

RESOLVING THE LACK OF PRIVATE-SCHOOL ACCOUNTABILITY IN STATE-FUNDED SPECIAL EDUCATION VOUCHER PROGRAMS

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ABSTRACT

The Indiana Supreme Court recently upheld the nation's most expansive school voucher program, once again propelling the national debate over the efficacy of both general education and special education voucher programs into the public spotlight. This decision marked a significant departure from a trend among state supreme courts in interpreting the legality of voucher programs under state constitutions' establishment clauses, subsequently prompting concern from voucher opponents that this decision will herald a new wave of voucher-favorable litigation that will further divert state funds from public to private—mostly religious—institutions. Several states have already proposed legislation to create or expand special education voucher programs following this decision. These proposed voucher programs provide millions of dollars in state funds to private schools, but the programs importantly lack basic accountability measures.

While most general education voucher programs have several accountability measures written into the language of their respective state statutes, the majority of special education voucher programs have relatively few or no accountability measures in place. Given the increase in proposals for special education voucher programs that would effectively divert state funding to private schools during a

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public-school funding crisis, states that propose legislation to introduce or expand special education voucher programs must be held accountable to ensure that use of the state's funding for these programs objectively benefits the individualized needs of students with disabilities. The specific and mandatory participation standards for private schools should include the requirement that these schools retain certified special education instructors and provide annual individualized assessments of student progress administered by these instructors to both the students' parents and to the state.

The undeniable future expansion of special education voucher programs necessitates the implementation of these proposed accountability measures. Requiring the inclusion of such accountability measures in the state statutes that authorize these programs will allow states to monitor the effectiveness of the programs, consequently allowing states to make well-informed decisions as to the expenditure of limited state funds and the implementation of new programs for students with disabilities. States currently proposing the creation or expansion of special education voucher programs must enact these proposed accountability measures now to prevent students with disabilities from receiving a subpar education and to prevent states from funding potentially ineffective educational programs during a public-school funding crisis.

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INTRODUCTION

In 2013, the Indiana Supreme Court upheld the nation's most expansive school voucher program,¹ subsequently reigniting the national debate over state-funded vouchers that allow both general education students and students with disabilities to attend private schools.² The decision marked a significant departure from a trend in state supreme courts' interpretations of school voucher programs under state constitutions' establishment clauses,³ as several state high courts have previously struck down school voucher programs based on a constitutional provision called a "Blaine Amendment" that also appears in Indiana's constitution.⁴ This constitutional provision prohibits the use of state money to fund private religious schools.⁵ The Indiana voucher program upheld in *Meredith v. Pence* is also unique because it is the first program to allow state funding of students' private-school tuition for middle-income families as well as low-income families.⁶ Additionally, this voucher program has the potential to fund more than half of the schoolchildren in Indiana under the program's broad eligibility requirements.⁷

1. *Meredith v. Pence*, 984 N.E.2d 1213, 1230-31 (Ind. 2013).

2. See, e.g., *Indiana School Voucher Program Enrollment More Than Doubled in Second Year*, HUFFINGTON POST (Nov. 20, 2012, 12:50 PM), http://www.huffingtonpost.com/2012/11/20/indiana-school-voucher-pr_n_2166293.html; *Indiana Supreme Court Upholds Nation's Broadest School Voucher Program*, WTHR.COM (Mar. 26, 2013, 10:42 AM), <http://www.wthr.com/story/21795803/indiana-supreme-court-upholds-broadest-school-voucher-program>; Peter Roff, *Education Reformers Should Look to Indiana*, U.S. NEWS & WORLD REP. (Apr. 1, 2013, 2:35 PM), <http://www.usnews.com/opinion/blogs/peter-roff/2013/04/01/school-vouchers-inject-market-based-reform-into-schools>.

3. See Martha McCarthy, *The Legal Status of School Vouchers: The Saga Continues*, 297 EDUC. L. REP. 655, 656 (2013).

4. See *infra* Subsection I.C.3 (emphasizing that state supreme courts have struck down school voucher programs based on language contained in the states' respective constitutions that prohibits state governments from funding private religious schools).

5. See *infra* Subsection I.C.4 (explaining that the Indiana Supreme Court upheld this school voucher program despite the existence of a Blaine Amendment within the state's constitution that prohibited the government from using state money to fund private schools, and emphasizing that the inclusion of this provision in states' constitutions was one of the pivotal factors in state supreme courts' earlier decisions to strike down the voucher programs).

6. IND. CODE § 20-51-4-2.5 (2014); see also Scott Elliott, *Indiana Could Be Top State for School Vouchers*, INDIANAPOLIS BUS. J. (Sept. 19, 2014), <http://www.ijb.com/articles/49600-indiana-could-be-top-state-for-school-vouchers>.

7. See *Meredith v. Pence*, 984 N.E.2d 1213, 1222-23 (Ind. 2013); McCarthy, *supra* note 3, at 665-66.

Therefore, the expansive nature of the Indiana program and the possibility that other state high courts will follow Indiana's lead in upholding similar programs⁸ despite this constitutional provision⁹ has prompted concern for the future of public education,¹⁰ especially considering the current public-school funding crisis.¹¹ In fact, several states have already proposed legislation to create or expand special education voucher programs following the *Meredith v. Pence* decision.¹² These proposals have sparked much controversy among voucher supporters and opponents.¹³ Moreover, a Florida judge

8. See McCarthy, *supra* note 3, at 670 (“If the majority of the states adopt large-scale voucher programs to fund education and courts follow the Indiana Supreme Court’s lead in endorsing such programs, this could launch a new chapter in the voucher narrative.”).

9. See *infra* Subsection I.C.1 (providing a short history of the Blaine Amendments and emphasizing that forty out of fifty states currently have a Blaine provision in their respective state constitutions).

10. See McCarthy, *supra* note 3, at 670; see also Tex. Am. Fed’n of Teachers, *Voucher Bill Encounters Strong Opposition in Texas Senate Committee Testimony*, TEX. AFT (Mar. 5, 2013), <http://www.texasaft.org/voucher-bill-encounters-strong-opposition-in-texas-senate-committee-testimony/> (discussing opposition to voucher programs based on concern for the future of public-school education, given that voucher programs divert state funds to pay the tuition of students attending private schools).

11. See, e.g., Valerie Strauss, *Florida Moves Toward School Voucher Expansion—But with No Accountability*, WASH. POST (Mar. 18, 2014), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/03/18/florida-moves-toward-school-voucher-expansion-but-with-no-accountability/> (“The money used to fund the [special education voucher] program would have gone to underfunded public schools, which are weakened by the diversion.[]It means our neighborhood public schools have less to offer students—teachers, sports, tutors, coaches, nurses, elective classes offered or materials they can afford for students.”); Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L. REV. 895, 900 (2011) (stating that an “increasing number of school districts—sometimes major urban districts, often poorer districts, and perhaps especially rural districts that simply cannot raise local property taxes to survive the next few especially lean years—are nearing the point where they may not be able to pay their bills and at the same time fulfill what state law requires of them regarding class size, length of school day or year, curricular coverage, and other such regulations” (footnote omitted)).

12. Florida proposed legislation to expand an existing special education voucher program in 2014. S.B. 850, 2014 Leg., Reg. Sess. (Fla. 2014). Wisconsin proposed legislation to create a new special education voucher program in 2013. S.B. 525, 101st Leg., Reg. Sess. (Wis. 2013).

13. See, e.g., Kathleen McGrory, *Florida Gov. Rick Scott Signs Voucher Expansion, Collegiate High Schools into Law*, TAMPA BAY TIMES (June 20, 2014, 1:06 PM), <http://www.tampabay.com/blogs/gradebook/florida-gov-rick-scott-signs-voucher-expansion-collegiate-high-schools/2185280>; Erin Richards, *New Voucher Plan for Special-Needs Students Revives Dispute*, J. SENTINEL (Jan. 20, 2014),

recently dismissed challenges to a new special education voucher program¹⁴ that provides \$18 million in state funds for students with disabilities¹⁵ and yet does not require educators at participating private schools to hold special education credentials¹⁶ or to provide student progress reports to the state.¹⁷

While most general education voucher programs have several accountability measures written into the language of their respective state statutes,¹⁸ the majority of special education voucher programs have relatively few or no accountability measures in place.¹⁹ There is currently a void in legal scholarship detailing ways in which newly proposed state-funded special education voucher programs might mandate more stringent accountability requirements for participating private schools.²⁰ Given the increase in proposals for special education voucher programs²¹ that would effectively divert state funding to private schools during a public-school funding crisis,²² states that propose legislation to introduce or expand special education voucher programs must be held accountable to ensure that use of the state's funding for these programs objectively benefits the individualized needs of students with disabilities.²³

This Note not only addresses the issue of private-school accountability, but also proposes ways in which this problem should

<http://www.jsonline.com/news/education/gop-legislators-to-revive-proposed-vouchers-for-special-needs-students-b99187865z1-241190261.html>.

14. See Kathleen McGrory, *Judge Dismisses Florida School Voucher Lawsuit*, MIAMI HERALD (Sept. 24, 2014, 6:20 PM), <http://www.miamiherald.com/news/local/education/article2233578.html>.

15. See McGrory, *supra* note 13.

16. See Strauss, *supra* note 11.

17. See *id.*

18. See *School Voucher Laws: State-By-State Comparison*, NCSL, <http://www.ncsl.org/research/education/voucher-law-comparison.aspx> (last visited Feb. 17, 2015). Most general education voucher programs require that participating private schools administer state assessments to voucher recipients and implement teacher evaluations. *Id.*

19. See *infra* Part II (categorizing current special education school voucher laws into three groups: programs with no state accountability measures in place, programs with one accountability measure in place, and programs with more than one accountability measure in place).

20. See *infra* Part III (providing a concrete solution that would increase accountability for participating private schools based on two specifically articulated accountability measures).

21. See *supra* note 12 and accompanying text.

22. See *supra* note 11 and accompanying text (providing several sources that discuss the current public-school funding crisis).

23. See *infra* Part III.

be remedied by outlining specific and mandatory participation standards for private schools.²⁴ Those private schools wishing to participate in special education voucher programs must (1) retain certified special education instructors;²⁵ and (2) provide annual individualized assessments of student progress administered by these certified special education instructors to both the students' parents and to the state.²⁶ These proposed requirements should apply to both parochial and secular private schools participating in special education voucher programs.²⁷ Requiring accountability for newly proposed state-funded special education voucher programs serves the dual purpose of ensuring that state dollars are spent in an objectively beneficial way and guaranteeing that students with disabilities who attend private schools receive a high standard of education.²⁸

Part I defines special education voucher programs and discusses the policy debate regarding these programs.²⁹ Part I also examines the current national status of state-funded school voucher programs and provides a brief legal history detailing the constitutional challenges to these programs at both the federal and state level.³⁰ Part II outlines accountability measures for general education voucher programs and then categorizes current special education school voucher laws into three groups: programs with no state accountability measures in place, programs with one accountability measure in place, and programs with more than one accountability measure in place.³¹ Finally, Part III acknowledges the potential for significant increases in special education voucher programs and proposes a solution to the accountability predicament by outlining specific and mandatory participation standards for private schools that would provide a practicable and effective way to ensure accountability.³²

24. See *infra* Section III.B (outlining two basic accountability requirements that all newly proposed special education voucher programs should implement).

25. See *infra* Subsection III.B.1.

26. See *infra* Subsection III.B.2.

27. See *infra* Part III. While both parochial and secular private schools participate in school voucher programs, most voucher litigation stems from states' funding of parochial private schools. See *infra* note 139 and accompanying text.

28. See *infra* Sections III.B-C.

29. See *infra* Part I.

30. See *infra* Part I.

31. See *infra* Part II.

32. See *infra* Part III.

I. SPECIAL EDUCATION VOUCHERS: POLICY DEBATE AND LEGAL HISTORY

Special education voucher programs allow parents to receive state funds that will enable them to send their child with disabilities to a private school.³³ While voucher proponents advocate for parents' ability to choose the requisite educational institution for their child with disabilities,³⁴ voucher opponents cite a number of problems with these voucher programs, focusing on the diversion of funds from public schools,³⁵ the lack of accountability measures for these programs,³⁶ and the fact that the Individuals with Disabilities Education Act (IDEA) already provides an effective avenue through which parents may attain private placement for their child.³⁷ Despite this opposition, special education voucher programs have survived Establishment Clause challenges on both the federal and state level,³⁸ which has led to an increase in proposals for implementing these programs,³⁹ thus illustrating the need to mandate more stringent accountability measures.⁴⁰

A. Defining Special Education Voucher Programs

The debate over school voucher programs stems from the transfer of students and state funds from public to private—mostly religious—schools.⁴¹ The National Conference of State Legislatures

33. See *infra* Sections I.A-B (defining special education voucher programs and providing statistics to illustrate the differences between public and private schools regarding students' rights under the IDEA).

34. See *infra* Section I.A (explaining the reasons for which voucher supporters consider special education vouchers an ideal way for parents to remove students with disabilities from the public-school system without resorting to potentially undesirable IDEA procedural requirements).

35. See *infra* Section I.A (presenting several arguments that voucher opponents commonly bring forth with regard to special education vouchers, the most common being that these programs divert much-needed funds from public-school systems).

36. See *infra* Part II (dividing the ten existing special education voucher programs into three groups based on the presence or absence of accountability measures in each program's authorizing state statute).

37. See *infra* Subsection I.B.2 (outlining special education voucher opponents' two main criticisms stemming from IDEA provisions).

