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## ARTICLE

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### SCHOOL VOUCHERS, SPECIAL EDUCATION, AND THE SUPREME COURT

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*Among all of the contentious debates in education policy, perhaps none is as divisive as the one over private school vouchers. Even as more than 400,000 American students currently use some form of publicly funded voucher to attend a private school—with the number growing each year—one recent survey found that just thirty-seven percent of Americans support the practice while forty-nine percent oppose it. This divergence of opinion, unsurprisingly, corresponds largely with political affiliation, with Republicans more likely to support vouchers than Democrats.*

*In this Article, I argue that a path towards consensus on the voucher debate may be discernible in an unlikely place: an arcane pocket of Supreme Court case law regarding special education. In a series of cases, the Supreme Court has offered a vision of private school choice with plausible appeal to conservatives and liberals alike—a fact evidenced by the overwhelming consensus among the Justices themselves. In each of these cases, the Court has permitted parents of students with disabilities to remove their children from public school and enroll them in a private school at the government's expense so long as a simple condition is met: the public school must have failed to provide the child with an appropriate education and the private school must succeed in its place. The Supreme Court's approach to private school choice in the special education context, in other words, treats it as a simple question of empirics. We should support school choice when it helps kids, but not when it does not.*

*Applying this view to the school voucher debate more broadly would call into doubt many of the popular values-based arguments advanced on both the left and right, leaving just one sound reason to oppose (or support) vouchers: the argument*

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*that they are bad (or good) for students. That argument, of course, is fundamentally contingent; it turns on what the research evidence tells us. And that evidence is hardly as iron-clad in either direction as the left or right might wish. That, in turn, suggests that liberals and conservatives alike should reconsider their positions on school vouchers in some important ways.*

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## INTRODUCTION

Consider two vignettes:

*The President of the United States calls for an overhaul of the federal role in K-12 public education. Alongside reductions in federal spending on public schools, the President proposes to increase spending on a private school voucher grant program by \$250 million. The program would support vouchers for students who opt out of the public school system, providing them up to \$12,000 to offset the costs of attending a private school.*

*Dissatisfied with the quality of education their son is receiving at a local public elementary school, the child's parents transfer him to a private school. The private school charges \$70,000 in tuition, roughly seven times greater than the public school's per pupil spending level. The parents demand reimbursement for this tuition from the school district, which the district denies. A court, however, sides with the parents and orders the district to pay.*

Readers may know that the first story is no hypothetical. The Trump Administration has indeed proposed to ramp up federal support for state-run school voucher programs while cutting public school spending.<sup>1</sup> But it turns out the second story is also real. The student is a fourth-grader named Andrew F., whose parents removed him from a public school in Douglas County, Colorado to send him to an academy that specializes in the education of children with autism, and the court that sided with the parents' demand that public dollars be used to pay their son's private school tuition was the Supreme Court of the United States.<sup>2</sup>

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<sup>1</sup> See Lauren Camera, *Trump Budget Proposal Would Boost School Choice*, U.S. NEWS & WORLD REP. (Mar. 16, 2017), <https://www.usnews.com/news/national-news/articles/2017-03-16/trump-budget-proposal-would-boost-school-choice> (reporting that "President Donald Trump's fiscal 2018 spending proposal would ax the Department of Education budget by \$9 billion while pouring an additional \$1.4 billion into school choice programs"); Sarah D. Sparks, *How Would Trump's School Choice Innovation Research Grants Work?* EDUC. WK. (May 23, 2017), [http://blogs.edweek.org/edweek/inside-school-research/2017/05/how\\_would\\_the\\_new\\_school\\_choic.html](http://blogs.edweek.org/edweek/inside-school-research/2017/05/how_would_the_new_school_choic.html) [<https://perma.cc/MF6X-KDP8>] (describing the Trump administration's proposal to "provide \$370 million dollars for the [Education Innovation and Research Grant] program, with 'a portion' of the money used to test the effectiveness of private school vouchers").

<sup>2</sup> *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S.Ct. 988 (2017); see also DOUGLAS CTY. SCH. DIST., 2015-2016 DISTRICT ACCOUNTABILITY REPORT (2016), <https://www.dcsd.k12.nv.us/filedb/file4674.pdf> [<https://perma.cc/W7AG-SBFK>] (noting Douglas County's 2014-2015 per pupil spending level of \$10,569); John Aguilar, *School District Ordered to Reimburse Family for Private Placement*, DISABILITY SCOOP (Feb. 13, 2018), <https://www.disabilityscoop.com/2018/02/13/school-district-ordered-private/24716/> [<https://perma.cc/3KGE-ZYFP>] (describing annual tuition of private school as being \$70,000). This description of *Andrew F.* is over-simplified. The Court did not formally order the public school district to reimburse Andrew's parents for tuition; it instead remanded for a lower court to determine whether such reimbursement

These two stories unfolded at about the same time, during the spring of 2017. Yet public reaction to them—particularly on the left—could not have been more divergent. Progressives uniformly derided the President’s attempt to transfer federal support for K-12 education from public schools to private schools.<sup>3</sup> By contrast, progressives lavished praise on the Supreme Court’s decision in *Andrew F.*’s favor.<sup>4</sup> Comments made by Washington Senator Patty Murray, the ranking Democrat on the Senate Committee on Health, Education, Labor, and Pensions, are illustrative. On March 22, the day *Andrew F.* was decided, Senator Murray lauded the Supreme Court’s ruling against the Douglas County School District because it held the district “accountable for providing students with disabilities meaningful educational benefit[s].”<sup>5</sup> Yet in a memo to her Senate colleagues issued on the same day, Senator Murray attacked the Trump Administration’s school voucher proposal for “ignor[ing] the needs of students and families” and “mak[ing] it harder to educate students in public schools.”<sup>6</sup>

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was necessary under a legal standard friendlier to *Andrew* and his parents. The lower court then proceeded to order reimbursement. See *Andrew F. ex rel Joseph F. v. Douglas Cty. Sch. Dist.* RE 1, 290 F. Supp. 3d 1175 (D. Colo. 2018) (awarding *Andrew*’s parents reimbursement from the school district). The Supreme Court has, however, sided with parents’ request for private school tuition reimbursement on three separate occasions. See *infra* Section II.A.

<sup>3</sup> See Laura Clawson, *Trump Would Slash Education Budget But Pour \$1.4 Billion Into Privatization*, DAILY KOS (Mar. 16, 2017, 1:06 PM), <http://www.dailykos.com/story/2017/3/16/1644187/-Trump-would-slash-education-budget-but-pour-1-4-billion-into-privatization> [https://perma.cc/JM8A-BEAL] (arguing that the administration’s proposal “could damage public education for generations to come”); Jonah Edelman & Randi Weingarten, *School Vouchers Don’t Just Undermine Public Schools, They Undermine Our Democracy*, L.A. TIMES (May 31, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-edelman-weingarten-school-vouchers-20170531-story.html> (arguing that President Trump’s plan “to siphon billions of dollars from public schools to fund private and religious school vouchers . . . [is] bad for kids, public education and our democracy”); Press Release, Am. Fed’n of Teachers, AFT President Randi Weingarten: “Trump’s Budget Proposal Is Manifestly Cruel to Kids” (May 23, 2017), <https://www.aft.org/press-release/aft-president-randi-weingarten-trumps-budget-proposal-manifestly-cruel-kids> [https://perma.cc/SUK2-KN5H] (criticizing the administration’s proposal as being “manifestly cruel to kids”).

<sup>4</sup> See, e.g., Laura McKenna, *How a New Supreme Court Ruling Could Affect Special Education*, ATLANTIC (Mar. 23, 2017), <https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662/> [https://perma.cc/3NEP-NKGW] (describing support for the ruling among various advocates for children with disabilities).

<sup>5</sup> See Christina Samuels, *Advocates Hail Supreme Court Ruling on Special Education Rights*, EDUC. WK. (Mar. 22, 2017), [http://blogs.edweek.org/edweek/speced/2017/03/advocates\\_hail\\_supreme\\_court\\_r.html](http://blogs.edweek.org/edweek/speced/2017/03/advocates_hail_supreme_court_r.html) (reporting support for the Supreme Court’s decision in *Andrew F.* from advocates and Senators).

<sup>6</sup> Memorandum from Patty Murray, Senator, U.S. Senate, to Senate Colleagues (Mar. 22, 2017), [https://www.help.senate.gov/imo/media/doc/Murray\\_Privatization%20Caucus%20Memo.pdf](https://www.help.senate.gov/imo/media/doc/Murray_Privatization%20Caucus%20Memo.pdf) [https://perma.cc/54XZ-S6EH] [hereinafter Senator Murray Memo]; see also Emma Brown, *Key Democratic Senator Outlines A Case Against School Vouchers*, WASH. POST (Mar. 22, 2017), [https://www.washingtonpost.com/local/education/key-democratic-senator-outlines-a-case-against-school-vouchers/2017/03/21/12e894de-0e68-11e7-9d5a-a83e627dc120\\_story.html](https://www.washingtonpost.com/local/education/key-democratic-senator-outlines-a-case-against-school-vouchers/2017/03/21/12e894de-0e68-11e7-9d5a-a83e627dc120_story.html) (reporting Senator Murray’s view that “school choice’ sounds good in theory but falls short in practice.”). For another

Notwithstanding these opposing reactions, the stripped-down narratives above suggest that what is at issue in both instances may be more similar than is often thought. The question in both situations is whether parents should be allowed to take government funds that would otherwise be spent in public schools and redirect them to a private school of their choosing for the purpose of educating a child. The practices go by different names—the term “voucher” is used to describe proposals like the Trump Administration’s, whereas the choice exercised by parents in the special education context is commonly known as a “unilateral placement.”<sup>7</sup> But the net result is the same. Resources are taken out of the public school system and shifted to a private school through a process that ostensibly benefits children whose parents have the means and information to make the requisite choice, and that arguably leaves less advantaged children behind in the public schools.

Commentators in the legal academy and school reform community have yet to grapple with the similarities between these two contexts. Like trains along parallel tracks, school voucher programs and unilateral special education placements have chugged along separately, with no examination of what might be learned from their points of intersection.<sup>8</sup> For progressives—a camp in which I include myself—this oversight has been somewhat convenient, since the intellectual coherence of supporting private school choice for students with disabilities but no one else is not obvious.<sup>9</sup> Convenience, though, should not deter us from asking hard questions about whether our policy intuitions truly make sense.

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example of inconsistent reactions in the two contexts, see *infra* note 175 (noting amicus curiae brief of the National Education Association in support of Endrew F.).

<sup>7</sup> See *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 14 (1993) (referring to parental placement of a child in private school for specialized education as a “unilateral placement.”). I use the phrase “unilateral placement” or “unilateral special education placement” to describe this practice in the remainder of the Article.

<sup>8</sup> Compare, e.g., James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547 (2007) (describing the history of school vouchers without reference to special education or unilateral placements), with Allan G. Osborne, *Reimbursement for Unilateral Parental Placements in Unapproved Private Schools Under IDEA*, 90 ED. LAW REP. 1, 2 (1994) (describing impacts of the Supreme Court’s initial pair of unilateral placement rulings without mentioning vouchers), and Emily Blumberg, Note, *Recent Development: Forest Grove School District v. T.A.*, 45 HARV. C.R.-C.L. L. REV. 163, 180 (2010) (discussing the Supreme Court’s upholding of a unilateral placement in *Forest Grove* but making no mention of vouchers).

<sup>9</sup> Note that I use the phrase “choice” in this Article to refer only to private school choice. I leave aside debates about public school choice, including the choice to attend a publicly financed charter school. For recent broader discussions of the move toward school choice in education reform, see Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359 (2018); Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 4 (2017); Michael Heise, *From No Child Left Behind to Every Student Succeeds: Back to a Future for Education Federalism*, 117 COLUM. L. REV. 1859 (2017).

This Article seeks to start that process of hard questioning. I ultimately suggest that a close examination of the Supreme Court's unilateral special education placement rulings has the potential to move much of the currently "stale"<sup>10</sup> debate over private school vouchers in new and possibly promising directions. In particular, I argue that to the extent liberals support the right of students with disabilities to publicly funded private school placements when the public schools fail them, such support undermines prominent lines of attack against school vouchers. These lines of attack include the claim that vouchers are inherently bad because they drain public schools of resources,<sup>11</sup> the argument that vouchers "undermine the public good" by disrupting the "transmission of social values that lead to social cohesion,"<sup>12</sup> and the view that vouchers subordinate children whose parents lack the means to exercise choice on their behalf.<sup>13</sup> All of these arguments would be equally valid as attacks against unilateral special education placements.<sup>14</sup> So one cannot accept them unless one is willing to deny relief to children with disabilities like Endrew, whose public school expected him to make essentially no educational progress for three straight years (an expectation he quickly disproved once he transferred to a private school and made rapid gains).<sup>15</sup>

What remains for school voucher opponents, then, is the argument that vouchers are bad because they do not actually benefit children.<sup>16</sup> That may or may not be true as an empirical matter—there is some evidence in both directions<sup>17</sup>—but the important point to glean is that the objection is *contingent*. If the only sound basis for opposing vouchers lies in the data, then the ground rules for the voucher debate are much like those for any school

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<sup>10</sup> See Aaron Saiger, *What We Disagree About When We Disagree About School Choice*, 99 IOWA L. REV. BULL. 49, 49 (2014) (noting that "debates over [the question of school choice] are feeling a bit stale").

<sup>11</sup> See *infra* Section III.B.

<sup>12</sup> Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 447 (2013). For further discussion, see *infra* Section III.B.

<sup>13</sup> See Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1114 (2014) (arguing that "those with social capital . . . leave for the charter, magnet, and other school-choice options offered within the district, even if the move within the district does not actually alleviate the racial and economic isolation to which their child is subject"). For further discussion, see *infra* Section III.B.

<sup>14</sup> See *infra* Section III.B.

<sup>15</sup> See *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 996-97 (2017) (noting that "within months [of enrolling at Firefly Autism House], Endrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school").

<sup>16</sup> See, e.g., Douglas N. Harris, *Betsy DeVos and the Wrong Way to Fix Schools*, N.Y. TIMES (Nov. 25, 2016), <https://www.nytimes.com/2016/11/25/opinion/betsy-devos-and-the-wrong-way-to-fix-schools.html> (opposing school voucher proposals on the ground that the evidence shows they have negative effects for participating students).

<sup>17</sup> See *infra* Section IV.B.

reform proposal for which there is disputed evidence (such as class size reduction<sup>18</sup>): if the evidence changes, so too should our policy views. This means that taking the special education analog seriously may be bad news for some of progressives' favorite tropes against school vouchers, but it also has the liberating potential of lowering the stakes of the debate.

But the oft-held views of liberals are by no means the only casualty in this analysis. The traditional, conservative view in support of school vouchers is also informed by a close comparison with unilateral special education placements. For to the extent there exists a consensus in favor of the Supreme Court's unilateral placement rulings—a fact indicated by unanimous votes in three of the four opinions the Court has issued on the topic<sup>19</sup>—that consensus ought to yield in cases where parents seek public reimbursement for a private school placement that *does not provide a beneficial education*.<sup>20</sup> As a result, unless one believes judges should require public schools to reimburse parents for inferior private placements that fail to educate students with disabilities, absolutist pro-voucher arguments regarding the need to get “government out of the business of educating our children,”<sup>21</sup> or the superseding value of parental liberty to choose a school,<sup>22</sup> should be taken off the table. The data, in other words, can cut both ways: just as liberals should be willing to accept vouchers if they benefit children, so should conservatives let them go if they do not.

The Article proceeds in four parts. Part I provides a primer on private school vouchers. It begins with a short discussion of the historical development of vouchers before moving to the modern-day policy arena,

18 See Grover J. Whitehurst & Matthew M. Chingos, *Class Size: What Research Says and What it Means for State Policy*, BROOKINGS INST. (May 11, 2011), <https://www.brookings.edu/research/class-size-what-research-says-and-what-it-means-for-state-policy/> [<https://perma.cc/4LDZ-9H8K>] (describing mixed results from studies on effects of class sized research).

19 See *infra* Sections II.A–B.

20 See, e.g., *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 451-52 (2d Cir. 2015) (denying private tuition reimbursement even though public school failed to provide student a free, appropriate public education because the private school chosen by plaintiff parents “did not offer any special education services and did not modify its curriculum to fit the student”); *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003) (noting the same outcome where the unilateral private placement did not “provide some element of special education services in which the public school placement was deficient”).

21 Joseph L. Bast, David Harmer, & Douglas Dewey, *Vouchers and Educational Freedom: A Debate*, CATO INST., (Mar. 12, 1997), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa269.pdf> [<https://perma.cc/6K3M-48WM>]. This argument traces its theoretical roots at least as far back as John Stuart Mill, who once wrote that state-provided education “establishes a despotism over the mind, leading by natural tendency to one over the body.” John Stuart Mill, *On Liberty*, in *ON LIBERTY AND OTHER WRITINGS* 1, 106 (Stefan Collini ed., Cambridge Univ. Press 1989).

22 See, e.g., Jason Russell, *Why Do School Choice Critics Elevate Test Scores Over Choice?*, WASH. EXAMINER (May 4, 2017), <https://www.washingtonexaminer.com/why-do-school-choice-critics-elevate-test-scores-over-choice> [<https://perma.cc/MSVX-BGU7>] (arguing that regardless of negative evidence regarding voucher impacts on student learning, “school choice is about more than just data” because “parents should be empowered to pick [a] school” for their child).

including a discussion of recent school choice proposals made by the Trump Administration. Part I concludes with an overview of the common arguments advanced by opponents and supporters of vouchers, arguments that will later be scrutinized in light of the Supreme Court's unilateral special education placement decisions.

Those decisions are the subject of Part II, which describes the three seminal cases in which the Supreme Court upheld and then expanded the right of parents to choose publicly funded private school placements for children with disabilities. Some commentators have recognized the importance of these cases—which I'll call the *Burlington* Trilogy, after the first case to recognize the right to a unilateral placement in 1985<sup>23</sup>—for their ability to advance the educational opportunities available to children with disabilities.<sup>24</sup> But the way in which the trilogy casts light on the broader debate over school vouchers has never before been examined.

Parts III and IV take up that analysis. Part III lays out the similarities between private school voucher programs and the Supreme Court's unilateral placement decisions. These similarities suggest that one's policy intuitions regarding the two kinds of interventions should be consistent, at least as a presumptive matter. Part III then considers whether there are salient *dissimilarities* between the two that could account for divergent policy positions, i.e., support for unilateral special education placements but opposition to vouchers. After rejecting the argument that special education is "special" in a material sense—because general school voucher programs *also* target disadvantaged student populations—I explain why another distinction holds explanatory power. Namely, courts in the unilateral placement cases order the expenditure of public dollars on private school tuition only after finding *evidence* that the recipient child is benefitting educationally.

That evidentiary requirement serves as the focus of Part IV, where I examine how the unilateral placement cases should inform our policy intuitions and arguments about school vouchers generally. I suggest first that the similarities between the two kinds of interventions undermine many common arguments against school vouchers. I then argue that, just as in the unilateral placement setting, one's opposition to (or support for) private school vouchers as a general policy matter should go only as far as the evidence takes it. If the data shows that vouchers provide benefits to

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23 Sch. Comm. of *Burlington v. Dep't of Educ.*, 471 U.S. 359, 360 (1985) (holding that "the grant of authority to a reviewing court under § 1415(e)(2) includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child" if the court determines that such placement is proper under the Act).

24 See, e.g., Osborne, *supra* note 8 (discussing the Court's unilateral placement decisions in *Burlington* and *Carter*); Blumberg, *supra* note 8, at 165 (discussing the impact of the Supreme Court's unilateral placement decision in *Forest Grove* on students with disabilities).



students,<sup>25</sup> then liberals should support those policies just as they do the unilateral placement cases. But if the data reveals vouchers to be harmful, as some more recent evidence suggests,<sup>26</sup> then conservatives should adjust their policy prescriptions accordingly as well.

