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Vouchers for Students with Disabilities: The Future of Special Education?

WENDY F. HENSEL*

I. INTRODUCTION

Many voices over the last decade have called for reform in special education in American public schools. As the number of those receiving services under the Individuals with Disabilities Education Act (“IDEA”)¹ has grown,² scholars and pundits have increasingly argued that the system not only is failing to meet the needs of many children with disabilities, but in some cases is actively inflicting harm on them.³ Although Congress has attempted with varying success to address such concerns each time it has amended the IDEA, at least some continue to believe that the current delivery model cannot effectively meet the highly diverse and at times intense instructional needs that are present across today’s K-12 population. Few dispute that the federal government’s failure to fully fund the mandates of the IDEA has left many schools grap-

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1. 20 U.S.C. §1400 *et seq.* (2008).

2. See Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the Individuals with Disabilities Education Act*, 58 HASTINGS L.J. 1147, 1149 (2007) (noting the “indisputable fact” that “the number of children receiving services under the IDEA has skyrocketed over the last three decades”). See also Thomas Parrish *et al.*, STATE SPECIAL EDUCATION FINANCE SYSTEMS, 1999-2000, PART II: SPECIAL EDUCATION REVENUES AND EXPENDITURES 5-7 (Center for Special Education Finance 2004) (showing growth in special education students between 1977-2003).

3. See *e.g.* H.R. REP. NO. 108-77, at 84 (2003) (“The overidentification of children as disabled and placing them in special education where they do not belong . . . takes valuable resources away from those that are truly disabled.”); Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1083 (2005) (“The disproportionate identification of African-American children with disabilities for special education under the Individuals With Disabilities Education Act (IDEA) persists today to the extent that the IDEA is viewed as a tool of racial discrimination and a dumping ground for minority students.”). Former Secretary of Education Roderick Page has testified that “[t]he stigma of being misclassified as mentally retarded or seriously emotionally disturbed, or as having a behavioral disorder may . . . have serious consequences in terms of the student’s self-perception and the perception of others, including family, peers, teachers, and future employers.” H.R. REP. NO. 108-77, at 98 (2003).

pling with the difficult task of trying to improve and individualize instruction in a time of tight educational spending generally.⁴

Since the initial passage of the Education for All Handicapped Children Act ("EAHCA") in 1975,⁵ much of the reform and innovation taking place in special education has occurred at the federal level, resulting in relatively slow change made with input from a wide variety of interest groups. The future of special education reform, however, may be radically different. Over the last several years, an increasing number of state legislatures have actively entered this arena, proposing or passing laws that give children with disabilities public money to attend a private school.⁶ Rather than trying to fix the perceived deficiencies within the existing system, these states instead facilitate the exit of unhappy parents and students from public schools altogether. Although the specifics of each statute vary, most allow students with an active individualized education plan ("IEP") who were enrolled in public school during the prior school year to elect a voucher loosely equal to the state-funded portion of the cost of their education.⁷ Supporters argue that voucher programs offer a superior approach to traditional reform because they will increase competition among schools for children with disabilities and thereby enhance the educational achievement of these students.⁸ Additionally, some supporters argue that this competition ultimately benefits those students who remain in public schools as well.⁹

4. See, e.g., Melissa Mitchell, *Money Matters. Federal Financial Support for Special Education: What's the Right Formula?*, Project ALIGN Issue Brief, March 1996, at 3 ("As a result of the federal government's failure to fully fund special education programs and the increases in special education identification, many states have begun to regard a reform of special education financing as essential.").

5. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C §1400 *et seq.* (2006)).

6. See *infra* Part II.

7. See *id.*

8. *Rethinking Special Education: How to Reform the Individuals with Disabilities Education Act: Hearing Before the Subcomm. On Educ. Reform of the H. Comm. On Educ. and the Workforce*, 107th Cong. 107-62 (1998) (statement of Dr. Patrick J. Wolf, Assistant Professor of Public Policy, Georgetown Public Policy Institute) ("[G]reater customer choice is likely to enhance accountability in Special Education. Experimental customer choice programs, such as public housing vouchers, have demonstrated that choice initiates a flight to quality.").

9. See Jay P. Greene and Marcus Winters, *The Effect of Special Educ. Vouchers on Public School Achievement: Evidence from Florida's McKay Scholarship Program*, 52 MANHATTAN INST. CIVIC REPORT 20 (Apr. 2008) available at http://www.manhattan-institute.org/html/cr_52.htm (study suggesting that "public school students with relatively mild disabilities made statistically significant test score improvements in both math and reading as more nearby private schools began participation in the McKay program"). See also Randy Hicks, *Vouchers Help Public Schools Too; Both Student Scores and Funding Increase When There's a Little Competition*, ATL. JOURNAL CONSTITUTION, Nov. 12, 2007, at 11A.

The momentum toward vouchers has the potential to make a significant and lasting impact on the manner in which children with disabilities are educated in the United States. Because most states require students receiving vouchers to waive their rights under the IDEA as a condition precedent to receiving state money, this impact will be felt not only at the state level, but also on federal policy going forward. Despite this reality, there has been surprisingly little scholarly inquiry by the legal academy into the impetus behind this movement, the legality of such programs, and the corresponding public policy consequences which follow their adoption. Instead, much of the literature has been driven by interest groups, many of which arguably have pre-determined agendas relating to school choice more generally.¹⁰ Because of the potential significance of the voucher movement, it is critical to take a comprehensive look at the advantages and disadvantages that vouchers pose for individual students with disabilities and special education as a whole.

This article will explore these issues and evaluate whether voucher programs conflict with or enhance the ideals embodied in the IDEA. Part I examines the history and impetus behind the voucher movement, looking to identify why this approach has gained such traction in a relatively short period of time. Part II describes the voucher programs currently in place in Florida, Utah, Georgia and Ohio, as well as legislation that has been proposed around the United States, both at the state and federal level. Part III evaluates the legal challenges made against the voucher programs in Arizona and Florida, and the federal government's current position on these state programs. Finally, Part IV analyzes the diverse public policy implications of voucher programs for children with disabilities. This section concludes that while special needs vouchers offer an attractive option for mildly-impaired children with sufficient resources to attend specialized schools, they offer considerably less to the majority of children with disabilities who use vouchers to enter private schools with no individualized instruction. The benefits secured by the former group, moreover, are offset by the costs to those children with

10. For example, much of the information about the effectiveness of Florida's program has come out of the Manhattan Institute, which identifies its mission as "to develop and disseminate new ideas that foster greater economic choice and individual responsibility." <http://www.manhattan-institute.org/>. Likewise, the Friedman Foundation for Educational Choice, which has been "dubbed 'the nation's leading voucher advocates'" by the Wall Street Journal, has issued positive assessments of special needs vouchers. See Robert Enlow, *Grading School Choice: Evaluating School Choice Programs by the Friedman Gold Standard*, SCHOOL CHOICE ISSUES IN DEPTH 4, Friedman Foundation for Educational Choice (Feb. 2008).

disabilities who remain in a public setting. Because state and federal legislatures should look to the well-being and advancement of all children with disabilities rather than a select few in setting policy agendas, voucher programs should be rejected or approached with extreme caution in the future.

II. ORIGINS OF THE SPECIAL NEEDS VOUCHER MOVEMENT

There is no question that the provision of private school vouchers to students with disabilities is highly controversial. The debate can be divisive even among advocates for students with disabilities, and the tenor of conversation here often matches that of other lightning-rod policy debates, like abortion rights and gun control. One lobbyist in Arizona, for example, described the debate over passage in his state as “passionate” and ultimately one-sided because “[p]eople on both sides are absolutely right about the issues. There’s no middle ground, no compromise. This is like war.”¹¹

Just as in many wars, there is little agreement over who should be credited with the momentum behind the movement. Not surprisingly, proponents of vouchers argue that it has its genesis in parental dissatisfaction with special education programs in the public schools.¹² They argue that the search for private options to the dilemma of difference is necessary in light of the limited resources and administrative indifference that children with disabilities often encounter in the public schools.¹³ Proponents believe that vouchers will allow parents to seek schools that are better tailored to meet the individualized needs of children who simply do not respond to typical instructional methods. Although the IDEA bestows procedural due process protections, it offers little to parents who are unwilling or unable to litigate claims beyond the

11. See Andrea Falkenhagen, *Vouchers for Disabled Students Go Unused*, EAST VALLEY TRIBUNE, Apr. 16, 2007 (quoting Mike Smith, lobbyist with the Arizona School Administrators Association), available at <http://www.eastvalleytribune.com/story/87897>.

12. See, e.g., Jay P. Greene and Greg Forster, *Vouchers for Special Education Students: An Evaluation of Florida’s McKay Scholarship Program*, 38 CIVIC REPORT 2 (June 2003), http://www.manhattan-institute.org/html/cr_58.htm (describing genesis of McKay program).

13. *Id.*

school level. Vouchers, advocates argue, give parents an exit strategy more readily employed while simultaneously diminishing the public resources spent on litigation over the scope of services provided.¹⁴

The debate over passage of voucher bills in many states supports this parent-driven scenario to at least some extent. In many states, just as at the federal level,¹⁵ the individual introducing the voucher legislation has ties to an individual with disabilities. For example, then-Senator John McKay, for whom Florida's McKay scholarship is named, is the parent of a child with disabilities.¹⁶ Typically, moreover, there are a number of parents in each state who voice their support of voucher legislation in local newspapers and hearings before state legislatures.¹⁷ This support often involves stories of children with disabilities failing in public schools with no recourse in sight.¹⁸

Beyond this support, however, there is no question that a number of interest groups and individual legislators have stepped on the bandwagon of special needs vouchers as the pathway to meeting other legislative agendas. The most common of these is a desire for universal school choice. For these advocacy organizations, children with disabilities may be elected as the poster children for the voucher movement because it is difficult politically to argue against benefits that will serve this vulnerable

14. See, e.g., Jay P. Greene, *The Uses of Vouchers*, CITY JOURNAL, July 28, 2009, http://www.city-journal.org/2009/nytom_school-choice.html (arguing that most parents do not have the resources "to engage in ongoing legal battles" to enforce their children's rights, and that vouchers provide a "mechanism- a market mechanism- to help make their rights a reality"); Marcus A. Winters, *Offer Vouchers for Special Education*, N.Y. DAILY NEWS, Dec. 28, 2008, <http://www.manhattan-institute.org/html/miarticle.htm?id=3768> ("With a special education voucher, disgruntled parents can skip the courtroom drama and send their child directly to a private school").

15. See, e.g., JACQUELINE VAUGHN SWITZER, *DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY 103* (discussing the significant relationships of sponsors of the ADA with people with disabilities).

16. See Greene and Forster, *supra* note 12, at 1. In Ohio, the Autism Scholarship Pilot Program was introduced by Representative Jon Peterson, who has a daughter with autism. See Liz Olivier, *States Debate School Choice for Students with Autism*, AUTISM SPECTRUM QUARTERLY 12 (Summer 2007).

17. See, e.g., Amy K. Stewart, *Bill Would Educate Parents About Carson Smith Scholarship*, DESERT NEWS, Feb. 27, 2009, at A4 ("Dozens of parents of special needs children rallied at the Capitol Friday to tell their story to lawmakers and show support for the Carson Smith Scholarship program.").

18. Deidre Fernandes, *Plan Opens Door to Vouchers, Public School Advocates Say*, THE VIRGINIAN-PILOT, March 2, 2006, at A1 (quoting Percilla Zeno, whose seventeen year-old special-needs son had been bullied in public school, as "really ecstatic" to see a Virginia special education voucher plan reintroduced in the House).

group.¹⁹ The debate surrounding passage of these bills tends to be characterized as pro-disability or anti-disability, with obvious consequences for opponents of school choice. In Missouri, for example, national school choice organizations financed YouTube videos of autistic children to facilitate support for pending special-needs scholarship legislation in early 2008.²⁰ The debate surrounding passage of the voucher bill was then framed to make thoughtful debate a virtual impossibility—“[e]ither you’re for autistic kids or you’re against autistic kids.”²¹ This stark positioning proved uncomfortable even for some supporters of school choice. As one legislator commented, “They have picked a group of individuals to try to advance their agenda, and I’m bothered by that . . . I just feel very strongly we shouldn’t be using this group of people.”²²

These legislative initiatives to some extent are driven by the “acorn theory” of school choice. Children with disabilities are chosen to lead the voucher charge both because of the sympathetic face they place on the debate and the nearly universal view that public education has failed this group at some level.²³ By cracking the door open and gaining public acceptance for some funding of private school, special needs vouchers serve as the seed or “acorn” that will grow into universal school choice for all students in the state. It is noteworthy that in some states that have

19. See, e.g., Jay P. Greene and Marcus A. Winters, *The Politics of Special Ed Vouchers: What You Can Expect from the Presidential Candidates*, THE WASHINGTON TIMES, May 01, 2008, at A15 (arguing that special education voucher programs are more politically appealing and rarely face legal challenges because “teachers’ unions don’t relish the image of dragging disabled kids into courts to compel them to return to public schools that were serving them poorly”); Andrew Rotherman, *McKay Madness! A Veil of Ignorance? Or a Tail of Willful Ignorance Wagging the Voucher Dog in Florida*, eduwonk.com (May 26, 2006) (“Of course, in the end McKay is really not about special education anyway. It’s about vouchers. And it’s a good sell. That’s why the program is wildly popular among voucher advocates, it reduces people like me to appearing to be picking on disabled kids.”).

20. See, e.g., Virginia Young, *Bill Would Give Aid for Tuition to Autistic Children*, ST. LOUIS POST-DISPATCH, Mar. 11, 2008, at B1. The videos were financed by Children’s Education Council of Missouri.