38. See *infra* Section I.C.

39. See *supra* note 12 and accompanying text.

40. See *infra* Part III.

41. See *infra* note 46 and accompanying text (providing percentages for the number of sectarian and nonsectarian private schools).

defines school vouchers as “state-funded scholarships that pay for students to attend private school rather than public school.”⁴² As a subset of school voucher programs, special education voucher programs provide state funds to parents of students with disabilities in order to pay for those students’ private-school tuition.⁴³ As for the number of students enrolled in public and private schools, 86% of children in the United States attend public schools while 11% of children attend private schools.⁴⁴ Three percent (3%) of students are homeschooled.⁴⁵ Additionally, 77% of these private schools are sectarian institutions while 23% are nonsectarian.⁴⁶ As for students enrolled in voucher programs, the number of participants steadily increases each year, with record numbers of enrollment for the 2013–2014 school year.⁴⁷ More than 308,000 students nationwide participated in private-school choice programs during the 2013–2014 school year, with a total of 115,580 students participating in voucher programs.⁴⁸ Of these 115,580 students, 36,424 students with disabilities were enrolled in ten special education voucher programs,⁴⁹ and the total amount of money expended in the 2013–

42. *School Vouchers*, NCSL, <http://www.ncsl.org/research/education/school-choice-vouchers.aspx> (last visited Feb. 17, 2015).

43. See *infra* Part II (categorizing and describing the ten special education voucher programs currently in place).

44. *Percentage Distribution of Students Ages 5 Through 17 Attending Kindergarten Through 12th Grade*, NAT’L CTR. FOR EDUC. STAT. (2010), http://nces.ed.gov/programs/digest/d11/tables/dt11_041.asp.

45. *Id.*

46. INST. OF EDUC. SCIS., NAT’L CTR. FOR EDUC. STAT. & U.S. DEP’T OF EDUC., *THE CONDITION OF EDUCATION 2012* (NCES 2012-045), at 139 (2012), <http://nces.ed.gov/pubs2012/2012045.pdf>.

47. Betsy Devos, *Kansas Becomes 19th School Choice State, 40th Program*, AM. FED’N FOR CHILDREN (Apr. 22, 2014, 9:33 AM), <http://www.federationforchildren.org/kansas-becomes-19th-school-choice-state-40th-program/> (stating that “[t]he [2013–2014] school year produced the largest single year increase in school choice enrollment nationwide”).

48. *Facts*, AM. FED’N FOR CHILDREN, ED CHOICE 101, <http://www.federationforchildren.org/ed-choice-101/facts/> (last visited Feb. 17, 2015). Of the 308,000 students, 115,580 students participated in voucher programs, 192,219 students participated in scholarship tax-credit programs, and 761 students participated in education savings-account programs. *Id.*

49. MATT FRENDEWEY ET AL., *SCHOOL CHOICE YEARBOOK 2013–2014*, at 15 (2014), http://allianceforschoolchoice.org/wp-content/uploads/2014/01/AFC_2013-14_Yearbook.pdf?758ca27. This number is the sum of each program’s total number of participating students, but does not include data from Mississippi’s Speech-Language Therapy Scholarship Program or North Carolina’s Children with Disabilities Scholarship Grants because these two programs began in 2013, and therefore no data is yet available for these programs. *Id.*

2014 school year for these special education voucher programs was \$275 million.⁵⁰ Given the steady increase in special education voucher programs and the millions of dollars expended each year on these programs, it is unsurprising that proponents and opponents engage in a heated debate regarding the efficacy of special education vouchers.⁵¹

Proponents of these programs argue that parental choice is critical in determining the best placement for a student with disabilities.⁵² Both the United States Supreme Court and state high courts have also justified these programs due to the importance of parental choice,⁵³ though this choice is both uninformed and potentially detrimental for special education students.⁵⁴ Supporters of special education voucher programs also argue that these programs provide increased opportunities for placement based on the individualized needs of a student with disabilities.⁵⁵ Finally, proponents emphasize that special education voucher programs are an effective way to avoid costly, time-consuming, and emotionally harrowing litigation procedures under the IDEA when parents wish to challenge the effectiveness of their student's education.⁵⁶

On the other hand, voucher opponents bring forth several critiques of these programs.⁵⁷ Voucher opponents argue that the use of state money to fund private schools violates state constitutional provisions due to the fact that many of these programs divert state

50. See *id.* at 13.

51. See *supra* note 2 and accompanying text.

52. See Jay P. Greene & Stuart Buck, *The Case for Special Education Vouchers*, 10 EDUC. NEXT 37, 41 (2010) (“The empirical research shows that when parents are empowered with vouchers, they are actually more likely to obtain necessary services.”).

53. See *infra* Subsections I.C.2-4.

54. See *infra* Part III.

55. See Greene & Buck, *supra* note 52, at 39 (stating that “one can anticipate an inexorable growth in the size and popularity of these programs” once parents realize that the programs provide increased opportunities for students with disabilities).

56. See *id.* (“But unlike the procedures established under IDEA, school-voucher laws give parents the right to select a private placement without having to convince public school officials of the need for such services, to say nothing of the legal costs of proving to a hearing officer, or a state court judge, that the decision of the school district was in error.”).

57. See *id.* (“In addition to legal challenges, opponents of special education vouchers are beginning to advance political and educational arguments against the idea as new programs are being considered in states such as Texas, Pennsylvania, North Carolina, and South Carolina, and the existing Ohio program is poised to expand.”).

funds to private religious schools.⁵⁸ Opponents further criticize the lack of accountability for participating private schools due to the absence of standardized testing procedures for students with disabilities⁵⁹ and to the fact that participating private schools do not require that certified special education teachers implement the special education programs.⁶⁰ Finally, opponents bring forth two arguments specifically related to students' rights already in place under the IDEA, thus asserting that there is no need for special education voucher programs that divert funding from public schools to private institutions.⁶¹ However, despite these criticisms of special education voucher programs, the number of voucher participants steadily increases each year.⁶² Additionally, several proposals for new programs or expansion of existing programs have recently emerged.⁶³ Thus, notwithstanding these concerns regarding the existing voucher programs, voucher proponents currently appear to control this debate.⁶⁴

B. Special Education Voucher Programs and the IDEA

Since the availability and efficacy of the IDEA provisions constitute prominent points of contention on both sides of the debate regarding school voucher programs,⁶⁵ it is first necessary to understand the general framework of this federal law⁶⁶ before outlining voucher opponents' two main arguments concerning

58. See *infra* Subsection I.C.3 (examining state high courts' decisions regarding constitutional challenges to school voucher programs).

59. See, e.g., Greene & Buck, *supra* note 52, at 42 (addressing the National Education Association's concerns regarding the lack of state assessment administration to students with disabilities enrolled in voucher programs).

60. See *infra* Subsection III.B.1 (consolidating data on whether the ten existing special education voucher programs require that instructors at the participating private schools have special education credentials).

61. See *infra* Subsection I.B.2 (analyzing the two arguments that school vouchers are unnecessary because the IDEA is an avenue through which students with disabilities have a right to private placement, and that utilizing special education vouchers requires that parents waive rights and procedural protections under the IDEA).

62. See *supra* note 47 and accompanying text.

63. See *supra* note 12 and accompanying text.

64. See *infra* Section III.A (showing an increase in recent proposals for the creation or expansion of special education voucher programs and charting the yearly increase in students with disabilities who enroll in these programs).

65. See *infra* Subsections I.B.1-2.

66. See *infra* Subsection I.B.1.

students' rights under the IDEA.⁶⁷ Given that thousands of students with disabilities enroll in special education voucher programs that cost the state hundreds of millions of dollars each year,⁶⁸ opponents cite the IDEA provisions already in place to show that these funds are wastefully spent.⁶⁹ On the other hand, proponents expound the necessity of this expense due to insurmountable problems with these IDEA provisions.⁷⁰

1. *Public v. Private Schools: Students' Rights Under the IDEA*

Under federal law, students with disabilities receive educational rights through the IDEA.⁷¹ The IDEA contains four main provisions: (1) every child has a right to a Free and Appropriate Public Education (FAPE),⁷² which can occur in either a public or private setting;⁷³ (2) the school district must design an Individualized Education Plan (IEP) for each child with a disability⁷⁴ and must design this IEP in consultation with the child's parents;⁷⁵ (3) the child's education should occur in the "[l]east restrictive environment";⁷⁶ and (4) parents can challenge the adequacy of the

67. See *infra* Subsection I.B.2.

68. See *supra* notes 49-50 and accompanying text.

69. See *infra* Subsection I.B.2.

70. See *infra* Subsection I.B.2.

71. 20 U.S.C. §§ 1400-1482 (2012). For a discussion of the IDEA as well as private placement of students under state special education laws, see Stuart Buck, *Special Education Vouchers are Beneficial: A Response to Hensel*, 41 J.L. & EDUC. 651, 653 (2012). Students with disabilities are also protected under § 504, which prevents schools from discriminating against students with disabilities. 29 U.S.C. § 794(a) (2012) (mandating that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance").

72. 20 U.S.C. § 1412(a)(1)(A).

73. *Id.* § 1412(a)(5)(A) ("To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

74. *Id.* § 1414(d)(1)(A)(i) (outlining the requirements for developing and reviewing a student's IEP).

75. *Id.* § 1414(d)(1)(B)(i).

76. *Id.* § 1412(a)(5).

child's education by requesting a due process hearing⁷⁷ with an independent hearing officer.⁷⁸ Parents have the right to appeal the decisions of the independent hearing officer to state educational agencies⁷⁹ and then may appeal again to the state or federal district courts.⁸⁰

As an alternative to these IDEA procedural remedies, state statutes that authorize special education voucher programs allow students with active IEPs who are currently enrolled in public schools to use the state's funds in order to attend private schools.⁸¹ Therefore, parents may remove their child from a public school without going through the process of challenging the adequacy of the child's education through the IDEA procedures and with the assurance that the state will pay for the child's private-school tuition through the voucher program.⁸² However, there are few or no accountability measures in place for ensuring that a student's IEP is carried out effectively once the parent elects to enroll the student in a voucher program and sends the student to a private school, which is one of the main criticisms of these voucher programs.⁸³

77. *Id.* § 1415(f)(1)(A) (mandating that "the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency").

78. *Id.* § 1415(f)(3)(A)(i)(I)-(II) (stating that the hearing officer cannot have any connection to the state or local governmental entities that oversee the child's education and cannot have any conflicts of interest).

79. *Id.* § 1415(g)(1) (stating that "any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency").

80. *Id.* § 1415(i)(2)(A) (providing that an aggrieved party "shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy").

81. See Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291, 292 (2010) ("Over the last several years, an increasing number of state legislatures have actively entered this arena [of reforming special education laws], proposing or passing laws that give children with disabilities public money to attend a private school.").

82. See Buck, *supra* note 71, at 655 ("IDEA private placements are much more restrictive than special education vouchers, which are available at the parents' wishes without the further need to seek anyone else's permission.").

83. See *infra* Part II (categorizing the ten special education voucher programs currently in place based on the presence or absence of accountability measures).

2. Criticisms of Special Education Voucher Programs Stemming from IDEA Provisions

Voucher opponents further outline two criticisms of special education vouchers that specifically pertain to IDEA provisions: (1) school vouchers are unnecessary because the IDEA is an avenue through which students with disabilities have a right to private placement;⁸⁴ and (2) utilizing special education vouchers requires parents to waive rights and procedural protections under the IDEA.⁸⁵ As a response to the first main criticism, the complex procedures involved under the IDEA to obtain a private placement raise several issues as to the effective placement of students with disabilities.⁸⁶ For instance, there is a low probability that parents will win the case, as school districts win a majority of IDEA challenges.⁸⁷

Additionally, the expense,⁸⁸ the time,⁸⁹ and—most importantly—the psychological and emotional toll on the child and the child’s family involved in litigation procedures makes legal challenges through the IDEA not only undesirable, but altogether impracticable for most parents.⁹⁰ Even if the parents do manage to win a legal challenge in order to obtain a private placement, the United States Supreme Court ruled that parents prevailing in the IDEA challenge are responsible for paying expert fees.⁹¹ One such

84. See Greene & Buck, *supra* note 52, at 39-40.

85. See Hensel, *supra* note 81, at 330 (“In exchange for securing a set amount for private schooling, students with disabilities waive their right to seek full tuition and fees when school districts fail to meet their obligations under the IDEA.”).

86. See Buck, *supra* note 71, at 654-55.

87. See Marcus A. Winters, *The Promise of Special Education Vouchers*, 9 NAT’L AFF. 146, 153 (2011) (“[W]hen school districts challenge orders to pay for a disabled child’s education at a private school, they usually win: According to research by Thomas Mayes and Perry Zirkel, school districts in fact triumph in about 63% of such cases.”).

88. See *id.* (emphasizing that “[m]any parents are unfamiliar with the legal process and can’t afford legal counsel; they are thus at a disadvantage when suing deep-pocketed school districts and their teams of lawyers”).

89. See *id.* at 154 (“Perhaps the biggest disadvantage faced by parents who would sue for private placement is time. Court challenges to a child’s IEP can take months and sometimes years to complete. During that time, the child remains in a public school that his parents believe is not meeting his needs. Delay doesn’t harm the school district, but it can be detrimental to a growing child.”).