Notably, this data-first approach should also inform public policy regarding data collection in the first place, encouraging policy makers to obtain as much data as possible about student outcomes in voucher-participating private schools. That point throws rather negative light on recent efforts by conservatives to obstruct the evaluation of voucher programs, including a 2017 congressional budget deal that eliminated funding for random controlled studies of the federally supported D.C. voucher program.<sup>27</sup> But it also suggests that, to the extent the research base on the effectiveness of vouchers is still emerging, the current policy climate in which a modest number of students use vouchers each year may actually get things about right.<sup>28</sup> I conclude with a few thoughts on how the voucher debate may be understood in contrast to other hot-button arguments in public education.

There are two important ways in which a more skeptical reader may doubt the practical significance of the arguments that follow. First, it is fair to wonder whether my thesis—that school vouchers warrant more fair-minded consideration in light of widespread support for special education unilateral

<sup>25</sup> See, e.g., MATTHEW M. CHINGOS & PAUL E. PETERSON, *THE EFFECTS OF SCHOOL VOUCHERS ON COLLEGE ENROLLMENT: EXPERIMENTAL EVIDENCE FROM NEW YORK CITY II* (2012), [https://www.brookings.edu/wp-content/uploads/2016/06/Impacts\\_of\\_School\\_Vouchers\\_FINAL.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Impacts_of_School_Vouchers_FINAL.pdf) [<https://perma.cc/JGL7-59XY>] (finding “large, statistically significant positive impacts on the college going of African-American students” who participated in a voucher program study); Patrick J. Wolf et al., *School Vouchers and Student Outcomes: Experimental Evidence from Washington, DC*, 32 *J. POL’Y ANALYSIS & MGMT.* 246, 246 (2013) (finding through a randomized experimental design of D.C. voucher participants that the program “had a positive impact on high school graduation rates” and that there was “suggestive evidence” of a positive impact on reading achievement).

<sup>26</sup> See DAVID FIGLIO & KRZYSZTOF KARBOWNIK, THOMAS B. FORDHAM INST., *EVALUATION OF OHIO’S EDCHOICE SCHOLARSHIP PROGRAM: SELECTION, COMPETITION, AND PERFORMANCE EFFECTS 2* (July, 2016), <https://files.eric.ed.gov/fulltext/ED575666.pdf> [<https://perma.cc/725H-BKQK>] (finding negative effects on student learning for voucher participants, but positive effects on students who applied for but were not selected for a voucher via random lottery); JONATHAN N. MILLS ET AL., *EDUC. RES. ALLIANCE FOR NEW ORLEANS, HOW HAS THE LOUISIANA SCHOLARSHIP PROGRAM AFFECTED STUDENTS? 2* (Feb. 22, 2016), <http://educationresearchalliancenaola.org/files/publications/ERA-Policy-Brief-Public-Private-School-Choice-160218.pdf> [<https://perma.cc/DU4C-4BUW>] (finding negative effects on participating students’ academic achievement during the first two years of the program).

<sup>27</sup> See Sarah D. Sparks, *Congress Budget Deal Bans New Gold-Standard Studies of Federal Vouchers*, *EDUC. WK.* (May 2, 2017), [http://blogs.edweek.org/edweek/inside-school-research/2017/05/congress\\_budget\\_deal\\_bans\\_new.html](http://blogs.edweek.org/edweek/inside-school-research/2017/05/congress_budget_deal_bans_new.html) [<https://perma.cc/7ZU9-3RU8>] (noting that the 2017 omnibus spending bill called for evaluations to use “an acceptable quasi-experimental research design . . . that does not use a control study group consisting of students who applied for but did not receive opportunity scholarships” instead of “randomized, controlled trials”).

<sup>28</sup> See *infra* subsection IV.A.4.

placements—turns on a regard for intellectual consistency that is not shared by elected officials or the broader public. Some may see little wrong with taking a position against school vouchers based on value arguments that are irreconcilable with simultaneous support for private school choice for students with disabilities. From the realist’s point of view, these divergent policy outcomes may just be the inevitable product of raw politics, where wealthy parents of students with disabilities have succeeded in obtaining a private school choice remedy that the broader public has yet to (and may never) embrace for low-income children.<sup>29</sup>

Second, my suggestion that the fate of school voucher proposals should turn on the research evidence may reveal a naïve view of the power of that evidence to drive policy debates. Professor Eloise Pasachoff has forcefully cautioned “against the fetishization of evidence in social science policymaking,” and K-12 education is no exception to her critique.<sup>30</sup> On this view, social science research is used less to drive our policy choices and more as “cover” for outcomes pre-determined by “policy elites.”<sup>31</sup>

As important as these concerns are, they ultimately rely on a cynical view of our democratic process to which I have not yet surrendered. It is likely true that many voters and lawmakers care less about consistent and reasoned judgment than about scoring political victories, and that these same individuals may stand impervious to the lessons of rigorous research. But surely that is not true of all of us. And if the price of testing this hypothesis is for one progressive legal academic (and former urban charter school teacher) to defend the unpopular claim that we should support school vouchers if the research shows them to be good for disadvantaged children, that is a price I am willing to pay.

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<sup>29</sup> See generally Eloise Pasachoff, *The Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1422-35 (2011) (explaining how the IDEA’s structure has led to enforcement disparities in favor of wealthier families). For evidence of this cross-cutting wealth dynamic in the unilateral placement context where plaintiff parents must be able to pay for private school tuition up front, consider the identity of one such parent who sought reimbursement in *New York City Board of Education v. Tom F.*, a case which reached the Supreme Court. 552 U.S. 1 (2007). The parent in question was Tom Freston, the former CEO of Viacom. Tamar Lewin, *Supreme Court to Address Meeting the Needs of Special Education Students*, N.Y. TIMES (May 30, 2009), <https://www.nytimes.com/2009/05/31/education/31tuition.html> (recounting the “ruling in favor of Mr. Freston” after Freston “enroll[ed] his learning-disabled son in private school without ever trying public school”).

<sup>30</sup> Eloise Pasachoff, *Two Cheers For Evidence: Law, Research, and Values in Education Policymaking and Beyond*, 117 COLUM. L. REV. 1933, 1937 (2017).

<sup>31</sup> *Id.* at 1968.

## I. A PRIMER ON PRIVATE SCHOOL VOUCHERS

The history of private school vouchers<sup>32</sup> and a thorough canvassing of the many arguments that voucher proponents and opponents offer in defense of their positions<sup>33</sup> is too nuanced for comprehensive recitation in this space. What comes next is accordingly a condensed overview of the major historical moments in the evolution of school voucher programs, a brief discussion of recent voucher proposals by the current presidential administration, and a primer on the most common arguments on both sides of the debate.

### A. *A Brief History of Private School Vouchers*

The first recorded instance of public (i.e., government-raised) dollars being used to pay the private school tuition costs incurred by students dates back to 1869, when Vermont enacted a law permitting towns to pay tuition directly to private academies for the education of resident children.<sup>34</sup> That policy, however, was viewed as a kind of rural exception for communities where the task of operating a full public school system would prove inefficient for reasons of economic scale.<sup>35</sup>

The formative moment for modern day debates over vouchers—which are viewed less as a geographic concession than a strategy for broad-scale school reform unto itself—was the publication of Milton Friedman’s *The Role of Government in Education* in 1955.<sup>36</sup> Friedman argued that providing parents

32 For an excellent overview of the origins of the modern-day voucher movement, see Forman, *supra* note 8. For broader discussion of the history of school choice more generally, including not just vouchers but other kinds of choice, including public school choice, see James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1289 (2005), which describes various episodes where progressive groups championed versions of school choice as a means for improving educational opportunity for black Americans, and Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 817-18 (2011), which describes five distinct historical moments where school choice has been seen as a potential solution to challenges facing American education.

33 For a compilation of arguments against school vouchers, see PUBLIC SCHOOL CHOICE VS. PRIVATE SCHOOL VOUCHERS (Richard D. Kahlenberg ed., 2003). For arguments in favor, see LIBERTY & LEARNING: MILTON FRIEDMAN’S VOUCHER IDEA AT FIFTY (Robert C. Enlow & Lenore T. Eal eds., 2006).

34 See Kirsten Goldberg, *Vermont’s ‘Tuitioning’ Is Nation’s Oldest Brand of Choice*, EDUC. WK., (May 18, 1988), <https://www.edweek.org/ew/articles/1988/05/18/x34adch.ho7.html> (identifying Vermont’s “tuitioning” system, which started in 1869, as “probably the longest-running and largest voucher . . . system in the nation”). Vermont may have been the first, but it was not the only state at the time to implement such laws. See John Maddaus & Denise A. Mirochnik, *Town Tuitioning in Maine: Parental Choice of Secondary Schools in Rural Communities*, J. RES. RURAL EDUC., Winter 1992, at 27, 31 (noting a similar law adopted in Maine in 1873).

35 See Maddaus & Mirochnik, *supra* note 34, at 31.

36 Milton Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST (Robert A. Solo ed., 1955)

with government-funded vouchers that they could use to send their children to a private school of their choosing would allow parents to “express their views about schools directly,” thereby allowing the “far more efficient” pressures of the “competitive private enterprise” to exert a positive influence on primary and secondary education writ large.<sup>37</sup>

While Friedman provided a normative engine for private school vouchers that was fueled by notions of free enterprise, the first public policy experience with vouchers did not actually occur until a progressive experiment was launched in the early 1970s in the Alum Rock Unified School District in California.<sup>38</sup> But that experiment died on the vine after the district demanded several concessions in the program’s design, early data revealed little by way of results, and widespread progressive support for the concept of vouchers failed to materialize.<sup>39</sup>

Some three decades after Friedman’s path-breaking publication, the first modern school voucher program was enacted in Milwaukee in 1989, where it continues to this day.<sup>40</sup> I describe the program as “modern” in that it typifies the private school voucher policies that currently exist in three relevant senses. First, just as in Friedman’s initial vision, the program provides government funding to parents who use it to offset the costs of private school tuition at a school of their choosing.<sup>41</sup> Second, the vouchers are available to a limited subset of students. The most common selection criterion is based on income, whereby students are eligible for a voucher if their families earn below a certain percentage of the federal poverty line.<sup>42</sup> A smaller number of

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37 *Id.* at 129; *see also id.* at 127 (explaining that government would “finance” a “minimum level of education” by “giving parents vouchers redeemable for a specified maximum sum per child per year if spent on ‘approved’ educational services,” including services offered by “private enterprises operated for profit.”).

38 *See* James Mecklenburger, *Vouchers at Alum Rock* 54 PHI DELTA KAPPAN 23, 23 (1972) (explaining how Alum Rock parents “shopped” for school programs for their children using vouchers).

39 *See id.* (describing compromises exacted by Alum Rock School District, including that only public school programs be allowed to compete for vouchers); Forman, *supra* note 32, at 1312 (describing the unceremonious end to the Alum Rock experiment).

40 For a thoughtful discussion of the history and lessons learned from the Milwaukee voucher program, which remains in effect to this day, *see* Erin Richards, *Milwaukee’s Voucher Verdict*, AM. PROSPECT (Jan. 12, 2017), <http://prospect.org/article/milwaukee’s-voucher-verdict> [<https://perma.cc/J8RT-85VL>].

41 *Id.* Many of the programs are formally denominated “scholarships,” but the basic mechanism is the same as the vouchers proposed by Friedman: parents who choose to enroll their children in private schools receive an amount of government funding to assist with the cost of doing so.

42 When Milwaukee’s program was first enacted, it authorized vouchers for students with a family income less than 175% of the federal poverty level; that bar was raised to 300% of the poverty level in 2011. *See* WISC. DEP’T OF PUB. INSTRUCTION, A BRIEF HISTORY OF VOUCHER EXPANSION, <https://dpi.wi.gov/sites/default/files/imce/eis/pdf/vhist.pdf> [<https://perma.cc/433X-VQ95>]. Other programs have similar income limits for participation. *See, e.g.*, U.S. DEP’T OF EDUC. INST. OF EDUC. SCIENCES, EVALUATION OF THE DC OPPORTUNITY SCHOLARSHIP PROGRAM 1 (2010), <https://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf> [<https://perma.cc/EN59-X86D>].

modern programs target other disadvantaged populations, such as students who attend low-performing public schools or students with disabilities.<sup>43</sup> Third, the state attaches some regulatory conditions on private schools who agree to accept the vouchers. The conditions vary from state-to-state, but common examples include requirements that the private school be accredited by a relevant agency and that they administer annual state assessments to voucher recipients (the results of which are often reported to the state for accountability and evaluation purposes).<sup>44</sup>

Modern voucher programs meeting these criteria exist now in fourteen states and the District of Columbia.<sup>45</sup> Altogether, 153,434 students enrolled in private schools by virtue of these programs in 2015–16.<sup>46</sup> Thirteen additional states have enacted other private school choice programs that function through different funding mechanisms, such as by awarding government-financed tax credits to individuals and companies that donate to private school scholarship organizations or by offering state-funded education savings accounts that parents can withdraw from to pay for qualifying private school costs.<sup>47</sup> Tax

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(noting an income limit of 185% of the federal poverty line for the D.C. voucher program); N. C. STATE EDUC. ASSISTANCE AUTH., RULES GOVERNING THE OPPORTUNITY SCHOLARSHIP PROGRAM 6 (2006), [http://www.ncseaa.edu/pdf/Rules\\_OPS.pdf](http://www.ncseaa.edu/pdf/Rules_OPS.pdf) [<https://perma.cc/TUA2-59PE>] (showing that the program is limited to families at or below 133% of the federal poverty limit); *Scholarship Programs*, LOUISIANA DEP'T EDUC., <https://www.louisianabelieves.com/schools/louisiana-scholarship-program> [<https://perma.cc/GT8Z-WVFU>] (noting that vouchers are available to students with family incomes less than 250% of the federal poverty line).

<sup>43</sup> See, e.g., *EdChoice Scholarship Program*, SCHOOL CHOICE OHIO, <http://www.schoio.org/school-options/choose-school-options/private-school/ohioscholarships/edchoice.html> [<https://perma.cc/5239-53ZZ>] (describing vouchers available to students who are assigned to one of the state's lowest-rated public schools); *McKay Scholarship Program EAQs*, FLA. DEP'T OF EDUC., <http://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/mckay/mckay-faqs.stml> [<https://perma.cc/8Z9N-JCF3>] (explaining criteria for participation for eligible students with disabilities).

<sup>44</sup> See NAT'L CONFERENCE ON STATE LEGISLATURES, ACCOUNTABILITY IN PRIVATE SCHOOL CHOICE PROGRAMS 3-5 (2014), <http://www.ncsl.org/documents/educ/AccountabilityInPrivateSchoolChoice.pdf> [<https://perma.cc/RS4P-CA8U>] [hereinafter ACCOUNTABILITY IN PRIVATE SCHOOL CHOICE PROGRAMS] ("Nearly all states with private school choice include . . . parameters to . . . [e]nsure school quality, whether through assessments or official accreditation." (emphasis omitted)).

<sup>45</sup> *School Vouchers*, NAT'L CONFERENCE ON STATE LEGISLATURES, <http://www.ncsl.org/research/education/school-choice-vouchers.aspx> [<https://perma.cc/MKM2-E86D>]. For a state-by-state description of these plans, see, *Interactive Guide to School Choice*, NAT'L CONFERENCE ON STATE LEGISLATURES, [http://www.ncsl.org/research/education/interactive-guide-to-school-choice.aspx#/> \[<https://perma.cc/38BW-CZM8>\].](http://www.ncsl.org/research/education/interactive-guide-to-school-choice.aspx#/)

<sup>46</sup> See AM. FED'N FOR CHILDREN, SCHOOL CHOICE YEARBOOK 2015–2016, at 15 (2016), [http://afcgrowthfund.org/wp-content/uploads/2016/04/2015-16-School-Choice-Yearbook-4\\_27.pdf](http://afcgrowthfund.org/wp-content/uploads/2016/04/2015-16-School-Choice-Yearbook-4_27.pdf) [<https://perma.cc/3HVR-9SQR>] [hereinafter SCHOOL CHOICE YEARBOOK].

<sup>47</sup> See ACCOUNTABILITY IN PRIVATE SCHOOL CHOICE PROGRAMS, *supra* note 44, at 2. Note that there is no evidence that the source of funding—whether government tax revenues or tax credits to private donors—influences the effects of a voucher program. Dennis Epple et al., *School Vouchers: A Survey of the Economics Literature*, 55 J. ECON. LITERATURE 441, 446 (2017) ("Distinguishing US

credit scholarship programs deserve particular attention in light of their recent rapid growth; such programs have surpassed directly government-funded vouchers in the number of students served.<sup>48</sup> These programs are known colloquially as “neo-vouchers” because they provide the same functional access for low-income families to private school tuition assistance as vouchers, just through a different government funding mechanism.<sup>49</sup> For purposes of this paper, I use the term “voucher” to encompass both traditional, directly-government-funded vouchers and neo-vouchers, because the salient point is that the government in both cases utilizes public funds to support private school tuition. Taking both of these programmatic approaches together brings the total number of children who are enrolled in private schools using government subsidies up to nearly 400,000.<sup>50</sup>

### B. *Vouchers in the Trump Administration*

The number of students who use vouchers to enroll in private schools, while meaningful in an absolute sense, remains small relative to the scope of American K-12 education as a whole. For every individual student who uses a voucher, 328 students remain enrolled in a traditional K-12 public school.<sup>51</sup> Seen in this light, vigorous debate over the future of the vouchers may seem hardly worth the candle.

But to many, the debate over vouchers has always been about more than the modest number of children currently enrolled; it has been about the possibility of a private take-over of public education writ large.<sup>52</sup> The unexpected election of Donald Trump lent credibility—and urgency—to these fears. As early as September 2016, then-candidate Trump had made a

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programs by their source of funding is for convenience. Nothing suggests that the source of funding per se will influence program effects . . .”).

<sup>48</sup> See SCHOOL CHOICE YEARBOOK, *supra* note 46, at 14 (noting that scholarship tax credit programs now serve over 230,000 students).

<sup>49</sup> See Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359, 1385 (2018) (“Rather than the traditional voucher that sent public funds directly to private schools, these neo-vouchers funnel the money through a complex process of tax-credits . . .”).

<sup>50</sup> See SCHOOL CHOICE YEARBOOK, *supra* note 46, at 17.

<sup>51</sup> This calculation is based on the 50.6 million K-12 public school students in 2016 according to the National Center for Education Statistics, which is 328 times greater than the number of voucher program participants. See *Back to School Statistics*, NAT’L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=372> [https://perma.cc/RW4D-NSJ7].

<sup>52</sup> See, e.g., DIANE RAVITCH, REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA’S PUBLIC SCHOOLS 212-213 (2013) (“Conservatives with a fervent belief in free-market solutions cling tenaciously to vouchers. They believe in choice as a matter of principle.”).

campaign pledge to be “the nation’s biggest cheerleader for school choice.”<sup>53</sup> Those words accompanied a policy proposal under which the Trump Administration would create a new \$20 billion block grant program to increase access to private school and charter school options for low-income children.<sup>54</sup> Revealing the sweeping breadth of his vision, candidate Trump declared at a campaign event that “[i]f the states collectively contribute another \$110 billion of their own education budgets toward school choice . . . that could provide \$12,000 in school choice funds to every single K-12 student who today is living in poverty.”<sup>55</sup> The Hillary Clinton campaign responded harshly, criticizing the Trump plan for “gut[ting]” federal education spending in order to fund private school vouchers and “decimat[ing] public schools across America.”<sup>56</sup>

Just months into his administration, however, President Trump proposed a private school choice initiative of far more modest scope.<sup>57</sup> Gone was the goal of providing choice to every low-income student in the nation, and gone were the pledges of billions in federal funding. Instead, the administration sought by way of its 2018 budget proposal to add \$250 million to the pre-existing Education Innovation and Research grant program, which would be used to issue competitive awards to states that provide “scholarships for students from low-income families to attend the private school of their choice.”<sup>58</sup>

Judging from the reaction to this proposal on the left, however, one would have no idea that the President had just reduced the funding for his proposed school choice initiative by a double digit factor.<sup>59</sup> Progressives roundly denounced the plan,<sup>60</sup> with one op-ed criticizing it as a “slush fund for private

<sup>53</sup> Caitlin Emma, *Trump Unveils \$20B School Choice Proposal*, POLITICO (Sept. 8, 2016), <https://www.politico.com/story/2016/09/donald-trump-school-choice-proposal-227915> [https://perma.cc/7JDJ-8227].