21. *Id.*

22. *Id.* (quoting Rep. Shannon Cooper, R-Clinton). In part as a response to the allegation that opponents of the bill were anti-autism, legislation was introduced in the House which would fund an autism-training program for teachers, develop a set of best practices for children with autism, and establish an Autism Spectrum Disorder Commission responsible for developing a strategic plan to address the growing number of autistic children in the state. See H.B. 2304, 94th Gen. Assemb., 2nd Reg. Sess. (Mo. 2008).

23. One lobbyist has argued that lawmakers “decided in a bizarre way that the best way to get vouchers is by target populations. The belief is, if they get enough of these then there’s critical mass – then they can open the voucher program to everybody.” See Andrea Falkenhagen, *Vouchers for Disabled Students Go Unused*, EAST VALLEY TRIBUNE, Apr. 16, 2007 (quoting Mike Smith, lobbyist with the Arizona School Administrators Association).

passed special needs voucher legislation, bills for universal school choice followed within a short period of the original bill's passage.²⁴

Organizations and individuals interested in religious education have also played a prominent role in the voucher movement. In Florida, which established the first special needs voucher program, critics argued that Governor Jeb Bush and GOP legislators were primarily interested "not in vouchers for disabled students but in vouchers students can use at religious schools."²⁵ As evidence for this assertion, critics pointed to the absence of oversight in Florida's original voucher legislation and the "laughable" accountability provisions added in 2006, which require no standardized testing or teacher credentialing, and provide no way to assess the quality of participating schools.²⁶ Whether or not this is correct, it is notable that religious schools have entered the market for voucher students in Florida much more rapidly than secular schools and educate a majority of students receiving vouchers in Florida.²⁷

Not surprisingly, some attribute the voucher movement to private school operators with a financial interest in expanding student populations. In Florida, critics have argued that the voucher program was influenced to a significant extent by individuals in this group.²⁸ As an example of this, they point out that the program was changed in 2005 to delete the statutory provision requiring participating schools to accept vouchers as full payment of tuition. This change, which conceivably could exclude many low-income children from participating in the program, was apparently brought about in part as a result of the influence of a pri-

24. Georgia, for example, has progressively moved towards a universal school voucher. The Special Needs Scholarship Act was enacted on April 20, 2007, and was soon followed by the passage of Georgia H.B. 1133, which created a school choice tax credit program for Georgians (codified at GA. CODE ANN. 20-2A-1). Georgia unsuccessfully introduced legislation in 2008 to allow students at public schools which fail or lose accreditation to attend an alternate public school or receive a private school voucher (S.B. 458) and to provide universal school vouchers (S.B. 90).

25. *Correct Voucher Policy? Stick to McKay Vouchers*, PALM BEACH POST, May 13, 2006, at 14A.

26. *Id.*

27. See Florida Dep't. of Educ., John M. McKay Scholarship Program Quarterly Report (June 2009), [hereinafter McKay Quarterly Report 2009], http://www.floridaschoolchoice.org/Information/McKay/quarterly_reports/mckay_report_june2009.pdf.

28. See, e.g., S.V. Date, *Private-School Director Influences Education Policy*, PALM BEACH POST 4A (April 12, 2004) (detailing influence of Patricia Hardman, head of Dyslexia Research Institute, a school that would receive and benefit from McKay scholarships, in limiting accountability provisions in statute).

vate school head with significant political connections who was appointed to a Florida Senate task force to study the voucher program.²⁹

Predictably, standing on the opposite side of this issue are teachers' unions and opponents of universal school choice. In general, these organizations are opposed to any measure that would "provide public tax dollars to parents in order to attend private schools."³⁰ Teacher organizations both have argued against passage of voucher legislation in their states and have successfully filed litigation to overturn such legislation upon its enactment.³¹

Although disability advocacy groups are clearly interested in the provision of special needs vouchers, there is split as to whether they believe such programs provide a step forward for children with disabilities or are a dangerous renunciation of the public's obligation to provide a free appropriate public education ("FAPE") for all students.³² Some are wary of taking a position that is contrary to that adopted by some parents in their organizations, and thus have elected to take no official stand on voucher legislation.³³ As vouchers gain traction within state legislatures, however, an increasing number of disability advocacy and interest groups have issued formal statements both for and against their adoption.³⁴ To date, no clear consensus has emerged among these organizations.

29. See, e.g., S.V. Date, *Tuition Might Rise for Parents Using Vouchers*, PALM BEACH POST 1A (May 16, 2004). Patricia Hardman also "opposed any increased oversight...[and] proposed requirements that schools be accredited and use certified teachers." *Id.* See also *Vouchers Become Subsidy for State's Private Schools*, BEACH POST 10A (May 22, 2004) (editorial concluding that "Florida's voucher programs have crossed the line at which the pretense of helping students ends and the real goal of enriching private schools becomes clear.").

30. *OEA Testifies Against Special Education Vouchers*, OEA LEGISLATIVE WATCH (Nov. 2, 2007). See also Corrina Jennings, *Texas Considers Special-Needs Vouchers*, SCHOOL REFORM NEWS 4 (June 2009).

31. See *infra* at Part IIIA.

32. See, e.g., Katherine Shek, *Educators, Advocates Fight to Keep Vouchers Out of IDEA*, specialedconnection.com (April 23, 2003). In Texas, for example, the group Texas Parents for Autism Scholarships favors voucher legislation, while Advocacy, Inc., a disability rights organization, opposes it. *Public Policy Issues Update: "Voucher" Proposals for Students with Disabilities During the 81st Texas Legislature* (2009), http://www.txddc.state.tx.us/about_us/council/meetings/feb09mtgs/v-tab14-feb-09.pdf. See also Olivier, *supra* note 16, at 14.

33. See, e.g., Autism Society of Ohio, *Ohio's Autism Scholarship Program* (noting that the organization is "currently neutral" on the Autism Scholarship Program in Ohio and takes "no stand"), http://www.autismohio.org/index.php?option=com_content&task=view&id=520&Itemid=134.

34. See, e.g., National Council on Disability, *School Vouchers and Students with Disabilities*, <http://www.ncd.gov/newsroom/publications/2003/vouchers.htm>; The Disability Policy Consortium, *Oppose School Vouchers*, http://www.dpctexas.org/Documents/Texas_81st_Legislative_Issues/ib20.php; Council for Exceptional Children, *Position on School Vouchers and IDEA Authorization* (2003), available at <http://www.cec.sped.org/Content/NavigationMenu/PolicyAdvocacy/CECPolicyResources/voucherstatement2003.pdf>; President's Commission on Excellence in Special Education, *A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES* 35 (July 2002) (advocating for increased school choice).

III. THE CURRENT STATE OF SPECIAL NEEDS VOUCHER PROGRAMS

As of the writing of this article, three states provide universal vouchers for all students with disabilities, while a fourth limits its voucher program to children with autism. As reflected by the number of states who have proposed similar legislation, there is little doubt that this number will grow in the near future.³⁵ This section explores the key components of the existing state programs and identifies proposed legislation in other states. It concludes with a brief discussion of federal efforts to incorporate this option into the most recent reauthorization of the IDEA and its resurrection during the 2008 Presidential election.

A. Universal Special Needs Vouchers

1. Florida: The McKay Scholarship Program for Students with Disabilities

Florida's John M. McKay Scholarship for Students with Disabilities, first offered in 2000, provides scholarships to enable children with disabilities to attend either a public school outside of their home school or a private school of their choice.³⁶ Eligible students must be enrolled in public school for at least one year and have both a qualifying disability and an individualized education plan ("IEP") in place.³⁷ Scholarships are equal to the private school's tuition and fees or the amount the student's home dis-

35. See *infra* Part II.C. As this article was nearing publication, the state of Oklahoma was close to passing special needs scholarship legislation. See H.B. 3393, 52nd Leg. Sess. (Ok. 2010). See also Tim Talley, *Okla. Bill Would Create Special Needs Scholarship*, R&D (May 5, 2010) (discussing likely passage of special needs scholarship in Oklahoma), available at <http://www.rdmag.com/News/FeedsAP/2010/05/life-sciences-okla-bill-would-create-special-needs-scholarships/>.

36. FLA. STAT. ANN. § 1002.39(1) (West 2007); Florida Dep't. of Educ., *John M. McKay Scholarships for Students with Disabilities Program*, [hereinafter McKay Scholarships] available at http://www.floridaschoolchoice.org/Information/McKay/files/Fast_Facts_McKay.pdf.

37. FLA. STAT. ANN. § 1002.39(1)-(2) (West 2007). As this article was nearing publication, Florida passed a bill that would expand eligibility for McKay scholarships to include children entering kindergarten and children who have been enrolled in public schools "in any of the 5 years prior to the 2010-2011 fiscal year," even if they are not currently so enrolled. See C.S./H.B. 1505, §§ 2(a), 3, 2010 Leg. (Fla. 2010), available at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1505er.docx& DocumentType=Bill&BillNumber=1505&Session=2010. The bill passed both the Florida House and Senate in late April 2010 but had not been signed by the governor at the time of writing this article. The amendments, if signed, will take effect in July 2010.

trict would have received for the student from the state, whichever is less.³⁸ In the 2007-2008, awards ranged between \$5,160 and \$21,769, with an average award of \$7,295.³⁹ That same year, the state paid out more than \$131 million to students participating in the program.⁴⁰ Once given, a scholarship remains in place until a student returns to public school, graduates or turns twenty-two, whichever occurs first.⁴¹ The McKay program grew significantly in its first seven years of operation, expanding from 970 participating students in 2000 to 20,530 in 2009.⁴²

In order to participate in the program, schools must register with and be approved by the state Department of Education (“DOE”).⁴³ In 2009, nearly 900 schools were identified as eligible to receive scholarship students.⁴⁴ In the early years of the legislation, few requirements were placed on schools receiving vouchers, and a number of fraudulent schools were found to be operating within the program.⁴⁵ To address this problem, the Florida legislature added several statutory safeguards in 2006.⁴⁶ Schools are now required to maintain a physical site where students regularly attend classes.⁴⁷ In addition, they must demonstrate fiscal soundness, satisfy health and safety codes, and have in place a non-discrimination policy.⁴⁸ The teaching staff at each school also must hold at least a baccalaureate degree, have three years of teaching experience in public or private schools, or “have special skills, knowledge, or expertise” to be deemed sufficiently qualified.⁴⁹ Moreover, all personnel with

38. FLA. STAT. ANN. § 1002.39(10)(a)-(b).

39. See McKay Scholarships, *supra* note 36.

40. *Id.*

41. FLA. STAT. ANN. § 1002.39(4)(a). Parents may request a reassessment of the award total every three years. *Id.* § 1002.39(5)(c).

42. McKay Scholarships, *supra* note 36, at 1.

43. FLA. STAT. ANN. § 1002.39(6)(b).

44. McKay Quarterly Report 2009, *supra* note 27, at 5.

45. See, e.g., S.V. Date, *Lack of Voucher Accountability Comes Back to Sting Proponent*, PALM BEACH POST, June 30, 2004, at 13A (discussing incidents of fraud in Florida voucher program).

46. FLA. STAT. ANN. § 1002.39(8)(c)-(d). The Florida legislature has proposed additional safeguards in recent legislation which passed both the House and Senate in April 2010 but had not been signed by the governor at the time of this article. The legislation, once signed, would permit the Commissioner of Education to “deny, suspend or revoke a private school’s participation in the scholarship program” if there is evidence that the school is “operating or has operated . . . in a manner contrary to the health, safety or welfare of the public.” C.S./H.B. 1505, §§ 7(a)2, 2010 Leg. (Fla. 2010).

47. *Id.* This provision was added in part as a result of on-line correspondence schools receiving voucher money. FLA. STAT. ANN. § 1002.39(8)(d).

48. *Id.* § 1002.421(2).

49. *Id.* § 1002.421(2)(h).

“direct student contact” must undergo criminal background checks and fingerprinting.⁵⁰ To ensure that information reported by participating schools is accurate, the DOE is authorized to conduct random site visits to participating schools to verify all submitted information.⁵¹

The legislature in 2006 also enhanced the substantive accountability measures of the statute to help parents monitor the progress of participating students. Schools are required to provide parents with a written report explaining their child’s progress during the academic year on at least an annual basis.⁵² Schools are likewise required to facilitate student participation in statewide annual assessments when parents indicate a desire for testing.⁵³ Significantly, however, schools are not required to administer any standardized tests themselves, despite the fact that Florida’s other voucher programs require such testing.⁵⁴

2. Utah: Carson Smith Scholarship for Students with Special Needs⁵⁵

The Carson Smith Scholarship program was first implemented during the 2005-2006 school year and is available to a wide range of students with disabilities. The program served 482 students during the 2007-2008 school year and was predicted to grow by as much as 49% by the end of that term.⁵⁶ Like Florida, Utah permits resident students who have an IEP and were enrolled in public school during the prior school year to apply for a scholarship to attend a private school.⁵⁷ The state diverges from the McKay program, however, in two ways: (1) new scholarship recipients

50. *Id.* § 1002.421(2)(i).

51. *Id.* § 1002.39(6)(f).

52. *Id.* § 1002.39(8)(c)-(d).

53. *Id.* § 1002.39(5)(f).

54. Private schools accepting students through the Florida’s Corporate Tax Credit vouchers, which offers vouchers to underprivileged children, must annually administer a nationally norm-referenced test identified by the Florida DOE and report the scores both to parents and an independent research organization. FL. STAT. ANN. § 220.187(8)(c)(2). The testing reports, however, will only be reported in the aggregate rather than by school, making it impossible to determine progress at the individual level. *Id.* § 220.187(9)(j).