90. See Buck, *supra* note 71, at 655.

91. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006) (holding that parents who prevailed in obtaining tuition reimbursement

legal challenge to the adequacy of a student's IEP lasted over seven years and cost the student's parents \$29,350 for the expert's services in the IDEA challenge.⁹² Furthermore, the system in place under the IDEA creates an adversarial system in which parents and educators work against as opposed to in coordination with each other.⁹³ Thus, opponents argue that the IDEA may not actually be a desirable avenue through which to challenge the effectiveness of a student's education.⁹⁴

The second main criticism of special education voucher programs specifically regarding the IDEA is the fact that a parent must waive the rights and procedural protections under the IDEA in order to utilize special education vouchers.⁹⁵ Additionally, although Section 504's antidiscrimination mandate applies to both secular and religious schools that receive federal funding, those private schools that participate in voucher programs are not included within this coverage when financed exclusively through state funds.⁹⁶ In response to these criticisms, voucher supporters point out that these legal rights under the IDEA are not irreversibly waived: Should parents decide that private placement does not work for their student, returning to the public-school system effectively and effortlessly reestablishes all of the child's rights under the IDEA.⁹⁷

Moreover, all parents who decide to send their children to private schools—whether through a voucher program or not—

for their son's private placement under the IDEA still had to pay tens of thousands of dollars for an expert's services in the litigation).

92. *Id.* at 294, 304; *see also* Greene & Buck, *supra* note 52, at 38.

93. *See* Elizabeth Adamo Usman, *Reality over Ideology: A Practical View of Special Needs Voucher Programs*, 42 *CAP. U. L. REV.* 53, 93 (2014) ("The special education system currently set up by the IDEA is, in essence, an adversarial system that pits parents and educators at opposite ends of a negotiating table with separate goals.").

94. *See supra* notes 87-90 and accompanying text.

95. *See* Hensel, *supra* note 81, at 330 ("The problematic absence of meaningful accountability measures is exacerbated by the waiver of legal rights required in order for students with disabilities to participate in special needs vouchers programs.").

96. 29 U.S.C. § 794(a) (2012) (mandating that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"). For a detailed discussion of Section 504 as it pertains to religious schools that receive federal funding, *see* Lynn M. Daggett, "Minor Adjustments" and Other Not-So-Minor Obligations: Section 504, Private Religious K-12 Schools, and Students with Disabilities, 52 *U. LOUISVILLE L. REV.* 301 (2014).

97. *See* Buck, *supra* note 71, at 659.

inevitably waive the ability to utilize public-school resources, but this does not mean that those resources will not be available should the student transfer to a public school.⁹⁸ Therefore, proponents argue that vouchers offer another more practicable option for parents of students with disabilities, an option that does not require that the parents resort to litigation should their student's educational needs fail to be met.⁹⁹ Proponents again emphasize that the IDEA's procedural protections may not be desirable because they can be costly, time-consuming, and emotionally draining for both the student and the student's family.¹⁰⁰ Moreover, these procedural "protections" may actually serve as barriers: While the exhaustion requirement exists to ensure that parents and schools make a serious effort to reconcile differences without the aid of the court system,¹⁰¹ the IDEA's procedural requirement that parents first exhaust administrative remedies in certain situations may lead to a court's outright rejection of parents' legal claims.¹⁰²

Despite these criticisms, however, special education voucher programs continue to grow in both the number of programs and the number of participants each scholastic year.¹⁰³ The growth in these programs means that increased numbers of students with disabilities will unwittingly forfeit their rights under the IDEA.¹⁰⁴ This not only places these students at a significant disadvantage, but also destroys the "parental choice" aspect that courts tout as the defining justification for these programs because parents do not realize that

98. See *id.* at 659-60.

99. See *id.* at 658-60 (stating that "without vouchers, the only thing that could be done is to pursue an expensive and time-consuming legal process; with vouchers, the parents would have the option of finding better services somewhere else or returning to the traditional public school" (footnote omitted)).

100. See *supra* notes 87-90 and accompanying text.

101. See Peter J. Maher, *Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the IDEA*, 44 CONN. L. REV. 259, 265-66 (2011).

102. See Kent Sparks, Comment, *Requiring Administrative Exhaustion While the School Shuts Down: An Insurmountable Barrier to Seeking IDEA Enforcement*, 2014 MICH. ST. L. REV. 1161, 1165 (2014) ("[P]arents seeking to temporarily prevent a school from closing due to an alleged IDEA violation face an insurmountable obstacle by being required to first exhaust the administrative remedies.").

103. See *infra* Section III.A (outlining recent proposals for the creation or expansion of special education voucher programs and charting the steady increase in students with disabilities who enroll in these programs each year).

104. See *supra* note 85 and accompanying text.

they are forfeiting their child's IDEA protections by enrolling their child in a voucher program.¹⁰⁵ This trend illustrates the need for more stringent accountability requirements for special education voucher programs,¹⁰⁶ especially since these programs also continue to survive challenges on both the federal and state level.¹⁰⁷

C. Surmounting Federal and State Constitutional Challenges

Outlining the policy debate regarding school vouchers makes clear the reasons for which opponents challenge these vouchers on both the federal and state level.¹⁰⁸ When presented with a challenge to the legality of a school voucher program, the United States Supreme Court held that such a program does not violate the Establishment Clause,¹⁰⁹ thus allowing states to provide voucher programs but not requiring states to do so.¹¹⁰ Therefore, the legality of these programs fell to the states and state courts' interpretation of their respective constitutional provisions.¹¹¹ State high courts predominantly struck down school voucher programs due to Blaine Amendments contained in states' constitutions that prevent the state government from funding private religious schools.¹¹² However, the recent *Meredith v. Pence* decision marks a departure in this trend, given that the Indiana Supreme Court upheld a voucher program despite the fact that Indiana's constitution also contains this Blaine provision.¹¹³ Contemporary voucher litigation predominantly comprises these arguments that voucher programs violate the Establishment Clause or violate Blaine Amendments found in state constitutions.¹¹⁴

105. See *infra* Section I.C.

106. See *infra* Part III (outlining two proposed requirements for current and future special education voucher programs).

107. See *infra* Section I.C.

108. See *supra* Section I.B.

109. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002).

110. See *McCarthy*, *supra* note 3, at 659-60.

111. See *id.* ("Most challenges to voucher programs under state constitutions have alleged violations of: (a) provisions barring the use of public funds for religious purposes, (b) provisions prohibiting compelled support of religious institutions, and/or (c) education clauses placing a duty on the legislature to provide for a uniform system of education in the state.").

112. See *infra* Subsection I.C.3.

113. See *infra* Subsection I.C.4.

114. See *infra* Subsection I.C.1.

1. *The Establishment Clause and the Waning Influence of the Blaine Amendments*

Voucher opponents contest school voucher programs by bringing forth arguments that these programs violate the Establishment Clause¹¹⁵ as well as violate Blaine Amendments in states' constitutions.¹¹⁶ The Establishment Clause broadly guarantees the separation of church and state.¹¹⁷ Forty states¹¹⁸ currently have Blaine provisions in their constitutions that prohibit the state government from providing money to private religious schools.¹¹⁹ Therefore, though the Establishment Clause may not bar a voucher program, the program may violate a state's Blaine provision.¹²⁰ These Blaine provisions originally began as a proposed amendment to the

115. See *supra* note 109 and accompanying text.

116. See *supra* note 111 and accompanying text.

117. U.S. CONST. amend. I.

118. The following is a list of the forty states and their respective Blaine provisions: (1) ALA. CONST. art. XIV, § 263; (2) ALASKA CONST. art. VII, § 1; (3) ARIZ. CONST. art. II, § 12; *id.* art. IX, § 10; (4) ARK. CONST. art. XIV, § 2; (5) CAL. CONST. art. IX, §§ 8, 9(f); *id.* art. XVI, § 5; (6) COLO. CONST. art. IX, § 7; (7) DEL. CONST. art. X, § 3; (8) FLA. CONST. art. I, § 3; (9) GA. CONST. art. I, § 2, para. 7; (10) HAW. CONST. art. X, § 1; (11) IDAHO CONST. art. IX, §§ 5, 6; (12) ILL. CONST. art. X, § 3; (13) IND. CONST. art. 1, § 6; (14) KAN. CONST. art. VI, § 6; (15) KY. CONST. § 189; (16) MASS. CONST. amends. XVIII, XLVIII; (17) MICH. CONST. art. I, § 4; *id.* art. VIII, § 2; (18) MINN. CONST. art. I, § 16; (19) MISS. CONST. art. IV, § 66; *id.* art. VIII, § 208; (20) MO. CONST. art. I, § 7; *id.* art. IX, § 8; (21) MONT. CONST. art. X, § 6; (22) NEB. CONST. art. VII, § 11; (23) NEV. CONST. art. XI, §§ 2, 9, 10; (24) N.H. CONST. pt. II, art. LXXXIII; (25) N.M. CONST. art. XII, § 3; *id.* art. XXI, § 4; (26) N.Y. CONST. art. XI, § 3; (27) N.D. CONST. art. VIII, §§ 1, 5; (28) OHIO CONST. art. VI, § 2; (29) OKLA. CONST. art. I, § 5; *id.* art. II, § 5; *id.* art. XI, § 5; (30) OR. CONST. art. I, § 5; (31) PA. CONST. art. III, §§ 15, 29; (32) S.C. CONST. art. XI, § 4; (33) S.D. CONST. art. VI, § 3; *id.* art. VIII, § 16; *id.* art. XXII, § 4; (34) TEX. CONST. art. I, § 7; *id.* art. VII, § 5(c); (35) UTAH CONST. art. I, § 4; *id.* art. III, § 4; *id.* art. X, §§ 1, 9; (36) VA. CONST. art. IV, § 16; *id.* art. VIII, §§ 10, 11; (37) WASH. CONST. art. I, § 11; *id.* art. IX, § 4; *id.* art. XXVI, § 4; (38) W. VA. CONST. art. III, § 15; (39) WIS. CONST. art. I, § 18; *id.* art. X, §§ 3, 6; (40) WYO. CONST. art. I, § 19; *id.* art. III, § 36; *id.* art. VII, § 8; *id.* art. XXI, § 28.

119. See generally Meir Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 111, 115 (2011) (providing a history of the Blaine Amendments and analyzing recent constitutional challenges to Blaine Amendments in school voucher cases).

120. See *id.*

federal Constitution¹²¹ that ultimately failed.¹²² Maine Congressman James Blaine introduced a National Blaine Amendment on December 14, 1875.¹²³ Blaine proposed this amendment to prohibit the federal government from providing funds to Catholic schools¹²⁴ in hopes of securing the 1876 presidential nomination.¹²⁵ While this amendment ultimately failed on the federal level, fourteen states immediately adopted some form of the Blaine Amendment to prevent the use of state funds to support religious schools,¹²⁶ and today forty states have various forms of the Blaine Amendment in their state constitutions.¹²⁷

Some voucher opponents believe that the Blaine provisions serve as the “most prominent weapon” for prohibiting the transfer of state funds to private schools.¹²⁸ However, scholars suggest that the Blaine Amendments no longer serve any significant purpose in deterring states from providing funds to private-school programs,¹²⁹ and the *Meredith v. Pence* decision appears to support this contention.¹³⁰ The Blaine Amendments are especially significant due to a United States Supreme Court decision that upheld the legality of voucher programs on the federal level.¹³¹

121. See Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL’Y 551, 556 (2003).

122. See *id.* at 573 (describing how the vote in the Senate lacked the necessary two-thirds majority for adoption of the proposed Blaine Amendment on the federal level).

123. See *id.* at 556.

124. See Clint Bolick, *The Constitutional Parameters of School Choice*, 2008 BYU L. REV. 335, 342 (2008).

125. See DeForrest, *supra* note 121, at 557.

126. See Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 673 (1998).

127. See *supra* note 118 and accompanying text.

128. See, e.g., Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 N.Y.U. ANN. SURV. AM. L. 413, 414 (2003).

129. See Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 298 (2008) (stating that “the Blaine Amendment is relatively insignificant—both as a constitutional event and as a tool for analyzing the no-funding amendments contained in the various state constitutions.”); see also Katz, *supra* note 119, at 115 (emphasizing that “[d]espite a number of recent constitutional challenges to the Blaine Amendments, most courts have attempted not to decide the issue, likely not wanting to call into question the constitutional provisions in forty states, many of which are well over one hundred years old”).

130. See *infra* Subsection I.C.4.

131. See *infra* Subsection I.C.2.

2. Federal Consideration of School Voucher Programs

School voucher programs survived a federal constitutional challenge in *Zelman v. Simmons-Harris*.¹³² While this case was not specific to special education vouchers, opponents challenged both general education and special education vouchers using the same arguments because state funds paid the private-school tuition of students in both programs.¹³³ In *Zelman*, Cleveland's voucher program allowed low-income students to use public funds for private—mostly religious—schools.¹³⁴ The Supreme Court held that the school voucher program did not violate the Establishment Clause.¹³⁵

The Court stated that the challenged program was one of “true private choice” in that it gives funds to *parents*, who may then choose where to send their children.¹³⁶ Because the funds did not go directly to private religious schools, but to parents, the Court stated that the voucher program and the benefits it conferred to private schools were “neutral in all respects toward religion.”¹³⁷ The Court thus placed a heavy emphasis on parental choice as the defining justification for the voucher program.¹³⁸ This 5–4 decision generated a heated debate, particularly because over 96% of the families chose

132. 536 U.S. 639, 662-63 (2002).

133. See generally McCarthy, *supra* note 3 (outlining the legal challenges to school voucher programs regardless of the program's designation as a special education or general education voucher program).

134. See *Zelman*, 536 U.S. at 647 (stating that forty-six of the fifty-six private schools that participated in this school voucher program were religious institutions).

135. See *id.* at 662-63 (“[The voucher program] permits . . . individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.”).

136. See *id.* at 653 (“We believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional.”).

137. See *id.* (emphasizing that the challenged school voucher program allows for the participation of both sectarian and nonsectarian schools and stating that public schools may actually benefit financially if they choose to participate).