<sup>54</sup> *Id.*

<sup>55</sup> Ben Kamisar, *Trump Pledges to Earmark \$20B for School Choice*, HILL (Sept. 8, 2016), <http://thehill.com/blogs/ballot-box/presidential-races/295034-trump-to-earmark-20b-for-school-choice> [https://perma.cc/2ZCJ-8EM7].

<sup>56</sup> See Emma, *supra* note 53.

<sup>57</sup> The President issued his proposed budget in March, 2017. See Aria Bendix, *Trump’s Education Budget Revealed*, ATLANTIC (Mar. 16, 2017), <https://www.theatlantic.com/education/archive/2017/03/trumps-education-budget-revealed/519837/> [https://perma.cc/2FH5-TGNH] (“Under the new budget, the Trump administration wants to spend \$1.4 billion to expand vouchers in public and private schools, leading up to an eventual \$20 billion a year in funding.”).

<sup>58</sup> U.S. DEPT OF EDUC., FISCAL YEAR 2018 BUDGET SUMMARY AND BACKGROUND INFORMATION 2-3 (2018), <https://www2.ed.gov/about/overview/budget/budget18/summary/18summary.pdf> [https://perma.cc/V2Y6-9K6S].

<sup>59</sup> The initial \$20 billion campaign proposal is eighty times greater than the proposed \$250 million in voucher funding via the Education Innovation and Research grant program. To the extent the \$20 billion plan also encompassed some funding for charter schools, a more apples-to-apples comparison would be against the \$1.4 billion the Trump budget proposes for vouchers and charter schools combined, which is a reduction by a factor of just over fourteen. See Bendix, *supra* note 57.

<sup>60</sup> See *supra* note 3 and accompanying text.

schools” and calling on lawmakers to “ensure that public money goes to public schools.”<sup>61</sup> For their part, a number of conservative groups were cautiously optimistic, although some warned of the potential unintended consequences of an increased federal role in encouraging private school choice.<sup>62</sup>

### C. *The Voucher Debate*

To understand the sharp disconnect between the President’s pro-voucher rhetoric and the outcry on the left requires an understanding of the arguments offered on both sides of the debate. This Section describes those arguments in their general contours, including the two main arguments made by voucher proponents and four objections on the other side. I present these arguments here solely for the sake of exposition, largely deferring evaluation of whether any are persuasive until after a description of the Supreme Court’s unilateral special education placement cases, which will serve as an analytical tool.

#### 1. Arguments in Favor

When one looks across the realm of arguments that advocates and lawmakers have offered in favor of private school vouchers, two dominant themes emerge: liberty and educational opportunity.

*Liberty.* The first theme sounds in liberty, in particular the liberty interests of parents of school-aged children. On this line of reasoning, the right to private school choice can be located within the broader confines of the fundamental liberty interest that the Supreme Court has recognized in parents who wish to “direct the upbringing and education of children under their control.”<sup>63</sup> One example of this argument in action is a model resolution

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<sup>61</sup> Scott Sargrad, *An Attack on America’s Schools*, U.S. NEWS & WORLD REP. (May 23, 2017), <https://www.usnews.com/opinion/knowledge-bank/articles/2017-05-23/donald-trump-and-betsy-devos-budget-would-destroy-public-schools>.

<sup>62</sup> See Lauren Camera, *Trump School Choice Proposals Drive Wedge Between Charter School Advocates*, U.S. NEWS & WORLD REP. (Mar. 23, 2017), <https://www.usnews.com/news/best-states/articles/2017-03-23/trump-school-choice-proposals-drive-wedge-between-charter-school-advocates> (discussing the divergent reactions to the proposed budget, including those of some conservative organizations who support private school choice but would rather avoid heavy involvement by the federal government); Michael Stratford, *Conservative Pushback to Trump’s School Choice Proposals*, POLITICO (May 22, 2017), <https://www.politico.com/tipsheets/morning-education/2017/05/22/conservative-pushback-to-trumps-school-choice-proposals-220433> [<https://perma.cc/ZG4T-DCBA>] (quoting conservative organizations warning that “funding to promote school choice creates a bigger federal footprint in education policy”).

<sup>63</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925); see also Scott MacGuidwin & Ajjit Narayanan, *School Vouchers: Pros and Cons*, U. PA. WHARTON PUB. POL’Y INITIATIVE (Nov. 25, 2015), <https://publicpolicy.wharton.upenn.edu/live/news/1076-school-vouchers-pros-and-cons> [<https://perma.cc/H3RZ-XJU6>] (stating that one argument for vouchers is that they “allow parents and students to choose the right school for them, be it private or public,” a choice that is “seen by many as a fundamental right”).



recently drafted by the American Legislative Exchange Council, an organization dedicated to advancing conservative legislation across the nation. Entitled a “Resolution Urging Congress to Pass Comprehensive School Choice Proposal,” the document urges Congress to expand support for education savings plans that would enable families to send their children to private K-12 schools on the ground that it is the “fundamental right of a parent to direct the upbringing, education, and care of his or her child.”<sup>64</sup> The Cato Institute frames the liberty argument this way: “What America needs is more educational freedom. Parents must be free to choose the education that’s best for their kids, no matter where they live or how much they earn.”<sup>65</sup> And U.S. Secretary of Education Betsy DeVos has made the same point, arguing recently that she is “opposed to any parents feeling trapped or, worse yet, feeling that they can’t offer their child the education they wish they could.”<sup>66</sup>

A related, more aggressive liberty argument is that vouchers are good because they are a step towards getting the government out of education altogether. Arguments of this sort are rarer, perhaps because the notion of eliminating public schools entirely would be anathema to a substantial majority of parents.<sup>67</sup> Still, there are those who have gone so far,<sup>68</sup> including prominent philosopher John Stuart Mill, who famously observed “[t]hat the whole or any large part of the education of the people should be in State hands, I go as far as anyone in deprecating . . . . A general State education is a mere contrivance for moulding people to be exactly like one another,” in whatever way “pleases the predominant power in the government.”<sup>69</sup> On this view, the liberty at issue is not just the parental right to choose a child’s school, but also the individual liberty interest of the child to be free from state-prescribed orthodoxy in terms of what to learn and how to think.

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<sup>64</sup> See *Resolution Urging Congress to Pass Comprehensive School Choice Proposal*, AM. LEGIS. EXCHANGE COUNCIL (May 5, 2017) (on file with author); see also Forman, *supra* note 8, at 563-65 (describing the religious values claim advanced by Christian conservatives in support of parental liberty to choose a private school with state financial support).

<sup>65</sup> *Educational Freedom: An Introduction*, CATO INST., <https://www.cato.org/education-wiki/educational-freedom-an-introduction> [<https://perma.cc/A53X-YMA8>].

<sup>66</sup> Betsy DeVos, U.S. Sec’y of Educ., Prepared Remarks to the Brookings Institution (Mar. 29, 2017), <https://www.ed.gov/news/speeches/us-secretary-education-betsy-devos-prepared-remarks-brookings-institution> [[perma.cc/6VLP-9LRP](https://perma.cc/6VLP-9LRP)].

<sup>67</sup> See, e.g., *Education*, GALLUP, <http://www.gallup.com/poll/1612/education.aspx> (last visited Jan. 6, 2019) (finding in 2016 that 76% of parents were completely or somewhat satisfied with the “quality of education [their] oldest child is receiving,” compared with just 23% who were somewhat or completely dissatisfied and that of participants asked “what would be the best way to improve kindergarten through 12th grade education in the U.S. today,” only 3% advocated for an end of government run schooling).

<sup>68</sup> See, e.g., Bast, Harmer & Dewey, *supra* note 21 (“The authors are 100% committed to getting government out of the business of educating our children.”).

<sup>69</sup> Mill, *supra* note 21, at 190.

*Educational Opportunity.* A second strand of argument in support of vouchers is rooted in maximizing educational opportunity for children, particularly disadvantaged children. Call this the “what’s best for kids” argument for vouchers. This line of argument originally emerged in the 1980s and 1990s as conservative voucher proponents sought an ally in the civil rights community.<sup>70</sup> But it remains prominent to this day, quite noticeably in speeches given by President Trump and Secretary DeVos. In remarks then-candidate Trump gave regarding his initial \$20 billion school choice initiative, he described choice as the “new civil rights agenda of our time,”<sup>71</sup> with his proposal serving as “a plan to provide school choice to every disadvantaged student in America.”<sup>72</sup> More recently, Secretary DeVos has described her support for school choice, including vouchers, as emanating from a similar philosophy: “[W]e must change the way we think about funding education and instead invest in children, not in buildings . . . . [T]here is evidence [school choice] works . . . for millions of students,” including through “private school choice.”<sup>73</sup>

It is important to see that this educational opportunity-centered argument for vouchers does not reject the liberty argument. To the contrary, it views the liberty argument as a means to the ultimate end of what’s best for kids. Thus, as Professors John Coons and Stephen Sugarman argued in their important 1978 work, *Education by Choice: The Case for Family Control*, parents should be viewed “primarily as potential instruments of the child’s welfare; the chief issue is whether [parental] choice would be a blessing for children . . . .”<sup>74</sup>

There are two pathways through which the educational opportunity argument for vouchers may be thought to work. One is direct, which functions with respect to the student who actually avails herself of a voucher at a participating private school. The theory is that the private school is likely to provide a higher quality education than the public school, perhaps because the ability to choose results is a better match for the child’s individual needs,<sup>75</sup>

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<sup>70</sup> See Forman, *supra* note 32, at 566-73 (explaining how conservative “[v]oucher proponents sought new allies” by turning “to the minority community” and “help[ing] to establish the Black Alliance for Educational Options (BAEO) in the summer of 2000.”).

<sup>71</sup> Noah Bierman, *All in One Speech: Donald Trump Complains About the Media, Repeats False Iraq War Claim, Unveils Education Policy*, L.A. TIMES (Sept. 8, 2016), <https://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-all-in-one-speech-donald-trump-1473363763-htmstory.html>.

<sup>72</sup> Sean Sullivan & Emma Brown, *Trump Pitches \$20 Billion Education Plan*, WASH. POST (Sept. 8, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/09/08/trump-pitches-20-billion-education-plan-at-ohio-charter-school-that-received-poor-marks-from-state> [<https://perma.cc/7QJK-8WVA>].

<sup>73</sup> DeVos, *supra* note 66.

<sup>74</sup> JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* 22-23 (1978).

<sup>75</sup> See *id.* at 53 (“The basic system of matching a child to his school experience . . . is almost wholly abstract; school selection for the child is made by government in total ignorance of the child’s

or perhaps because private schools are for organizational reasons likely to be of inherently higher quality.<sup>76</sup>

The other way vouchers may increase educational opportunity is indirect. This is Friedman's theory of market forces; the view that unleashing competition among schools for students (and the tuition dollars they bring with them) will, like a rising tide, lift all boats.<sup>77</sup> If these two pathways correctly predict behavior, then it is easy to see the allure of school vouchers: vouchers have the potential to help *all* children, both the students who use them (because they'll choose better schools) and the ones who don't (because their public schools will improve in order to avoid declining student enrollments).

A final point is worth making before considering the objections to vouchers. There is an important dimension along which the liberty and educational opportunity rationales differ: the liberty argument is absolute, whereas the educational opportunity argument is contingent. Put another way, the enactment of a voucher program automatically counts as success if one believes the liberty argument, because the end objective is simply to promote parental and student freedom. But the educational opportunity argument turns on whether students actually do better in the private schools they choose (and the public schools where nonparticipants remain). That, of course, is an empirical question, the result of which should either confirm or reject the hypothesis that parental choice leads to improved educational opportunity.

## 2. Arguments Against

The objections to vouchers are not quite as susceptible to neat categorization. But a fair accounting includes four dominant themes: the concern that vouchers will drain public schools of resources; objections rooted in the idea of public education as a source of collective, societal values; fears that vouchers will lead to the subordination of the least advantaged students and families; and the argument that vouchers reduce rather than enhance educational opportunity.<sup>78</sup>

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wishes or special qualities."); Corey A. DeAngelis & Heidi Holmes Erickson, *What Leads to Successful School Choice Programs? A Review of the Theories and Evidence* (Univ. of Ark. Dep't of Educ. Reform, Working Paper No. 2017-17, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3045988](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3045988) ("Since all children have unique interests, ability levels, desires, and learning styles, an improved student-school match can lead to better student outcomes.").

<sup>76</sup> See DeAngelis & Erickson, *supra* note 75 ("There is also evidence that students experience the desired outcomes that parents want from a better school match."); see generally JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990).

<sup>77</sup> See Friedman, *supra* note 36 ("Parents could express their views about schools directly, by withdrawing their children from one school and sending them to another, to a much greater extent than is now possible.").

<sup>78</sup> Another common argument against vouchers is that they violate First Amendment Establishment Clause principles insofar as public dollars may ultimately be used to pay for private

*Resource draining.* One line of defense voucher opponents often raise is that vouchers drain much-needed resources from public schools. The 2004 Democratic Party Platform exemplified this concern, objecting to “private school vouchers” because they “funnel scarce dollars away from the public schools.”<sup>79</sup> More recently, Massachusetts Senator Elizabeth Warren has decried voucher proposals for “drain[ing] valuable taxpayer resources from our public schools and funnel[ing] those funds to unaccountable private and for-profit education providers.”<sup>80</sup> Many organizations and individuals that oppose school vouchers express similar fears.<sup>81</sup>

No one disputes that, for each child who uses a voucher, the public school where she would otherwise be enrolled will no longer receive some amount of state aid.<sup>82</sup> And so in that absolute sense, voucher programs do result in

tuition at religious schools. The Supreme Court has rejected that argument. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002) (finding that an Ohio tuition aid program did not violate the Establishment Clause, as the program simply permitted financial needy individuals to “exercise genuine choice among options public and private, secular and religious” and therefore operated neutrally with regards to religion). This Article takes no position on the argument, which benefits little from the unilateral special education placement analog. That is because one could make a principled, yet limited, objection to *both* voucher programs and unilateral special education placements when, and only when, they result in public dollars going to support religious schooling. Under current law, after all, parents of children with disabilities may receive tuition reimbursement for private parochial schools just as in the voucher context. *See Matthew J. v. Mass. Dep’t of Educ.*, 989 F. Supp. 380, 391 (D. Mass. 1998) (“Reimbursement to the parents [of a child requiring special education services] of their tuition payment to the Master’s School [a private Christian school] would not, under any of the applicable tests, violate the First Amendment.”).

<sup>79</sup> 2004 *Democratic Party Platform*, AM. PRESIDENCY PROJECT (July 27, 2004), <https://www.presidency.ucsb.edu/documents/2004-democratic-party-platform> [<https://perma.cc/NBN2-4ZUG>].

<sup>80</sup> Alban Murtishi, *Elizabeth Warren Says Trump’s Education Secretary Pick Will Hurt Public Schools*, MASSLIVE (Jan. 9, 2017), [https://www.masslive.com/news/index.ssf/2017/01/elizabeth\\_warren\\_says\\_trumps\\_e.html](https://www.masslive.com/news/index.ssf/2017/01/elizabeth_warren_says_trumps_e.html) [<https://perma.cc/9NNH-63BM>].

<sup>81</sup> *See, e.g.*, Am. Fed’n of Teachers, *Private School Vouchers Don’t Help Kids*, <https://www.aft.org/private-school-vouchers-dont-help-kids#sthash.gVLPau4p.dpuf> [<https://perma.cc/6PUW-CVH9>] [hereinafter AFT on Private School Vouchers] (“Private school vouchers take money away from neighborhood public schools . . .”); Carol Burris, *Do Charters and Vouchers Hurt Public Schools? The Answer is ‘Yes,’* NETWORK FOR PUB. EDUC. (Jan. 23, 2017), <https://networkforpubliceducation.org/charters-vouchers-hurt-public-schools-answer-yes/> [<https://perma.cc/2J8W-XD7G>] (“Charter schools, vouchers, and other ‘choice’ options redirect public money to privately operated education enterprises, which . . . harms public schools by siphoning off students, resources, and funding while reducing the ability of your public schools to serve the full range of student needs and interests.”); Senator Murray Memo, *supra* note 6 (“Privatization programs drain public resources by diverting funds that could be used to improve the public school system . . .”).

<sup>82</sup> *See, e.g.*, Susan L. Aud, *Education By The Numbers: The Fiscal Effect of School Choice Programs, 1990-2006*, SCHOOL CHOICE ISSUES IN DEPTH, April 2007, at 3, 17, <https://www.edchoice.org/wp-content/uploads/2015/09/Education-by-the-Numbers-Fiscal-Effect-of-School-Choice-Programs.pdf> [<https://perma.cc/FDH4-79F4>] (recognizing that when students use vouchers, public school districts lose some but not all of their revenues).

public schools losing certain funds they would otherwise receive. However, some have argued that vouchers may actually have a net positive effect on the resources public schools have available to spend on a *per-student* basis, on the theory that districts retain a fixed local revenue base that can be used to support the education of a reduced number of students. As argued by Susan Aud:

When a student uses school choice, the local public school district no longer needs to pay the instructional costs associated with that student, but it does not lose all of its per-student revenue, because some revenue does not vary with enrollment levels. Thus, school choice produces a positive fiscal impact for school districts as well as for state budgets.<sup>83</sup>

Voucher opponents disagree, noting that this fails to take into account substantial fixed costs that public schools face each year, which local revenue alone may not be enough to cover.<sup>84</sup>

Without taking a position on the accuracy of the resource draining objection, I should mention that the resource-draining objection is arguably incomplete on its own terms. After all, the mere fact that vouchers may leave public schools with less absolute funding is not necessarily a bad thing without some attention to the *consequences* of that reduced funding. So in making the resource objection, voucher opponents may be implicitly relying on another objection discussed below, such as the concern that public schools are essential for transmitting social values or that they provide better educational opportunities to children.<sup>85</sup>

*Public Values.* A second kind of argument against school vouchers focuses on the “public” in public education. The trouble with vouchers, the argument goes, is that they allow families to opt out of the public school system where critical social values are taught to children.<sup>86</sup> As Professor Derek Black eloquently puts it, “given the nature of the democratic values our public education seeks to promote, individually responsive education makes little sense. Public education entails the provision of common experiences,” whereas a “consumer-based system allows for too much educational variation and opens the door to individual biases that are contrary to public

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<sup>83</sup> *Id.* at 5.

<sup>84</sup> See Burris, *supra* note 81 (“When a public school loses a percentage of students to charter schools or a voucher program, the school can’t reduce costs by an equivalent percent. The school still must pay the same utility, maintenance, transportation, and food services costs.”).

<sup>85</sup> It is also theoretically possible to construct a sympathetic account where greater spending on public schools is desirable for some other reason (perhaps a concern for the well-being of public school employees, or the desire to have public schools serve as local community centers), but I leave those arguments aside for purposes of this Article.

<sup>86</sup> Edelman & Weingarten, *supra* note 3 (“[D]istrict and charter public schools . . . are part of what unites us as a country.”).

education.”<sup>87</sup> Or as Professor Osamudia James has argued, “[p]ublic schools are about the public,” whereas “[s]chool choice policies and rhetoric” promote “competition [and] individualism”—values that are “inherently incompatible with a successful public school system.”<sup>88</sup>

At bottom, the thrust of this critique is that one vital task of education in America is to promote values that we as a society prize for all children. Thus, for example, a public education system’s curriculum would focus on things like “civic education and cultivation of respect for others.”<sup>89</sup> As longtime education reformer Diane Ravitch has argued, “[p]ublic schools were created by communities and states for a civic purpose . . . to build and sustain democracy, to teach young people how to live and work together with others, and to teach the skills and knowledge needed to participate fully in society.”<sup>90</sup>

But privately-run schools might not prioritize these same values. As Hillary Clinton explained in a 2007 speech: “I don’t see how you would implement [school vouchers] without having a lot of people get vouchers for schools that would be teaching things antithetical to American values.”<sup>91</sup> Thus, unlike public schools that instruct students in accordance with state standards, private schools are free to adopt their own curricula.<sup>92</sup> What is more, private schools need not necessarily apply with the same all-comers admissions policies as public schools. To this point, Secretary of Education DeVos made headlines recently when she refused to rule out the possibility of federal school choice funds going to private schools that discriminate in student enrollment on the basis sexuality or gender identity.<sup>93</sup> And others

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<sup>87</sup> Black, *supra* note 12, at 103.