55. UTAH CODE. ANN. § 53A-1a-701 *et seq.* (2007).

56. Lisa Schenker, *Carson Smith Special Needs Scholarship Program Growing in Utah*, SALT LAKE TRIBUNE, Jan. 25, 2008, available at http://www.sltrib.com/education/ci_8078447. The number of recipients grew 234% in 2006-07, and 34% in the 2007-2008 school year as of January 2008. Report to the Utah Legislature, A PERFORMANCE AUDIT OF THE CARSON SMITH SCHOLARSHIP FOR STUDENTS WITH SPECIAL NEEDS 5 (January 2008). Notably, the 2008 state audit report concluded that “[t]he number of additional students receiving the scholarship appears to be slowing down.” *Id.*

57. UTAH CODE. ANN. § 53A-1a-704(2)(d).

are selected by lottery when the number of applicants exceeds the funding allocated by the state; and (2) students enrolled in private schools that have “previously served students with disabilities” are permitted to apply for scholarships when an “assessment team”⁵⁸ can “readily determine with reasonable certainty that the student has a disability . . . and would qualify for special education services.”⁵⁹ A considerable number of children establish eligibility via the latter method, with one recent audit finding that 62% of children across five districts “were not in public school at the time they applied for and received the Carson Smith Scholarship.”⁶⁰

During the 2009-2010 school year, forty-eight private schools participated in the program, a growth of 500% since 2005.⁶¹ The state’s list of requirements for participating private schools is similar in many respects to that of Florida. Schools must operate in a physical location that provides direct contact between students and teachers, complete an audit that confirms the fiscal soundness of the school, have a non-discrimination policy in place, and comply with health and safety codes.⁶² Teacher requirements are largely identical,⁶³ as is the substantive requirement that schools formally assess students’ academic progress each year, with a report provided both to the parent and to the assessment team.⁶⁴ Unlike Florida, Utah requires participating schools to disclose to parents the special education services that will be provided to their child, the cost of

58. Members of the assessment team include parents, the student’s private school teacher, special education personnel from the student’s school district, and special education personnel from the private school where the student is enrolled. *Id.* § 53A-1a-703(1)(a)-(d).

59. *Id.* § 53A-1a-704(3)(b)(i). The statute defines disability consistently with the Individuals with Disabilities Education Act. *See id.* § 53A-1a-704(2)(b)(i)-(xi). *See also* Parents for Choice in Education, *The Carson Smith Special Needs Scholarship* (indicating that “[n]ew applications are being accepted on a lottery”), available at http://www.choiceineducation.org/index.php?option=com_content&view=category&layout=blog&id=139&Itemid=185.

60. Report to Utah State Legislature, *supra* note 56, at 7.

61. Parents for Choice in Education, *Special Needs Voucher Program Grows Beyond Expectations*, June 4, 2008, available at http://www.choiceineducation.org/documents/PressRelease_2008_06_05.pdf; Carson Smith Scholarship 2009-2010 Eligible School List, available at <http://schools.utah.gov/additionalinformation/Carson-Smith-Scholarship.aspx>.

62. UTAH CODE ANN. § 53A-1a-705(1).

63. At a minimum, teachers are required to have a baccalaureate degree, three years of teaching experience, or “the necessary skills, knowledge, or expertise that qualifies them to provide instruction” in particular subjects to special needs students. *Id.* § 53A-1a-705(1)(g). They also must pass a criminal background check. *See* Utah Office of Educ., *Special Needs Scholarship Program Description*, available at http://www.schools.utah.gov/admin/documents/2008-09_Program_Description.pdf.

64. UTAH CODE ANN. § 53A-1a-705(1)(f).

such services, and the credentials of the teaching staff to facilitate placement decisions.⁶⁵

Scholarship amounts are calculated according to either the level of special education assistance the student would receive in public school or the private school's tuition and fees, whichever is less.⁶⁶ Students who fall in the former category are awarded either a "partial" scholarship if they receive less than 180 minutes of special education per day, or a "full" scholarship if they receive more than 180 minutes.⁶⁷ During the 2010-2011 school year, Utah will award partial scholarship recipients \$3,865.50, and full scholarship recipients \$6,442.50.⁶⁸ The program is funded annually by the Utah legislature, and scholarships are limited by the availability of such funds. In 2007-2008, a report to the Utah Legislature estimated that \$2.5 million annually will be required to fund the program at its current level, which notably does not account for growth in the program.⁶⁹

Scholarships remain in effect for a three year period.⁷⁰ In order to secure an additional three year extension, students must be evaluated by the assessment team to determine whether the student still qualifies for special education services and, if so, at what funding level.⁷¹ The scholarship ultimately terminates when a student graduates or turns twenty-two.⁷²

3. Georgia: Special Needs Scholarship Act⁷³

Georgia is the most recent state to offer vouchers to students with disabilities. Beginning in the 2007-2008 school year, students enrolled in public school in Georgia for at least one year with a categorical disability and an IEP are eligible to participate in the program.⁷⁴ Upon acceptance, a student may either transfer to a different public school or use

65. *Id.* § 53A-1a-705(1)(e).

66. *Id.* § 53A-1a-706(2).

67. Report to the Utah Legislature, *supra* note 56, at 12.

68. See Utah Office of Educ., *Special Needs Scholarship (2010-2011) Program Overview for Parent Applicants*, available at <http://schools.utah.gov/additionalinformation/DOCS/2010-11ParentProgramOverview.aspx>.

69. Report to the Utah Legislature, *supra* note 56, at i, 11. Under Utah law, vouchers may be awarded by lottery if expenditures grows beyond desired or expected levels. *Id.* at 17.

70. UTAH CODE. ANN. § 53A-1a-704(6)(a).

71. *Id.* § 53A-1a-704(6)(b)-(d).

72. *Id.* § 53A-1a-704(6)(d).

73. GA. CODE ANN. § 20-2-2111 *et seq.* (2007).

74. *Id.* § 20-2-2114(a).

state money to attend a private school approved by the state DOE.⁷⁵ Scholarships are awarded in amounts equal to the state-funded portion of a student's public education or a private school's tuition, whichever is less.⁷⁶ In 2008-2009, students received an average award of \$6,331.⁷⁷ Parents are responsible for the remaining tuition, if any, charged by the private school. In 2008-2009, 1,596 students received a tuition grant to attend one of 145 private schools.⁷⁸

The requirements for private schools are very similar to those employed in Florida and Utah as described above. In addition, participating schools must be accredited or provisionally accredited at one of twelve accrediting agencies identified by the Department of Education.⁷⁹ Teachers are required to have a bachelor's degree or at least three years of experience in education and health.⁸⁰ Schools are required to "regularly report" to both parents and the DOE on a student's academic progress, but no substantive standards are provided. Parents are, however, given the right to request that their child participate in any state-wide assessments.⁸¹

Scholarships remain in place indefinitely until a student graduates from high school or turns twenty-one, whichever occurs first.⁸² The statute provides that acceptance of a scholarship constitutes a parental refusal to consent to services under the IDEA.⁸³

B. Restricted Special Needs Vouchers – The Ohio Autism Scholarship Program⁸⁴

Unlike other states with special needs voucher programs, Ohio has authorized scholarships only for children with autism and autism-spectrum disorders. To be eligible, a child must be identified as autistic by the school

75. *Id.* § 20-2-2113(b)(1)-(4).

76. *Id.* § 20-2-2116(a)-(b).

77. See Georgia Dept. of Education, 2008-2009 SPECIAL NEEDS SCHOLARSHIP PROGRAM (GSNS) PRELIMINARY DATA REPORT 2 (Nov. 18, 2008); Bridget Gutierrez, *Vouchers Popular, Limited*, ATLANTA JOURNAL-CONSTITUTION, December 17, 2007, at A1.

78. See Georgia Department of Education, *supra* note 77, at 2; Gutierrez, *supra* note 77, at A1.

79. Georgia Department of Education, GEORGIA SPECIAL NEEDS SCHOLARSHIP PROGRAM PRIVATE SCHOOL RESPONSIBILITIES 2, <http://public.doe.k12.ga.us/DMGetDocument.aspx/010808%20Georgia%20GSNS%20Private%20School%20Responsibilities%20to%20post.pdf?p=6CC6799F8C1371F68ECD17D75DC08CF5932DC8247A27C58E7299C97D23FFFA52&Type=D>.

80. GA. CODE ANN. § 20-2-2115(a)(7).

81. *Id.* § 20-2-2114(c).

82. *Id.* § 20-2-2114(e).

83. *Id.* § 20-2-2114(f).

84. OHIO REV. CODE ANN. § 3310.41 (West 2008).

district, have an IEP in place, and either be enrolled in a public school or eligible to enroll the year the scholarship is sought.⁸⁵ Once these conditions are met, the child is entitled to receive up to \$20,000 “to pay tuition . . . to attend a special education program that implements the child’s individualized education program.”⁸⁶ Private service providers may qualify under this definition. In the first quarter of the 2004-2005 school year, 178 children actively participated in the program.⁸⁷ By the 2007-2008 school year, this number had increased to over 900 students.⁸⁸ There is no cap in the statute limiting the number of students who can participate.

Ohio’s scholarship program is unique in several ways. It requires participating service providers to implement the child’s IEP as developed by the school district, therefore controlling at least to some extent the content of the child’s education. The statute does not require parents to explicitly waive all rights under the IDEA in order to receive services. Although public schools are relieved from providing a free appropriate public education to children who receive the scholarship, they nevertheless are required to “initiat[e] and conduct . . . meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability on at least an annual basis.”⁸⁹ There is no ongoing assurance of payment, and parents must apply for reimbursement each year.⁹⁰

Private schools and individual service providers must be authorized by the DOE to participate in the program. Applicants must provide the credentials of each employee and an affidavit affirming compliance with all state requirements, including the existence of a nondiscrimination policy, fiscal soundness, and operation for at least one year prior to application.⁹¹ Once approved, providers must give progress reports both

85. *Id.* § 3310.41(A)(7).

86. *Id.* § 3310.41(B). To secure these funds, participating parents submit evidence of fees incurred and receive reimbursement from the state. There is no cash outlay as in other state programs. See Ohio Dept. of Educ., AUTISM SCHOLARSHIP PROGRAM GUIDELINES (2009-2010) § 4, available at <http://education.ohio.gov/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=459&ContentID=6678>.

87. See Ohio Legislative Office of Educ. Oversight, *Formative Evaluation of Ohio’s Autism Scholarship* (May 22, 2005).

88. See Autism Society of Ohio, *Ohio’s Autism Scholarship Program*, available at http://www.autismohio.org/index.php?option=com_content&task=view&id=520&Itemid=134# Statistics. At least one report provided a slightly lower number of children served—approximately 734 families in 2007. Piet Van Lier, ANALYZING AUTISM VOUCHERS IN OHIO: A REPORT FROM POLICY MATTERS OHIO 1 (Mar. 2008).

89. See Ohio Dept. of Educ., *supra* note 86, at § 6(5).

90. See *id.* at § 1(2).

91. See *id.* at App. B.

to the child's parents and the child's school district on a "regular basis" which outline the child's progress in obtaining his or her IEP goals.

In late 2007, the Ohio legislature introduced bills to create a Special Education Pilot Program which would extend a similar scholarship to all children with disabilities in the state with an active IEP.⁹² The legislature had attempted to pass this same program as part of budget legislation in early 2007, but the governor vetoed the relevant provisions.⁹³ Eight education stakeholder groups testified in opposition to the proposed program.⁹⁴ The bill was reintroduced in 2008 but lacked one vote in the House to become law. The bill was introduced for a third time in 2009 but remained in Committee at the end of the year.⁹⁵

C. Proposed Special Needs Voucher Legislation

Several states have introduced special needs scholarship legislation in the last few years, including Alabama, Arkansas, Colorado, Kansas, Kentucky, Maryland, Missouri, Mississippi, Oklahoma, Nevada, Oregon, South Carolina, and Texas.⁹⁶ Many of the provisions track the statutes in place in Florida, Georgia and Utah generally. Although most cover all students with disabilities, several of the bills relate exclusively

92. See Ohio H.B. 348 at <http://www.lbo.state.oh.us/fiscal/fiscalnotes/127ga/HB0348IN.htm> and H.B. 431 <http://www.lbo.state.oh.us/fiscal/fiscalnotes/126ga/HB0431HR.htm>- HB431.

93. See Christina A. Samuels, *Ohio Special Education Voucher Program Defeated*, EDUCATION WEEK (Dec. 11, 2008), available at <http://blogs.edweek.org/edweek/speced/vouchers/>.

94. These organizations include the Ohio Education Association, the Ohio School Boards Association, the Buckeye Association of School Administrators, the Ohio Association of Public School Employees, the Ohio Association of School Business Officials, the Ohio Federation of Teachers, the Ohio Parent Teacher Association, the Ohio School Psychologists Association and the League of Women Voters. See *OEA Testifies Against Special Education Vouchers*, OEA LEGISLATIVE WATCH (November 2, 2007), available at http://bucyrusea.ohea.us/important%20documents/Legislative%20Watches/Legislative_Watch.pdf.

95. See <http://lsc.state.oh.us/coderev/sen128.nsf/e16bcd54ff380ee5852560f20055a7f0/e7fd076ef10aa4de852575600061381f?OpenDocument>.