138. See *id.* at 652 (“Because the program ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between government and religion was broken, and the Establishment Clause was not implicated.”).

to use the state funding for religious schools.¹³⁹ In sum, given that *Zelman* upheld voucher programs on the federal level, the legality of voucher programs has been largely left to the states, subject to state high courts' interpretations of their respective constitutional provisions.¹⁴⁰

3. *State Consideration of School Voucher Programs*

Though the United States Supreme Court upheld school voucher programs on the federal level, state high courts have predominantly held that these programs violate state constitutional provisions that prohibit the use of state funds for private schools.¹⁴¹ In 1999, the Vermont Supreme Court struck down a school voucher program that allowed tuition reimbursement to sectarian schools.¹⁴² The Blaine provision in Vermont's constitution provides that "no person ought to, or of right can be compelled to . . . support any place of worship . . . contrary to the dictates of conscience."¹⁴³ The Vermont Supreme Court struck down the voucher program due to this Blaine provision because the voucher program "authorize[d] tuition reimbursement to sectarian schools without appropriate restrictions."¹⁴⁴ Similarly, in 2004, a Florida court struck down a voucher program¹⁴⁵ due to a constitutional provision that prohibits state aid for private education.¹⁴⁶ The court stated that the voucher program violated this Blaine provision because the program provided

139. See McCarthy, *supra* note 3, at 658. *But see Zelman*, 536 U.S. at 659 ("The 96% figure . . . discounts entirely (1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial assistance.").

140. See McCarthy, *supra* note 3, at 659-60.

141. See *supra* Subsection I.C.2.

142. See *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 563-64 (Vt. 1999).

143. See *id.* at 549 (quoting VT. CONST. ch. 1, art. III).

144. *Chittenden Town Sch. Dist.*, 738 A.2d at 564.

145. See *Bush v. Holmes*, 886 So. 2d 340, 366 (Fla. Dist. Ct. App. 2004) (en banc).

146. See *id.* at 352 ("The constitutional prohibition in the no-aid provision involves three elements: (1) the prohibited state action must involve the use of state tax revenues; (2) the prohibited use of state revenues is broadly defined, in that state revenues cannot be used 'directly or indirectly in aid of' the prohibited beneficiaries; and (3) the prohibited beneficiaries of the use of state revenues are 'any church, sect or religious denomination' or 'any sectarian institution.'").

state funds to religious schools.¹⁴⁷ In 2009, the Arizona Supreme Court struck down a special education school voucher program based on a similar Blaine provision found in Arizona's constitution.¹⁴⁸ The provision stated that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."¹⁴⁹ While the Arizona Supreme Court recognized the merit in the program, the Court emphasized that the language of the state constitution prohibited such funding of religious schools.¹⁵⁰ However, despite these state high-court decisions, the Indiana Supreme Court upheld a voucher program in *Meredith v. Pence* notwithstanding the Blaine provision in Indiana's constitution—effectively sparking a potential new direction for voucher litigation at the state level.¹⁵¹

4. *Meredith v. Pence: A New Direction*

Despite the number of state high courts that have struck down voucher programs, the Indiana Supreme Court in *Meredith v. Pence* changed course by upholding a school voucher program notwithstanding the inclusion of a Blaine Amendment provision in the state's constitution.¹⁵² The voucher program at issue in *Meredith v. Pence* distributed funds called "choice scholarships" that allowed students who fit the eligibility requirements to enroll in private schools—including religious private schools—instead of public schools.¹⁵³ Unsurprisingly, given the high percentage of private

147. See *id.* at 366. On appeal, the Florida Supreme Court invalidated this program on other grounds, thus avoiding the separation of church and state issue. See *Bush v. Holmes*, 919 So. 2d 392, 412-13 (Fla. 2006) (stating that the voucher program violated another provision regarding the "uniformity" requirements for Florida public schools and emphasizing that "[w]hat is in the Constitution always must prevail over emotion" (quoting *Bush v. Schiavo*, 885 So. 2d 321, 336 (Fla. 2004))).

148. See *Cain v. Home*, 202 P.3d 1178, 1185 (Ariz. 2009).

149. See *id.* at 1180 (quoting ARIZ. CONST. art. IX, § 10).

150. *Cain*, 202 P.3d at 1185 (emphasizing that while "[t]he voucher programs appear to be a well-intentioned effort to assist two distinct student populations with special needs," the Arizona Supreme Court is "bound by our Constitution . . . [that] does not permit appropriations of public money to private and sectarian schools").

151. See *infra* Subsection I.C.4.

152. See 984 N.E.2d 1213, 1230-31 (Ind. 2013).

153. See *id.* at 1217 (quoting Brief for Appellants at 3).

schools that are sectarian,¹⁵⁴ the majority of private schools that have participated in this program are religious institutions.¹⁵⁵

The opponents of the Indiana school voucher program brought three challenges, all of them familiar challenges that voucher opponents had brought in previous cases before other state courts.¹⁵⁶ The first challenge contested the use of state funds for private-school education instead of use of those funds for the general and uniform system of common schools that is proscribed by the state's constitution.¹⁵⁷ The Court quoted the challenged language of Indiana's constitution:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; *it shall be the duty* of the General Assembly *to encourage*, by all suitable means, moral, intellectual, scientific, and agricultural improvement; *and to provide*, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.¹⁵⁸

With regard to this challenge, the Indiana Supreme Court determined that the education clause proscribed two separate legislative duties: the first duty being “*to encourage*, by all suitable means, moral, intellectual, scientific, and agricultural improvement,”¹⁵⁹ and the second duty being “*to provide*, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.”¹⁶⁰ The Court ultimately held that the word “and” meant that these two duties were separate because “[t]he framers use of the conjunction ‘and’ plainly suggests that the phrases are separate and distinct,”¹⁶¹ and thus the second duty “is not implicated by the school voucher program.”¹⁶² In sum, the Court held that the contested education clause contained two separate educational duties, which allowed the Court to uphold the voucher program that provided funds to private schools.¹⁶³

The Indiana Supreme Court's decision regarding this provision is in direct opposition to the Louisiana Supreme Court and the

154. See *supra* note 46 and accompanying text.

155. See *Meredith*, 984 N.E.2d at 1220 (stating that “most of the schools . . . were religiously affiliated”).

156. See *supra* Subsection I.C.3.

157. See *Meredith*, 984 N.E.2d at 1220.

158. See *id.* at 1221 (quoting IND. CONST. art. VIII, § 1).

159. See *Meredith*, 984 N.E.2d at 1221.

160. See *id.*

161. See *id.*

162. See *id.* at 1225.

163. See *id.* at 1224-25.

Florida Supreme Court's respective decisions.¹⁶⁴ In fact, the Louisiana Supreme Court had quickly rejected the same argument regarding the separate educational duties that the Indiana Supreme Court accepted in *Meredith v. Pence*.¹⁶⁵ Similarly, the Florida Supreme Court also held that the duty to provide a uniform system of public education also encompassed the state's duty to ensure adequate provision for all students' education in the state.¹⁶⁶ However, despite Louisiana and Florida's interpretations, the Indiana Supreme Court decided to consider these separate duties.¹⁶⁷ Therefore, the first challenge to the Indiana school voucher program failed based on the Indiana Supreme Court's close reading of a conjunction within the constitutional provision that allowed the state to provide funding for students to attend private schools.¹⁶⁸

The Court in *Meredith v. Pence* also held that the voucher program did not abridge the state constitutional provision that "no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent"¹⁶⁹ because this clause was not meant to limit government expenditures.¹⁷⁰ Even though the Court recognized that other state supreme courts had come to the opposite conclusion regarding very similar provisions in their respective state constitutions, the Indiana Supreme Court expressed disagreement with those decisions.¹⁷¹ Instead, the Court held that the challenged voucher program did not violate the state's constitutional prohibition on the compelled support of religion.¹⁷²

Finally, the Indiana Supreme Court also held that the state's constitutional provision that barred states from allocating funds "for the benefit of any religious or theological institution" did not render the school voucher program unconstitutional.¹⁷³ The Court instead

164. See *La. Fed'n of Teachers v. State*, 118 So. 3d 1033, 1051 (La. 2013) (holding that the state's education clause did not create separate educational duties); *Bush v. Holmes*, 919 So. 2d 392, 406-07 (Fla. 2006) (holding that the state's education clause mandated that the state provide a uniform system of public education, a duty that is not separate from the duty to ensure adequate provision for students' education).

165. See *La. Fed'n of Teachers*, 118 So. 3d at 1051.

166. See *Bush*, 919 So. 2d at 406-07.

167. See *Meredith*, 984 N.E.2d at 1224-25.

168. See *id.*

169. See *id.* at 1225 (quoting IND. CONST. art. I, § 4).

170. See *Meredith*, 984 N.E.2d at 1226.

171. See *id.* at 1226 n.20 (citing *Jackson v. Benson*, 578 N.W.2d 602, 622-23 (Wis. 1998)).

172. See *Meredith*, 984 N.E.2d at 1226 n.20.

173. See *id.* at 1227 (quoting IND. CONST. art. I, § 6).

compared the voucher program to money that private institutions receive from fire department and police department services to show that the framers did not intend to prohibit all funding that may benefit private institutions.¹⁷⁴ However, the wording of Indiana's constitutional provision does not differ substantially from other states' constitutional provisions that have caused state courts to strike down these voucher programs, suggesting that these Blaine provisions may not hold the same force in 2013 as they did in the early 2000s.¹⁷⁵

Additionally, the Indiana Supreme Court specifically distinguished the voucher program at issue with private-school dual-enrollment programs that provide an unconstitutional advantage because private-school students may enroll in more costly courses in public schools.¹⁷⁶ While private schools receive a benefit from this dual-enrollment program, the Court stated that the voucher program does not actually provide money directly to private religious schools.¹⁷⁷ Rather, the voucher program provides the money to families of students, whose parents then choose to place the student in a private school: "The voucher program does not directly fund religious activities because *no* funds may be dispersed to *any* program-eligible school without the *private, independent selection by the parents of a program-eligible student*."¹⁷⁸ Therefore, the Indiana Supreme Court applied the same reasoning that the United States Supreme Court applied in the *Zelman v. Simmons-Harris* case—that indirect funding of private schools through parental choice does not violate the state's constitutional

174. See *Meredith*, 984 N.E.2d at 1227 ("We first find it inconceivable that the framers and ratifiers intended to expansively prohibit any and all government expenditures from which a religious or theological institution derives a benefit—for example, fire and police protection, municipal water and sewage service, sidewalks and streets, and the like. Certainly religious or theological institutions may derive relatively substantial benefits from such municipal services. But the primary beneficiary is the public, both the public affiliated with the religious or theological institution, and the general public. Any benefit to religious or theological institutions in the above examples, though potentially substantial, is ancillary and indirect.").

175. See McCarthy, *supra* note 3, at 669.

176. See *Meredith*, 984 N.E.2d at 1227 (citing *Embry v. O'Bannon*, 798 N.E.2d 157, 160-67 (Ind. 2003) (plurality opinion)).

177. See *Meredith*, 984 N.E.2d at 1229.

178. See *id.*

provision¹⁷⁹—as opposed to the reasoning of several other state supreme courts.¹⁸⁰

Since the three challenges to the Indiana voucher program were so similar to challenges that caused numerous state supreme courts to strike down these programs based on similarly worded Blaine provisions,¹⁸¹ a debate arose as to whether state high courts will follow the Indiana Supreme Court's decision and uphold these voucher programs despite their own Blaine provisions.¹⁸² While *Meredith v. Pence* may appear to be an outlier at first glance, this decision may encourage other state high courts to uphold school voucher programs despite similar Blaine provisions found in their respective state constitutions.¹⁸³ Professor Martha McCarthy expresses concern regarding this novel interpretation of state education clauses and its potential effect on other state high courts, emphasizing that the Indiana decision is likely to “signal a new wave of state litigation with outcomes more favorable to voucher programs.”¹⁸⁴ The Indiana Supreme Court's decision may provide the impetus for other state supreme courts to likewise weaken the influence of their states' respective Blaine Amendments.¹⁸⁵ Therefore, the likelihood that new voucher litigation may result in more voucher-favorable outcomes highlights the necessity of urgently implementing more stringent accountability measures for participating private schools.¹⁸⁶

While proponents of special education voucher programs extol the importance of parental choice in determining the appropriate school for a child with disabilities,¹⁸⁷ opponents believe that these programs violate state establishment clauses as well as deplete

179. See *supra* Subsection I.C.2 (showing the emphasis that the United States Supreme Court placed on parental choice as the defining justification for upholding the legality of school voucher programs on the federal level).

180. See *supra* Subsection I.C.3.

181. See *supra* Subsection I.C.3.

182. See McCarthy, *supra* note 3, at 670.

183. See, e.g., *id.*; Bolick, *supra* note 124, at 344-45.

184. See McCarthy, *supra* note 3, at 669 (“By offering a new slant on interpreting state education clauses and rejecting all challenges to the Indiana voucher program, the Indiana high court has provided encouragement to school privatization proponents that this ruling could become a prototype for other state court decisions. If this happens, it could signal a new wave of state litigation with outcomes more favorable to voucher programs.”).