<sup>88</sup> James, *supra* note 13, at 1119.

<sup>89</sup> Minow, *supra* note 32, at 844.

<sup>90</sup> See, e.g., RAVITCH, *supra* note 52, at 207.

<sup>91</sup> Maureen Sullivan, *Hillary Clinton on Education: 8 Things the Presidential Candidate Wants You To Know*, FORBES (Apr. 12, 2015, 10:00 AM), <https://www.forbes.com/sites/maureensullivan/2015/04/12/hillary-clinton-on-education-8-things-the-presidential-candidate-wants-you-to-know> [<https://perma.cc/75LV-NFBJ>].

<sup>92</sup> See Valerie Strauss, *Common Core Backer: For Public Schools, It’s Great. For My Private School, Not So Much*, WASH. POST (Mar. 30, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/03/30/common-core-backer-for-public-schools-great-for-private-school-not-so-much> (“[M]ost of Nashville’s private schools don’t follow the testing regime or the standards that are used in public schools, although this is not singular to Nashville. It is also true . . . everywhere else around the country.”).

<sup>93</sup> See Erica L. Green, *Betsy DeVos Refuses to Rule Out Giving Funds to Schools That Discriminate*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/us/politics/betsy-devos-refuses-to-rule-out-giving-funds-to-schools-that-discriminate.html> (“For states that have programs that allow for parents to make choices, they set up the rules around [federal funding and discrimination based on sexuality or gender identity].”).

have pointed out that voucher programs treat the right to choose one's school as a greater priority than promoting diversity.<sup>94</sup>

*Choice as subordination.* A third argument against vouchers contends that school choice serves as a vehicle for racial and socioeconomic subordination, propagating existing inequalities in society.<sup>95</sup> The starting point for this critique is the recognition that the set of choices available to beneficiaries of school voucher programs—who are typically low-income or otherwise disadvantaged students<sup>96</sup>—is constrained in important ways. One way is that the size of vouchers available to students in most programs is modest; it is usually capped by the amount of state-generated money spent per student.<sup>97</sup> Elite private schools thus often decline to participate.<sup>98</sup> Even assuming some quality options exist, choosing whether to apply for a voucher and where to send one's child is a complex, information-intensive decision making process in which “parents with financial means or savvy will likely benefit most.”<sup>99</sup> Martha Minow puts it succinctly: “publicly funded school vouchers risk perpetuating unequal educational opportunities for poor students of color because they and their parents may not be able to take advantage of the private school options” and because “good options remain relatively scarce.”<sup>100</sup>

*Educational opportunity.* The final argument against vouchers responds directly to the “what's best for kids” argument made in their defense. Vouchers, it is argued, are no better (or are actually worse) for children,

<sup>94</sup> See Minow, *supra* note 32, at 845 (“By subordinating racial and other kinds of integration to school choice, contemporary schooling policies in the United States expressly elevate private preferences. But given our history, school choice programs that foreclose attention to race reinforce or even worsen racial separation in American schools.”). *But see* Forman, *supra* note 32, at 1317 (“[O]ne response is that the private schools are no more racially segregated than the [neighborhood] public schools . . . . [W]hen opponents claim that vouchers are a scheme to re-segregate the schools they seem to overlook the extraordinarily high segregation levels already existing in public schools.”).

<sup>95</sup> See James, *supra* note 13 at 1102-03 (“Race, class, and identity will necessarily impede genuine choice in the education system and undermine the democratic values of citizenship and equality that should inform public-education policy.”).

<sup>96</sup> See *supra* notes 42–43 and accompanying text.

<sup>97</sup> For a comprehensive list of the funding caps across state voucher programs, see *Voucher Programs: Voucher Amount*, EDUC. COMM'N OF THE STATES (March 2017), <http://ecs.force.com/mbdata/mbquestRTV1?rep=V1705> [<https://perma.cc/98YW-JRQR>] [hereinafter *Voucher Programs: Voucher Amount*] (noting that “[t]he amount of money available through a voucher program . . . is often based on the state's per pupil amount from the funding formula,” thus excluding local per student spending (emphasis added)).

<sup>98</sup> See, e.g., Matthew McKnight, *False Choice*, NEW REPUBLIC (Apr. 15, 2011), <https://newrepublic.com/article/86710/school-vouchers-education-republicans> [<https://perma.cc/ZzLA-5F64>] (“Tuition at [Washington, D.C.’s] most elite, highest-achieving private schools are far too expensive for . . . voucher allotments . . .”).

<sup>99</sup> Minow, *supra* note 32, at 832.

<sup>100</sup> *Id.*; see also Senator Murray Memo, *supra* note 6 (describing school choice as a “false choice for parent, students, and communities”).

either because students who participate end up experiencing the same (or worse) outcomes in private schools or because the students left behind do the same (or worse) in public schools. As President Obama reasoned in a 2014 interview, vouchers make for bad policy because “[a]s a general proposition, vouchers ha[ve] not significantly improved the performance of kids that are in these poorest communities.”<sup>101</sup> Others have grounded their opposition to vouchers on similar claims.<sup>102</sup>

Those who believe vouchers do not improve educational opportunity for disadvantaged children might explain that conclusion in a variety of ways. One possibility is that the private schools that choose to participate in voucher programs are actually no better than traditional neighborhood public schools, particularly for children from minority populations.<sup>103</sup> Another is that the theorized competitive effects of school choice on the public schools are just that—theoretical.<sup>104</sup> Yet another is more insidious: the possibility that vouchers lead to private schools “skimming the most engaged families of whatever color or class from public schools, while leaving the rest of the students in inadequate schools without the political clout and active monitoring of engaged parents.”<sup>105</sup>

If one were to categorize each of these objections along the same absolute-contingent dimension as the arguments in support of vouchers, two of the four objections are absolute in nature (and a third is effectively so given real-life conditions). That is, the resource draining and public values objections, if accepted, would defeat vouchers on a definitional level. Vouchers *necessarily* involve the redirection of state aid from public to private schools and increase the number of children enrolled in private schools where society’s shared values may not be taught. The subordination critique is theoretically susceptible to future developments, as one may imagine a world in which vouchers are awarded for unlimited sums of money (such as would create a larger set of choices for disadvantaged children) and where all parents have the information and ability to make an informed choice. But if that sounds unrealistic to you, then the subordination attack on vouchers is effectively absolute as well: vouchers are bad because they invariably

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<sup>101</sup> Valerie Strauss, *Obama Smacks Bill O’Reilly on School Vouchers*, WASH. POST (Feb. 5, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/02/05/obama-smacks-bill-oreilly-on-school-vouchers>.

<sup>102</sup> See, e.g., AFT on Private School Vouchers, *supra* note 81 (“Research shows that voucher programs either fail to increase student performance or actually hurt student achievement.”).

<sup>103</sup> See McKnight, *supra* note 98 (reporting on structural issues within private schools that lead to disparities in success between students belonging to racial minorities and their white peers).

<sup>104</sup> *But see infra* note 200 and accompanying text.

<sup>105</sup> Minow, *supra* note 32, at 832; see also James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2092 (2002) (“[W]ell-informed, motivated, and economically well-off families are more likely to [use] school choice.”).



perpetuate disadvantage along wealth and racial lines. The equal educational opportunity critique, by contrast, is contingent. Whether one should oppose vouchers because they are bad for children depends on whether they are in fact bad for children along whatever metrics we care about.<sup>106</sup>

## II. UNILATERAL SPECIAL EDUCATION PLACEMENTS

When scholars of constitutional or education law speak of the Supreme Court and school vouchers, the one (and usually only) case that comes to mind is *Zelman v. Simmons-Harris*, a 2002 decision holding that the city of Cleveland's voucher program did not violate the Establishment Clause even though a majority of student participants attended religious schools.<sup>107</sup> Many law review pages have been filled debating the merits and consequences of that decision, and I will not add to them here.<sup>108</sup>

Instead, I want to argue in the balance of this Article that much can be gained from careful attention to a separate, largely overlooked set of Supreme Court decisions regarding the education of students with disabilities. This Part unpacks those decisions; Part III discusses the similarities between them and the broader school voucher debate. Part IV examines what we should make of the common arguments for and against vouchers given this comparison.

### A. *The Burlington Trilogy*

Between 1985 and 2009, the Supreme Court held in a series of three cases that parents of public school students with disabilities may, in certain situations, force the government to foot the bill for their child's private school tuition. This Section describes those cases—the *Burlington Trilogy*—and the

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<sup>106</sup> The same is true with regard to the discrimination subspecies of the public values argument, since opposition to vouchers on that ground would be defeasible in light of rules outlawing private school discrimination. Thus, for example, one would no longer oppose vouchers out of concerns for private school discrimination if the proposed voucher program were to condition private school eligibility for state funds on the schools' compliance with ample antidiscrimination requirements.

<sup>107</sup> 536 U.S. 639, 658–63.

<sup>108</sup> See, e.g., Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 163 (2002) ("So at last we have our answer: vouchers are all right. Well, maybe and maybe not. Four Justices, after all, joined in a dissenting opinion [in *Zelman*] that 'doctrinal bankruptcy has been reached today.'") (internal citation omitted); Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 920 (2003) ("[W]e explore the *Zelman* opinions, the questions those opinions suggest but fail to answer, and the implications of the decision for the future of relations between the state and religious entities.").

following Section examines *Endrew F.*, the Supreme Court's most recent decision affecting unilateral placements.

1. *School Committee of Burlington v. Massachusetts Department of Education*

In 1977, Michael Panico was a first-grade student enrolled in public school in the Town of Burlington, Massachusetts.<sup>109</sup> After Michael started to experience serious academic difficulties, his parents and the school district discovered that he had a learning disability.<sup>110</sup>

Under the federal Education of the Handicapped Act (known now as the Individuals with Disabilities Education Act, or IDEA<sup>111</sup>), this diagnosis entitled Michael to a “free appropriate public education,” which is defined to mean “special education and related services . . . provided at public expense” and that comply with an “individualized education program,” or IEP.<sup>112</sup> The IEP, in turn, is a description “of the educational needs of a” student with a disability, along with the “specially designed instruction and related services to be employed to meet those needs.”<sup>113</sup> Under the IDEA, school officials and a child's parents are required to develop a child's IEP jointly.<sup>114</sup> The school district and Michael's parents did exactly that.

By the third grade, however, Michael's parents had become dissatisfied with his IEP, which had failed to help Michael progress in line with what his parents and school officials agreed was his “above average to superior intelligence.”<sup>115</sup> The school district proposed a new plan for the next school year, 1979-1980, that would place Michael in a separate classroom for six children with special needs. But after experts hired by Michael's family to evaluate him recommended placing him in a different, “highly specialized” private school, Michael's parents rejected the district's proposed IEP and transferred him to the private school, paying the cost of tuition out of pocket.<sup>116</sup> Michael's parents then sought reimbursement for those costs from the school district.

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<sup>109</sup> Sch. Comm. of Burlington v. Dep't. of Educ., 471 U.S. 359, 361 (1985).

<sup>110</sup> *Id.*

<sup>111</sup> I refer to the relevant statute as the IDEA during the description of the *Burlington* case for the sake of consistency, even though the law at the time was technically known as the Education of the Handicapped Act.

<sup>112</sup> *Id.* at 361, 367-68 (quoting 20 U.S.C. § 1401(18) (1982)). The definition is now contained under 20 U.S.C. § 1401(9) (2012), and remains largely the same as the language quoted by the *Burlington* court.

<sup>113</sup> *Id.* at 368.

<sup>114</sup> *Id.* (“The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child.”).

<sup>115</sup> *Id.* at 362.

<sup>116</sup> *Id.* According to a lower court opinion, the annual cost of tuition at Michael's private school was \$6486 a year. *Burlington v. Dep't of Ed.*, 655 F.2d 428, 432 n.7 (1st Cir. 1981). In 2017 dollars, that amounts to roughly \$20,000 per year.

The school district and Michael's parents argued in court over who should pay Michael's private school tuition costs for six years. By the time the case reached the Supreme Court of the United States in 1985, Michael was entering the ninth grade. By then, the issue before the Court had distilled to a clear question: "whether the potential relief available" under the IDEA "includes reimbursement to parents for private school tuition" when the parents "place a child in a private school without the consent of local school authorities."<sup>117</sup>

In a unanimous, 9–0 opinion written by then–Associate Justice Rehnquist, the Supreme Court ruled in favor of Michael's parents, affirming their right to private school tuition reimbursement.<sup>118</sup> Citing the provision of the IDEA authorizing parents to seek judicial review of unfavorable action, the Court observed that the law grants courts the power to "grant such relief as the court determines is appropriate."<sup>119</sup> And what constitutes "appropriate relief," the Court reasoned, must be determined by reference to "the purpose of the [IDEA]," which is to provide children with disabilities a "free appropriate public education."<sup>120</sup> In that light, a ruling in favor of the school district would place the parents in an impossible bind: "go along with the [public school's proposed inappropriate] IEP to the detriment of their child" or "pay for what they consider to be the appropriate [private] placement," only to have a court tell them years later "that these expenditures could not . . . be reimbursed by the school . . ."<sup>121</sup> The IDEA, the Court reasoned, "was intended to give [children with disabilities] *both* an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives."<sup>122</sup>

*Burlington* thus ruled conclusively that parents may unilaterally place a child in a private school setting and receive reimbursement for tuition if two conditions are met: the education offered by the public school must be deemed "inappropriate"<sup>123</sup> and "the private placement [chosen] by the parents" must be "proper."<sup>124</sup> Of course, whether these two conditions are satisfied in any given case is often hotly disputed, so *Burlington* correctly noted that "parents who unilaterally change their child's placements . . . without the consent of state or local school officials[] do so at their own financial risk."<sup>125</sup>

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<sup>117</sup> *Burlington*, 471 U.S. at 367.

<sup>118</sup> *Id.* at 374.

<sup>119</sup> *Id.* at 369 (quoting 20 U.S.C. § 1415(e)(2) (1982)). This language is now housed under 20 U.S.C. § 1415(i)(2)(C)(iii) (2012).

<sup>120</sup> *Burlington*, 471 U.S. at 369.

<sup>121</sup> *Id.* at 370.

<sup>122</sup> *Id.* at 372 (emphasis added).

<sup>123</sup> *Id.* At 370.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 373-74.

2. *Florence County School District v. Carter*

After *Burlington*, confusion emerged among lower courts regarding the second condition for private tuition reimbursement—the requirement that the private school chosen by parents of a child with a disability provide a “proper” education. The U.S. Court of Appeals for the Second Circuit held in a 1989 case that to qualify as a “proper” private placement, a private school must “meet the standards of the State educational agency” and be recognized as such on a list of state-approved private schools for special education.<sup>126</sup> The Fourth Circuit disagreed.<sup>127</sup>

The Supreme Court resolved this conflict in *Florence County School District Four v. Carter* in 1993.<sup>128</sup> The case involved a ninth grade student named Shannon Carter, who was classified as learning disabled.<sup>129</sup> School district officials proposed an IEP that would grant Shannon “three periods of individualized instruction per week” and that reflected an overall expectation that Shannon would make just four months’ progress in specific academic areas during the entire school year.<sup>130</sup> Shannon’s parents rejected this proposal as inadequate and unilaterally placed her in Trident Academy, a private school specializing in educating children with disabilities.<sup>131</sup> They then filed suit seeking reimbursement under the rule in *Burlington*.<sup>132</sup>

A federal district court sided with the parents.<sup>133</sup> The court explained that the public school’s proposed IEP was “wholly inadequate” and failed to satisfy the IDEA.<sup>134</sup> It also credited testimony from an expert who “determined that Shannon had made ‘significant progress’ at Trident [Academy],” including “that her reading comprehension had risen three grade levels in her three years at the school.”<sup>135</sup> Thus, both of the conditions for private school tuition reimbursement announced in *Burlington* had been met: the public school had failed to fulfill its duty to provide an appropriate education under the IDEA, and the private school had succeeded in doing exactly that, at least as measured by Shannon’s actual educational progress. The district court entered an order granting Shannon’s parents nearly \$36,000

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<sup>126</sup> *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 568 (2d Cir. 1989).

<sup>127</sup> *Florence Cty. Sch. Dist. Four v. Carter*, 950 F.2d 156 (4th Cir. 1991) (“[P]lacement in a private school not approved by the state is not a bar to reimbursement under the Act . . .”).

<sup>128</sup> 510 U.S. 7 (1993).

<sup>129</sup> *Id.* at 10.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* In addition to moving Shannon and prior to filing the suit in question, her parents attempted to file a challenge to the IEP in accordance with IDEA, and had their claim rejected by both the local educational officer and the state educational agency hearing officer. *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 11.

to offset the tuition and related costs they had incurred sending her to Trident.<sup>136</sup>

The School District argued in the Supreme Court that tuition reimbursement should nonetheless be denied because regardless of whether Shannon made great progress at the Trident Academy, the private school did not comply with the formal procedures for creating an IEP that public schools must follow under the IDEA<sup>137</sup> and the State had not technically placed the Trident Academy on a list of private schools approved for providing special education.<sup>138</sup> The Supreme Court rejected these arguments in another unanimous, 9–0 opinion, explaining that the school district’s arguments would “effectively eliminate the right of unilateral withdrawal recognized in *Burlington*.”<sup>139</sup> Determining when a private school has provided a “proper” education, in other words, is a function of how much progress a child is making—not whether the private school has complied with formal procedures and technicalities.

The Court also found unpersuasive the school district’s complaint that “allowing reimbursement for parents such as Shannon’s puts an unreasonable burden on financially strapped local educational authorities.”<sup>140</sup> True, the Court acknowledged, Congress had “imposed a significant financial burden on States and school districts” that choose to participate in the IDEA’s federal funding program. But schools cannot complain of the financial burden of private tuition reimbursement because they can avoid such claims altogether either by “giv[ing] the child a free appropriate public education in a public setting, or plac[ing] the child in an appropriate private setting of the State’s choice.”<sup>141</sup>

### 3. *Forest Grove School District v. T.A.*

The last case in the *Burlington* Trilogy, *Forest Grove School District v. T.A.*, was decided in 2009.<sup>142</sup> The question in *Forest Grove* was whether parents could demand private school tuition reimbursement even if their child had

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<sup>136</sup> See *Carter v. Florence Cty. Sch. Dist. Four*, 950 F.2d 156, 160 (4th Cir. 1991). Note that \$12,000 per year in 1991 dollars amounts to roughly \$21,000 per year in present dollars.

<sup>137</sup> *Florence Cty. Sch. Dist. Four*, 510 U.S. at 13–14. This argument was based on the statutory definition of a “free appropriate public education,” which the school district argued ought to apply to any private school seeking to be eligible for tuition reimbursement. *Id.* According to the school district, Trident Academy failed to satisfy state requirements because “it employed at least two faculty members who were not state certified and . . . it did not develop IEP’s.” *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 13.

<sup>140</sup> *Id.* at 15.

<sup>141</sup> *Id.*

<sup>142</sup> 557 U.S. 230 (2009).

never been enrolled in a public school district's special education program to begin with.<sup>143</sup> Yet again, the Supreme Court sided with the parents and against the public school district.<sup>144</sup>

The student at issue in the case, T.A., was enrolled in the Forest Grove School District from kindergarten through his junior year of high school.<sup>145</sup> After T.A.'s parents expressed concern regarding his school work during his freshman year, a school psychologist conducted cognitive testing and decided that T.A. did not need further evaluation for any learning disabilities, such as attention deficit hyperactivity disorder (ADHD).<sup>146</sup> However, two years later a private specialist diagnosed T.A. with ADHD and a number of other disabilities related to learning and memory.<sup>147</sup> The specialist recommended T.A. be placed in a "structured, residential learning environment," and the parents did so, enrolling T.A. in a private academy that focused on "educating children with special needs."<sup>148</sup> When the district refused to reimburse the cost of tuition to T.A.'s parents, one of whom was the former CEO of Viacom,<sup>149</sup> T.A.'s parents sued.