96. See, e.g., H.B. 227, 2008 Leg. (Ala. 2008); S.B. 08-142, 66th Gen. Ass., 2nd Reg. Sess. (Colo. 2008) (defeated in committee); CO S.B. 130 (2009); H.B. 397, 2008 Reg. Sess. (Ky. 2008); KY S.B. 186 (2009); S.B. 813, 2008 Reg. Sess. (Md. 2008); H.B. 1886, 94th Gen. Ass., 2nd Reg. Sess. (Mo. 2008); S.B. 993, 94th Gen. Ass., 2nd Reg. Sess. (Mo. 2008); S.B. 08-2026, 2008 Reg. Sess. (Miss. 2008); MS SB 2117 (2009); H.B. 3393, 52nd Leg. (Ok. 2010); H.B. 3101, 117th Sess. (S.C. 2007-2008); 86th Gen. Ass., Reg. Sess. H.B. 2482 (Ark. 2007); S.B. 282, 2007 Leg. (Kan. 2007); S.B. 158, 2007 Leg. (Nev. 2007); NV S.B. 81 (2009); A.B. 130, 2007 Leg. (Nev. 2007); H.B. 3349, 74th Leg. Ass., Reg. Sess. (Or. 2007); H.B. 19, 80th Leg. Sess. (Tex. 2007); TX H.B. 716, S.B. 183 (Tex. 2009); S.B. 2204 (Tex. 2009).

to children with autism.⁹⁷ A few states, moreover, have proposed provisions that are not reflected in existing legislation. One of the bills introduced in Missouri would establish a special needs scholarship through a corporate tax credit program, which seems to be a hybrid of Florida's McKay scholarship and Corporate Tax Credit Scholarship Program for low-income children.⁹⁸ Several states have proposed heightened accountability requirements for participating private schools. Texas, for example, would require private schools accepting vouchers to administer standardized tests and report individual results to parents and aggregate results to the public.⁹⁹ The proposed Oregon and Alabama bills would impose heightened teacher qualification standards, requiring teachers who provide special education or related services to children receiving autism scholarships to be certified and licensed pursuant to state standards.¹⁰⁰ To facilitate their non-discrimination requirements, Texas and Nevada also propose requiring participating schools to hold a lottery for available positions when they have more qualified applicants than positions available.¹⁰¹ Finally, several of the proposed bills would require school districts to transport children participating in the scholarships to the private school of their choice.¹⁰²

All of the bills raised prior to 2008 stalled before a formal vote was taken by the full state legislature. Some legislation remains pending as of the writing of this article.¹⁰³ The level of legislative activity relating to special needs vouchers suggests a high degree of interest in these pro-

97. See H.B. 227, 2008 Leg. (Ala. 2008); A.B. 130, 2007 Leg. (Nev. 2007); H.B. 3349, 74th Leg. Ass., Reg. Sess. (Or. 2007). Notably, however, these bills are closer to the McKay scholarship than the Ohio autism program in terms of scope and substantive content. The Oregon legislation, for example, notes that "the participating school is not required to abide by the [scholarship student's public] individualized education program," unlike the Ohio statute which simply provides funds to private providers implementing public IEPs. H.B. 3349(2)(5).

98. H.B. 1886, 94th Gen. Ass., 2nd Reg. Sess. (Mo. 2008); FLA. STAT. ANN. § 220.187 (2008) (CTC program).

99. H.B. 19, 80th Leg. Sess. (Tex. 2007) (proposed § 29.357(1)-(2)). Colorado similarly would require all participating students to take state-wide assessment tests but includes no provision to report results publicly by school. S.B. 08-142, 66th Gen. Ass., 2nd Reg. Sess. (Colo. 2008) (proposed § 22-20-206((3))).

100. H.B. 2257, 2008 Leg. (Ala. 2008) (proposed §6(b)(3)); H.B. 3349, 74th Leg. Ass., Reg. Sess. (Or. 2007) (proposed § 6(4)).

101. H.B. 19, 80th Leg. Sess. (Tex. 2007) (proposed § 29.355(2)(b)); S.B. 158, 2007 Leg. (Nev. 2007) (proposed § 14(1)); A.B. 130, 2007 Leg. (Nev. 2007) (proposed § 14(1)).

102. See, e.g., H. 3101, 116th Sess. (S.C. 2007-2008) (proposed §59-156-40(c);); H.B. 397, 2008 Reg. Sess. (Ky. 2008) (proposed § 4(4)).

103. See, e.g., H.B. 3393, 52nd Leg. Sess. (Ok. 2010).

grams, and it is likely to remain “among the fastest-growing choice policies” across the nation.¹⁰⁴

D. Federal Consideration of Vouchers

The potential for a special needs voucher program at the federal level was considered in 2003 during the IDEA reauthorization debates. Representative Jim DeMint, a Republican from South Carolina, introduced an amendment that would have allowed states to supplement existing special needs voucher programs with IDEA Part B funds “if the Federal funds are distributed to parents who make a genuine independent choice as to the appropriate school for their child”¹⁰⁵ The amendment provided that “a private school accepting those funds shall be deemed, for both the programs and services delivered to the child, to be providing a free appropriate public education and to be in compliance with section 504,”¹⁰⁶ simultaneously fulfilling the state’s obligation to provide FAPE.¹⁰⁷ It also allowed for the provision of federal grants to states to plan, design, and implement voucher programs similar to Florida’s McKay scholarship.¹⁰⁸ Although the amendment required private schools receiving federal voucher money “to be academically accountable to the parent for meeting the educational needs of the student,” it imposed no substantive provisions or accountability measures.¹⁰⁹

Predictably, the National School Board Association and the National Coalition for Public Education were opposed to the federal subsidization of special needs vouchers.¹¹⁰ A number of disability-rights organizations, including the Disability Rights Education and Defense Fund, the National Coalition on Self-Determination, and the National Council on Independent Living, also voiced their opposition to the amendment.¹¹¹ Ultimately, their position carried the day. Although the amendment

104. Greene and Winters, *supra* note 9, at *2.

105. 149 CONG. REC. H3514 (amending § 612(a)(10)(A)(vii)(I)).

106. *Id.* (amending § 612(a)(10)(A)(vii)(III)).

107. *Id.* (amending § 612(a)(10)(A)(vii)(II)).

108. *Id.* (amending § 664(c)).

109. *Id.* (amending § 612(c)(11)(D)).

110. See Anne Checkosky, *Voucher Advocates Claim IDEA’s Procedure Undermines Relationships*, specialedconnection.com (March 5, 2003); Katherine Shek, *Educators, Advocates Fight to Keep Vouchers Out of IDEA*, specialedconnection.com (April 23, 2003).

111. *Id.* See also Kara Urbanski, *Schools to Lose Funding, Staff if Vouchers Go Nationwide*, specialedconnection.com (Mar. 6, 2003).

passed in the Education Reform Subcommittee of the House Education and Workforce Committee, it was defeated on the House floor by a vote 182 to 240.¹¹²

Representative Marilyn Musgrave, a Republican from Colorado, offered an amendment authorizing states to provide vouchers to students with disabilities already attending private schools. The IDEA requires school districts to set aside a portion of IDEA Part-B dollars to provide special education and related services to private school students with disabilities in an amount proportionate to the number of children with disabilities enrolled in private schools in the district.¹¹³ The amendment would have allowed districts to award a “certificate” directly to parents in an amount equal to the per-pupil amount of the proportionate set-aside funds, or the actual cost of special education and related services for the special needs private student, whichever is less.¹¹⁴ The voucher could then “be redeemed by the parents at eligible special education and related services providers” identified by the Local Education Agency (“LEA”), which must meet minimal fiscal and legal requirements similar to those is in the McKay scholarship.¹¹⁵ This amendment proved to be even less popular than the broader voucher proposal by Representative DeMint, however, and was defeated on the House floor 176 to 247.¹¹⁶

The potential for a federal voucher program for students with disabilities was most recently considered during the 2008 Presidential campaign. Sarah Palin, the Republican Vice-Presidential nominee and mother of a child with Down’s syndrome, advocated changing federal regulations to facilitate and encourage states to adopt a special needs scholarship similar to the McKay model.¹¹⁷ In states adopting such programs,

112. 149 CONG. REC. H3523 (2003).

113. This is particularly true for those districts which include private schools catering to students with disabilities. Federal education money is allocated according to the total number of public and private school students within a district, rather than the total number of students with disabilities within the district. The IDEA, moreover, requires schools to allocate federal funding based on the total number of students attending private schools within the district. Mark C. Weber, *Services for Private School Students Under the Individuals with Disabilities Education Improvement Act: Issues of Statutory Entitlement, Religious Liberty, and Procedural Regularity*, 36 J.L. & EDUC. 163, 174 (2007). As a result, districts with private schools serving students with disabilities “will have to share” their federal dollars with a disproportionately large number of private school students. *Id.* at 175.

114. 149 CONG. REC. H3517 (2003) (amending § 612(a)(10)(A)).

115. *Id.*

116. *Id.* at 3524.

117. See Katherine Zernike, *Palin Promises Choice for Disabled Students*, N.Y. TIMES, Oct. 25, 2008, at A13.

IDEA funding would follow the child and be fully portable to any public or private school elected by the parents.¹¹⁸ Although Governor Palin promised that “the McCain-Palin team will . . . expect states to hold these [private] schools accountable,” she provided no details as to how or at what level this oversight would occur.¹¹⁹

As fate would have it, Barack Obama won the Presidential race in late 2008. Although he at one time indicated that he would support private school vouchers if empirical evidence supported their effectiveness, he voiced his apparently unilateral opposition to “using public money for private school[s]” during the latter part of his campaign.¹²⁰ As a result, there is unlikely to be a significant push to fund special needs vouchers at the federal level in the near future.

IV. THE LEGALITY OF SPECIAL NEEDS VOUCHERS

Given the level of controversy surrounding voucher programs, it is no surprise that opponents of special needs vouchers have challenged their legitimacy in court. The following section discusses these legal challenges and explores the U.S. Office of Civil Right’s position on how such programs interface with the requirements of federal civil rights statutes.

A. State Challenges to Special Needs Vouchers

Because education is one of the foundational obligations of each state, state law provides the most immediate check on any legislature’s ability to implement a voucher program. Court treatment of a voucher program in Florida similar to the McKay scholarship, as well a direct challenge to a program in Arizona, reflect that state law can erect significant obstacles to a state’s desire to extend public funding to private schooling.

1. Florida Opportunity Scholarship Program

Florida has experimented with several voucher programs to enable students to attend private schools at public expense. In 1999, it enacted the Opportunity Scholarship Program (OSP), which provided vouchers

118. *Id.*

119. *Palin Lauded for Attention to Special Ed, Not Vouchers*, specialconnection.com (Oct.28, 2008).

120. *Obama and the AFT*, N.Y. SUN, July 14, 2008, at 2.

to low-income children attending public schools that repeatedly failed to meet Florida's standardized rating system.¹²¹ In many respects, OSP was similar to the McKay scholarship, which was enacted the following year. Both programs allowed eligible students to transfer to a better public school or to use public funding at a private school.¹²² Neither program imposed significant accountability provisions on private schools participating in the programs.¹²³

The legality of OSP was ultimately challenged in state court by multiple groups, including some parents of children in public schools and Florida's teacher's union.¹²⁴ Plaintiffs claimed that OSP violated the state constitution's mandate to provide for "the education of all children residing within its borders" and provide "by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education."¹²⁵ They further argued that public support of private schools violated Article IX, § 6 of the state constitution, which restricts use of the state school fund "only to the support and maintenance of free public schools."¹²⁶ Plaintiffs also maintained that the provision of public money to religious schools constituted state endorsement of religion in violation of both Article I, § 3 of the state constitution and the U.S. Constitution's Establishment Clause. While the case was pending, however, the U.S. Supreme Court issued a decision in *Zelman v. Simmons-Harris*, which held that publicly-funded school choice programs are consistent with the federal Establishment Clause so long as the program is the product of "true private choice."¹²⁷ As a result, the plaintiffs voluntarily dismissed their challenge under federal law, and the litigation proceeded on state law grounds alone.¹²⁸

In early 2006, the Florida Supreme Court held that the Opportunity Scholarship was in "direct conflict" with Article IX, § 1(a)'s mandate to provide "a uniform, efficient, safe, secure, and high quality system of free public schools."¹²⁹ It reasoned that "[t]he OSP violates this provision by

121. *Bush v. Holmes*, 919 So.2d 392, 397 (Fla. 2006) (discussing OSP).

122. *Id.*

123. *Compare Parrish*, *supra* note 2 with *Bush v. Holmes*, 919 So.2d 392, 409-410 (Fla. 2006) (discussing OSP's lack of accountability provisions).

124. *Holmes v. Bush*, 2000 WL 526364 (Fla. Cir. Ct. 2000).

125. *Bush v. Holmes*, 919 So.2d at 397-98 (quoting Art. IX, § 1(a), Fla. Const.).

126. *Id.* at 410. *See also* Andrew J. Coulson, *Is it Really 'Public' Education if Voters Get No Say?*, ORLANDO SENTINEL, Sept. 2, 2008, at A7 (naming Florida teacher's union as the primary challenger of the law).

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

128. *Bush v. Holmes*, 919 So. 2d at 399.