185. See *supra* note 129 and accompanying text.

186. See *infra* Part III.

187. See *supra* Section I.A (providing a discussion of the policy debate regarding special education voucher programs).

funding for public schools.¹⁸⁸ There is considerable disagreement regarding whether the IDEA provides an adequate and even feasible avenue through which parents may challenge the educational services that their child receives.¹⁸⁹ While voucher opponents believe that the system in place under the IDEA is practicable,¹⁹⁰ voucher supporters highlight the difficulties inherent in following the IDEA procedural requirements.¹⁹¹ As for legal action, voucher opponents have challenged school voucher programs on both the state and federal level, predominantly arguing that these programs violate constitutional provisions.¹⁹² However, given the *Meredith v. Pence* decision and the subsequent increase in proposals for special education voucher programs,¹⁹³ the likelihood that the states' respective Blaine provisions will not provide a bar for these programs indicates the need to mandate objective accountability measures for participating private schools.¹⁹⁴ Thus, categorizing current special education voucher programs based on their respective levels of state accountability helps to elucidate this need for more stringent accountability requirements.¹⁹⁵

II. CATEGORIZING AND ASSESSING SPECIAL EDUCATION VOUCHER PROGRAMS BASED ON THEIR RESPECTIVE LEVELS OF STATE ACCOUNTABILITY

Though several critics have addressed flaws in school voucher programs and have challenged the legality of these programs at both

188. See *supra* Section I.A.

189. See *supra* Subsection I.B.2 (outlining two main criticisms of special education voucher programs stemming from IDEA provisions).

190. See *supra* Section I.B.2.

191. See Greene & Buck, *supra* note 52, at 39-40 ("Given the low probability of victory as well as the considerable time, expense, and psychological discomfort involved in waging a legal battle, it isn't surprising that private placements are rare, especially among families who lack the wealth and sophistication required to navigate the legal system successfully.").

192. See *supra* Subsections I.C.2-3 (discussing constitutional challenges to school voucher programs on both the federal and state level).

193. See *supra* note 12 and accompanying text (indicating that Florida and Wisconsin are examples of two states that have proposed expansion or creation of special education voucher programs).

194. See *infra* Part III.

195. See *infra* Part II (dividing the ten current special education voucher programs into three categories: programs with no state accountability measures, programs with one state accountability measure, and programs with more than one state accountability measure).

the federal and state level,¹⁹⁶ there is one criticism that remains untouched: private-school accountability.¹⁹⁷ There are currently ten state-funded special education voucher programs in place across the United States,¹⁹⁸ the majority of which contain no state assessment requirements or adequate teacher certification requirements for ensuring that state funds actually benefit the individualized needs of students with disabilities.¹⁹⁹ While legal scholars have pointed out these issues, no one has yet proposed a definitive solution or outlined specific steps toward reaching a solution to this particular problem.²⁰⁰ Therefore, examining the statutory language that authorizes these special education voucher programs and categorizing the programs based on the presence of accountability measures—or the complete lack thereof—is the first step toward proposing a solution.²⁰¹ The ten special education voucher programs currently in place can be categorized into three groups based on their respective levels of accountability: programs with no state accountability measures,²⁰² programs with one accountability measure,²⁰³ and programs with more than one accountability measure.²⁰⁴

A. Special Education Voucher Programs with No State Accountability Measures

Though the majority of general education voucher programs require that the participating private school administer state

196. See *supra* Section I.C.

197. See *infra* Sections II.A-C (categorizing special education voucher programs based on the presence or absence of accountability measures to illustrate the lack of private-school accountability).

198. See *supra* note 49 and accompanying text.

199. See *infra* Sections II.A-C.

200. See Hensel, *supra* note 81, at 328 (stating that “[t]his absence of accountability is certain to leave at least some children with disabilities worse off upon exiting from public school”); see also James G. Dwyer, *No Accounting for School Vouchers*, 48 WAKE FOREST L. REV. 361, 386 (2013) (“What, if anything, do states require of the private schools they subsidize by way of education? With several existing voucher programs, the answer is straightforward: ‘nothing.’”).

201. See *infra* Sections II.A-C.

202. See *infra* Section II.A (outlining the five special education voucher programs currently in place with no state accountability measures).

203. See *infra* Section II.B (outlining the two special education voucher programs currently in place with one state accountability measure).

204. See *infra* Section II.C (outlining the three special education voucher programs currently in place with more than one state accountability measure).

assessments and report data on student progress to the state,²⁰⁵ the majority of special education voucher programs lack this basic accountability measure.²⁰⁶ General education voucher programs include accountability measures such as required annual standardized testing, public reporting of student results, and independent evaluations of instructors.²⁰⁷ The School Choice Yearbook charts these three basic accountability measures for all voucher programs.²⁰⁸ When visually compared to general education voucher programs in a chart with these three accountability measures, the lack of accountability for special education voucher programs is glaringly and grievously obvious: Almost every special education voucher program is missing all three of those basic requirements.²⁰⁹ Additionally, federal legislation such as the IDEA requires that educators in non-voucher settings are “highly qualified,”²¹⁰ meaning that these educators must have a minimum of a bachelor’s degree and receive certification as a special education instructor or successfully complete the state’s special education licensing exam.²¹¹ In contrast, the majority of these special education voucher programs do not even require that the participating private school maintain a single educator with special education credentials on staff.²¹² There are currently five special education voucher programs that lack the two basic accountability measures of requiring that participating private schools retain educators with special education credentials and requiring that the schools report student progress to the state.²¹³

205. *See supra* note 18 and accompanying text.

206. *See infra* Subsection III.B.2.

207. *See* FRENDEWEY ET AL., *supra* note 49, at 98 (charting the presence of accountability measures in school voucher programs).

208. *See id.*

209. *See id.*

210. 20 U.S.C. § 1412(a)(14)(D) (2012) (“[A] State shall adopt a policy that includes a requirement that local educational agencies in the State take measurable steps to recruit, hire, train, and retain highly qualified personnel to provide special education and related services under this subchapter to children with disabilities.”).

211. *Id.* § 7801(23) (defining the term “highly qualified” with respect to current elementary and secondary teachers as well as teachers who are new to the profession).

212. *See infra* Subsection III.B.1.

213. Florida’s John M. McKay Scholarships for Students with Disabilities Program, Utah’s Carson Smith Special Needs Scholarship Program, Georgia’s Special Needs Scholarship Program, Oklahoma’s Lindsay Nicole Henry Scholarship for Students with Disabilities Program, and North Carolina’s Children with Disabilities Scholarship Grant. *See infra* Subsections II.A.1-5.

1. *Florida: John M. McKay Scholarships for Students with Disabilities Program*

Florida was the first state in the nation to offer state-funded school vouchers exclusively to students with disabilities.²¹⁴ In the 2013–2014 school year, 27,040 students received vouchers²¹⁵ that totaled an expenditure of \$168,890,916 in state funds.²¹⁶ This voucher program allows students the option to attend a private school by providing a scholarship to pay for the students' tuition.²¹⁷ As for teacher certification requirements, the statute provides that special education instructors in the participating private school must have a baccalaureate degree and three years of teaching experience "or have special skills, knowledge, or expertise that qualifies them to provide instruction in subjects taught,"²¹⁸ though the statute has no specific requirement that instructors hold special education certifications.²¹⁹ There is also no requirement that private schools provide assessments of student progress to the state, though the school must cooperate with parents in the event that a parent would like the child to take part in state standardized testing.²²⁰

In addition to the lack of required special education certification and the absence of a requirement for providing the state with annual assessments of student progress, schools that participate in the McKay Scholarship program also fail to provide parents with information about the program when parents ask for that information.²²¹ When surveyed, "50% of parents of public special

214. See FRENDEWEY ET AL., *supra* note 49, at 15.

215. See *id.*

216. See *id.*

217. FLA. STAT. § 1002.39(1) (2014) (offering tuition scholarships for students with "an intellectual disability; a speech impairment; a language impairment; a hearing impairment, including deafness; a visual impairment, including blindness; a dual sensory impairment; an orthopedic impairment; an other health impairment; an emotional or behavioral disability; a specific learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; a traumatic brain injury; a developmental delay; or autism spectrum disorder").

218. *Id.* § 1002.421(2)(h).

219. *Id.* (stating that teachers must "have special skills, knowledge, or expertise," but providing no specific requirement that teachers are certified in special education instruction).

220. *Id.* § 1002.39(5)(f), (8)(c)(2).

221. See Hensel, *supra* note 81, at 322 ("Some states . . . do not require private schools participating in special needs vouchers to inform parents of the

education students in the study's survey reported that they 'were not able to get the information they had wanted,' particularly on the subjects of 'quality of teachers, academic quality, and special education programs.'"²²² Another study "found that 77% of the schools accepting McKay students provided no special program of any kind for disabled students."²²³ Thus, parents often lack information about these voucher programs and cannot easily obtain this information.²²⁴

2. *Utah: Carson Smith Special Needs Scholarship Program*

Utah's special education voucher program began in 2005.²²⁵ In the 2013–2014 school year, 650 students received vouchers²²⁶ that totaled an expenditure of \$3,892,000 in state funds.²²⁷ This program offers scholarship money to a student with disabilities in order for the student to attend a private school that has registered with the state.²²⁸ Like the Florida special education voucher program, Utah's program is also offered to students with a broad range of disabilities.²²⁹ The program further requires that special education instructors have either a baccalaureate degree;²³⁰ at least three years of prior teaching experience;²³¹ or "the necessary special skills, knowledge, or expertise," but does not specifically require that special education instructors hold any particular special education credentials.²³² While participating private schools must assess each

individualized instruction and services that will be provided to their child upon matriculation.").

222. See *id.* at 323 (footnote omitted).

223. See *id.*

224. See *id.*

225. See FRENDEWEY ET AL., *supra* note 49, at 15.

226. See *id.*

227. See *id.*

228. UTAH CODE ANN. § 53A-1a-704(2) (West 2014) (outlining the qualifications for students with disabilities).

229. *Id.* § 53A-1a-704(2)(b)(i)-(xi) (offering scholarships for students with "(i) an intellectual disability; (ii) a hearing impairment; (iii) a speech or language impairment; (iv) a visual impairment; (v) a serious emotional disturbance; (vi) an orthopedic impairment; (vii) autism; (viii) traumatic brain injury; (ix) other health impairment; (x) specific learning disabilities; or (xi) a developmental delay, provided the student is at least five years of age . . . and is younger than eight years of age").

230. *Id.* § 53A-1a-705(1)(g)(i).

231. *Id.* § 53A-1a-705(1)(g)(ii).

232. *Id.* § 53A-1a-705(1)(g)(iii).

student's progress annually,²³³ the statute only requires that the students' parents receive reports of this information; there is no requirement that this information be reported to the state.²³⁴

3. Georgia: Special Needs Scholarship Program

Georgia's Special Needs Scholarship Program began in 2007²³⁵ and allows students wishing to participate in this voucher program to attend either another public school²³⁶ or a private school.²³⁷ In the 2013–2014 school year, 3,400 students received vouchers²³⁸ that totaled an expenditure of \$13,649,039 in state funds.²³⁹ This program also offers scholarships to students with a number of disabilities, ranging from Autism to visual impairment.²⁴⁰ As far as educational requirements for special education instructors, teachers must have a baccalaureate degree or “have at least three years of experience in education or health,” though the degree and years of experience are not specific to teaching special education.²⁴¹ There is no requirement that the participating private school report the students' progress to the state, but the statute does require that the school annually provide the students' parents with the teachers' credentials.²⁴²

4. Oklahoma: Lindsay Nicole Henry Scholarship for Students with Disabilities Program

In 2010, Oklahoma enacted a special education voucher program to serve students with disabilities.²⁴³ In the 2013–2014 school year, 290 students received vouchers²⁴⁴ that totaled an

233. *Id.* § 53A-1a-705(1)(f)(i).

234. *Id.* § 53A-1a-705(1)(f)(ii).

235. *See* FRENDEWEY ET AL., *supra* note 49, at 15.

236. GA. CODE ANN. § 20-2-2113(b)(1)-(2) (2014).

237. *Id.* § 20-2-2113(b)(4).

238. *See* FRENDEWEY ET AL., *supra* note 49, at 15.

239. *See id.*

240. GA. CODE ANN. § 20-2-2114(a)(2) (offering scholarship funds to students with the following disabilities: “(A) Autism; (B) Deaf/blind; (C) Deaf/hard of hearing; (D) Emotional and behavioral disorder; (E) Intellectual disability; (F) Orthopedic impairment; (G) Other health impairment; (H) Specific learning disability; (I) Speech-language impairment; (J) Traumatic brain injury; or (K) Visual impairment”).

241. *Id.* § 20-2-2115(a)(7).

242. *Id.*

243. *See* FRENDEWEY ET AL., *supra* note 49, at 15.

244. *See id.*

expenditure of \$1,312,773 in state funds.²⁴⁵ This program offers state funds to students with disabilities who already have an IEP on file in order for the student to attend a private school.²⁴⁶ Teachers must hold a baccalaureate degree, but even this is not necessary if the instructor has at least three years of experience or has acquired “special skills, knowledge or expertise.”²⁴⁷ Thus, there is no requirement in this statute that teachers have any special education credentials, and there is no definition of what these lesser qualifications might entail.²⁴⁸ Furthermore, while the statute requires that the participating private school send student progress reports to the student’s parents,²⁴⁹ the statute does not require that the school send this information to the state.²⁵⁰

5. *North Carolina: Children with Disabilities Scholarship Grant*

In 2013, North Carolina implemented the Children with Disabilities Scholarship Grant for students with disabilities.²⁵¹ There is currently no data to report on this scholarship program regarding student enrollment or funds expended in the 2013–2014 school year because this program began in 2013.²⁵² Eligible students must require an IEP and daily special education services, but the statute does not require that teachers hold special education credentials.²⁵³ Additionally, although the participating private schools must report student progress to parents upon request in fulfillment of IDEA requirements, no such requirement appears in the statute for reporting student progress to the state.²⁵⁴ While these five special education voucher programs with no accountability measures comprise half of the special education voucher programs currently in

245. *See id.*

246. OKLA. STAT. tit. 70, § 13-101.2(A) (2014).

247. *Id.* § 13-101.2(H)(6).