The facts in *Forest Grove* are thus materially different in one respect from *Burlington* and *Florence County*. Unlike the students in the two earlier cases, who had been diagnosed with disabilities and had received IEPs from the public school district that the parents (and courts) ultimately deemed inadequate, the student in *Forest Grove* had never received a diagnosis (much less an IEP) from the district in the first place. That difference should matter, the Forest Grove School District argued in the Supreme Court, because the IDEA was amended in 1997 in a manner that limits private school tuition reimbursement to only those students who "previously received special education and related services under the authority of [a school district]."<sup>150</sup>

The Supreme Court disagreed, with Justice Stevens writing the majority opinion (over a dissent authored by Justice Souter, which was joined by Justices Scalia and Thomas).<sup>151</sup> Rejecting the school district's interpretation of the statute, the majority explained that it would "border[] on the irrational" to read the IDEA to "provide a remedy . . . when a school district offers a child inadequate special-education services," only to "leave parents without relief in the more egregious situation in which the school district

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<sup>143</sup> *Id.* at 233.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 234.

<sup>148</sup> *Id.*

<sup>149</sup> See Lewin, *supra* note 29.

<sup>150</sup> *Forest Grove*, 557 U.S. at 240 (quoting 20 U.S.C. § 1412(a)(10)(C)(ii) (2006)).

<sup>151</sup> *Id.* at 249 (Souter, J., dissenting).

unreasonably denies a child access to such services altogether.”<sup>152</sup> Thus, although the amended text of the IDEA could reasonably be read to confer a reimbursement remedy upon only those students who had already received special education services in the public school, the majority declined to “conclu[de] that Congress abrogated *sub silentio*” the Court’s earlier “decisions in *Burlington* and *Carter*.”<sup>153</sup> As a result of *Forest Grove*, then, the right to private tuition reimbursement extends even to students who have not previously been offered special education by their public schools.<sup>154</sup>

### B. *Andrew F.*

The *Burlington* Trilogy resolved critical questions about when parents may unilaterally remove a child from a public school, place her in a private school, and be entitled to reimbursement for the cost of tuition out of public coffers. *Burlington* itself established the foundational rule that reimbursement is available as “appropriate relief” under the IDEA;<sup>155</sup> *Carter* held that a private school qualifies for reimbursement if it provides an education that is proper in substance (i.e., based on the actual progress made by the child) rather than form;<sup>156</sup> and *Forest Grove* made clear that all children with disabilities may be entitled to reimbursement regardless of whether a public school has previously offered them an IEP.<sup>157</sup>

But a critical threshold question remained unsettled, with significant ramifications for how frequently the right to a unilateral placement could be exercised in practice: when can a public school be said to have violated its duty under the IDEA to provide a free appropriate public education in the first place? As *Burlington* made clear, such a finding is the first condition that must be satisfied before parents may be reimbursed for a unilateral private placement.<sup>158</sup> For if a public school is successfully providing a child the special education services she needs, no order imposing tuition reimbursement would be appropriate to begin with.

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<sup>152</sup> *Id.* at 245.

<sup>153</sup> *Id.* at 243.

<sup>154</sup> It is worth noting that T.A.’s parents ultimately lost their request for tuition reimbursement on remand because the district court concluded that his parents had enrolled him at the private academy “solely because of his drug abuse and behavioral problems,” rather than because of the school district’s failure to provide a free, appropriate public education as required under the IDEA. *See Forest Grove Sch. Dist. v. T.A.*, 638 F.3d 1234, 1239 (9th Cir. 2011).

<sup>155</sup> *See supra* subsection II.A.1.

<sup>156</sup> *See supra* subsection II.A.2.

<sup>157</sup> *See supra* subsection II.A.3.

<sup>158</sup> *See* 471 U.S. 359, 374 (1985) (“If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement . . . .”); *see also supra* note 132 and accompanying text.

This was the issue in *Andrew F.*, a case that some have already labeled a “landmark” ruling for children with disabilities<sup>159</sup> and that liberal advocacy groups and commentators have widely applauded.<sup>160</sup> In a story that should by now sound quite familiar, Andrew was a public school student diagnosed with a disability (in Andrew’s case, autism).<sup>161</sup> In accordance with the IDEA, the Douglas County School District provided Andrew with special education services each year, pursuant to an IEP developed jointly by school officials and Andrew’s parents.<sup>162</sup> By the fourth grade, however, Andrew’s parents had grown dissatisfied. Andrew experienced behavioral challenges and his “academic and functional progress had essentially stalled . . .”<sup>163</sup> Troublingly, Andrew’s IEPs “largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward” the objectives that his parents and school had agreed upon.<sup>164</sup>

After the school district proposed an IEP for Andrew’s fifth grade year that was, in his parents’ view, yet again “pretty much the same as his past ones,” his parents removed him from public school and enrolled him at a private academy specializing in the education of children with autism.<sup>165</sup> After that change, Andrew’s academic progress and behavior improved dramatically, so much so that the school district did not contest that the private school provided him a proper education.<sup>166</sup>

Just as in the *Burlington* Trilogy cases, Andrew’s parents sought reimbursement for the costs of Andrew’s private school tuition in federal district court. In response, the school district argued that the IEP it had offered to Andrew was appropriate to begin with, such that the choice to enroll Andrew in a private school was one for which his parents, and not the public school district, should be financially responsible.<sup>167</sup> The district court and U.S. Court of Appeals for the Tenth Circuit agreed with Douglas County, explaining that the relevant standard under the IDEA is a low one: “the educational benefit

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<sup>159</sup> John Aguilar, *U.S. Supreme Court Ruling on Douglas County Student Disabilities Case Gets Tangled Up In Neil Gorsuch Hearing*, DENV. POST (Mar. 22, 2017), <https://www.denverpost.com/2017/03/22/supreme-court-ruling-tangled-neil-gorsuch-hearing/> [<https://perma.cc/7L4M-9SYH>].

<sup>160</sup> See, e.g., *supra* notes 4–5 and accompanying text.

<sup>161</sup> *Andrew F. ex rel Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 996 (2017).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Andrew F. ex rel Joseph F. v. Douglas Cty. Sch. Dist.* RE 1, No. 12-2620-LTB, 2014 WL 4548439, at \*4 (D. Colo. Sept. 15, 2014) (acknowledging school district’s concession that “the education provided by [the private school was] reasonably calculated to enable [Andrew] to receive educational benefits”).

<sup>167</sup> *Id.* at \*8 (“[T]he District declined [Andrew’s] parents’ request for reimbursement . . . because the District felt that it could provide [Andrew] with a [free appropriate public education] . . .”).



mandated by IDEA must merely be ‘more than *de minimis*.’<sup>168</sup> Under that standard, the Tenth Circuit reasoned, this was “without question a close case.”<sup>169</sup> But because Andrew was making at least “*some* progress” at the public school, even if only minimal, the school district should prevail.<sup>170</sup>

At the Supreme Court of the United States, Andrew’s parents argued that the Tenth Circuit’s “merely more than *de minimis*” standard understated the substantive level of educational benefit a public school must provide under the IDEA.<sup>171</sup> A number of disability rights advocacy organization filed amicus briefs in his support.<sup>172</sup> And in a unanimous 8–0 opinion, the Supreme Court agreed. “When all is said and done,” Chief Justice Roberts wrote for the Court, “a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all . . . The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>173</sup>

The upshot of *Andrew F.* is that a public school district’s obligation to provide a free appropriate public education under the IDEA constitutes a more onerous substantive duty than many school districts had previously thought. Insofar as this ruling increases the number of students with disabilities who are being provided inappropriate special education services in their public schools, *Andrew F.* expands the number of potential situations in which parents may unilaterally place their children in a private school and thereafter be entitled to tuition reimbursement at public expense.<sup>174</sup>

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<sup>168</sup> *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. Re-1*, 798 F.3d 1329, 1338 (10th Cir. 2015), *vacated and remanded*, 137 S. Ct. 988 (2017); *Andrew F.*, 2014 WL 4548439, at \*4 (quoting *Urban ex rel. Urban v. Jefferson Cty. Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996)).

<sup>169</sup> *Andrew F.*, 798 F.3d at 1342.

<sup>170</sup> *Id.* (emphasis added).

<sup>171</sup> *Andrew F.*, 137 S. Ct. at 1001.

<sup>172</sup> See, e.g., Brief for National Disability Rights Network et al., as Amici Curiae Supporting Petitioner at 15, *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017) (No. 15-827), 2016 WL 6916164, at \*15 (arguing that a more than *de minimis* standard is required “[b]ecause education prepares children for future adult roles, educational expectations for disabled children now anticipate higher education, employment, and independent living, rather than a life of dependence and institutionalization.”).

<sup>173</sup> *Andrew F.*, 137 S. Ct. at 1001.

<sup>174</sup> To be certain, the ruling in *Andrew F.* has repercussions beyond the availability of a unilateral private school placement. Often, a child’s parents will challenge an IEP as failing to fulfill the requisite standard *without* withdrawing their child and placing her in a private school in the interim. However, as *Andrew F.* itself reveals, it is sometimes the case that parents who are displeased with the services their child is receiving will remove their child from public school during the pendency of their dispute with the school district to ensure that the child does not fall further behind in the interim. This was also exemplified by the parents in both *Burlington*, 471 U.S. 359, 370 (1985), and *Forest Grove*. See Lewin *supra* note 29.

### III. COMPARING VOUCHERS & UNILATERAL PLACEMENTS

A number of education advocacy organizations have debated the costs and benefits of the Supreme Court's unilateral placement decisions.<sup>175</sup> But advocates and commentators have not yet discussed the latent tension between the left's support for those decisions and its opposition to school vouchers generally.<sup>176</sup> This oversight is perhaps understandable since the most obvious prism through which to view the unilateral placement cases is that of disability rights; the cases themselves certainly never use the terms "voucher" or "school choice."

My aim in the first section is to show that there is more in common between the unilateral placement cases and school voucher proposals than has traditionally been thought. When one looks functionally at what is happening in the cases, the right that parents of children with disabilities are asserting looks an awful lot like a school voucher. And if that is correct, then there is at least a *prima facie* argument that one's position on the desirability of publicly funded, unilateral private school placements for students with disabilities ought to align with one's position on school vouchers.

In the second section, I examine the strongest arguments that there exists some material distinction between the two kinds of interventions that justifies divergent policy views. To provide a preview, those arguments (and my reactions) are: (1) special education is different because it focuses on disadvantaged children, unlike voucher programs (not true); (2) unilateral placements affect a smaller number of students (not persuasive); and (3) publicly-funded unilateral placements only occur after a finding of educational benefit to a child (true and persuasive). Part IV then discusses some lessons that follow from this comparative exercise.

#### A. Similarities

In the course of describing the evolution of school voucher programs, Part I identified three essential features of modern voucher policies that emerged after the enactment of Milwaukee's ground-breaking program in 1989.<sup>177</sup> First,

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<sup>175</sup> Compare, e.g., Amicus Brief of the Council of the Great City Schools as Amicus Curiae in Support of Petitioner at 21, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009) (No. 08-305), 2009 WL 556377, at \*21 (arguing that tuition reimbursement "diverts resources away from special education in public schools"), with Brief Amicus Curiae of the National Education Association in Support of Petitioner at 3, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017) (No.15-827), 2016 WL 6916168, at \*3 [hereinafter NEA Amicus Curiae Brief](arguing that the IDEA's focus on "high quality" educational outcomes for students with disabilities "is irreconcilable with a standard that requires only slightly above the barest educational progress").

<sup>176</sup> For an example of this inconsistent reaction, see *supra* notes 3–6 and accompanying text.

<sup>177</sup> See *supra* Section I.A.

voucher programs provide public funding to parents who send their children to a private school of their choice in order to offset the costs of tuition. Second, vouchers are available to a limited set of disadvantaged students, typically based on family income. Third, private schools that participate in the voucher program agree to abide by certain state regulations. All three of these features are present in the context of unilateral special education placements.

Most obviously, the *Burlington* Trilogy shows that parents are able to accomplish under the IDEA exactly the same thing as parents in a voucher program: they can send their children to a private school and obtain public funding to offset the costs. Just as a parent who takes part in a voucher program is able to make the unilateral decision to send her child to a participating private school at public expense, so too are the parents in the special education placement cases.<sup>178</sup> Both interventions, in other words, can be accurately described as publicly funded, private school choice.

Moreover, like voucher programs, the tuition reimbursement remedy is available to just a limited set of disadvantaged students. While most voucher programs are made available exclusively to low-income students,<sup>179</sup> the reimbursement remedy in the unilateral placement cases is available only to students classified as having a qualifying disability under the IDEA. Indeed, the eligible population in the unilateral placement cases is actually the same as in a controversial voucher program recently enacted in Florida, which provides public funding to students with disabilities to attend private schools.<sup>180</sup> This serves to underscore the room for tension between one's reaction to school voucher proposals and the unilateral placement decisions. For example, the National Education Association—the nation's largest teacher's union—filed an amicus brief in *support* of Andrew F.'s argument for private school tuition reimbursement in the Supreme Court,<sup>181</sup> but it has publicly *opposed* general voucher programs for students with disabilities.<sup>182</sup>

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<sup>178</sup> It is true that in the voucher context, public money goes directly from the state to the private school at the outset, so that parents need not front the costs of tuition. In the unilateral placement setting, parents must pay first and receive reimbursement later. But in both cases the salient point is that public dollars are used to pay for private school tuition costs as a consequence of individual parent choices.

<sup>179</sup> See *supra* note 42.

<sup>180</sup> See *McKay Scholarship Program FAQs*, *supra* note 43.

<sup>181</sup> See NEA Amicus Curiae Brief, *supra* note 175.

<sup>182</sup> See, e.g., NAT'L EDUC. ASS'N, *VOUCHER SCHEMES: A BAD IDEA FOR STUDENTS WITH DISABILITIES* 1 (2008), <http://citeseerx.ist.psu.edu/viewdoc/download?rep=rep1&type=pdf&doi=10.1.1.204.7972> [<https://perma.cc/M73A-W3H4>] (stating that the NEA “opposes vouchers for students with disabilities” because “children would lose a multitude of rights if special education were funded through vouchers or through education tax credits, with no guarantee[] . . . [of] yield[ing] a better quality education”). Secretary of Education DeVos recently flagged this tension. See Alyson Klein, *DeVos Tells Special Educators: Parents Shouldn't Have to Sue for K-12 Choices*, EDUC. WEEK (July 17, 2017),

Finally, in order for tuition reimbursement to be available for a unilateral special education placement, the private school in question must comply with certain regulatory requirements, just as private schools that participate in voucher programs. In the unilateral placement context, the most notable requirement is that the private school must provide a “proper” education to the student in question.<sup>183</sup> Courts thus routinely deny requests for private tuition reimbursement when the evidence suggests that the private school chosen by parents has actually failed to provide proper special education services.<sup>184</sup> In the voucher setting, private schools must similarly comply with regulatory requirements such as state accreditation and participation in statewide testing for purposes of school accountability.<sup>185</sup> In both cases, if a private school proves unable to meet a relevant condition, public funding ceases to flow.<sup>186</sup>

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[http://blogs.edweek.org/edweek/campaign-k-12/2017/07/devos\\_special\\_educators\\_parents\\_school\\_choice\\_sue.html](http://blogs.edweek.org/edweek/campaign-k-12/2017/07/devos_special_educators_parents_school_choice_sue.html) [https://perma.cc/2DPM-RWFQ] (“Every family should have the ability to choose the [school] that is right for their child. They shouldn’t have to sue their way to the Supreme Court to get it.” (quoting Betsy DeVos, U.S. Sec’y of Educ.)).

<sup>183</sup> See Sch. Comm. of Burlington v. Dep’t. of Educ., 471 U.S. 359, 370 (1985). One irony is that once a child with a disability is enrolled in a private school, the IDEA’s protections no longer apply in the same way. See U.S. DEP’T OF EDUC., THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: PROVISIONS RELATED TO CHILDREN WITH DISABILITIES ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS 1 (2011), <https://www2.ed.gov/admins/lead/speced/privateschools/idea.pdf> [https://perma.cc/6CTP-EAZM] (“The [local education agency’s] obligations to parentally placed private school children with disabilities are different from its responsibilities to those enrolled in public schools . . .”). Some have argued for greater regulation, which underscores the similarities between this and the voucher setting. Compare John White, *America’s Disadvantaged Students Need Real Accountability, Not Ideology*, THOMAS B. FORDHAM INST. (Jan. 12, 2016), <https://edexcellence.net/articles/americas-most-disadvantaged-students-need-real-accountability-not-ideology> [https://perma.cc/G2AL-2A9W] (discussing state testing and other regulations imposed on Louisiana private schools participating in voucher program), with Robyn Powell, *New Report Shows How ‘School Choice’ Puts Students With Disabilities at Risk*, REWIRE.NEWS (Dec. 13, 2017), <https://rewire.news/article/2017/12/13/new-report-shows-school-choice-puts-students-disabilities-risk> [https://perma.cc/9VNG-QNRK] (“Without an express means of carrying [rights granted under the IDEA and ADA] into the private voucher schools, children with disabilities placed in private school . . . will have no right to special education.”).

<sup>184</sup> See *supra* note 20 (discussing cases where tuition reimbursement remedy is denied because private school fails to provide a proper education to student with a disability).

<sup>185</sup> See ACCOUNTABILITY IN PRIVATE SCHOOL CHOICE PROGRAMS, *supra* note 44, at 3 (“Accountability policies that oversee the performance of private school choice programs primarily focus on setting standards private schools must meet in order to accept participating students . . . . Every state with a private school choice program sets parameters for participation.”). The extent to which participating private schools must comply with regulations differs by state, although recent efforts in states such as Louisiana have tended toward more robust state oversight. See generally White, *supra* note 183 (discussing state testing and other regulations imposed on Louisiana private schools participating in voucher program).

<sup>186</sup> To be certain, the affected student’s parents could theoretically elect to foot the cost of tuition and leave the student in the private school. But without public financial support for the private placement, the parents may well decide to send their child back to the public schools or to a different private school that meets the relevant standards.

At their root then, unilateral special education placements and school voucher programs entail the same basic policy intervention: public dollars are directed to a select category of disadvantaged families so that their children may be taken out of public schools and educated in private schools that meet certain regulatory conditions. In my view, these similarities make out a *prima facie* case that one should hold consistent views across the two settings. That is, one should support the right of parents to choose a private school placement for their child in both settings, or one should oppose it in both settings.<sup>187</sup> But if one wishes to support the right to parental choice in the unilateral placement cases and to oppose it in the context of voucher programs generally—as seems to be the consensus liberal position<sup>188</sup>—then the burden is on them to justify those diverging views. The next Section considers possible arguments to that effect.

### B. Differences

I have argued thus far that strong similarities exist between the Supreme Court's unilateral special education placement decisions and school voucher programs, warranting a presumption that one's policy intuitions should be consistent between the two contexts. But of course there are differences between the two kinds of interventions. I consider now whether any of these differences justify one's support for one kind of publicly funded private school choice but not the other.

#### 1. Unilateral Placements Are About Special Education

To any who are familiar with the IDEA and disability rights, the most glaring basis for distinguishing cases like *Andrew F.* from general private school voucher programs is that the unilateral placement cases are about special education and private school choice for children with disabilities. Voucher programs are not.<sup>189</sup> So maybe there's something special, so to speak, about special education.

What might that something be? Students with disabilities, the argument might go, face unique educational challenges that often require heightened attention and public resources.<sup>190</sup> That very vulnerability might justify

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<sup>187</sup> As to opposition, in particular, one could advance program design objections that apply equally to both interventions, for example, opposing private choice until additional regulatory conditions are imposed on all participating private schools such as an antidiscrimination mandate along lines of race, gender, and sexuality.

<sup>188</sup> See, e.g., *supra* notes 3–6, 181, 182 and accompanying text.

<sup>189</sup> Or at least most of them are not. See *supra* note 43.