129. *Id.* at 405-06.

devoting the state's resources to the education of children within our state through means other than a system of free public schools."¹³⁰ Because the state lacked oversight over the private schools and teachers participating in the program, it could not guarantee the uniformity required by the state constitution.¹³¹ The court suggested, however, that a voucher program could potentially satisfy this constitutional standard if it provided necessary services that public schools could not offer.¹³² Having invalidated the statute, the court declined to consider whether OSP violated the establishment clause of the Florida constitution as well.¹³³

For whatever reason, the litigants in *Bush v. Holmes* chose not to challenge the McKay scholarship directly, despite its marked similarity to OSP. It is unlikely that McKay would fall within the court's exception of providing services that public schools cannot offer, since this would be akin to an admission that the state cannot provide FAPE to students with disabilities in the public schools. Such an admission would require the state to pay for the full tuition and fees of the private school rather than the limited funding provided through the voucher program.¹³⁴ Nevertheless, the legislature to date has not addressed how McKay differs from the invalidated OSP, and students continue to receive McKay scholarships.¹³⁵ Notably, fourteen states have similar uniformity clauses in their state constitutions, which ultimately could derail the adoption of a special needs voucher program.¹³⁶

2. Arizona: Scholarships for Pupils with Disabilities¹³⁷

The Arizona Scholarship for Pupils with Disabilities was implemented in late 2006. Very similar in scope to the McKay Scholarship, this legislation provided that students who had "spent the prior school year

130. *Id.* at 407.

131. *Id.* at 409.

132. *Id.* at 411-412.

133. *Id.* at 413.

134. See School Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359 (1985).

135. See S.V. Date, *School Vouchers Lose Champions with Bush's Exit*, PALM BEACH POST 1A (March 17, 2007) (quoting Ron Meyer, head of a Florida teacher's union, as saying "There seems to be some bills [to expand McKay] as though there were no Bush vs. Holmes"); *Florida School Vouchers Flunk Test*, ST PETERSBURG TIMES (July 1, 2009) ("The same flaws [identified in the Opportunity Scholarship] are evident in the remaining two programs: the Corporate Tax Credit voucher and the McKay Scholarships for disabled students."), available at <http://www.tampabay.com/opinion/editorials/article1014720.ece>.

136. See Jamie Dycus, *Lost Opportunity: Bush v. Holmes and the Application of State Constitutional Uniformity Clauses to School Voucher Schemes*, 35 J.L. & EDUC. 415, 418 (2006).

137. ARIZ. REV. STAT. ANN. § 15-891 *et seq.* (2007).

in attendance at a public school” and also had an IEP plan in place were eligible to attend either a public school in an adjacent district or any “qualified” private school.¹³⁸ Approximately 124,500 students in Arizona were eligible to participate in the program in its inaugural year.¹³⁹

Whether a school was considered “qualified” was left almost exclusively to parental discretion.¹⁴⁰ The statute’s only requirement was that a school be “located in this state and . . . not discriminate on the basis of race, color, handicap, familial status or national origin.”¹⁴¹ The state’s website made clear that all private schools met this definition, and that the Department of Education had “no authority to evaluate and determine whether a private school meets the criteria to be considered a qualified school.”¹⁴² The statute contained no teacher qualification requirements. Once a student elected to take a scholarship, the state had no further involvement in monitoring the child’s academic performance or the quality of his or her educational experience.¹⁴³

The funding for this program was limited to a set amount designated by the legislature, which in 2006 was \$2.5 million awarded on a “first-come, first serve” [sic] basis.¹⁴⁴ The scholarship total was calculated at the lesser of (1) the cost of the chosen school’s tuition and fees or actual per pupil cost, whichever was greater, or (2) the amount the public school would have received for the student pursuant to Arizona’s special education law. In 2006-2007, the thirty-four students participating in the program received awards ranging between \$3,000 and \$23,000, with an average award amount of \$7,735.¹⁴⁵

In February 2007, the American Civil Liberties Union, People for the American Way, and several educational organizations filed a challenge to the Scholarship for Pupils with Disabilities on the ground that it violated the state’s constitution.¹⁴⁶ They argued that because the scholarship

138. *Id.* § 15-891(A)-(B).

139. See Comments of Dan LaDolce, Arizona Department of Education, Office of Exceptional Student Services, reported at <http://www.azschoolchoice.com/programs.aspx?IICatID=0&IIID=2814>.

140. See Arizona Scholarship for Pupils with Disabilities FAQ, #12, available at <http://www.ade.az.gov/hb2676/FAQs.doc>.

141. ARIZ. REV. STAT. ANN. § 15-891(F)(2).

142. See <http://www.ade.az.gov/hb2676/>.

143. See Arizona Scholarship for Pupils with Disabilities FAQ #21, available at <http://www.ade.az.gov/hb2676/FAQs.doc>.

144. See Arizona Scholarships for Pupils with Disabilities Program Application, <http://www.tusd.k12.az.us/contents/Documents/ParentApplication9-06.doc>.

145. See http://www.ed.gov/parents/schools/choice/educationoptions/report_pg8.html.

146. *Cain v. Home*, 2007 WL 1891530 (Ariz. Sup. June 14, 2007).

could be used at religious schools, it violated Article II, § 12 (the “Religion Clause”), which provides that “[n]o public money . . . shall be appropriated to any religious worship, exercise, or instruction, or to the support of any religious establishment.”¹⁴⁷ They likewise argued that it violated Article IX, § 10 (the “Aid Clause”), which prohibits any “tax . . . or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.”¹⁴⁸ Following in Florida’s footsteps, the plaintiffs also claimed that the scholarship violated the constitution’s requirement of “a ‘general and uniform public school system’ which is ‘open to all the children of the State and . . . free from sectarian control’”¹⁴⁹

The defendants countered that the court’s inquiry should be guided by the Supreme Court’s decision in *Zelman v. Simmons-Harris*¹⁵⁰ as described above.¹⁵¹ Defendants further argued that the scholarship did not constitute an appropriation of public money for private schools because students, rather than private institutions, were the “true beneficiaries” of the public appropriation.¹⁵²

The superior court upheld the scholarship program, concluding that it was constitutional under each of these provisions.¹⁵³ Although the court of appeals agreed with respect to the Religion Clause, it struck down the program on the ground that it violated the Aid Clause of the state constitution.¹⁵⁴ In early 2009, the Arizona Supreme Court agreed with the latter finding.¹⁵⁵ The court reasoned that the program constituted a direct transfer of funds from the state treasury to private schools in violation of Article IX, § 10. The court found it “immaterial” that parents were required to endorse the scholarship check, reasoning that “once a pupil has been accepted into a qualified school under either program, the parents or guardians have no choice; they must endorse the check or warrant to the qualified school.”¹⁵⁶ It concluded that employing the “true

147. Cain v. Home, 202 P.3d 1178, 1180 (Ariz. 2009) (detailing defendants’ arguments).

148. *Id.*

149. AZ. CONST. Art. XX, §7; Art. XI, § 1 (cited in Home, 2007 WL 1891530 at *1).

150. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

151. *See* Cain, 202 P.3d at 1182 (detailing defendants’ arguments).

152. *Id.* at 1183-84.

153. Cain v. Home, 2007 WL 1891530 (Ariz. Sup. June 14, 2007).

154. Caine v. Home, 183 P.3d 1269, 1277-78 (Az. App. 2008). The court declined to determine whether the scholarship program violated the other sections of the state constitution identified by the plaintiff. *Id.* at 1278.

155. Cain, 202 P.3d at 1184.

156. *Id.*

beneficiary” test in such circumstances would render Article IX, § 10 a nullity, and therefore was impermissible.¹⁵⁷ Notably, the court declined to answer the additional question of whether the program constituted state support of religion in violation of Article II, § 12.¹⁵⁸

As a result of the court’s decision, all students participating in the program lost their state-funded scholarships at the end of the 2008-2009 school year. Because many state constitutions include provisions similar to those at stake in the Arizona litigation,¹⁵⁹ the logic of this case may serve as a significant check to the establishment of voucher programs in the future.

B. Conflicts with Federal Legislation

The legal arguments raised in state court challenges to voucher programs are unlikely to result in equivalent federal concerns. In the wake of *Zelman v. Simmons-Harris*, it is highly unlikely that a court would conclude that a properly structured voucher program violates the federal Establishment Clause.¹⁶⁰ There likewise are no federal equivalents to the state constitutional provisions requiring the establishment of a uniform system of public schools or prohibiting the provision of public funds to private schools.¹⁶¹ The question remains, however, whether voucher programs conflict with federal education and civil rights laws, including the IDEA, § 504 of the Rehabilitation Act,¹⁶² and Americans with Disabilities Act.¹⁶³

Both Georgia and Utah provide that a parent’s decision to accept a special needs voucher “shall have the same effect as a parental refusal to consent to services pursuant to the Individuals with Disabilities Education Act.”¹⁶⁴ With the exception of Ohio’s autism scholarship, moreover, no existing or proposed program requires participating private schools to implement an IEP as contemplated by the IDEA.¹⁶⁵ To

157. *Id.*

158. *Id.* at 1185, n.4.

159. *See, e.g.*, *Cain v. Horne*, 183 P.3d at 1277-78 (discussing decisions in other states with similar constitutional provisions).

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

161. *See, e.g.*, *Cain v. Horne*, 183 P.3d at 1273 (noting that Arizona’s Aid Clause has “no equivalent in the United States Constitution”).

162. 29 U.S.C. § 794 (2006).

163. 42 U.S.C. § 12101 *et seq.*

164. GA. CODE ANN. § 20-1-2114(f); UTAH CODE ANN. § 53A-1a-704(5)(a)(iii).

165. 20 U.S.C. § 1414(d) (2006).

date, no state or federal court has addressed whether these provisions conflict with federal law. There is administrative guidance, however, suggesting such waivers are permissible under the IDEA.

1. Application of the IDEA

The U.S. Department of Education's Office of Civil Rights (OCR) has twice opined that students with disabilities who voluntarily participate in voucher programs waive most of their rights under the IDEA. It first did so in a July 1990 Staff Memorandum evaluating whether EAHCA, the IDEA's predecessor, applied to the Milwaukee Choice Program (MCP), a fixed-amount voucher offered to low-income general and special education children in Milwaukee, Wisconsin.¹⁶⁶ Although acknowledging that "[t]hese constitute exceedingly difficult issues of first impression for the Department," OCR concluded that when a parent elects to accept a private school voucher, the child in question is "parentally placed" for purposes of EAHCA, freeing school districts from the requirement to provide FAPE to that child.¹⁶⁷ OCR was not persuaded that the state's partial subsidization of the child's education constituted a public agency placement under the statute, triggering its procedural and substantive protections. Reasoning that public agency placements are made by the statutory IEP team, while parents act as the "key decisionmaker[s]" in school choice programs, OCR concluded FAPE did not apply to participating children unless and until they chose to return to public school.¹⁶⁸

The agency restated this conclusion in 2001 in the context of Florida's McKay Scholarship,¹⁶⁹ affirming that children who accept scholarships will be treated as "private school children with disabilities" with "no individual entitlement to FAPE [or] related services" under the IDEA.¹⁷⁰ Recognizing the significance of this conclusion, OCR "strongly recommend[ed] that the State or local education agency notify parents who choose private school placement under the Scholarship Program that the student may retain certain rights under Section 504 and Title II of the

166. OCR Staff Memorandum, 22 IDELR 669, 670 (July 27, 1990).

167. *Id.* at 669-670.

168. *Id.* at 670-671.

169. Letter to Bowen, 35 IDELR 129 (OCR March 23, 2001).

170. *Id.* at 130.

ADA, although the student will not be entitled to [FAPE] under IDEA, while enrolled in private school.”¹⁷¹

The treatment of voucher recipients as private school students with disabilities for purposes of the IDEA is significant in a number of respects. The statute requires each LEA to locate, identify, and evaluate children with disabilities who are enrolled by parents in private schools within the school district.¹⁷² Once identified, however, these children have no individual enforceable right to special education and related services under the IDEA.¹⁷³ Although the LEA must consider the needs of each private school student with disabilities, it can refuse to provide special education or related services to any particular student once it has engaged in “meaningful consultation.”¹⁷⁴ Having required parental waiver of IDEA rights in order to participate in voucher programs, it is unlikely that a state would then willingly provide additional funding or services to these same students once enrolled in private school.

The IDEA’s extensive due process rights likewise do not apply to private school students with disabilities. Instead, such rights attach only to complaints regarding the LEA’s responsibility to identify, locate, and evaluate these students.¹⁷⁵ As Professor Mark Weber has concluded, this leaves school districts with “tremendous amounts of unreviewable decision making power” over the provision of services to students attending private schools.¹⁷⁶ There is no available avenue to challenge the state’s decisions when disagreements arise in this area. A parent’s acceptance of a special needs voucher, therefore, effectively waives all meaningful protection under the IDEA for his or her child.

The designation of children receiving vouchers as private school students for purposes of the IDEA also potentially affects the amount of federal funds available for students with disabilities who remain in public school. Federal special education funds primarily are allocated according to the total number of private and public school students educated within a particular school district.¹⁷⁷ As discussed earlier, the IDEA

171. *Id.* Interestingly, despite OCR’s concern about the potential for “parental misunderstanding” in this regard, no voucher program apparently includes such notice.

172. 20 U.S.C. § 1412(a)(3)(A) (2006); 34 C.F.R. § 300.131(a) (2009).

173. 34 C.F.R. § 300.138(a) (2009). *See also* Weber, *supra* note 113, at 182. There may, however, be an entitlement to services under state law. *Id.* at 182-189.

174. Letter to Mendelson, 49 IDELR 198 (OSEP Aug. 25, 2007); 34 C.F.R. §§ 300.131-134 (2008).

175. 34 C.F.R. § 300.140(a) (2008).