248. *See* Wendy F. Hensel, *Recent Developments in Voucher Programs for Students with Disabilities*, 59 LOY. L. REV. 323, 329 (2013).

249. OKLA. STAT. tit. 70, § 13-101.2(H)(5).

250. *See id.* (stating that participating private schools must send student progress reports to parents, but providing no requirement that states also receive reports of student progress).

251. *See* FRENDEWEY ET AL., *supra* note 49, at 15.

252. *See id.*

253. N.C. GEN. STAT. § 115C-112.5(2) (2014) (outlining the criteria for eligible students).

254. *Id.* § 115C-112.9.

place across the United States, there are currently two programs that contain one accountability measure.²⁵⁵

B. Special Education Voucher Programs with One State Accountability Measure

Two of the ten existing special education voucher programs contain one state accountability measure for ensuring that students with disabilities receive an adequate education.²⁵⁶ Mississippi's two programs tailored to students with specific disabilities each contain one accountability measure: The two programs require that the instructors at the participating private schools hold licenses or certifications to teach students with those disabilities.²⁵⁷ These certifications work as an effective accountability measure for ensuring that students with disabilities receive the appropriate education.²⁵⁸

Mississippi's special education voucher program for students with dyslexia, the Mississippi Dyslexia Therapy Scholarship for Students with Dyslexia Program, began in 2012.²⁵⁹ In the 2013–2014 school year, seventy-three students received vouchers²⁶⁰ that totaled an expenditure of \$330,681 in state funds.²⁶¹ To be eligible to attend a “public or state accredited nonpublic special purpose school that provides . . . comprehensive dyslexia therapy instruction,”²⁶² students must be diagnosed with dyslexia and in first through sixth grade.²⁶³ The statute also contains a provision that requires specific licensing and certification requirements for instructors.²⁶⁴ Instructors must be licensed in dyslexia therapy or supervised by a licensed dyslexia

255. See *infra* Section II.B.

256. MISS. CODE ANN. §§ 37-173-21(2), 175-1(f) (2014).

257. *Id.* § 173-21(2), 175-1-(f).

258. See *infra* Subsection III.B.1.

259. See FRENDEWEY ET AL., *supra* note 49, at 15.

260. See *id.*

261. See *id.*

262. MISS. CODE ANN. § 37-173-1(g) (2014).

263. *Id.* § 37-173-1(f).

264. *Id.* § 37-173-21(2) (“The qualified personnel to facilitate the educational process of learning and instruction for children with dyslexia who attend the schools shall consist of the following: (a) An administrator or director with additional training in the characteristics of dyslexia; (b) A dyslexia therapist licensed by the department in dyslexia therapy; (c) Dyslexia therapists in training participating in a department approved dyslexia therapy graduate internship program; and (d) Licensed elementary teachers under the supervision of a state department licensed dyslexia therapist.”).

therapist from the state department.²⁶⁵ However, while participating private schools must provide annual student progress reports to the student's parents, there is no requirement that these progress reports also be shared with the state.²⁶⁶

In 2013, Mississippi implemented another special education voucher program for a specific group of students with disabilities, the Mississippi Speech-Language Therapy Scholarship for Students With Speech-Language Impairments Program.²⁶⁷ As this program began in 2013, there is currently no data available on the number of students who received vouchers or the amount of money the state expended on this program.²⁶⁸ Eligible students must be in kindergarten through sixth grade and have “an eligibility ruling of speech-language impairment.”²⁶⁹ Much like Mississippi's Dyslexia Therapy Scholarship, this program also requires that educators of voucher recipients hold specific certification credentials in that the instructors must be speech-language pathologists.²⁷⁰ Additionally, though the school must provide annual written reports of student progress to parents, the statute does not require that the school send these reports to the state.²⁷¹ While Mississippi's two special education voucher programs contain one accountability measure—specific licensing and certification requirements for special education instructors—only three programs contain more than one accountability measure.²⁷²

C. Special Education Voucher Programs with More Than One State Accountability Measure

Three of the ten existing special education voucher programs contain more than one accountability measure: one voucher program in Louisiana²⁷³ and two in Ohio.²⁷⁴ These programs contain

265. *Id.*

266. *Id.* § 37-173-17(1)(c) (stating that the participating private school must “[b]e academically accountable to the parent or legal guardian for meeting the educational needs of the student by, at a minimum, annually providing to the parent or legal guardian a written explanation of the student's progress”).

267. *See* FRENDEWEY ET AL., *supra* note 49, at 15.

268. *See id.*

269. MISS. CODE ANN. § 37-175-3 (2014).

270. *Id.* § 37-175-21(2).

271. *Id.* § 37-175-17(1)(c).

272. *See infra* Section II.C (outlining the three special education voucher programs that have more than one accountability measure in place).

273. *See infra* Subsection II.C.1.

accountability measures such as required special education certification for special education instructors and required reporting of student progress to the state.²⁷⁵ Thus, these programs provide the state with objective criteria through which to evaluate the effectiveness of the voucher programs.²⁷⁶

1. *Louisiana: School Choice Program for Certain Students with Exceptionalities*

Louisiana enacted its special education school voucher program in 2010.²⁷⁷ In the 2013–2014 school year, 245 students received vouchers²⁷⁸ that totaled an expenditure of \$534,898 in state funds.²⁷⁹ In order to receive funds for private schooling, students must “be in need of services for autism, a mental disability, emotional disturbance, developmental delay, other health impairment, specific learning disability, or traumatic brain injury”²⁸⁰ and have an IEP on file.²⁸¹ In 2014, the Louisiana legislature amended this provision to include that the student may either have an IEP “or a plan that is created by the nonpublic school that the student will attend and that clearly identifies the services provided by the school and specifies how those services adequately address the student’s needs.”²⁸² Furthermore, the statute requires that participating schools must have provided special education services for at least two years.²⁸³ The statute also specifically requires that a participating school employ “teachers holding appropriate certification in special education” such that it matches the special education credentials required of public school instructors.²⁸⁴ However, while the statute requires that schools report the number of

274. See *infra* Subsections II.C.2-3.

275. See *infra* Subsections II.C.1-3.

276. See *infra* Part III (discussing the importance of mandating objective accountability measures to ensure that students with disabilities receive a quality education and to ensure that state funds are spent wisely).

277. See FRENDEWEY ET AL., *supra* note 49, at 15.

278. See *id.*

279. See *id.*

280. LA. STAT. ANN. § 17:4031(B)(2)(a) (2014).

281. *Id.*

282. Act of May 28, 2014, No. 272, § 17:4031(B)(2)(a), 2014 La. Sess. Law Serv. 1-2 (West).

283. LA. STAT. ANN. § 17:4031(D)(1)(c).

284. *Id.*

students enrolled in the program to the state, the statute does not require that schools report student progress to the state.²⁸⁵

2. *Ohio: Autism Scholarship Program*

In 2003, Ohio implemented its Autism Scholarship voucher program.²⁸⁶ In the 2013–2014 school year, 2,623 students received vouchers²⁸⁷ that totaled an expenditure of \$46,970,000 in state funds.²⁸⁸ Eligible voucher recipients must be diagnosed with Autism²⁸⁹ and have an IEP on file in order to receive state funds.²⁹⁰ This program requires that the participating private school implement the student’s IEP that the school district developed.²⁹¹ The school district “is responsible for initiating and conducting meetings to develop, review and revise the IEP of a child with a disability at least annually.”²⁹² Participating private schools must also provide quarterly student progress reports to both parents and to the state regarding the student’s progress toward the outlined IEP goals.²⁹³ Additionally, parents do not have to waive the students’ rights under the IDEA in order to participate in the program.²⁹⁴

3. *Ohio: Jon Peterson Special Needs Scholarship Program*

In 2011, Ohio passed a broader special education voucher program.²⁹⁵ In the 2013–2014 school year, 2,103 students received vouchers²⁹⁶ that totaled an expenditure of \$26,110,226 in state

285. *Id.* § 17:4031(E)(1)-(2).

286. *See* FRENDEWEY ET AL., *supra* note 49, at 15.

287. *See id.*

288. *See id.*

289. OHIO REV. CODE ANN. § 3310.41(A)(7)(a) (West 2014).

290. *Id.* § 3310.41(A)(7)(b).

291. *Id.* § 3310.41(B).

292. *See* OHIO DEP’T OF EDUC., AUTISM SCHOLARSHIP PROGRAM GUIDELINES 15 (2010–2011), <https://education.ohio.gov/getattachment/Topics/Special-Education/Federal-and-State-Requirements/Procedures-and-Guidance/Individualized-Education-Program-IEP/Individualized-Education-Program/ASP-Guidelines-1.pdf>.

293. *See id.* at 16 (“These reports should indicate the child’s progress toward the annual goals and the extent to which that progress is sufficient for the child to achieve the goals by the end of the year.”).

294. *See* Hensel, *supra* note 81, at 305.

295. *See* FRENDEWEY ET AL., *supra* note 49, at 15.

296. *See id.*

funds.²⁹⁷ This program allows any student with an IEP on file, including students diagnosed with Autism, to receive state funds to attend a private school.²⁹⁸ However, students with Autism may not receive scholarships under both Ohio programs.²⁹⁹ As for teacher credentials, participating private schools must employ instructors who “hold credentials determined by the state board to be appropriate for the qualified special education children enrolled in the special education program it operates.”³⁰⁰ This program is notably the only special education voucher program that requires administration of state assessments, which are conducted by the student’s IEP team.³⁰¹ Finally, this program requires that participating private schools provide reports of the students’ progress to the state as well as keep track of the implementation of the students’ IEPs.³⁰²

Categorizing these special education voucher programs based on the presence or absence of accountability measures illustrates that the majority of these programs lack accountability.³⁰³ This near-complete absence of accountability measures is glaring when compared to the numerous accountability measures employed in general education voucher programs.³⁰⁴ Given that an increasing number of students enroll in voucher programs each year³⁰⁵ and the fact that these programs cost each state millions of dollars each year,³⁰⁶ newly proposed special education voucher programs should—at the very least—require two specific accountability

297. *See id.*

298. OHIO REV. CODE ANN. § 3310.51(F) (West 2014) (defining eligibility requirements for students wishing to receive the scholarship, including age requirements, the definition of a child with a disability, and particular requirements pertaining to the implementation of a student’s IEP).

299. *Id.* § 3310.51(F)(5).

300. *Id.* § 3310.58(C).

301. *Id.* § 3310.522.

302. *Id.* § 3310.58(G) (“The school or entity agrees to provide a record of the implementation of the individualized education program for each qualified special education child enrolled in the school’s or entity’s special education program, including evaluation of the child’s progress, to the school district in which the child is entitled to attend school, in the form and manner prescribed by the department.”).

303. *See supra* Sections II.A-B.

304. *See supra* notes 205-09 and accompanying text (describing general education voucher program accountability measures, such as required teacher qualifications and required standardized testing that is reported to the state).

305. *See* FRENDEWEY ET AL., *supra* note 49, at 17 (charting the increase in the total number of students enrolled in voucher programs from the 2000–2001 school year to the 2013–2014 school year).

306. *See id.* at 15.

measures to ensure that students receive a quality education and that these programs constitute an effective use of state funds.³⁰⁷ First, participating private schools must have certified special education instructors on staff;³⁰⁸ second, participating private schools must provide annual reports of student progress to the state.³⁰⁹

III. OUTLINING SPECIFIC AND MANDATORY PARTICIPATION STANDARDS FOR PRIVATE SCHOOLS TO ENSURE ACCOUNTABILITY

Establishment Clause challenges to voucher programs on both the federal and state level illustrate the intensity of this policy debate over special education voucher programs.³¹⁰ Scholars tend to outline the policy reasons in support of or in opposition to these voucher programs,³¹¹ but provide relatively few concrete suggestions that would increase accountability for those private schools participating in special education voucher programs.³¹² One reason for this may be that the traditional measures of accountability for general education students³¹³ are not the best measures for students with disabilities because each student with a disability has individualized goals based on the student's IEP.³¹⁴ However, there are practicable ways to

307. *See infra* Section III.B.

308. *See infra* Subsection III.B.1.

309. *See infra* Subsection III.B.2.

310. *See supra* Section I.C.

311. *See supra* Section I.B (describing the arguments of school voucher proponents and opponents as well as identifying criticisms of special education voucher programs that specifically pertain to existing IDEA procedures).

312. *See* Ralph D. Mawdsley & Allan G. Osborne, Jr., *Providing Special Education Services to Students in Religious Schools*, 219 EDUC. L. REP. 347, 365 (2007) (“Even when [IDEA] funds are used to provide services for parentally-placed children in private schools, the accountability for the funds and the services provided remains with the states and the public school districts.”).

313. Standardized state tests are the traditional measures of accountability for general education voucher programs. *See* Dwyer, *supra* note 200, at 389 (stating that “[a] significant number of states require that students participating in a [general education] voucher program take some of the same standardized tests that public school students take and report the results to the state education agency or to parents”).