<sup>190</sup> See 20 U.S.C. § 1400(c)(5)(D) (2012) (“Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . .

allowing students with disabilities to opt out of public schools that are not serving them adequately and to attend private schools instead. Any harm wrought by that process—whether in terms of lost resources for the public schools, harm to societal values, or subordination of children with less savvy parents<sup>191</sup>—would be outweighed by the benefits to an especially disadvantaged population of children.

This argument has an unquestionable appeal to it. As a society, we ought to be most concerned with providing educational opportunity to those who face disadvantage through no fault of their own. One could certainly agree with the outcome in the unilateral placement cases while opposing voucher programs that offer public funding to parents who are relatively advantaged in terms of wealth and social capital.

But this is a strawman. As explained above, most modern voucher programs—and the only ones worth defending—*also* serve disadvantaged student populations, most often by imposing an income limit on participating families.<sup>192</sup> (The same is not true of the expansion of tax advantaged status to private K-12 education expenses in the 2017 Tax Cuts and Jobs Act, which can and should be criticized for its anti-egalitarian distributional effects). But, for example, President Trump’s controversial proposal to appropriate \$250 million in federal funding for a voucher grant program to the states was designed to offer private school “scholarships for students from low-income families.”<sup>193</sup> The question for these kinds of targeted programs, in other words, is not whether students with disabilities face challenges that distinguish them from the average public school student whose parents may prefer a private school placement; the question is whether there is reason to grant special treatment

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providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate. . . .”).

<sup>191</sup> See *supra* subsection I.C.1.

<sup>192</sup> See *supra* note 42 and accompanying text. Note that even neo-vouchers, or tuition tax credit programs that some states have adopted as an alternative to traditional voucher programs, typically impose income limits on eligible students. See Nat’l Conference of State Legislatures, *Tuition Tax Credits*, <http://www.ncsl.org/research/education/school-choice-scholarship-tax-credits.aspx> [<https://perma.cc/T459-DHH7>] (describing income limits in tax credit programs across states).

<sup>193</sup> See FISCAL YEAR 2018 BUDGET SUMMARY AND BACKGROUND INFORMATION, *supra* note 58, at 2-3. Note that not all voucher programs have such limits. For example, the 1869 Vermont town tuitioning law that sought to alleviate the burdens of establishing a public school in rural communities is not means tested. That has led to controversial stories of public dollars being used to support private placements made by extremely wealthy families. See, e.g., Annie Waldman, *Voucher Program Helps Well-Off Vermonters Pay for Prep School at Public Expense*, PROPUBLICA (June 2, 2017), <https://www.propublica.org/article/voucher-program-helps-well-off-vermonters-pay-prep-school-at-public-expense?> [<https://perma.cc/2EWY-LD3C>] (“By subsidizing part of the cost of private schools . . . [Vermont’s voucher program] disproportionately benefit[s] wealthier families.”). In my view, efforts to offer private school vouchers to higher-income families should be rejected on the ground that public resources aimed at improving K-12 education should be devoted first and foremost to disadvantaged children.

in the form of publicly funded school choice to one group of disadvantaged children (students with disabilities) but not another (poor children).<sup>194</sup>

I do not think there is. To start, it is hard to make the case that students with disabilities are more disadvantaged as a class than poor children, and therefore categorically more deserving of access to private school choice. The likelier reality is that some are more disadvantaged and some are not,<sup>195</sup> but in any case there is little to be gained through this debate. Indeed, one could reasonably look at the students who benefit from government-funded private education in the two contexts and conclude that we have reached the opposite of the appropriate moral position. In the unilateral placement context wealthy parents, like the Viacom CEO in the *Forest Grove* case, are able to pursue public reimbursement for unilateral placements, while in the voucher context poor families rarely have that chance, given the scarcity of general voucher programs.

A more nuanced argument is that school choice may be more sensible for children with disabilities because there are efficiencies that can be gained from educating students with unique educational challenges in specialized private settings.<sup>196</sup> The plaintiff children in the *Burlington* Trilogy cases and *Andrew F.*, for example, were placed in private schools tailored to particular forms of learning disabilities.<sup>197</sup> By contrast, when large groups of poor children fail to learn in a public school's general education program, the more efficient thing might be to fix the system altogether. Otherwise, the argument goes, letting individual students opt out of the system using a voucher would sap the public schools of the brightest, most engaged students to the detriment of those left behind.<sup>198</sup>

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<sup>194</sup> Most voucher programs set income participation limits slightly above the federal poverty line. See *supra* note 42. For example, the D.C. Opportunity Scholarship Program limits participation to families whose income is below 185% of the federal poverty line. EVALUATION OF THE DC OPPORTUNITY SCHOLARSHIP PROGRAM, *supra* note 42, at 1. In 2017, the poverty line for a family of four was \$24,600 per year, which means parents can obtain a voucher in D.C. for a family of four only if their income is below \$45,510. See HealthCare.gov, *Federal Poverty Level*, <https://www.healthcare.gov/glossary/federal-poverty-level-FPL/> [<https://perma.cc/NN33-669E>].

<sup>195</sup> The IDEA encompasses thirteen qualifying disabilities, each with varying degrees of impact on a child's educational experience. See Andrew M.I. Lee, *The 13 Conditions Covered Under IDEA, UNDERSTOOD*, <https://www.understood.org/en/school-learning/special-services/special-education-basics/conditions-covered-under-idea> (describing the thirteen conditions covered by the IDEA and their impact on a student's ability to learn). One could reasonably conclude that a child with a relatively less debilitating disability who is born into a family of highly educated, wealthy parents may be comparatively advantaged compared to a non-disabled child who grows up in poverty.

<sup>196</sup> My thanks to Courtney Joslin for identifying this important argument.

<sup>197</sup> See *supra* Sections II.A–B.

<sup>198</sup> One could also argue that learning disabilities are a different kind of disadvantage as compared to being impoverished because disabilities may be more nature-based, whereas poverty is more of a nurture-based disadvantage. It is not clear, however, why this should matter: both kinds of disadvantage are out of a child's control. And in any case, as Professor Jim Ryan has

This is a forceful argument at an instinctive level. But notice that it is also ultimately an *empirical* one. Whether a child with a disability actually receives a proper education in her private school setting is a matter decided by a court based on an evidentiary determination; courts order school districts to pay tuition reimbursement only if a private school succeeds in doing so.<sup>199</sup> Likewise, the view that it would be more efficient to somehow “fix” the entire public school system than to allow poor students to choose private placements is also an empirical claim. As it turns out, the existing research consistently finds that vouchers improve, rather than decrease, the quality of affected public schools: “virtually all of the[] studies” evaluating public school performance after the introduction of vouchers “find that public-school achievement increases with the intensity of treatment.”<sup>200</sup>

The major point, then, is that the very reason one might think publicly funded private school choice is permissible in the context of unilateral special education placements—our concern for the disadvantage faced by students with disabilities—does not meaningfully distinguish the unilateral placement cases from modern day voucher programs. If a material distinction between the two kinds of interventions is to exist, it must be found somewhere else.

## 2. Unilateral Placements Are Smaller in Number

A second argument for treating unilateral special education placements and general voucher programs differently focuses on the number of affected students. Unilateral placements, it might be said, are so rare and thus so few in number that any harm to public school budgets and the transmission of shared, societal values barely registers.

As an initial matter, to evaluate this argument fairly would require some sense of how many students with disabilities avail themselves of publicly-financed private education by virtue of the Supreme Court’s unilateral placement rulings. Unfortunately, the U.S. Department of Education does not keep data on this exact score. The closest statistic I am aware of is the total number of students with disabilities who are educated in private schools

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persuasively argued, the scientific basis for the nature versus nurture distinction is eroding; scientists increasingly agree that external environmental factors have an enormous effect on brain development. See Jim Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 GEO. L.J. 1455, 1480-91 (2013) (noting that “there is increased acceptance regarding the significance of environmental factors” in cognitive development, and “both genes (nature) and the environment (nurture) play a role” in such development).

<sup>199</sup> See cases cited *supra* note 20.

<sup>200</sup> Epple et al., *supra* note 47, at 478; see also Patrick J. Wolf, *Programs Benefit Disadvantaged Students*, EDUC. NEXT, Spring 2018, at 46, 49 (noting that fifteen studies have “report[ed] consistently positive results” from voucher competition for “students remaining in public schools,” that six have reported neutral to positive effects, one has reported no effect, and none have shown negative effects).



at public expense, which was 88,098 in 2005—the most recent year I could identify.<sup>201</sup> That number would seem modest, though not insignificant, in comparison to the roughly 400,000 students who participate in voucher programs.<sup>202</sup> But the 88,098 number is arguably over-inclusive for our purposes because it counts students with disabilities whom school districts *agree* to place in private schools at public expense. The number of students receiving government funds to attend a private school over the public schools' objection is smaller, though it is hard to say by how much.

One reaction is that whether the public schools agree to finance a child's private school education should not matter. After all, many of the objections to school vouchers described earlier do not turn on the public schools' lack of consent. If one thinks vouchers are bad because they lead to more children being educated in private schools that are not required to teach a collective set of public values, for example, it would not be much comfort to learn that the public schools have agreed to that state of affairs. The same ought to be true for those concerned with the subordination of disadvantaged children whose parents may not possess the means to exercise informed school choice. If anything, those who take this view might be *more* concerned with private school choice that requires a public school's consent, given that obtaining a district's agreement to a private placement may well involve sophisticated negotiation and advocacy.<sup>203</sup>

Moreover, even accepting that only a modest number of students avail themselves of publicly funded private school choice under the rule announced in *Burlington*, the financial burden of each such placement is greater than for each private school voucher. Whereas vouchers are typically for some amount *less* than a state's average annual per pupil expenditure,<sup>204</sup> a tuition reimbursement remedy in the unilateral placement cases is usually much *greater*. In *Andrew F.*, for example, the annual tuition cost of Andrew's private academy was in excess of \$70,000, seven times greater than Douglas County's own per pupil spending level.<sup>205</sup> It is therefore no surprise that the school districts who have lost in the Supreme Court's unilateral placement decisions have often pointed to the substantial costs of reimbursement remedies when

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201 Brief Amici Curiae of National School Boards Association et al. in Support of Petitioner at 14, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2008) (No. 08-305), 2009 WL 598248, at \*14.

202 See SCHOOL CHOICE YEARBOOK, *supra* note 46, at 17.

203 See Joy Resmovits, 'We're Losing Our Little Boy': One Family's Heartbreaking Fight for Their Son's Education, HUFFINGTON POST, (Jan. 23, 2014), [https://www.huffingtonpost.com/2013/11/24/public-schools-special-education\\_n\\_4261145.html](https://www.huffingtonpost.com/2013/11/24/public-schools-special-education_n_4261145.html) [<https://perma.cc/5GP4-958H>] (describing numerous meetings and arguments over availability of a private school placement for a child with autism).

204 See *Voucher Programs: Voucher Amount*, *supra* note 97; see also Epple, *supra* note 47, at 447 tbl. 1 (listing funding amounts for various school voucher programs).

205 See *supra* note 2.

trying to persuade the Court to accept their positions.<sup>206</sup> And this financial burden is magnified even more after taking into account the costs of litigation that school districts encounter when opposing lawsuits seeking reimbursement. If anything then, a concern for maximizing public school resources might actually counsel a stronger level of opposition to the Court's unilateral placement rulings than one's opposition to vouchers generally.

The best argument for worrying more about the budgetary effects of a general voucher program is that unlike special education placements, which are capped in number by the incidence of disability, the number of voucher users has room to grow substantially if more states were to adopt such policies. But even then, so what? As noted earlier in the Article,<sup>207</sup> the draining of resources from public schools is not a problem in and of itself; our concern should instead only be triggered if children are worse off because of it. And though it may be surprising to learn, on this front the research evidence so far is quite consistent: student achievement *improves* in public schools once vouchers are introduced as a source of competition.<sup>208</sup>

### 3. Unilateral Placements Require an Evidentiary Basis

That brings us to a third ground for distinction. Unlike voucher programs, which offer money on an *ex ante* basis to any parent who chooses a private school for their children, public money flows through to support private school tuition in the unilateral placement cases *ex post*—that is, as a reimbursement order issued by a court *after* the parent fronts the initial cost. And what happens between the *ante* and *post* may be crucial: reimbursement is ordered only after a court finds evidence that the public school has violated that child's right to an appropriate education and that the private school is providing educational benefits.<sup>209</sup>

On closer examination, this last distinction between the unilateral placement and voucher contexts actually encompasses two discrete points, one formalistic and the other substantive. Formally, the special education unilateral placement can be said to be *remedial* in the sense that the award of public funds

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<sup>206</sup> See *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 246 (2008) (explaining why the Court is unmoved by the school district's argument that ruling in favor of tuition reimbursement "will impose a substantial financial burden on public school districts . . .").

<sup>207</sup> See *supra* text accompanying note 85.

<sup>208</sup> See Epple et al., *supra* note 47, at 478; Wolf, *supra* note 200, at 48. There are at least two plausible explanations for this trend: One is that while voucher usage drains a public school district of *state* aid for each participating student, *local* property tax resources remain in the system to be spread over a smaller number of students. A second is that vouchers may yield procompetitive effects on public schools that fear losing students to private schools. See *infra* notes 244–245 and accompanying text.

<sup>209</sup> See *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985).

for private school tuition turns on the finding that a child's statutory right (under the IDEA) has been violated. Vouchers, by contrast, are *prospective*, which is to say they require no finding of a legal violation. One might argue, then, that the unilateral placement is more worthy of our support because *the law matters*. We should countenance government dollars for private tuition when a public school violates some law, but not when it doesn't.

On its own, this argument winds up feeling somewhat empty. For one thing, voucher programs could be redesigned quite easily as a legal remedy, too. For instance, the Every Student Succeeds Act requires each state to identify public schools that are in need of "comprehensive support and improvement," a category that must comprise "not less than the lowest-performing 5 percent" of public schools receiving federal Title I funds.<sup>210</sup> A state could accordingly make private school vouchers available on a remedial basis to any student who attends one of these low-performing schools. Alternatively, some have argued for school vouchers as a judicially imposed remedy when state courts find public education systems to violate state constitutional provisions.<sup>211</sup> Either approach would eliminate the formalistic difference between the two settings, restoring the presumption that our policy views should be consistent.

More significantly, it isn't apparent why efforts to improve educational opportunities for disadvantaged children should be limited to only those students who can show the violation of some legally protected right. The fact that a school district may be offering a poor child (or a child with a disability) a low-quality public education that happens to rise just above the level of a legal violation is hardly a sufficient reason to disavow further efforts to improve the child's school opportunities. One might therefore argue that a prospective intervention is actually better for educational equity in that it would enable a greater number of disadvantaged children to exit educational conditions that their parents find inadequate. Conversely, the unilateral special education placement remedy could be criticized insofar as it limits the availability of relief to children whose parents are wealthy enough to file a lawsuit and front the costs of private school tuition while they wait.<sup>212</sup>

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<sup>210</sup> 20 U.S.C. § 6311(c)(4)(D)(i)(I) (2012).

<sup>211</sup> See, e.g., David J. Hoff, *Choice Advocates Seek Vouchers as Remedy for N.J. Students in Low-Performing Schools*, EDUC. WEEK (July 13, 2006), [https://www.edweek.org/ew/articles/2006/07/13/43njchoice\\_web.h25.html](https://www.edweek.org/ew/articles/2006/07/13/43njchoice_web.h25.html) [<https://perma.cc/PN7B-DR8L>] ("[V]oucher proponents have launched an effort to use school choice as a remedy for students in 97 New Jersey schools that have failed to provide the 'thorough and efficient' education guaranteed by the state's constitution.").

<sup>212</sup> Consider, for example, that the father of T.A. in the lawsuit against the Forest Grove School District was the former CEO of Viacom, who (like all parents in the unilateral placement cases) had ample means to pay for his child's tuition during the pendency of the lawsuit. See Lewin, *supra* note 29.

Whether a school district has violated some law, in other words, should not be the critical fact for deciding whether to make a policy intervention available to a child. What ought to matter is whether there is evidence that the child will actually benefit in some substantive way from the intervention.

That, of course, *is* something that is different between the unilateral placement cases and voucher programs. We can be certain that the private schools that our public dollars are supporting in the unilateral placement cases are benefitting children with disabilities because that very finding is necessary before a court will order reimbursement in any case.<sup>213</sup> Yet no such evidence is needed as a precondition to the exercise of school choice in the general voucher context.

There are two ways of conceptualizing this evidentiary ground for distinction. One way is to view it as a concern for evidence of improved educational opportunity at an *aggregate* level—call this the “collectivist” view. We can be certain that publicly funded private school placements under *Burlington* increase educational opportunity for children with disabilities in the aggregate because a finding of improved educational opportunity is necessary in each claim for reimbursement. But there is no evidence that general voucher programs benefit children in the aggregate (or so the voucher opponent would argue).<sup>214</sup>

Another version of the argument reflects a concern for educational opportunity at the level of each *individual* student—call this the “individualist” view. What matters on this individualist account is not whether the policy intervention as a whole (i.e., all unilateral placements or an entire voucher program) benefits children in the aggregate, but rather whether any single child is helped or harmed. What makes the unilateral placement intervention worthy of support, then, is the very fact that public money flows after a finding of individual student benefit. And what makes general voucher programs objectionable is the absence of a similar case-by-case finding, which opens the door to some students actually being worse off by virtue of enrolling in a private school.

One need not pick sides between these two views for present purposes.<sup>215</sup> The main point for now is simply that both versions of the argument are logically coherent and establish a potentially persuasive reason why one may support the Supreme Court’s unilateral placement cases without supporting school vouchers generally. If one’s support runs only so far as the evidence that the policy intervention actually helps kids,

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<sup>213</sup> See *supra* Section II.A.

<sup>214</sup> For a discussion of the existing evidence on school voucher programs, see *infra* Section IV.A.

<sup>215</sup> For further discussion of the collectivist and individualistic evidentiary arguments, see *infra* subsection IV.A.2.

then the requirement of a judicial finding of evidence in the unilateral placement cases (and the lack of any similar requirement in voucher programs) may make all of the difference.

But a further point follows from this. If one wishes to take divergent positions on the unilateral placement cases and school voucher programs, the best argument for doing so is empirical in nature, and thus fundamentally *contingent*. We should support publicly funded private-school choice to the extent the evidence says it helps children; we should oppose it to the extent the evidence says it does not. That conclusion should tell us a lot about what kinds of arguments are legitimate—and what kinds are not—when it comes to the broader debate over vouchers.

#### IV. REVISITING OUR VIEWS ON SCHOOL VOUCHERS

I have argued thus far that simultaneous liberal support for the Supreme Court's unilateral placement rulings and opposition to school vouchers poses something of a conundrum given that both entail the same basic intervention: publicly-funded, private school choice. But as we just saw, there is a plausible argument for reconciling these divergent positions that is evidentiary in nature. One may support publicly funded private education in the unilateral placement context because evidence regarding improved student outcomes supports it. One may oppose voucher programs, by contrast, to the extent the evidence does not.

So where does that leave us? There are several lessons to be mined from the unilateral placement cases on both the left and right.<sup>216</sup> I discuss these lessons presently, incorporating the latest research evidence regarding school vouchers at the most relevant junctures.

##### A. *Lessons For The Left*

I want to suggest four major takeaways for those on the left. First, unless liberals are willing to reverse course and oppose the unilateral special education placement cases, they should cast aside several of the arguments often pressed against school vouchers. Second, assuming liberals wish to persist in their support for the unilateral placement decisions, just one credible

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<sup>216</sup> I use the terms “left” and “right” generically here to refer respectively to self-identified liberals, who generally oppose school vouchers (but support increased educational opportunity for students with disabilities), and self-identified conservatives, who generally support school vouchers. See *Poll: School Vouchers No Major Issue*, ABC NEWS (Oct. 17, 2014), <https://abcnews.go.com/Politics/story?id=122683&page=1> [<https://perma.cc/W2L9-WCDZ>] (finding 43% of Republicans support vouchers compared to just 26% of Democrats). There are of course many exceptions within each camp, which I do not mean to paper over; I use the left/right dichotomy solely for expositional simplicity.

argument remains for opposing vouchers: the argument that vouchers harm students. This argument, however, is contingent on the actual research evidence. That evidence—and this is the third takeaway—is still emerging, and the evidence that exists is not nearly as negative on school vouchers as some on the left might like. While some studies show no positive effect (or even negative effects), there are also studies showing significant positive effects for minority students across various dimensions.<sup>217</sup> Finally, the lack of conclusive evidence on the effect of school vouchers suggests that the proper policy response is not categorical opposition to vouchers, but rather continued exploration and assessment on a modest scale. To the likely discomfort of many liberals, it turns out this is more or less what the current policy climate and recent policy proposals from the Trump Administration look like.