176. Weber, *supra* note 113, at 204-205.

177. 20 U.S.C. § 1412(a)(10)(A) (2006). *See also* Weber, *supra* note 113, at 175.

requires school districts to set aside a portion of this funding, in an amount proportionate to the number of children with disabilities enrolled in private schools within the district, to provide special education and related services to private school students with disabilities.¹⁷⁸ As an increasing number of students with disabilities matriculate into private schools as a result of voucher programs, their proportionate share of federal dollars necessarily grows. If the number of students receiving vouchers is sufficiently large, this reallocation could appreciably diminish the money available to educate students with disabilities who remain in the public schools.

In fact, to some degree, this has already occurred in Florida, which is home to the largest disability voucher program. Florida initially treated McKay students as having waived all rights under the IDEA upon accepting a special needs scholarship. In keeping with this position, school districts did not count McKay scholarship students when calculating the proportionate share of federal IDEA money to allocate to private school students with disabilities. In 2006, however, OCR directed Florida to change this practice and include all students with disabilities in their count.¹⁷⁹ As a result, many counties were forced unexpectedly to budget significant additional funding to service the needs of children in private school. In Broward County, for example, the addition of McKay students raised the number of private school students with disabilities from 100 to 1,600 children, requiring an additional \$1.5 million to be allocated to private school students with disabilities.¹⁸⁰ This represented a direct loss to the students with disabilities in the public schools, who tend to have more severe impairments than those experienced by McKay scholarship students.¹⁸¹

2. *Application of § 504 and the ADA*

Although the waiver of meaningful protection under the IDEA is problematic for parents accepting vouchers, the consequences of such

178. See Weber, *supra* note 113, at 174-75.

179. Nirvi Shah, *New Rule Shifts More Tax Bucks for Disabled to Private Schools*, PALM BEACH POST, May 10, 2006, at 1A. The author has confirmed that Georgia also counts special needs scholarship recipients in allocating private school proportionate funds. See E-mail Correspondence with Nancy O'Hara, Georgia Dept. of Educ. (August 31, 2009) (on file with author).

180. *Id.* Palm Beach county added approximately 1000 students with disabilities to its private school allocation, requiring more than six times the original allocation of \$200,000. *Id.*

181. *Id.* See also discussion *infra* at Part IV.

waivers would be limited to the extent that § 504 or the ADA provide similar protection to students with disabilities, either by regulating the private schools directly or through regulation of the state agencies administering voucher programs. A close look reveals, however, that the protection these statutes extend to private school students is relatively minimal.

All non-religious private schools are covered as “public accommodations” under Title III of the ADA,¹⁸² and as such, are precluded from discriminating on the basis of disability.¹⁸³ Among other things, this prohibition requires private schools to make reasonable modifications to policies, practices, and procedures where such modifications are necessary for students with disabilities and do not represent a fundamental alteration of the academic program.¹⁸⁴ Title III also precludes private schools from refusing to allow a qualified student with a disability to participate in their programs or imposing unnecessary eligibility requirements that tend to screen out such students.¹⁸⁵ To ensure inclusion, private schools must provide auxiliary aids and services where necessary to facilitate communication with students with disabilities, and architectural barriers must be removed where it is readily achievable to do so.¹⁸⁶

Although these general protections are not insignificant, Title III’s impact is limited because the statute does not require private schools to develop or implement individualized education plans or accommodations for students with disabilities.¹⁸⁷ There likewise is no entitlement to the procedural guarantees extended by the IDEA.¹⁸⁸ Such protection, if it is to be found at all, must arise out of § 504 or Title II of the ADA.

The antidiscrimination mandate of § 504, which includes an obligation to provide FAPE, extends to “any program or activity receiving Federal financial assistance,” including both sectarian and religious schools.¹⁸⁹

182. 42 U.S.C. § 12181(7)(J) (2006) (identifying “nursery, elementary, secondary...or other place of education” as a public accommodation); 28 C.F.R. § 36.102(e) (2009). Notably, Title III’s exemption of parochial schools is “broad.” *Marshall v. Sisters of the Holy Family of Nazareth*, 399 F. Supp. 2d 597 (E.D. Pa. 2005).

183. 42 U.S.C. § 12182(a) (2006).

184. 42 U.S.C. § 12182(b)(2)(A)(ii).

185. 42 U.S.C. § 12182(b)(2)(A)(i).

186. 42 U.S.C. §§ 12182(b)(2)(A)(iii)-(iv).

187. *See Woodatch (Private Schools)*, 9 N.D.L.R. 42 (May 2, 1996) (DOJ); *Bercovitch v. Baldwin School*, 133 F.3d 141, 152 (1st Cir. 1998).

188. *Compare* 42 U.S.C. § 12188 *with* 20 U.S.C. § 1415.

189. 29 U.S.C. § 794 (2006). *See also* *Hunt v. St. Peter School*, 963 F. Supp. 843 (W.D. Mo 1997) (applying 504 to Catholic school that had received federal funding through Title I and the school lunch program).

OCR has taken the position that private schools accepting vouchers do not fall within this coverage so long as the voucher programs are financed exclusively with state funds and not commingled with federal money.¹⁹⁰ Accordingly, §504 does not directly regulate the conduct of participating private schools unless they receive federal funding through another program, such as Title I or school lunch programs.

Initially, there was some argument that § 504 indirectly regulated private schools participating in voucher programs because their receipt of public funds transformed them into state contractors. OCR disagreed and rejected this position in its 1990 Staff Memorandum.¹⁹¹ Reasoning that “parents are the operative decision-makers” in the program, “and no LEA participation is involved,” OCR concluded that participating private schools remained exempt from coverage under the federal statute.¹⁹² Based on the same rationale, private schools accepting voucher funds do not thereby become “public entities” subject to coverage under Title II of the ADA. Accordingly, neither statute directly governs the conduct of private schools that do not otherwise accept federal funding.

There is no question, however, that each State Educational Agency (SEA) receives federal financial assistance and is covered by both § 504 and Title II as a public entity.¹⁹³ This coverage applies to all of the SEA’s operations, including its administration of any special needs voucher program.¹⁹⁴ Federal regulations preclude states from “providing significant assistance to an agency . . . that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program or activity,” which would include participating private schools.¹⁹⁵ They do not, however, “further elaborate on what constitutes discrimination.”¹⁹⁶

The protection provided to students with disabilities via this provision in reality is relatively minimal. Section 504 permits private schools to establish selective admissions criteria when such criteria are based on

190. OCR Staff Memorandum, 22 IDELR at 671-673; Letter to Bowen, 35 IDELR at 129. In support of this conclusion, OCR noted the “longstanding Departmental policy” that benefits extended to private school students with disabilities “via the SEA and LEA’s obligations [under the IDEA] to provide for ‘equitable services’” do not result in coverage under § 504. OCR Staff Memorandum, 22 IDELR at 671.

191. *Id.* at 672.

192. *Id.*

193. *Id.* at 673-674.

194. *Id.*

195. 34 C.F.R. § 104.4(b)(1)(v).

196. OCR Staff Memorandum, 22 IDELR at 674.

legitimate academic policies.¹⁹⁷ Thus, although the state must ensure that private schools do not exclude students with disabilities who “can, with minor adjustments, be provided an appropriate education within the school’s program,”¹⁹⁸ it has no obligation to ensure that “private schools provide an appropriate education to . . . students [with disabilities] with special educational needs if [the participating private schools do] not offer programs designed to meet those needs.”¹⁹⁹ Even for those students with disabilities who are admitted, there is no requirement that participating schools develop an IEP, ensure adequate educational progress, or provide procedural protections.²⁰⁰ As a result, the protections afforded by federal law to voucher students are inconsequential in comparison to the legal rights waived by parents upon acceptance of state assistance for private school.

V. THE PUBLIC POLICY IMPLICATIONS OF VOUCHER PROGRAMS

The debate over the quality of public versus private education is hardly new. For years, interest groups have advocated either for the merits of school choice or the need to maintain the integrity of the public school system. The stakes change, however, when the conversation turns to the merits of outsourcing the education of students with disabilities. In light of the vulnerability of this population and the potential for discrimination, it is critical to evaluate whether the benefits they secure from vouchers can exceed or even match the substantive benefits and legal protection that are tied to public placements. The remainder of this article critically evaluates where private school vouchers for students with disabilities fall along this continuum. The first section evaluates the programmatic aspects of enacted voucher legislation to assess whether they are consistent with the heightened educational requirements of special

197. *St. Johnsbury Academy v. D.H.*, 240 F.3d 163, 173-74 (2d Cir. 2001) (upholding private schools refusal to admit student with disabilities where student did not perform at or above grade level).

198. 34 C.F.R. § 104.39(a) (2008). Although “minor adjustments” is not defined in the regulation, at least one court has suggested that it is akin to the substantive requirement of reasonable accommodation. *Ireland v. Kansas Dist. Of Wesleyan Church*, 1994 U.S. Dist. LEXIS 11367 (D. Kan. 1994).

199. Letter to Bowen, 35 IDELR at 129-130 (citing 34 C.F.R. Part 104.39 (a)).

200. OCR Staff Memorandum, 22 IDELR at 670-71.

needs children. The concluding section explores the desirability of voucher programs for students with disabilities generally, evaluating their consistency with the IDEA's goal of integrating students with disabilities into the mainstream of society.

A. Programmatic Concerns with Voucher Programs for Students with Disabilities

The school choice movement is grounded in the belief that the private sector can provide educational services to all students more effectively and efficiently than can public institutions. Many adherents distrust governmental control and regulation, instead placing their faith in the free market system. As a result, most existing voucher programs for students with disabilities lack meaningful public oversight of participating private schools. Notably, this lack of regulation is not accidental, but instead an intentional, and to some proponents, instrumental aspect of such programs. In the context of children with disabilities, this lack of accountability, structure, and legal protection can pose serious challenges.

1. Lack of Specialized Instruction

Education for children with disabilities is considered "special" because it employs instructional inputs specially tailored to reflect both a student's individual abilities and limitations in a school setting.²⁰¹ Depending upon the disability at issue, this process can be highly specialized, requiring significant training and education in best practices and instructional techniques to maximize student outcomes.²⁰² The development of IEPs mandated by the IDEA is intended to check and facilitate this process, identifying specific goals for each eligible child during the school year and establishing meaningful benchmarks to measure the child's progress in meeting such goals throughout the year.²⁰³

Some states, however, do not require private schools participating in special needs vouchers to inform parents of the individualized instruction and services that will be provided to their child upon matriculation.²⁰⁴

201. See 20 U.S.C. § 1414(d) (2006) (describing contents of IEP). See also Hensel, *supra* note 2, at 1174-75 (discussing meaning of "special education").

202. See President's Commission on Excellence in Special Education, *A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES* (July 2002).

203. See 20 U.S.C. § 1414(d).

204. See *infra* Part II.A.

Although parental choice is often highlighted as a strength of voucher programs, the information necessary to make informed choices is often lacking. In Florida, for example, 29% of the surveyed parents that participated in the McKay scholarship program in one county agreed that “information on special education programs was difficult to obtain.”²⁰⁵ Even more troubling, 50% of parents of public special education students in the study’s survey reported that they “were not able to get the information they had wanted,”²⁰⁶ particularly on the subjects of “quality of teachers, academic quality, and special education programs.”²⁰⁷ This lack of information in some cases has led to disturbing results. Parents have been surprised to find after enrollment that services received from the private school are in no way comparable to those set forth in their child’s IEP.²⁰⁸ The only remedy a parent can exercise at this point is the highly disruptive option of moving their child to another school.

There unquestionably are a number of excellent private schools in each state that specialize in the education of children with disabilities and offer individualized instruction well suited to meet the needs of these students.²⁰⁹ There is evidence to suggest, however, 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.²¹⁰ When asked whether the state was concerned about such statistics, one Florida official commented that this “did not present a problem because about 85% of McKay voucher recipients have only a mild learning disability,” which may simply require a smaller learning environment.²¹¹

205. See Virginia R. Weidner, *THE MCKAY SCHOLARSHIPS FOR STUDENTS WITH DISABILITIES: PARENTS USE OF INFORMATION AND INFORMATION SOURCES* 179 (Mar. 4, 2005) (unpublished Ed.D dissertation, Florida State University College of Education) (on file with Florida State University College of Education).

206. *Id.* at 179-80.

207. *Id.* at 104.

208. See, e.g., Kimberly Miller, *Safeguards Few for Disability Vouchers*, PALM BEACH POST, Dec. 8, 2003, at 1A (quoting public school educator as saying, “I get calls all the time from parents who say their child’s speech or writing isn’t improving in the private school, and that’s because the school doesn’t have a strategist working individually with their child . . . The parents are always surprised.”).

209. See, e.g., Greene and Forster, *supra* note 12.

210. See S. V. Date, *Concern Voiced Over Voucher School’s Lack of Special Ed*, PALM BEACH POST, Dec. 10, 2003, at 9A (noting that 496 of the 641 participating schools lacked special programs).

211. See *id.*

To the extent that this position is correct, it challenges the assumption that private schools are superior providers of special education and related services to children with disabilities. There is no question that public schools would enthusiastically embrace small class sizes to the extent that funding is made available to do so. The voucher discussion, however, focuses on outsourcing students with disabilities rather than improving the delivery of education in the public setting. This may suggest that at least some programs are primarily focused on changing the setting in which services are provided rather than ensuring the superiority of the services delivered. Notably, Florida's Governor Jeb Bush sought to overturn the state constitution's provision limiting public school class size despite his support of the McKay scholarship.²¹² At least some critics have argued that his primary motivation for doing so was to support religious education rather than the needs of students with disabilities.²¹³

If that is the case, then these programs have been quite successful. In some states, the majority of schools accepting special needs vouchers are religiously based. In Florida, for example, more than 64% of the schools eligible to receive scholarship students were identified as "religious," and 52% of students receiving vouchers attended religious schools.²¹⁴ In Georgia, approximately 45% of participating schools are identifiably affiliated with religion.²¹⁵ This trend is likely to continue, moreover, because "religious school[s] have been entering the market to provide options for parents with students with disabilities at a much faster rate than private non-religious schools."²¹⁶ Although some religious schools laudably have developed programs specifically designed

212. Linda Kleindienst, *Revise Class-Size Limits, Bush Says Constitution Would Have to Be Changed*, S. FLA. SUN SENTINEL, Feb. 15, 2005 at 1A.

