28 C.F.R. § 35.130; § 35.160.
- 220 28 C.F.R. § 35.164.
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- 222 U.S. Department of Justice, *Letter to Evers* (April 9, 2013). Available at https://www.aclu.org/files/assets/04_09_13_letter_to_wisconsin_dpi_0.pdf.

- 223 *Liberty Resources, Inc. v. Philadelphia Housing Authority*, 528 F. Supp. 2d 553 (E.D. Pa. 2007).
- 224 See also Wendy F. Hensel, "The Limits of Federal Disability Law: State Educational Voucher Programs," *Journal of Law and Education* 44, no. 199 (2015): 219–224.
- 225 *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) held that Ohio's school voucher program did not violate the First Amendment's establishment of religion clause, despite the large number of students attending religious schools with school vouchers. The court reasoned that the program did not violate the Establishment Clause because the program (1) was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system, and (2) was a program of true private choice that did not have the effect of advancing religion.
- 226 See <https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/15-577.htm>.
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- 228 See http://www.washingtonpost.com/local/education/aclu-says-its-suing-to-stop-nevadas-new-school-voucher-program/2015/08/27/db57dcd2-4cd0-11e5-902f-39e9219e574b_story.html.
- 229 Arizona, Florida, and Wisconsin's voucher programs explicitly include students with Section 504 Plans. See <http://www.edchoice.org/school-choice/school-choice-in-america>.
- 230 *Brumfield v. Dodd*, 425 F. Supp. 528 (E.D. La. 1976).
- 231 U.S. Memorandum in Support of Its Motion to Extend Time to Respond to Discovery. Retrieved from <http://www.gov.state.la.us/assets/docs/10-29-13%20-%20DOJ%20Motion%20to%20Postpone.pdf>.
- 232 Retrieved from <http://www.politico.com/story/2013/11/justice-department-louisiana-voucher-program-100072>.
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