314. *See, e.g.*, Greene & Buck, *supra* note 52, at 42 (“It might be best, however, not to require state accountability testing in a special education voucher program. With the difficulties disabled students face and the highly varied goals and criteria for success that may be appropriate for each student, state accountability testing is not always helpful in assessing the academic progress of individual special education students. Educational goals and assessments often need to be customized to individual circumstances.”).

measure accountability for special education voucher programs.³¹⁵ State statutes that authorize special education voucher programs should require that participating private schools (1) retain certified special education instructors,³¹⁶ and (2) provide annual individualized assessments of student progress administered by those certified special education instructors to both the students' parents and to the state.³¹⁷ Therefore, newly proposed special education voucher programs should follow Louisiana and Ohio's lead in mandating more stringent accountability requirements for participating private schools to ensure that state funds are objectively benefiting the needs of students with disabilities and that state funds are allocated to effective educational programs.³¹⁸

A. Future Increases in Special Education Voucher Programs

The need to define objective accountability measures for special education voucher programs is apparent when considering the increases in proposals for the creation or expansion of these programs.³¹⁹ The recent *Meredith v. Pence* decision thrust school voucher programs into the public spotlight,³²⁰ consequently leading to proposals for the creation or expansion of voucher programs in several states.³²¹ Moreover, the Indiana Supreme Court in *Meredith* upheld a voucher program³²² despite the inclusion of a Blaine provision that prohibits states from funding religious schools.³²³ This decision might very well lead to new voucher litigation that results in other state high courts upholding voucher programs despite similar Blaine provisions.³²⁴ Given that these Blaine provisions exist in forty

315. See *infra* Section III.B.

316. See *infra* Subsection III.B.1.

317. See *infra* Subsection III.B.2.

318. See *infra* Section III.B.

319. See *supra* note 12 and accompanying text.

320. See *supra* note 2 and accompanying text (providing sources with news coverage of the voucher debate following the Indiana Supreme Court's decision in *Meredith v. Pence*).

321. See *supra* note 12 and accompanying text.

322. See *Meredith v. Pence*, 984 N.E.2d 1213, 1230-31 (Ind. 2013).

323. See *supra* Subsection I.C.1.

324. See McCarthy, *supra* note 3, at 669 ("By offering a new slant on interpreting state education clauses and rejecting all challenges to the Indiana voucher program, the Indiana high court has provided encouragement to school privatization proponents that this ruling could become a prototype for other state court decisions. If this happens, it could signal a new wave of state litigation with outcomes more favorable to voucher programs." (footnote omitted)).

out of fifty state constitutions,³²⁵ the likelihood that other state courts may uphold school voucher programs despite these Blaine provisions may have an enormous impact on the amount of students able to receive state funds for private-school education.³²⁶ For instance, following *Meredith*, the number of Indiana voucher recipients doubled.³²⁷ Additionally, enrollment in voucher programs has increased each year, with record numbers of enrollment for the 2013–2014 school year.³²⁸ It is then especially troubling that special education voucher programs may increase and survive constitutional challenges when little to no state accountability measures exist in the state statutes that authorize these programs.³²⁹ States currently expend over \$275 million each year on special education voucher programs³³⁰ and yet have no way to ensure that students with disabilities who receive vouchers actually benefit from the instruction received at those institutions due to the paucity of required accountability measures.³³¹

Predictions regarding the future creation and expansion of voucher programs certainly have merit with respect to special education voucher programs.³³² For instance, Wisconsin recently proposed a new special education voucher program,³³³ and Florida recently passed a bill on June 20, 2014, to expand funding for special

325. See *supra* note 118 and accompanying text.

326. See Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 99 (2005) (emphasizing that there is an “array of judicial options for circumventing, invalidating, or even ignoring state no-funding provisions”); Buck, *supra* note 71, at 655-56 (“Whether other states that have similar ‘Blaine amendments[]’ . . . will interpret them as restrictively as Arizona or whether they will still permit vouchers to be used at religiously affiliated schools is not yet known.”).

327. See Stephanie Wang, *Indiana Voucher Students Double to Nearly 20,000*, INDYSTAR (Jan. 27, 2014, 11:38 PM), <http://www.indystar.com/story/news/politics/2014/01/27/indiana-voucher-students-double-to-nearly-20000/4939801/>.

328. See Devos, *supra* note 47 (“The [2013–2014] school year produced the largest single year increase in school choice enrollment nationwide.”).

329. See *supra* Part II.

330. See *supra* note 50 and accompanying text; see also FRENDEWEY ET AL., *supra* note 49, at 15 (charting the amount of state funds expended every year on each of the ten special education voucher programs).

331. See *supra* Part II.

332. See McCarthy, *supra* note 3, at 669 (predicting the likelihood of more voucher-favorable outcomes).

333. See *supra* note 12 and accompanying text.

education vouchers.³³⁴ The new bill provided an additional \$18 million for these programs.³³⁵ At the eleventh hour, legislators added special education provisions to the general education voucher bill, prompting criticism from teachers' organizations from around the state.³³⁶ This kind of last-minute expansion of special education voucher programs is dangerous for students with disabilities who enroll in these programs, especially if the proposed expansion contains no provisions that ensure accountability.³³⁷ Notably, this new special education voucher program does not require teachers at participating private schools to hold a teaching certificate, let alone a degree in education or special education.³³⁸ Furthermore, there is no requirement that the participating private school report student progress to the state.³³⁹ Thus, requiring that states implement these two objective accountability measures now would work toward ensuring that the increasing number of students with disabilities who enroll in these programs each year benefit from the instruction they receive and that these programs are worth the \$275 million expended each year.³⁴⁰

B. Requiring Specific Accountability Measures for Participating Private Schools

The majority of special education voucher programs lack two very basic accountability measures: the requirement that participating private schools retain teachers with special education credentials and the requirement that these schools provide the state with reports of students' progress.³⁴¹ Given the highly influential

334. See McGrory, *supra* note 13 (“The bill . . . let[s] the parents of special-needs children access state funding for private-school tuition, tutoring, educational materials[,] and various types of therapies.”).

335. See *id.*

336. See McGrory, *supra* note 14 (stating that “with two days left in the legislative session, lawmakers [added the special education provisions] . . . a move the Florida Education Association later called ‘sneaky’”).

337. See Strauss, *supra* note 11.

338. See *id.* (“Voucher school teachers do not have to have a degree in education. In fact, they don’t even have to have a teaching certificate.”).

339. See *id.* (“The legislation doesn’t require that voucher schools explain how the money they get from the scholarships is spent or how students progress.”).

340. See *supra* note 50 and accompanying text.

341. See *supra* Part II.

Meredith v. Pence decision³⁴² and the increase in proposals for special education voucher programs,³⁴³ mandating accountability for these future programs is essential to ensure that students with disabilities receive the necessary education and that the state government spends its funds effectively.³⁴⁴ This is especially true given that an increase in these programs would divert even more funds away from the public-school system.³⁴⁵ Therefore, states that propose legislation to introduce or expand special education school voucher laws must be held accountable to ensure that use of the state's funding for these programs objectively benefits the individualized needs of students with disabilities.³⁴⁶ A proposed solution to this lack of accountability would require that any newly proposed legislation providing state funding to private schools for special education vouchers include specific accountability measures.³⁴⁷ At the very least, those private schools wishing to participate in special education voucher programs must (1) retain certified special education instructors;³⁴⁸ and (2) provide annual individualized assessments of student progress administered by those certified special education instructors to both the students' parents and to the state.³⁴⁹ Only by adopting these two accountability measures will states ensure that students with disabilities receive a quality education and that state educational funds are spent wisely.³⁵⁰

342. See *supra* Subsection I.C.4 (providing an in-depth discussion of the Indiana Supreme Court's decision to uphold the school voucher program and foreshadowing the effect this decision may have on future voucher litigation).

343. See *supra* Section III.A.

344. See *infra* Subsections III.B.1-2.

345. See McCarthy, *supra* note 3, at 670-71 ("If the majority of the states adopt large-scale voucher programs to fund education and courts follow the Indiana Supreme Court's lead in endorsing such programs, this could launch a new chapter in the voucher narrative. The movement to privatize education shows no signs of slowing, and voucher and tax credit proposals are currently being discussed in a majority of the states. Assuming that 60% of the state's student population could take advantage of private education under Indiana's voucher program, the threat to public schools is very real." (footnote omitted)).

346. See *infra* Subsections III.B.1-2 (proposing two mandatory accountability measures for private schools that participate in special education voucher programs).

347. See *infra* Subsections III.B.1-2.

348. See *infra* Subsection III.B.1.

349. See *infra* Subsection III.B.2.

350. See *infra* Subsections III.B.1-2.

1. *Participating Private Schools Must Retain Certified Special Education Instructors*

One solution to the accountability problem is to ensure that the educators who will be responsible for teaching voucher recipients are certified special education instructors.³⁵¹ Only four of the existing ten special education voucher programs require that teachers hold special education credentials.³⁵² States spend millions of dollars each year on these special education voucher programs,³⁵³ but the majority of existing programs do not even require that the participating private school have a single teacher with special education credentials on staff.³⁵⁴ In fact, four state statutes that authorize these programs only require that the teacher have a mere three years of teaching experience,³⁵⁵ and even this is exempted if the teacher has “skills, knowledge, or expertise,”³⁵⁶ or “experience in education or health,” though the statutes fail to define exactly what type of proficiency is required.³⁵⁷ No required teacher qualifications exist at all for one program.³⁵⁸ This could lead to dire consequences for special education voucher recipients because, according to the broad statutory language, any number of persons could meet these meager

351. The majority of special education voucher programs do not require that instructors have degrees or training in teaching students with disabilities. *See supra* Sections II.B-C.

352. The four special education voucher programs that require teachers to hold special education credentials are: The Mississippi Dyslexia Therapy Scholarship for Students with Dyslexia Program, the Mississippi Speech-Language Therapy Scholarship for Students with Speech-Language Impairments Program, Louisiana’s School Choice Program for Certain Students with Exceptionalities, and Ohio’s Jon Peterson Special Needs Scholarship Program. *See supra* Sections II.B-C.

353. *See supra* Part II (outlining the ten existing special education voucher programs and the amount each respective state expended on each voucher program during the 2013–2014 school year); *see also* FRENDEWEY ET AL., *supra* note 49, at 15 (charting the amount of state funds expended by each of the ten special education voucher programs in the 2013–2014 school year).

354. *See supra* Part II.

355. FLA. STAT. § 1002.421(2)(h) (2014); GA. CODE ANN. § 20-2-2115(a)(7) (2014); OKLA. STAT. tit. 70, § 13-101.2(H)(6) (2014); UTAH CODE ANN. § 53A-1a-705(1)(g)(ii) (West 2014).

356. FLA. STAT. § 1002.421(2)(h); OKLA. STAT. tit. 70, § 13-101.2(H)(6); UTAH CODE ANN. § 53A-1a-705(1)(g)(iii).

357. GA. CODE ANN. § 20-2-2115(a)(7).

358. N.C. GEN. STAT. § 115C-112.9 (2014) (requiring that parents receive reports of student progress, but containing no requirements for teacher certifications or qualifications).

qualifications despite having little to no practical training in teaching students with disabilities.³⁵⁹

Additionally, parents of students with disabilities may not be aware that these private schools have low standards for instructors as compared to their public-school counterparts or that they waive their child's rights under the IDEA by enrolling their child in a voucher program at a private school.³⁶⁰ Non-voucher educational programs require that their educators are "highly qualified,"³⁶¹ which means that these instructors must have a bachelor's degree and either complete the state's special education licensing exam or become fully certified as a special education instructor.³⁶² These qualifications stand in sharp contrast to the undefined "skills" required of educators under most special education voucher programs.³⁶³ Furthermore, the implementation of the IDEA and the requirement of "highly qualified" special education instructors "implicitly recognize[s] that special education cannot be appropriate without qualified teachers and other qualified personnel."³⁶⁴ Thus, the lack of a requirement for "highly qualified" special education instructors at participating private schools means that state money is spent to fund private schools with subpar educational programs for students with disabilities.³⁶⁵

Moreover, since parents are not informed that these voucher programs do not have such requirements for participating private schools, it seems that the "parental choice" benefits that voucher proponents and courts hold in such high regard are not very

359. See Hensel, *supra* note 248, at 329 ("Neither the statute nor the Department of Education indicates what 'special skills' might qualify under this provision, opening the door to potentially wide-ranging qualifications.").

360. See *supra* Subsection I.B.2.

361. 20 U.S.C. § 1412(a)(14)(D) (2012) ("[A] State shall adopt a policy that includes a requirement that local educational agencies in the State take measurable steps to recruit, hire, train, and retain highly qualified personnel to provide special education and related services under this subchapter to children with disabilities.").

362. *Id.* § 7801(23) (defining "highly qualified" with respect to primary and secondary instructors).

363. See *supra* notes 356-57 and accompanying text (listing the state statutes that merely require an instructor at a private school participating in the voucher program to have "skills" or "experience" instead of degrees or training in educating students with disabilities).

364. J. Matt Jameson & Dixie S. Huefner, "Highly Qualified" Special Educators and the Provision of a Free and Appropriate Public Education to Students with Disabilities, 35 J.L. & EDUC. 29, 32 (2006).

365. See *supra* Part II.

trustworthy.³⁶⁶ Parents may not realize that enrolling their student with disabilities in a private school through the voucher program means that they have forfeited their child's rights under the IDEA³⁶⁷ and instead have placed their child in a private school that does not even require a single special education instructor to be on staff.³⁶⁸ Furthermore, many parents unwittingly make uninformed choices due to the lack of information that participating private schools provide for parents and the inability for parents to receive this information even when they do ask for it.³⁶⁹ The surveys of parents who enrolled their students in the McKay Scholarship Program show that half of the parents were not able to obtain information about the program even after asking for this information.³⁷⁰ Moreover, 77% of private schools participating in the McKay Scholarship Program did not even have a special education program.³⁷¹ These surveys indicate that parental choice, an aspect that voucher proponents tout as the defining justification for these programs³⁷² and that courts use to justify Establishment Clause issues,³⁷³ is an uninformed choice at best—and at worst a choice that places students in an environment that does not have any resources for students with disabilities.³⁷⁴

Given that the majority of special education voucher programs may not actually have any special education instructors on staff, new programs should require that private schools wishing to participate in a voucher program prove that the teachers who will educate the

366. See *supra* Section I.C (showing that both federal and state courts have upheld voucher programs based on the “parental choice” rationale).