213. *See Correct Voucher Policy*, PALM BEACH POST, May 13, 2006 at 14A.

214. *See* McKay Quarterly Report 2009, *supra* note 27, at 6. Significantly, the majority of minority children who use McKay vouchers attend religious schools. *See* Weidner, *supra* note 205, at 97 (study in Duval County finding that 61.02% of African-Americans in sample attended religious school versus 35.54% of White, Non-Hispanic students).

215. *See* Georgia Dept. of Educ., 2009-2010 SCHOOL YEAR GEORGIA SPECIAL NEEDS SCHOLARSHIP PROGRAM FINAL AUTHORIZED PARTICIPATING PRIVATE SCHOOLS LIST (AUG. 13, 2009), available at <http://public.doe.k12.ga.us/DMGetDocument.aspx/GSNS%20School%20list%20for%20post%20Final%20Aug.pdf?p=6CC6799F8C1371F65B4F476D201B5224E5B34D4B8A56A1330194A90B77C2DDE6&Type=D>.

216. Weidner, *supra* note 205, at 177. But *see* Andrea Falkenhagen, *Vouchers for Disabled Students Go Unused*, EAST VALLEY TRIBUNE, Apr. 16, 2007 (noting that in the first year of the Arizona scholarship, "[l]ess than \$40,000 of the money approved – 15 percent of the money spent on vouchers this year – has gone to sectarian schools.").

to meet the needs of children with disabilities,²¹⁷ many are poorly equipped to meet the instructional demands of this population.²¹⁸ Because students with disabilities are, by definition, those most in need of individualized education, the dominance of religious schools in voucher programs would seem problematic.

2. *Limited Teacher Qualifications*

If private schools accepting public vouchers provide superior teaching over the public schools, the lack of differentiated instruction may be of less significance for children with disabilities. Research shows that “highly qualified teachers significantly increase student learning outcomes” and “contribute . . . more to student achievement” than any other variable in quality education.²¹⁹ The disability community recognizes this and has advocated for increased funding of teacher training as an essential component of student achievement.²²⁰

Federal education legislation over the last decade has increasingly codified the professional requirements necessary for highly skilled teachers. The No Child Left Behind Act (“NCLB”)²²¹ is a striking example in this regard, requiring all personnel teaching core academic subjects in Title I schools to be “highly qualified,” or have a minimum of a bachelors degree and full state certification or licensing, among other requirements.²²² The statute also gives parents the right to know the

217. The Sophia Academy in Georgia, for example, describes itself as “the only Christian school devoted solely to students with learning differences.” See The Sophia Academy website, <http://www.sophiaacademy.org/history.html>. See also Van Lier, *supra* note 88, at 12 (describing religious schools which specialize in the education of autistic students).

218. See, e.g., U.S. Conference of Catholic Bishops Dept. of Educ., CATHOLIC SCHOOL CHILDREN WITH DISABILITIES 12 (Nov. 2002) (“Eighty-seven percent of the dioceses report that some of their schools are unable to enroll students because they do not have the capacity to meet the special needs of the students.”); Patricia Bauer, *Few Catholic Schools Offer Special Education* (February 10, 2009), available at <http://www.patriciaebauer.com/2009/02/10/catholic-schools-special-education/>; Michael Paulson, *Religious Schools Look to Fill Special-Education Needs*, THE BOSTON GLOBE (June 27, 2005) (“Jewish community leaders say that many of the day schools have been unable or unwilling to accommodate children with special needs, especially those whose needs are the most complex.”).

219. J. Matt Jameson and Dixie S. Huefner, “Highly Qualified” Special Educators and the Provision of a Free Appropriate Public Education to Students with Disabilities, 35 J.L. & EDUC. 29, 30, n.5 (2006) (surveying current literature).

220. Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN’S L.J. 1, 24 (2004).

221. 20 U.S.C. §§ 6301 *et seq.* (2002).

222. 20 U.S.C. § 6319(a)(2)(A) (2006); 20 U.S.C. § 7801(23) (2006); 34 C.F.R. §§ 200.55(a), 200.56 (2008). This includes paraprofessionals who have teaching responsibilities. 20 U.S.C. § 6319(c) (2006).

teaching credentials and professional qualifications of all instructional staff.²²³ Notably, this sweeping legislation was supported by politicians and advocacy groups who otherwise oppose federal intervention into public school systems.²²⁴

Congress made clear that the “highly qualified” teacher requirements extend to special educators during the 2004 reauthorization of the IDEA. Although the definition includes more flexibility for this group, it likewise requires teachers to have at least a bachelor’s degree and either full certification as a special educator or successful completion of a state’s special education licensing exam.²²⁵ At least one scholar has argued that these changes, coupled with IDEA’s regulatory guidance, “implicitly recognize that special education cannot be appropriate without qualified teachers and other qualified personnel to provide teacher services.”²²⁶

In contrast to the detailed professional teaching credentials required at the federal level, there is virtually no consideration of teacher qualifications in voucher programs. In order to enroll students receiving vouchers, schools in Florida and Utah need only ensure that they employ teachers with “special skills, knowledge, or expertise”²²⁷ The breadth of these terms suggests that almost any adult potentially could meet this minimal threshold. Certainly, there is no expectation that teachers have a college degree or even a high school diploma in order to lead the classroom.

There is no question that many participating private schools will voluntarily impose more stringent requirements on its teachers than these programs. Likewise, there undoubtedly are some individuals who would not meet the federal standards but who nevertheless may be exemplary teachers. The complete absence of quality control over teaching, however, runs counter to wealth of evidence reflecting the significance of education, training, and professional development on teaching effectiveness.²²⁸

223. 20 U.S.C. § 6311(h)(6) (2006); 34 C.F.R. § 200.61(a) (2008).

224. Rosenbaum, *supra* note 220, at 26.

225. 20 U.S.C. 1412(a)(14) (2006). For a general discussion of the highly qualified special educator requirement in the IDEA, see Jameson and Hueffner, *supra* note 219, at 34-36.

226. Rosenbaum, *supra* note 220, at 32.

227. FLA. STAT. ANN. § 1002.421(2)(h); UTAH CODE. ANN. § 53A-1a-705(1)(g).

228. See, e.g., Yin Cheong Cheng et al, *Towards a New Knowledge Base of Teaching Effectiveness*, in *TEACHING EFFECTIVENESS AND TEACHER DEVELOPMENT: TOWARDS A NEW KNOWLEDGE BASE 6* (2001) (Cheong Cheng et al, ed.) (“There is recurrent evidence in the literature that teacher development is a major way to help teachers change their role, improve their performance, and become effective in teaching.”); Yin Cheong Chang et al, *Research and Analysis of Teaching Effectiveness and Teacher Development*, in *id.* at 28 (“It is commonly accepted that the teacher is the key element for the success of school education”).

Students with disabilities are eligible under the IDEA in part because they need individualized education and related services in order to benefit from instruction. It strains common sense to conclude that teachers with “special skills” will systematically educate this challenging population more effectively than the highly qualified professionals in public schools. As such, voucher programs would seem to fail in their objective of providing superior services to children with disabilities.

3. *Lack of Accountability*

Legislatures that have adopted voucher programs presumably do so on the basis that private schools may be better equipped to serve the needs of students with disabilities. Programmatic concerns are of little significance if voucher programs result in a superior education for this population. It is virtually impossible to determine whether this is correct, however, because special needs voucher programs require no substantive measure of academic achievement from participating students.²²⁹ Significantly, this is not the result of oversight by lawmakers, but rather one of intentional design.²³⁰ Many advocates of voucher programs believe that the private sector can deliver services more effectively than the government because it is not hindered by regulatory requirements. This is reflected in the actions of one prominent school choice advocacy group, which will decrease the “grade” it awards to special needs voucher programs when states require any teaching credentialing or school accreditation.²³¹

As a result, none of the existing programs require standardized testing or assessment other than Ohio’s autism program, which retains some

229. See, e.g., Greene & Winters, *supra* note 9, at *5 (noting that because McKay scholarship students “are not required to take the state’s standardized exams, we have no information on their performance after they leave public school and thus no basis for evaluating McKay’s impact on them.”).

230. S.V. Date, *Lack of Voucher Accountability Comes Back to Sting Proponent*, PALM BEACH POST June 30, 2004, at 13A (noting that the lack of accountability provisions in Florida in part arose as a result of pressure from interest groups opposed to such oversight); Enlow, *supra* note 10, at 20 (“School choice programs exist to give students more options and parents more freedom. Thus it goes against the purpose of such a program to impose unnecessary regulations on participating schools.”); Christina Samuels, *Analysis Criticizes Ohio Vouchers Targeting Students with Autism*, EDUC. WEEK (March 27, 2008) (“Those who run the voucher program at the state level say it was created expressly to have few bureaucratic barriers between parents and the money.”).

231. Enlow, *supra* note 10, at 26-29. See also David Salisbury, School Choice Movement Must Fight Restrictions on Private School, Cato Institute (May 8, 2003), available at http://www.cato.org/pub_display.php?pub_id=3089.

control over the child's IEP.²³² Although most allow students to participate in public standardized testing upon parental request, there is no provision for formal notice of when such testing will occur or solicitation of private school students.²³³ Instead, participating private schools at most are required to give parents a written account of student progress at least once per year.²³⁴ There is no suggestion as to what should be included in such accounts and no assurance of an objective measure against which to assess a student's progress.

This absence of accountability is certain to leave at least some children with disabilities worse off upon exiting from public school. This was painfully clear in Florida in the early years of its program, when a notable number of participating private schools were found to have employed criminals, engaged in fraud, and failed to deliver educational services to students with disabilities.²³⁵ In 2006, Florida's legislature passed additional accountability measures in an attempt to end these practices and ensure a quality education for program recipients.²³⁶ Even these accountability provisions, however, were described as so weak as to be "laughable" by one state paper.²³⁷ To date, Florida has ignored a coalition of private schools calling for accreditation requirements for schools participating in the McKay program.²³⁸ Florida likewise has chosen not to require McKay students to undergo standardized testing even though it requires students in its voucher program for low-income students, the Florida Tax Credit Scholarship (FTC), to do so.²³⁹ Notably, one study analyzing the data available as a result of this testing concluded

232. See *infra* Part II.B.

233. See *infra* Part II.

234. *Id.*

235. See, e.g., S.V. Date, *Lack of Voucher Accountability Comes Back to Sting Proponent*, PALM BEACH POST, June 30, 2004, at 13A (discussing incidents of fraud in Florida voucher program).

236. See *infra* Part II.A.1.

237. *Correct Voucher Policy*, PALM BEACH POST 14A (May 13, 2006).

238. In Florida, several private schools urged lawmakers to restrict McKay vouchers to accredited schools. Date, *supra* note 235 (discussing efforts of Larry Keough, representative of Florida Catholic Conference). These groups argued that accreditation not only would ensure a baseline of quality, but also would "weed[] out school operators who are primarily interested in making quick money." *Id.* Although Florida passed a number of accountability reforms in 2006, accreditation did not survive to the final legislation.

239. FLA. STAT. ANN. § 220.187(7)(e).

that participants in FTC performed no better or worse academically than those who remained in public schools.²⁴⁰

To counter such findings, supporters of voucher programs at times will point to a private study published by the Manhattan Institute which contains promising data on the McKay scholarship.²⁴¹ The study was completed in 2003, three years after McKay's implementation. At the time, the number of children receiving McKay scholarships was less than half that of the 2008-2009 school year.²⁴² The study includes some important findings, including the observation that students using McKay scholarships are significantly less likely to be the victims of bullying in their private school placement.²⁴³ The data also reflects that McKay students are in smaller classrooms than their public counterparts,²⁴⁴ that many McKay parents feel their children were provided with the services that they were promised by participating schools,²⁴⁵ and that some McKay students were provided with an IEP or its equivalent.²⁴⁶ Unfortunately, however, the study does not answer the question of whether students with disabilities have achieved demonstrably better educational outcomes than those of their public school peers. The study contains no data against which to measure student progress in academic subjects or basic skill development, such as reading and writing. As such, while hopeful, the study cannot make up for the lack of public data on the superiority of a private education for students with disabilities.

The federal proposals allowing the portability of IDEA funds indicate that accountability measures would be included in any amendment.²⁴⁷ Given that proponents of this option have repeatedly referred to the McKay plan as a model program,²⁴⁸ however, it is unlikely that these measures would require much beyond a minimal level of communica-

240. David N. Figlio, EVALUATION OF FLORIDA'S CORPORATE TAX CREDIT SCHOLARSHIP PROGRAM FIRST FOLLOW-UP REPORT – PARTICIPATION, COMPLIANCE AND TEST SCORES IN 2007-08 1-2 (June 16, 2009), available at http://www.floridaschoolchoice.org/information/ctc/files/figlio_report_2009.pdf.

241. Greene and Forster, *supra* note 12, at 3-4.

242. See McKay Scholarships, *supra* note 36.

243. Greene and Forster, *supra* note 12, at 9.

244. *Id.* at 6.

245. *Id.* at 7.