### 1. Anti-Voucher Arguments That Don't Work: Resource Draining, Public Values, and Anti-Subordination

Three of the major arguments frequently made against school voucher policies—the resource draining, public values, and anti-subordination arguments—are inconsistent with support for the Supreme Court's unilateral placement rulings.<sup>218</sup> If one genuinely held these concerns, the logical consequence would be to oppose *both* vouchers and reimbursement for the private tuition costs of children with disabilities who have been failed by the public schools.

*Resource draining.* Starting with the resource draining objection, I've already explained how court-ordered tuition reimbursement remedies exact an even higher financial burden on public schools than vouchers on a per-student basis.<sup>219</sup> This is true for several reasons: special education is costlier than general education; there is no set limit on the kinds of private schools (and associated tuition bills) parents may decide upon in the unilateral placement context;<sup>220</sup> and litigation costs only add to this burden. Thus, one study found that the average additional per-pupil cost for special education services offered outside the public schools was roughly five times greater each year than the same figure for special education programs offered

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<sup>217</sup> See *infra* subsection IV.A.3.

<sup>218</sup> For a recap of these arguments, see *supra* subsection I.C.1.

<sup>219</sup> See *supra* subsection III.B.3.

<sup>220</sup> One relevant limit that does exist is the requirement that the parents' private school placement be "reasonable," which means courts may as an equitable matter award some amount less than total reimbursement if "the court determines that the cost of the private education [selected by parents] was unreasonable." *Florence Cty. Schl. Dist. Four v. Carter*, 510 U.S. 7, 16 (1993).

within public schools.<sup>221</sup> In New York City alone, more than \$85 million was spent on unilateral private school placements for students with disabilities in 2007-2008.<sup>222</sup> In short, if one thinks keeping resources in public schools is a good reason to oppose school vouchers, there is a lot to dislike about unilateral special education placements, too.

*Public values.* The societal values objection to school vouchers is also difficult to sustain without condemning unilateral placements. If the argument is that children must be taught in public schools to ensure the inculcation of important values like civic awareness, tolerance, and community engagement, we should be just as concerned when students with disabilities are educated in the private school system as any other group. It makes little sense to demand that all children in the general education curriculum must learn about civics and American democracy in public schools, while being unconcerned when children with disabilities are sent to private schools where those same values are left untaught. And if one's objection to vouchers is based on the concern that public funds will be used to support private schools that discriminate against students on racial, religious, or other grounds, that is also a powerful reason to oppose unilateral special education placements.<sup>223</sup>

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221 JAY G. CHAMBERS ET AL., WHAT ARE WE SPENDING ON SPECIAL EDUCATION SERVICES IN THE UNITED STATES, 1999-2000? SPECIAL EDUCATION EXPENDITURE PROJECT 21 ex. 6 (2002), <https://files.eric.ed.gov/fulltext/ED471888.pdf> [<https://perma.cc/L88G-G34J>]

222 Brief of the Council of the Great City Schools as *Amicus Curiae* in Support of Petitioner at 24, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2008) (No. 08-30); *see also id.* (noting that the “average settlement per-pupil paid by New York City in unilateral placement cases was . . . \$22,534.78 [in] [2007-2008[]”).

223 By the same token, one could imagine program design reforms that would resolve this objection equally across both contexts. Thus, Congress might amend the IDEA to limit tuition reimbursement remedies to parents who enroll their children in private schools that refuse to discriminate on the basis of race, religion, and other protected statuses. Some state voucher programs are already so constrained. *See, e.g.*, OHIO REV. CODE ANN. § 3313.976(A)(6) (West 2016) (prohibiting private school participation in school voucher program if it “advocate[s] or foster[s] unlawful behavior or teach[es] hatred of any person or group on the basis of race, ethnicity, national origin, or religion”). To be sure, there is a forceful argument that participating private schools should also be forbidden to discriminate on the basis of sexuality or transgender status; some (but certainly not all) private schools have had voucher funds rescinded on that ground. *See* Liz Bowie, *Private School Loses State Voucher Money over Anti-LGBT Policy*, BALTIMORE SUN (Oct. 13, 2017, 10:30 AM), <http://www.baltimoresun.com/news/maryland/education/bs-md-school-voucher-discrimination-20171012-story.html> [<https://perma.cc/L3Q-F3VS>] (reporting that the board of Maryland's private school voucher program made the decision to rescind vouchers from a Lutheran school that claimed “it reserved the right to deny admission to gay and transgender students”). But in any case, similar critiques can be made of the public schools as well. *See, e.g.*, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016) (addressing whether Title IX forbids school board policy banning a transgender boy from using the boy's restrooms at his high school), *vacated and remanded*, 137 S. Ct. 1239 (2017).

*Antisubordination.* Finally, the antisubordination critique of voucher programs is an especially convincing attack on unilateral special education placements. To start, the same dynamics that threaten to make school choice an empty promise for the most disadvantaged students in the voucher context—such as the lack of readily accessible information about private school options and the need for sophisticated behavior by a child’s parents—are also at work in the unilateral placement context.<sup>224</sup> In fact, class-based subordination concerns are exacerbated by virtue of the way the unilateral placement remedy functions as a reimbursement for costs already incurred. Only comparatively wealthy parents can afford to front the out-of-pocket costs needed to send their child to a private academy that specializes in educating children with disabilities.<sup>225</sup> Yet without access to the financial resources needed to enroll in these schools while their parents await a reimbursement order, it is poor children with disabilities who will lack real choice when their public schools fail to provide them an appropriate education.

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It would be a reasonable, intellectually consistent reaction at this point to reconsider one’s initial support for the Supreme Court’s unilateral placement rulings. Perhaps it is a bad thing that the Court has required public school districts to fork over substantial resources to private schools so that they may educate predominantly well-off children on whatever topics they happen to choose. I have no great quarrel with that view, though one should be aware of how heterodox it would be by comparison to the chorus of liberal voices who have supported the expansion of rights for children with disabilities under *Endrew F.* and the *Burlington* Trilogy.

What I do want to point out is that this position is not without its own costs. For what it means is that public schools would be, to a great extent, unaccountable for failing to provide appropriate educational opportunities to students with disabilities. A school district could, for years on end, refuse to provide a meaningful IEP to a child with a disability, content with the knowledge that the child’s parents have no right to take matters into their own hands by sending the child to a better school at the district’s expense. Indeed, a district could refuse to evaluate a child or offer special education services

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<sup>224</sup> See Pasachoff, *supra* note 29 at 1422-35 (“Throughout the country, scholars and commentators provide repeated examples of parents with greater financial resources disproportionately taking advantage of the IDEA’s private enforcement mechanisms in comparison to their less well-heeled neighbors.”).

<sup>225</sup> See, e.g., Aguilar, *supra* note 2 (noting that in addition to the \$70,000 per year tuition costs for Endrew F’s private school, his parents had also incurred significant court fees).



altogether.<sup>226</sup> Short of paying private school fees out of pocket with no hope of reimbursement, parents of children like Andrew—who for years was given the same, pro forma IEP revealing no expectation of educational development—would have no choice but to accept those inadequate services as they wait for the years-long grievance process to reach a resolution.<sup>227</sup>

Of course, one hopes that in the vast majority of cases, school officials will be motivated to do right by children with disabilities.<sup>228</sup> But hope without accountability is what existed before the enactment of federal special education law, and in that world, millions of children with disabilities in the United States “were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out.”<sup>229</sup> So if you oppose school vouchers but think the Supreme Court was correct to grant children with disabilities a right to a free, appropriate education at a private school when the public schools fail them, that is well and good. But you will need a different argument against vouchers than the ones discussed so far.

## 2. An Anti-voucher Argument That Might Work: What’s Best for Kids

The similarities between the unilateral placement cases and school vouchers rule out three anti-voucher arguments popular on the left, at least if one wants to defend the outcomes of cases like *Burlington* and *Andrew F.* But the material difference between the two contexts that I identified earlier—the need for evidence that a student with a disability will benefit from a private school placement<sup>230</sup>—suggests that a fourth argument could be logically sound. Vouchers are bad for students (and unilateral placements are good) insofar as that is what the evidence tells us about their effects on student outcomes. The “what’s best for kids” argument against vouchers, in other words, is a legitimate one to make.

Just what we should take away from this conclusion differs somewhat depending on whether one takes the collectivist or individualist version of the argument.<sup>231</sup> In the collectivist version, one would naturally oppose

<sup>226</sup> Cf. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245 (2009) (“It would be particularly strange for the [IDEA] . . . to leave parents without relief in the . . . egregious situation in which the school district unreasonably denies a child access to [special education] altogether.”).

<sup>227</sup> See *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 370 (1985) (“As this case so vividly demonstrates . . . the review process is ponderous. A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed.”).

<sup>228</sup> See *Forest Grove*, 557 U.S. at 260 (“[W]e have to decide this case on the premise that most [arguments between parents and school districts over special education] will be carried on in good faith . . .”) (Souter, J., dissenting).

<sup>229</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) (internal quotation marks omitted) (quoting H.R. REP. NO. 94-332, at 2 ((1975)).

<sup>230</sup> See *supra* subsection III.B.3.

<sup>231</sup> See *supra* subsection III.B.3.

vouchers if the research base reveals that vouchers harm children in the aggregate. That also means if there was a knockdown evidentiary case that vouchers actually *improve* educational opportunity overall, one would have to support voucher policies even though some individual students might wind up worse off. As with any policy that increases overall wellbeing at the cost of some individual losses—think a district-wide proposal to redistribute high quality teachers to the lowest-performing schools—what counts in the collectivist view is aggregate welfare.

In the individualist version, the policy takeaway is that one could theoretically reject a general voucher program even if the evidence suggests it will improve overall student outcomes because there is a statistical likelihood that at least some individual students would be harmed. Though even with that view, one would still support a voucher program that incorporates an individualized proof component to protect individual students—perhaps something akin to *Burlington's* unilateral placement remedy, which requires a showing that a public school has failed to provide an appropriate education and that a private school placement is proper.<sup>232</sup> Indeed, some states already make vouchers available to students who attend chronically failing public schools as indicated by statewide accountability metrics.<sup>233</sup> One could imagine a slight modification requiring parents to submit proof that the private school where they seek to enroll their child is positioned to provide a proper education,<sup>234</sup> or an accountability regime requiring that the private school show that it is actually increasing student achievement.<sup>235</sup>

For what it's worth, my own sense is that the collectivist version of the "what's best for kids" argument is the better argument. In school reform generally, we do not impose the exacting requirement that every policy choice must improve aggregate student outcomes without harming a single student in the process.<sup>236</sup> Policy choices require tradeoffs, and sometimes as a matter of statistical variance a policy that helps children overall may harm some individual children. But if school vouchers are in fact beneficial for low-

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<sup>232</sup> 471 U.S. at 369-70.

<sup>233</sup> See *EdChoice Scholarship Program*, *supra* note 43.

<sup>234</sup> Note that this standard is not terribly high in the unilateral placement cases. See *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112 (2d Cir. 2007) ("To qualify for reimbursement under the IDEA, parents . . . need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.").

<sup>235</sup> See *infra* note 275 and accompanying text.

<sup>236</sup> For example, when public dollars are spent on class size reduction, that may improve student outcomes in the aggregate. But it is likely as a statistical matter that some individual children will be worse off, whether because they are assigned to a lower-quality teacher (rather than a better teacher with a somewhat larger number of children), because they are placed in a different class peer group with less positive peer effects, or simply because the money could have been spent better on some other reform.

income students according to the research, then an *ex ante* system that allows any low-income parent to choose a private school for her child (without requiring a showing that the child would benefit) would save litigation costs and ensure greater participation among children with less savvy parents.

Of course, all of this underscores a critical feature of the “what’s best for kids” argument: it is contingent on empirical facts. I discuss those empirics now.

### 3. The Evidence on Vouchers Is Unclear

Although three decades have passed since the advent of the modern day school voucher program in Milwaukee, research on voucher effects is not yet conclusive. A recent survey of the research in the *Journal of Economic Literature* yielded the following top-line recommendation: while there is “insufficient [evidence] to warrant recommending that vouchers be adopted on a widespread basis,” the “record definitely warrants continued exploration” given the “evidence that in some cases vouchers can have significant positive effects on educational performance . . . .”<sup>237</sup> The educational opportunity argument for categorically opposing vouchers, it would seem, stands on shaky empirical footing. But insofar as the evidentiary base is still emerging, progressives would be within reason to support modest initiatives aimed at supporting high quality research on vouchers’ effects.

To explain this conclusion requires a word about what outcomes we care about. This is a notoriously difficult debate to which I cannot do justice here.<sup>238</sup> But the research evidence provides meaningful data along three primary metrics, which I share here fully acknowledging that one might find them to be an incomplete measure for success in K-12 education.

The first metric one might use to evaluate the effect of voucher programs is academic achievement as measured by student performance on math and reading assessments. On this score, the data is conflicting. With respect to low-income students who avail themselves of vouchers to attend a private school, the most recent studies of voucher programs in Washington, D.C., Louisiana, Ohio, and Indiana have found statistically significant negative effects on student performance in math and reading.<sup>239</sup> New data on the

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<sup>237</sup> Epple et al., *supra* note 47, at 443.

<sup>238</sup> For a short blog entry demonstrating the complexity of this debate, see Heather Wolpert-Gawron, *What Is the Purpose of Public Education?*, HUFFINGTON POST (May 25, 2011), [http://www.huffingtonpost.com/heather-wolpertgawron/what-is-the-purpose-of-pu\\_b\\_774497.html](http://www.huffingtonpost.com/heather-wolpertgawron/what-is-the-purpose-of-pu_b_774497.html) [<https://perma.cc/2T3V-CKHR>] (identifying twenty discrete categories of responses among 300 survey respondents to the question, “what is the purpose of public education?”).

<sup>239</sup> See *supra* note 26; Mark Dynarski & Austin Nichols, *More Findings About School Vouchers and Test Scores, and They are Still Negative*, EDUC. NEXT (July 17, 2017), <https://www.educationnext.org/more-findings-about-school-vouchers-and-test-scores-still-negative> [<https://perma.cc/3KYG-JLUU>] (discussing negative findings in Indiana and Washington, D.C.).

Indiana and Louisiana programs have concluded, however, that the initial academic losses suffered by students using vouchers decrease to the point of potentially being reversed over time.<sup>240</sup>

If these studies were the only authorities, there would be strong reason to think vouchers are a flawed intervention unworthy of further exploration. However, earlier studies conducted in New York City, Dayton, Ohio, and Washington, D.C. have found positive test score effects for African-American students as a distinct subgroup.<sup>241</sup> Still other studies have shown no statistically significant effect on voucher users' test scores.<sup>242</sup>

While the data for students who actually use vouchers is mixed, the data on students who *do not* use them and are left behind in the public schools is not.<sup>243</sup> Thus, for example, studies in Milwaukee, Florida, and Ohio each find that the introduction of choice via private school vouchers is correlated with statistically significant gains on test score performance among the students who stay behind in public schools.<sup>244</sup> Competition, it appears, produces some positive effect on the public schools, calling into question fears about the skimming of students and the draining of necessary resources.<sup>245</sup>

A second metric for evaluating vouchers is educational attainment. There is less data on this measure, but what does exist suggests that vouchers are

showing that “on average, students that use vouchers to attend private schools do less well on tests than similar students that do not attend private schools”).

<sup>240</sup> See R. Joseph Waddington & Mark Berends, *Impact of the Indiana Choice Scholarship Program: Achievement Effects for Students in Upper Elementary and Middle School 26-27* (June 24, 2017) (unpublished manuscript), [http://creo.nd.edu/images/people/Waddington\\_Berends\\_Indiana\\_Voucher\\_Impacts\\_06.24.17.pdf](http://creo.nd.edu/images/people/Waddington_Berends_Indiana_Voucher_Impacts_06.24.17.pdf) [<https://perma.cc/ZFL3-PC59>] (finding that “[b]y year four, voucher students who remain enrolled in a private school regain what they lost relative to public school students”); see also Cory Turner & Anya Kamenetz, *School Vouchers Get 2 New Report Cards*, NPR (June 26, 2017), <https://www.npr.org/sections/ed/2017/06/26/533192616/school-vouchers-get-a-new-report-card> [<https://perma.cc/2TBC-C8MA>] (finding similar reversal of negative effects by year three for Louisiana voucher students).

<sup>241</sup> See Epple et al., *supra* note 47, at 467-68 (describing studies suggesting “some—albeit not very robust—indication of test score effects for African-American students”).

<sup>242</sup> See *id.* at 467 (“A perhaps surprisingly large proportion of the best-identified studies suggest that winning a voucher has an effect on achievement that is statistically indistinguishable from zero.”)

<sup>243</sup> See *supra* text accompanying note 200; see also Wolf, *supra* note 200, at 46, 49.

<sup>244</sup> Epple et al., *supra* note 47, at 476-77 (describing the methodology and results of the relevant studies); see also *id.* at 485 (“The most robust finding [from studies examining the impacts of voucher programs on public schools] is that voucher threats induce public schools to improve.”)

<sup>245</sup> One sensible program improvement to ameliorate any concerns that might remain about “skimming,” even if the evidence shows that students left behind in public schools do better after vouchers are introduced, would be to require participating private schools to admit students by random lottery. See Paul E. Peterson, *The Case for Vouchers*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/vouchers/choice/provouchers.html>, [<https://perma.cc/Y2X6-4258>] (reporting on a series of interviews with individuals supporting voucher programs, including one with Harvard Associate Professor of Economics Caroline Hoxby, who suggests that attaching financial incentives to private schools using a lottery system would prevent selective admissions practices).

likely beneficial. In particular, a random controlled study of Washington, DC's voucher program found that after four years "students who were offered a voucher . . . were 12 percentage points more likely to graduate [from high school] than those who were not," and that students who actually *used* a voucher were 21% more likely to graduate.<sup>246</sup> In terms of college matriculation, a New York voucher study of 2,700 students found that African American students who were offered a voucher for use between kindergarten and fifth grade were 20% more likely to enroll in college than those who were not.<sup>247</sup> A study of Florida's private school choice program found a 15% increase in college enrollment among voucher participants.<sup>248</sup> Two more recent studies, however, found little or no statistically significant impact on college enrollment and attainment.<sup>249</sup>

A final metric for evaluating the impact of vouchers on educational opportunity is parental satisfaction. Here, the data also seems to suggest some positive effect from vouchers, as studies generally find that "[f]amilies who use vouchers to attend an area private school are much more satisfied with their schooling than are families who remain in public schools" about aspects such as "school safety, teaching, parental involvement, class size, school facility, . . . discipline, . . . academic quality, . . . and what is taught in school."<sup>250</sup>

Putting all of this data together suggests that the sole argument against vouchers that survives liberal support for the unilateral placement cases—that vouchers are categorically bad for students—is not yet proven by the evidence. Any policy intervention that has shown some ability to improve student achievement and increase high school graduation and college enrollment rates in statistically significant ways among low-income children (and African-American children in particular) deserves our consideration. Further investigation may reveal that some of these gains cannot be replicated

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<sup>246</sup> Epple et al., *supra* note 47, at 467.

<sup>247</sup> CHINGOS & PETERSON, *supra* note 25, at ii; Epple et al., *supra* note 47, at 468.

<sup>248</sup> See Leesa Foreman, *Educational Attainment Effects of Public and Private School Choice* 7 tbl.1 (Univ. of Ark. Coll. of Educ. & Health Professions, Working Paper 2017-16), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3045987](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3045987).