367. See *supra* Subsection I.B.2.

368. See *supra* Section II.A.

369. See Hensel, *supra* note 81, at 323 (“Although parental choice is often highlighted as a strength of voucher programs, the information necessary [to] make informed choices is often lacking.”).

370. See *supra* note 222 and accompanying text.

371. See Hensel, *supra* note 81, at 323 (“One study in Florida, for example, found that 77% of the schools accepting McKay students provided no special program of any kind for disabled students.”).

372. See *supra* note 52 and accompanying text.

373. See *supra* notes 136-38 and accompanying text (discussing the “parental choice” rationale that courts utilize to justify upholding the legality of school voucher programs when faced with challenges that these programs violate the Establishment Clause).

374. See Hensel, *supra* note 81, at 323 (“There is evidence to suggest . . . that the majority of children accepting special needs vouchers attend private schools with little or no differentiated programming. One study in Florida, for example, found that 77% of the schools accepting McKay students provided no special program of any kind for disabled students.”).

voucher recipients are certified special education instructors.³⁷⁵ Therefore, new programs should follow Louisiana's lead in this respect and require that educators in participating private schools hold the same certification requirements as those teachers who educate students with disabilities in non-voucher settings.³⁷⁶ In modeling the requirements for special education instructors at participating private schools after the requirements for instructors in non-voucher programs, the state can accomplish the goals of ensuring that students receive a quality education and that the state spends its money in a beneficial way.³⁷⁷

2. *Participating Private Schools Must Conduct Annual Student Assessments and Report Student Progress to the State*

In addition to the lack of special education credentials for teachers of voucher recipients,³⁷⁸ the majority of special education voucher programs also do not require that private schools report student progress to the state.³⁷⁹ States could be spending millions of dollars³⁸⁰ on ineffective programs, but have no way to know this because eight out of the ten existing programs do not require that the state receive reports on students' progress.³⁸¹ While many programs require that the private schools provide annual progress reports to parents, there is no similar requirement that the schools send those progress reports to the state.³⁸² The two Ohio programs constitute the only special education voucher programs that report student progress to both the student's parents as well as to the state.³⁸³

Therefore, one way to solve this problem is to follow Ohio's lead in providing annual individualized educational assessments of student progress administered by the certified special education

375. *See supra* Part II.

376. *See supra* note 284 and accompanying text (outlining Louisiana's requirement that instructors in participating private schools hold the same credentials as instructors in non-voucher settings).

377. *See supra* note 284 and accompanying text.

378. *See supra* Section II.A (categorizing the special education voucher programs that do not require instructors to hold special education credentials).

379. *See supra* Sections II.A-B.

380. *See supra* note 50 and accompanying text (stating that total amount of money expended in the 2013–2014 school year was \$275 million).

381. *See supra* Part II.

382. *See supra* Part II.

383. *See supra* Subsections II.C.2-3.

instructors to the state.³⁸⁴ Ohio's Jon Peterson Special Needs Scholarship Program is currently the only special education voucher program that requires administration of state assessments conducted by the student's IEP team.³⁸⁵ New programs should adopt Ohio's framework in this respect by also requiring that the student's IEP team annually conduct an assessment of the student's progress.³⁸⁶ This way, if a student is not succeeding in the program, then the student does not spend additional years and state funds in a program that does not work for that student.³⁸⁷ The student's IEP team would have the ability to monitor the student's annual progress and counsel the student depending on the student's assessment results.³⁸⁸

Following Ohio's lead, the state should also review the collective assessment results from the participating schools each year: If the state determines based on these annual assessments that a private school is not providing the requisite services to students with disabilities, then the state may have to reevaluate the amount of money spent on these programs.³⁸⁹ Both voucher supporters and opponents can likely agree that it is undesirable for students with disabilities to receive a subpar education, and it is equally undesirable for states to waste millions of dollars on potentially ineffective programs.³⁹⁰ Therefore, if private schools wish to participate in the voucher program and receive state funding during a public-school funding crisis, then these schools must objectively show that the funding is benefiting the student by reporting student assessment data to the state.³⁹¹

384. See *supra* notes 293, 302 and accompanying text.

385. OHIO REV. CODE ANN. § 3310.522 (West 2014).

386. *Id.* § 3310.58(G) ("The school or entity agrees to provide a record of the implementation of the individualized education program for each qualified special education child enrolled in the school's or entity's special education program, including evaluation of the child's progress, to the school district in which the child is entitled to attend school, in the form and manner prescribed by the department.").

387. See *supra* Subsections II.C.2-3.

388. The Jon Peterson Special Needs Scholarship Program requires that each student's IEP team review the student's progress on an annual basis and report that progress to the state. See *supra* Subsections II.C.2-3.

389. See *supra* notes 292-93 and accompanying text.

390. See *supra* note 50 and accompanying text.

391. See *supra* note 11 and accompanying text (providing sources that emphasize the lack of educational funding assistance for public schools).

C. The Importance of Implementing More Stringent Accountability Measures

While some critics may have reservations about implementing more stringent accountability measures, the importance of requiring accountability measures outweighs these concerns.³⁹² The first criticism of this approach is the assertion that more stringent requirements attached to these voucher programs would impede the goal of expanding the availability of special education voucher programs.³⁹³ Critics may argue that, in setting more difficult standards for participating private schools, fewer schools are likely to meet the qualifications for participation in the programs,³⁹⁴ which would consequently render these voucher programs less available for students with disabilities.³⁹⁵ However, each Ohio program effectively provided vouchers to over 2,000 students in the 2013–2014 school year for each voucher program while also requiring that private schools receive annual records of student progress,³⁹⁶ and this number continues to increase each year despite these more stringent accountability requirements.³⁹⁷ Student enrollment in the recently enacted Jon Peterson Special Needs Scholarship Program increased by over 300 students,³⁹⁸ and student enrollment in the Autism Scholarship Program increased by over 2,300 students since its inception in 2003.³⁹⁹ Furthermore, these programs should not, in fact, be expanded—and more funds dispensed to participating private

392. See *infra* notes 393, 402, 407 and accompanying text (outlining three anticipated criticisms to implementing more stringent accountability requirements).

393. See Greene & Buck, *supra* note 52, at 42 (“It might be best, however, not to require state accountability testing in a special education voucher program.”).

394. See Arianna Prothero, *Why Private Schools Are Opting Out of Voucher Programs*, EDUC. WK. BLOG (Jan. 21, 2015, 1:47 PM), http://blogs.edweek.org/edweek/charterschoice/2015/01/why_private_schools_are_opting_out_of_voucher_programs.html (stating that “[c]oncerns about too much regulation and maintaining independence are the primary reasons private schools choose not to participate in school voucher or tax-credit scholarship programs”).

395. See Greene & Buck, *supra* note 52, at 42–43.

396. See FRENDEWEY ET AL., *supra* note 49, at 15 (showing that 2,623 students received vouchers in Ohio’s Autism Scholarship Program and that 2,103 students received vouchers in Ohio’s Jon Peterson Special Needs Scholarship Program in the 2013–2014 school year).

397. See *id.* at 79, 81 (providing charts for each of the two special education voucher programs that show growth in these programs since their respective inaugural years).

398. See *id.* at 81.

399. See *id.* at 79.

schools during a public-school funding crisis—if private schools are not held accountable and do not provide objective evidence of the program’s success.⁴⁰⁰ If states adopt the proposed basic accountability measures of teacher certification and reporting student assessment to the state, then states will be able to take the appropriate remedial steps when participating private schools fall short of these standards, thus ensuring that students with disabilities receive proper instruction and that the state allocates its money to effective programs.⁴⁰¹

Another criticism is that states would be less flexible in their ability to provide services for students with disabilities.⁴⁰² Critics may argue that increased regulation of instructors may deter some unqualified but otherwise excellent educators from providing unique services to individual students with disabilities.⁴⁰³ This, in turn, would create fewer opportunities for students with disabilities, a group of individuals who would benefit from increased flexibility in educational options.⁴⁰⁴ However, there is a real danger that programs with no accountability or objective assessments may actually harm students with disabilities by failing to ensure that these students receive the individualized attention they need, and therefore these private-school services would be undesirable.⁴⁰⁵ Requiring that schools retain certified special education teachers on staff can only serve to benefit these programs and the students they aid because all instructors would then possess the necessary skills to meet the individualized needs of each student participating in the voucher program.⁴⁰⁶

400. See *supra* note 50 and accompanying text (stating that \$275 million was expended in the 2013–2014 school year and that funds spent on vouchers increase each year).

401. See *supra* Section III.B.

402. See Hensel, *supra* note 81, at 326.

403. See *id.* (conceding that “there undoubtedly are some individuals who would not meet the federal standards but who nevertheless may be exemplary teachers”).

404. See Greene & Buck, *supra* note 52, at 39 (arguing that increased opportunities for students with disabilities through voucher programs are critical because these programs “give parents the right to select a private placement without having to convince public school officials of the need for such services”).

405. See Dwyer, *supra* note 200, at 394-95.

406. See Jameson & Huefner, *supra* note 364, at 32 (asserting that “the IDEA regulations . . . implicitly recognize that special education cannot be appropriate without qualified teachers and other qualified personnel to provide related services”).

Finally, some critics may argue that it is too difficult to provide objective measurements of progress for students with disabilities because every student requires a unique educational experience.⁴⁰⁷ One way in which to solve this issue is to have the required special education instructors at the private school evaluate each individual student based on the student's individual goals implemented by the student's IEP team, thus modeling accountability measures from the existing framework successfully used in non-voucher programs.⁴⁰⁸ This data on student progress should then be shared with the state in order to determine whether or not the participating private school has implemented an effective program.⁴⁰⁹

The undeniable future expansion of special education voucher programs necessitates accountability: Not only are these programs here to stay, but proposals for the creation of new programs and for the expansion of existing programs also continue to rise.⁴¹⁰ The recent *Meredith v. Pence* decision and the subsequent increase in proposals for special education voucher programs⁴¹¹ illustrate that these programs will continue to rise in both the number of available programs and in the number of students with disabilities who will exercise the option to attend private schools through state funding.⁴¹² Therefore, participating private schools must be held accountable in order to guarantee that the increasing number of students with disabilities served through these programs receive the requisite services and that the millions of state dollars expended actually finance effective programs.⁴¹³ Two basic accountability measures that all newly proposed special education voucher programs should implement include the requirement that participating private schools retain certified special education instructors⁴¹⁴ and that the schools provide annual reports of student progress to the state.⁴¹⁵ This will

407. See *supra* Section I.B.

408. See *supra* Subsection III.B.2 (proposing that states with special education voucher programs require that the private schools participating in these programs conduct annual student assessments and report student progress to the state).

409. See *supra* Subsection III.B.2.

410. See FRENDEWEY ET AL., *supra* note 49, at 17 (charting the steady increase in the total number of students enrolled in voucher programs from the 2000–2001 school year to the 2013–2014 school year).

411. See *supra* note 12 and accompanying text.

412. See FRENDEWEY ET AL., *supra* note 49, at 17.

413. See *supra* Part III.

414. See *supra* Subsection III.B.1.

415. See *supra* Subsection III.B.2.

allow states to monitor the effectiveness of the programs and subsequently make well-informed future decisions as to the expenditure of limited state funds and the implementation of new programs that benefit the individualized needs of students with disabilities.⁴¹⁶

CONCLUSION

Given the lack of sufficient funding for public schools⁴¹⁷ and the increase in proposals for state-funded special education voucher programs following the *Meredith v. Pence* decision,⁴¹⁸ states that wish to expand special education voucher laws must be held accountable to ensure that use of the state's funding for these programs objectively benefits the individualized educational needs of students with disabilities while also ensuring that state dollars are used wisely.⁴¹⁹ Since lack of private-school accountability remains one of the most heavily criticized features of these special education voucher programs,⁴²⁰ newly proposed legislation for the creation or expansion of special education voucher programs should require that private schools meet specific participation standards.⁴²¹ Participating private schools must (1) retain certified special education instructors;⁴²² and (2) provide annual individualized assessments of student progress administered by these certified special education instructors to both the students' parents and to the state.⁴²³

These proposed mandatory participation standards offer practical ways in which states can increase accountability in order to serve the policy goals of ensuring that students with disabilities receive a proper education and ensuring that state funds finance effective programs.⁴²⁴ Unless each state mandates more stringent accountability measures to address the shortcomings of these programs, the unimpeded expansion of these voucher programs will be detrimental to both the students with disabilities who attend these ineffective programs as well as states that provide funding for these

416. See *supra* Section III.B.

417. See *supra* note 11 and accompanying text.

418. See *supra* note 12 and accompanying text.

419. See *supra* Section III.B.

420. See *supra* Section I.A.

421. See *supra* Part III.

422. See *supra* Subsection III.B.1.

423. See *supra* Subsection III.B.2.

424. See *supra* Part III.

programs.⁴²⁵ States currently proposing new special education voucher programs or proposing the expansion of existing programs must enact these proposed accountability measures now to prevent students with disabilities from receiving a subpar education and to prevent states from funding ineffective educational programs during a public-school funding crisis.⁴²⁶

425. *See supra* Part III.

426. *See supra* Part III.