<sup>249</sup> See PATRICK J. WOLF ET AL., DO VOUCHER STUDENTS ATTAIN HIGHER LEVELS OF EDUCATION? 11, 15, 16 (2018), [https://www.urban.org/sites/default/files/publication/96721/do\\_voucher\\_students\\_attain\\_higher\\_levels\\_of\\_education\\_o.pdf](https://www.urban.org/sites/default/files/publication/96721/do_voucher_students_attain_higher_levels_of_education_o.pdf) [<https://perma.cc/MUB9-5XHU>] (observing no statistically significant difference in college attainment based on voucher treatment, although voucher users were more likely to enroll and continue in four-year-colleges); MATTHEW CHINGOS, THE EFFECT OF THE DC SCHOOL VOUCHER PROGRAM ON COLLEGE ENROLLMENT 8-9 (2018) (finding that DC's voucher program had no statistically significant effect on college enrollment).

<sup>250</sup> Paul E. Peterson et al., *School Vouchers: Results from Randomized Experiments*, in *THE ECONOMICS OF SCHOOL CHOICE* 107, 124-25 (Caroline M. Hoxby ed., 2003).

on a wide scale, or that there are other more beneficial ways to use the relevant resources, but it is currently too soon to say.

#### 4. The Existing Policy Climate Is About Right

In one sense, the existing research examining school vouchers is inconvenient. It would be far simpler for policy makers if all of the research pointed convincingly in a single direction, whatever that direction might be. But as just discussed, even as there are too many studies finding positive effects from vouchers to justify outright opposition, there are also enough studies showing negative effects to sound a note of caution.<sup>251</sup> So what position should the left take moving forward?

I submit that, given existing conditions, the proper response is to gather more data. In other policy areas, that would be uncontroversial: if there is an intervention that shows some positive and some negative effects, but too little data to form a firm conclusion, it would be quite reasonable for government to continue funding the intervention so that additional study may be conducted. Very little about the school voucher debate is uncontroversial, of course, so it is possible that even a gather-more-data recommendation may make waves on the left.

It should not. As Professors Chris Elmendorf and Darien Shanske have persuasively argued, much of the challenge facing systemic school reform efforts is a problem of data—a problem in which states themselves are complicit.<sup>252</sup> In that respect, generating data about potential reforms is *itself* a valuable objective to be pursued.<sup>253</sup> And in the social science community, this is exactly what leading thinkers have recommended regarding school vouchers. One set of experts recently summarized their survey of existing research by stating that “the evidence does not make a case for wholesale adoption of vouchers, but [it] does strongly suggest the desirability of continued experimentation and evaluation.”<sup>254</sup>

If one were to take this information-gathering objective to heart, what would that mean for concrete policy choices? Drawing on a blank canvas, my sense is that an ideal policy climate would involve a sufficient absolute number of children participating in voucher programs, across a diverse array

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<sup>251</sup> See *supra* subsection IV.A.3.

<sup>252</sup> See Chris Elmendorf & Darien Shanske, *Solving Problems No One Has Solved: Courts, Causal Inference, and the Right to Education*, 2018 U. ILL. L. REV. 693, 693 (2018) (“The state’s own choices substantially determine whether researchers—and hence litigators—can produce credible evidence concerning the causal effect of state laws and funding arrangements on the outcomes that ground the education right.”).

<sup>253</sup> *Id.* at 698 (arguing that courts should “reorient[] education-rights jurisprudence toward the production of knowledge about how to educate disadvantaged children effectively”).

<sup>254</sup> Epple, *supra* note 47, at 486.

of environments, to enable sound research. The absolute number should remain quite small as a proportion of the total student population in the United States, however, in consideration of the risk of negative effects that some more recent studies have revealed. Policy governance over such programs would ideally come from municipalities and states to ensure local buy in, but, given that empirical study may otherwise be a public good susceptible to a collective action problem, a modest federal financial role might be appropriate to incentivize high quality research.

If that policy climate sounds familiar to you, that's because it is largely the world as it already exists—and the world as the Trump Administration has proposed. In that world, a significant absolute number of students (roughly 400,000) utilize vouchers.<sup>255</sup> That number, however, represents just a small fraction of the total number of students in American K-12 schools. Those students are enrolled in voucher programs in more than twenty states around the country, plus the District of Columbia, which provides a measure of diversity to further improve the quality of research outcomes. And the President has recently proposed further support for the states' research efforts through a \$250 million investment in the Education Innovation and Research grant program, with the avowed purpose of “build[ing] the evidence base around private school choice” by “provid[ing] scholarships for students from low-income families to attend the private school of their choice.”<sup>256</sup>

There is one respect in which the current voucher policy climate may be objectionable. As noted earlier, some have worried that vouchers provide state support for private schools that engage in discriminatory enrollment practices.<sup>257</sup> I share that concern. Accordingly, just as the federal government has a role in incentivizing high quality research, there should be a role for it in setting a ground floor for the kinds of admissions policies and anti-discrimination rules that all private schools must abide by to qualify for participation in federally funded voucher programs.<sup>258</sup> Notice, however, that this is a program design issue, not an argument about vouchers *per se*; it is an argument that the left should be making *as a condition of support*, not an argument to end the debate full-stop.<sup>259</sup>

At the end of the day, then, the logical consequence of the “what's best for kids” argument against school vouchers may actually be an argument

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<sup>255</sup> See SCHOOL CHOICE YEARBOOK, *supra* note 46, at 17.

<sup>256</sup> See FISCAL YEAR 2018 BUDGET SUMMARY AND BACKGROUND INFORMATION, *supra* note 58, at 2-3.

<sup>257</sup> See *supra* notes 93-94 and accompanying text.

<sup>258</sup> See *supra* note 223 (describing some rules that states already impose prohibiting discrimination by participating private schools).

<sup>259</sup> It is also an argument that would apply with equal force to unilateral special education placements, to the extent one supports them.

largely in defense of the voucher programs we already have. That defense is tentative, to be certain. If further research reveals a compelling case that vouchers produce no positive effects or even negative effects, the proper policy response would change accordingly. But liberals who care about educational opportunity for disadvantaged children must also be open to the empirical possibility that vouchers are good for kids. If that ends up being the case—and only time will tell if that is so—then no good reasons would be left for opposition.<sup>260</sup>

### B. *Lessons for the Right*

The conclusion that one's views on school vouchers should align with the research evidence has implications for the right as well.<sup>261</sup> In particular, it suggests that absolutist, liberty-based arguments for vouchers prove too much and that conservatives may do well to qualify their support for voucher programs in some important ways.

#### 1. The Trouble With Liberty Arguments

Recall that voucher proponents typically advance two distinct kinds of arguments in favor of their position. One is the mirror image of the empirical argument made by voucher opponents—the view that vouchers are actually what is best for increasing educational opportunity for disadvantaged children.<sup>262</sup> The other is that vouchers are necessary to realize the liberty interests of parents in directing the upbringing of their children.<sup>263</sup> I will discuss some policy implications for the pro-voucher empirical argument in the next subsection; at the moment I want to focus on what the unilateral placement cases can tell us about the liberty argument.

There is an important factual feature that the Supreme Court's unilateral placement cases share in common. In each of the cases, there was no dispute in the Supreme Court that the private school chosen by the parents provided

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<sup>260</sup> One possibility is that further research will confirm that vouchers have effects statistically indistinguishable from zero. In my view, that would count as an argument against adoption, since the political capital could be used on more beneficial reforms. However, as I discuss below, it is also possible that further research will reveal that vouchers can be beneficial under certain conditions, such as under particular regulatory requirements or with certain funding levels. If that is the case, then liberal support for vouchers should track those research findings.

<sup>261</sup> Again, I acknowledge that my use of “the left” and “the right” here is an over-generalization; I use those categories to personify positions commonly (but by no means universally) held by persons of different political views.

<sup>262</sup> See *supra* subsection I.C.2.

<sup>263</sup> See *supra* subsection I.C.1.



a proper education to the child at issue.<sup>264</sup> That makes sense, inasmuch as the whole premise of the tuition reimbursement remedy is that a private school is providing a child with a disability the appropriate education that she was denied in a public setting.<sup>265</sup> *Andrew F.* is the perfect example of this principle. While Andrew failed to make appreciable educational progress for nearly three years in public school,<sup>266</sup> upon being enrolled at his private academy Andrew “did much better” both behaviorally and academically, due in large part to the private school’s adoption of an individualized behavioral intervention plan.<sup>267</sup>

But what would the right rule be if a child with a disability did *not* benefit from her private school placement—or worse yet, experienced regression? Lower courts have uniformly ruled that no reimbursement is required under those circumstances.<sup>268</sup> It would hardly be “appropriate,” after all, to impose a costly reimbursement order on a school district for tuition at a private school that has provided a child educational services no better (or even worse) than the school district itself.<sup>269</sup> To continue with the *Andrew F.* example, if Andrew had actually fared *worse* academically and behaviorally at his \$70,000 per year private academy than he had at his initial public school, why should the school district have to pay the bill when it could have provided a better, or at least equivalent, education at lower cost?

The natural implication of this is that the parental liberty interest in choosing a school for one’s child is not individually enough to justify school voucher programs. What we ultimately care about is whether a child *benefits* from the private school placement. And focusing on that bottom line brings up several ways in which support for vouchers on the right should be qualified.

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<sup>264</sup> See *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 997 (2017) (“Within months [of being placed in his private school], Andrew’s behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school.”); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 235 (2009) (noting the uncontested finding that T.A.’s “private-school placement was appropriate under IDEA”); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 11 (1993) (noting trial court’s finding that “Shannon had made ‘significant progress’ at [her private school] and that her reading comprehension had risen three grade levels in her three years at the school”); see also *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 374 (1985) (deciding only the question of appropriate relief without addressing whether the private school placement at issue was proper).

<sup>265</sup> See *supra* note 122-124 and accompanying text.

<sup>266</sup> *Andrew F.*, 137 S. Ct. at 996.

<sup>267</sup> *Id.* at 996-97.

<sup>268</sup> See cases cited *supra* note 20.

<sup>269</sup> The same is true if the public school is providing a free appropriate public education to begin with. See, e.g., *Kathleen H. v. Mass. Dep’t of Educ.*, 154 F.3d 8, 13 (1st Cir. 1998) (finding the district court’s denial of reimbursement appropriate on the grounds that the child “made encouraging progress in the regular classroom” under the IEP provided by his school district).

## 2. Some Qualifications On Voucher Support

Recognizing that the empirical, “what’s best for kids” argument is the sole persuasive ground for supporting school vouchers leads to three meaningful policy takeaways on the right.

First, as described above, even though several studies have shown some promising voucher outcomes in terms of educational attainment, student achievement, and parental satisfaction, the data is not so conclusive as to warrant widespread adoption.<sup>270</sup> Recent negative effects found in Louisiana,<sup>271</sup> Ohio,<sup>272</sup> and Indiana<sup>273</sup> are especially troubling, throwing cold water on proposals to implement vouchers on a broad or permanent scale. Vouchers, in other words, are still somewhere in the design and testing phase, not the launch phase. In that respect, the Trump Administration was wise to back away from early campaign promises to enact a sweeping \$110 billion school choice initiative and to propose a more modest \$250 million research grant initiative instead.<sup>274</sup>

Second and relatedly, conservatives should be unabashed in supporting efforts to gather more data about school vouchers. If, as I have suggested, the best reason to support vouchers is the belief that they improve educational opportunity for disadvantaged children, then supporters should embrace research that may prove their theory right. And if the data ends up revealing no positive effects (or even negative effects), then that should be the end of the matter—just as the left should give up its opposition if there emerges a strong empirical case in vouchers’ favor.

In some respects, voucher proponents have acted in accord with this pro-data position. President Trump’s proposal to spend \$250 million providing (and studying) vouchers under the Education Innovation and Research grant program is just one example; the conservative Thomas B. Fordham Institute has recently advocated for requiring all students who receive a voucher to take statewide assessments to gauge the effectiveness of participating private schools.<sup>275</sup> But there are other respects in which the right has taken a

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<sup>270</sup> See *supra* subsection IV.A.3.

<sup>271</sup> See MILLS ET AL., *supra* note 26.

<sup>272</sup> See FIGLIO & KARBOWNIK, *supra* note 26.

<sup>273</sup> See Dynarski & Nicols, *supra* note 239.

<sup>274</sup> See FISCAL YEAR 2018 BUDGET SUMMARY AND BACKGROUND INFORMATION, *supra* note 58, at 2-3; Kamisar, *supra* note 55.

<sup>275</sup> See THOMAS B. FORDHAM INST., PUBLIC ACCOUNTABILITY & PRIVATE-SCHOOL CHOICE 4 (2014), [http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/Public-Accountability-and-Private-School-Choice\\_o.pdf](http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/Public-Accountability-and-Private-School-Choice_o.pdf) [<https://perma.cc/TA82-LHKV>] (recommending that states instituting voucher programs “[r]equire that all students who receive a voucher . . . participate in state assessments” and “[m]andate public disclosure of those assessment results”); Chester E. Finn, Jr., *Jay and Rick: Get Real About Voucher-School Accountability*, THOMAS B. FORDHAM INST. (Jan. 27, 2014), <https://edexcellence.net/commentary/education-gadfly-daily/flypaper/jay-and-rick-get-real->

distinctly anti-data view. Most prominently, after the recent publication of studies showing negative voucher effects, the GOP-controlled Congress agreed as part of a 2017 budget deal to forbid the further use of random controlled studies in evaluating the federally funded Washington, D.C. voucher program.<sup>276</sup> To the extent conservative support for vouchers is premised on the idea that they help kids, efforts to derail evaluation of that very premise cannot be justified.

Third, putting the focus on whether private schools are helping students learn should also persuade conservatives to support private-school-level accountability measures as part of an ideal voucher program design,<sup>277</sup> something which several states and cities already do.<sup>278</sup> Louisiana, for example, requires all voucher students to take the same statewide standardized tests as their public school counterparts and publishes performance ratings for every private school with more than ten voucher users per grade.<sup>279</sup> Private schools with sufficiently low ratings are forbidden to enroll additional voucher students.<sup>280</sup>

These kinds of policies make eminent sense: if vouchers are desirable to the extent that they improve student outcomes, then policy makers should recognize that some private schools may fail at this basic objective—and if so,

about-voucher-school-accountability [<https://perma.cc/FL25-SEHB>] (“Our team believes that, in a country that judges student achievement and school effectiveness in the public sector primarily by test results . . . voucher-bearing kids should also take tests whose results can be compared with those of their public-school peers. The simplest way to do this, and certainly the way that allows the most direct comparisons, is for voucher students to take the *same* tests as their peers, which means the state tests . . .”).

<sup>276</sup> See Sparks, *supra* note 27 (“The 2017 omnibus spending bill . . . calls for [voucher programs] evaluations to use ‘an acceptable quasi-experimental research design . . . that does not use a control study group consisting of students who applied for but did not receive opportunity scholarships.’”).

<sup>277</sup> Unfortunately, this is not a consensus position among conservatives. See, e.g., Michael J. Petrilli, *The Problem With ‘Bad Voucher Schools Aren’t a Problem’*, EDUC. NEXT (Jan. 17, 2014), <https://www.educationnext.org/the-problem-with-bad-voucher-schools-arent-a-problem> [<https://perma.cc/TS4C-4TEH>] (identifying opponents to private school voucher accountability, including the Cato Institute, Friedman Foundation, and others).

<sup>278</sup> See THOMAS B. FORDHAM INST., *supra* note 275, at 5 (describing accountability requirements in Louisiana, Indiana, Ohio, Cleveland, and Milwaukee); see also SCHOOL CHOICE YEARBOOK, *supra* note 46, at 23 (“[T]he number of [school choice] programs that include academic transparency and accountability [provisions] has increased by more than 100 percent over the past five years.”).

<sup>279</sup> See News Release, La. Dep’t of Educ., Louisiana Scholarship Program Annual Report Shows Student Achievement Progress (Nov. 3, 2014), <https://www.louisianabelieves.com/newsroom/news-releases/2014/11/03/louisiana-scholarship-program-annual-report-shows-student-achievement-progress> [<https://perma.cc/5729-6VVX>] (“Students in the Scholarship Program take the same state tests as students in public schools. Participating schools . . . receive a Scholarship Cohort Index . . . calculated in the same way as a public school’s School Performance Score.”).

<sup>280</sup> See *id.* (“[S]chools which have participated in the program for at least two years . . . and achieve a proficiency rate less than 25 percent on state assessments are not permitted to enroll additional Scholarship students for the next year.”)

they should not continue to receive public funding. Indeed, withholding public voucher funding from private schools with a track record of failure is analogous to the sensible rule already discussed in the unilateral placement context—that tuition reimbursement is improper where a private school fails to provide an appropriate special education.<sup>281</sup>

Requiring private schools that take part in voucher programs to conduct (and be accountable for) assessments of participating students also strikes a sensible middle ground between concerns of program efficiency and harm to individual students. For those who worry that some individual children may be harmed by vouchers even if vouchers increase the welfare of disadvantaged children on the whole, an accountability regime that cuts off funding to failing private schools can serve as a strong check. Moreover, it is a less onerous check than requiring each parent seeking a voucher to prove on an individualized basis that her child will benefit from a private placement—the kind of judicial finding called for in the unilateral placement cases.

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The takeaways I have suggested may well be unpopular, as they target some long-held views on the left and right. But in another sense, they should be liberating. Clearing away the argumentative underbrush should allow us to see that because the voucher debate is just about the evidence the stakes are not as life or death as the rhetoric would suggest.<sup>282</sup> When the research base becomes sufficiently robust, one side of the voucher debate may come out on top and other on bottom. Yet if that is so, then whoever the losing side winds up being should at least be comforted that the reason they have lost is because that is what's best for kids.

Alternatively, it may be that the research evidence reveals no decisive victor in this battle; perhaps voucher programs have a statistically negligible effect on children in the aggregate. In that case, policymakers could reasonably argue that political capital should be saved for a policy intervention with more meaningful effects. Or it may be that further study shows voucher programs to be sensitive to program design. Students, it may be found, benefit more when vouchers are of a certain size or when state regulation of voucher-accepting private schools fits a certain profile. This, too, would be an important finding, as it would enable policymakers to legislate more effectively, supporting voucher programs that work and jettisoning ones that do not. But none of these policy conversations will be possible if we do

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<sup>281</sup> See cases cited *supra* note 20.

<sup>282</sup> See, e.g., *supra* note 3 (citing various articles that give dramatic left leaning critiques of the Trump administration's voucher proposals).

not have the data to begin with. We should start, then, by agreeing to gather the data in the first place.

### CONCLUSION

There are some debates about education in America that seem insoluble—the permissibility of prayer in public schools, whether school districts may use race as a factor in student assignment, the content of the curriculum (consider the evolution versus creationism debate), and so on. It often seems that there is no way out of these arguments because they bottom out on deeply held views regarding what normative values our society ought to prioritize.

Some would put the debate over private school vouchers in the same category. I have argued that this is wrong. One's support for vouchers should not depend on abstract arguments about resource draining, shared societal values, subordination, or parental liberty. It should turn on what the cold, hard data tells us about the impact of school vouchers on educational outcomes for disadvantaged students.

That, at least, is the lesson to be gathered from what may at first glance have seemed an unlikely source: a series of Supreme Court decisions regarding special education. The virtually universal support for publicly financed private school choice in that context illustrates that what we care about most really is (and ought to be) the provision of quality educational opportunities to disadvantaged kids. In that respect, voucher programs are no different than any other proposal aimed at improving educational opportunity—reforms such as class-size reduction<sup>283</sup> and universal pre-kindergarten.<sup>284</sup> They should be evaluated on their empirical merits.

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<sup>283</sup> See *supra* note 18 and accompanying text.

<sup>284</sup> See Mollie Ferrarello, *Does Pre-K work? Brookings Experts Weigh in on America's Early Childhood Education Debate*, BROOKINGS INST. (May 26, 2017), <https://www.brookings.edu/blog/brookings-now/2017/05/26/does-pre-k-work-brookings-experts-weigh-in-on-americas-early-childhood-education-debate> [<https://perma.cc/94GF-78Q4>] (discussing the research evidence on the effectiveness of pre-kindergarten programs).

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