246. *Id.* at 8.

247. *Palin Lauded for Attention to Special Ed, Not Vouchers*, specialconnection.com (Oct. 28, 2008).

248. See, e.g., Text of Sarah Palin's Speech on Advocating for Children with Special Needs (Oct. 24, 2008), available at <http://www.lifenews.com/nat4495b.html> (referring to McKay scholarships).

tion between parents and participating schools. Imposing more stringent requirements would conflict both with the stated goal of expanding the availability of state voucher programs and enhancing states' flexibility in offering services to children with disabilities.

4. Loss of Legal Protection

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. The Chairperson of the National Council on Disability, whose members are appointed by the President and confirmed by the U.S. Senate, has expressed "deep concerns" to Congress about vouchers' potential to "seriously undermin[e] the education and civil rights of children with disabilities" ²⁴⁹ This concern is well justified given that parents and students relinquish virtually all rights under the IDEA upon acceptance of a voucher. Students thereafter are not entitled to an individualized education plan, procedural protection when disputes arise, or even a meaningful education. Instead, if OCR is correct, their legal protection under the IDEA is limited to their right to be counted when determining the amount of Part-B funds to set aside for servicing the needs of private school students. ²⁵⁰ This protection provides no enforceable individual entitlement and is unlikely to result in the state's voluntary provision of services to voucher students. ²⁵¹

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. The IDEA gives parents the ability to file due process claims against districts, ensuring that their concerns are considered by a neutral third party. ²⁵² In serious cases involving the denial of FAPE, districts can be forced to reimburse parents for the full expense of private schooling. ²⁵³ Because it is significantly cheaper to provide voucher funding, schools violating

249. See *Special Education: Is IDEA Working as Congress Intended?: Hearing Before the Comm. on Govt. Reform*, 107th Cong. 109 (2002) (statement of Marcia Bristro, Chairperson, National Council on Disability).

250. See *infra* Part III.B.1.

251. *Id.*

252. 20 U.S.C. § 1415 (detailing procedural protections of IDEA).

253. See *School Comm. of Burlington*, 471 U.S. 359.

the IDEA's provisions may actually encourage contentious students to elect vouchers, thereby skirting their legal obligations.

As discussed above, the coverage provided by the ADA and § 504 cannot make up for this loss of legal protection. Private schools can lawfully establish selective admissions criteria and exclude students with disabilities where their programs are not "designed to meet those needs" or where students cannot be accommodated with "minor adjustment[s]." ²⁵⁴ They are not obligated to provide a meaningful education and cannot legally be held accountable when a student makes no academic progress. While this is problematic for any student, it is particularly troublesome for students with disabilities who are eligible under the IDEA precisely because they have individualized, often intense instructional needs that cannot be met within the traditional curriculum. In the absence of discernable benchmarks of progress and clearly identified legal rights, there is a heightened chance that these children will face intentional discrimination or seemingly benign indifference.

Proponents of vouchers have argued that parents' ability to withdraw their children from poorly performing schools will be sufficient to ensure that students are treated well and offered a quality education.²⁵⁵ There is no question that a parental exit option can provide meaningful psychological value to parents, as it ensures that they cannot be held hostage in poorly performing schools. Its value as a negotiation tool, however, is limited because of the vulnerability of the population at issue. Students with disabilities, perhaps more than any other group, have difficulty tolerating change in their routines and environments. Friendships, to the extent that they exist at all, are often the product of long-term relationship building and development efforts by parents and teachers.²⁵⁶ A change in

254. Letter to Bowen, 35 IDELR at 129-130 (citing 34 C.F.R. Part 104.39 (a)). See also *St. Johnsberry Academy v. D.H.*, 240 F.3d 163, 174 (2d Cir. 2001) (upholding private school's refusal to mainstream student with disabilities where student did not meet school's "legitimate academic policy" of performing at or above grade level).

255. See, e.g., Beth Lear and Mathew Carr, *Accountability and School Choice*, BUCKEYE INSTITUTION FOR PUB. POL'Y SOLUTIONS (May 5, 2008) (noting that school choice supporters argue that "parents hold private schools accountable through choices they make in the education marketplace"), available at <http://www.buckeyeinstitute.org/article/1124>.

256. See, e.g., Fred Frankel et al., *Parent-Assisted Transfer of Children's Social Skills Training: Effects on Children With and Without Attention-Deficit Hyperactivity Disorder*, 36 J. AM. ACADEMY OF CHILD & ADOLESCENT PSYCH. 1056 (Aug. 1997) (noting peer rejection of children with ADHD and the significance of parental training in social skills); Martin Fujiki et al., *Social Skills of Children with Specific Learning Impairments*, 27 LANGUAGE SPEECH AND HEARING SERV. IN SCHOOLS 195 (July 1996) (study finding that children with speech-language impairments had weaker social skills and fewer peer relationships).

schools can therefore trigger significant behavior problems and academic difficulties for these children.²⁵⁷ In addition, because of the limited number of placements that accept students with disabilities, particularly those with severe disorders, there may be few, if any, academic alternatives parents can pursue short of returning to a public setting.²⁵⁸ A mid-year transition to a public school will preclude voucher funding for the following school year under the terms of eligibility in some states.²⁵⁹ As a result, the exit option for many parents will provide a choice between the Scylla and Charybdis—either they must burden their already struggling child with removal, or they must remain in a school that does not adequately meet their child’s needs. In short, the acceptance of vouchers leaves parents operating with no legal safety net and few meaningful options when things go wrong.

This transfer of responsibility from the public to individual parents is a troubling shift from the IDEA’s recognition that society at large has a stake in the successful education of children with disabilities. Although voucher programs provide parents with additional choices, they also squarely place the burden of securing an adequate education for their child on their shoulders alone. This apparently is true even in Ohio, where parents retain some rights under the IDEA. Education officials have been quoted as saying, “This is not the public education system. Parents now have more responsibility; they now have to ensure that the IEP gets implemented.”²⁶⁰

5. The Significance of Parental Satisfaction

Voucher proponents oft-repeated response to the concerns identified above is that parental satisfaction is the best measure of program success

257. See Anshu Gupta, *Mental Health of Children*, MENTAL HEALTH REVIEW (2008) (“Frequent change in school, rejection from peers, bullying, often leads to emotional, behavioral and academic problems”), available at http://www.psyplexus.com/mhr/mental_health_children.html.

258. See, e.g., Van Lier, *supra* note 88, at 10-11.

259. See Walter C. Jones, *More Parents Using Vouchers for Disabled Kids*, ATHENS BANNER-HERALD (May 10, 2009), available at onlineathens.com (quoting Dana Tofig, a spokesman for the Georgia Department of Education, as saying that if students using vouchers “transfer in midyear, they lose the right to obtain vouchers in the future. The law requires a child be in public school special ed the entire year before applying[.]”).

260. Van Lier, *supra* note 88, at 29 (quoting one of the two staff members responsible for the Ohio Autism Scholarship).

and obviates the need for additional state oversight.²⁶¹ There is clear evidence suggesting that special needs vouchers are popular with many parents of children with disabilities, and the overwhelming majority of voucher participants are pleased with these programs.²⁶² Any program that enhances the satisfaction of participants requires careful scrutiny before modification or cessation. There is a real and significant therapeutic value to providing the parents of children with disabilities with a sense of control over their children's future and positive belief in the educational outcomes that are offered.²⁶³ These parents exist in stressful environments that often times feel overwhelming due to the needs of their children.²⁶⁴ These feelings are exacerbated by school districts that often are focused on minimizing the costs of special education and related services rather than maximizing the potential of each child with disabilities. Providing these parents with options that do not require expensive, protracted negotiations with public schools is important and should be welcomed among the disability rights community.

Parental satisfaction with voucher programs, however, is far from universal. In Utah, for example, only 482 out of 700 total scholarship recipients remained in the program between the program's inception in 2005 and the time of an audit in January 2008. Although the auditors "believe this reflects satisfaction with the program," a 31% attrition rate is not insubstantial over this relatively short period of time, particularly in a state which allows students never educated in a public setting to receive

261. See, e.g., Report to the Utah Legislature, *supra* note 56, at 23 ("the best indicator of the success of this program is parental response"); *No Complaints, or Else*, PALM BEACH POST 10A (August 10, 2004) (critiquing Florida Department of Education's assertion that "voucher schools don't need the same oversight as public schools because voucher parents are best able to recognize [student] success.").

262. See, e.g., *id.*; Report to the Utah Legislature, *supra* note 56, at iii (stating that participating parents "are overwhelmingly in favor of the program and find it a success"); Van Lier, *supra* note 88, at 27; Weidner, *supra* note 205, at xii (study finding that McKay parents "were more satisfied with the schools their children attend, with the information they had, and with the sources they used than were public school respondents.").

263. See Sarah Hamlyn-Wright et al., *Locus of Control Fails to Mediate Between Stress and Anxiety and Depression in Parents of Children with a Developmental Disorder*, 11 AUTISM 489, 490 (2007) (noting studies finding that "one important factor known to mediate the relationship between stress and depression or anxiety in...various groups of care givers is *locus of control* -i.e. the predisposition to perceive events as under one's own (internal) control or as controlled by other (external) factors").

264. See, e.g., Frank J. Floyd and Erin M. Gallagher, *Parental Stress, Care Demands, and Use of Support Services for School-Age Children with Disabilities and Behavior Problems*, 68 FAMILY RELATIONS 359 (Oct. 1997) ("Previous research documents that the special child care demands faced by the parents of children with disabilities can cause significant stress for the parents and significant disruption in family relationships.").

funding.²⁶⁵ Significantly, 37% of those who withdrew from the program did so because the private school did not meet their child's needs or was located too far from the family home.²⁶⁶

The surveys relied upon by voucher supporters, moreover, provide less information than might appear at first glance. It is notable that they look only to the satisfaction of those parents who are participating or have participated in the relevant programs. These parents are those most likely to be unhappy with the provision of services in the public schools, and therefore are correspondingly more appreciative of any exit option offered, however limited.²⁶⁷ Such surveys do not take into account the feeling of the vast majority of parents of children with disabilities who remain in public school, either because no feasible alternatives exist, or because of a belief in public education. Rating the success of a program only on those who will benefit from its availability presents a mixed picture at best. One might expect that those who benefit from a tax-break for the wealthy would be very pleased by the program. That result, however, says nothing about either the satisfaction levels of those who did not receive the break or its consequences for the national economy.

In some cases, moreover, parental satisfaction with voucher programs may ironically stem in part from the absence of meaningful accountability measures. It is very difficult for many parents to independently evaluate their child's academic progress once he or she progresses beyond basic skill development in elementary school.²⁶⁸ As a result, many will rely heavily on feedback from school professionals reporting their child's growth and academic performance. Problematically, schools participating in voucher programs have an incentive to artificially inflate assessment measures in order to keep students enrolled. A

265. Report to the Utah Legislature, *supra* note 56, at 7-8. Although Utah is the only state to currently re-evaluate eligibility every three years, the short window evaluated in the audit would not reflect changes due to loss of eligibility. UTAH CODE ANN. § 53A-1a-704(6)(a).

266. Report to the Utah Legislature, *supra* note 56, at 27.

267. *See, e.g., id.* at 25 (noting that most parents surveyed whose children participated in the scholarship program reported they "were dissatisfied with their child's public school").

268. *See, e.g.,* Jennifer Deplanty et al., *Perceptions of Parent Involvement in Academic Achievement*, 100 J. EDUC. RESEARCH 361, 362 (July/August 2007) ("Parent involvement may...decrease as students move from elementary into junior high school because parents are less knowledgeable in some of the academic subject areas...As a result, less educated parents might shift their attention away from school because they feel inadequate when helping children with homework") (internal citations omitted); Laurence Steinberg, *BEYOND THE CLASSROOM: WHY SCHOOL REFORM HAS FAILED AND WHAT PARENTS NEED TO DO* 17 (Simon & Schuster 1996) (study finding that nearly 33% of all high school students reported that "their parents have no idea how they are doing in school").

parent receiving a report of academic progress is far less likely to remove a child than one receiving indicators of academic failure or stagnation. In some cases, parents may only learn of their child's continuing educational difficulties upon changing academic settings. In Florida, for example, there are reports of McKay scholarship students who received high grades in private schools only to find that they were several grade levels behind when returning to public school.²⁶⁹

B. Global Concerns with Voucher Programs for Students with Disabilities

Programmatic concerns, however significant, can be modified and altered by legislatures. Many of the issues discussed above could be alleviated by implementing accountability measures to ensure that students with disabilities are not simply provided with additional choices, but with choices that have a meaningful chance to improve educational outcomes for every voucher participant. Ohio, for example, has provided for some meaningful accountability standards in its voucher program to provide for more consistent services.²⁷⁰ The state also provides a high degree of financial support to parents, ensuring that parents have more options with respect to their child's education.²⁷¹

Within existing programs, moreover, there indisputably are many students with disabilities who are benefiting from their state's special needs voucher programs. Many will be served well by dedicated teaching professionals in quality educational placements tailored to meet their instructional needs. The IDEA's legal protections do not guarantee the assistance of caring administrators and effective teachers in public classrooms, as is made abundantly clear in the horror stories told by some parents of children with disabilities. Regardless of the law's dictates, there will always be some school districts and administrators more concerned with meeting the technical requirements of the IDEA than the needs of the students they serve.

269. See, e.g., Kimberly Miller, *Voucher Controls Within Reach After 2 Years of Slipping Away*, PALM BEACH POST, Apr. 28, 2006, at 1A. ("I guess I was stupid. I'm glad he was on the honor roll, but I would have much rather them be truthful.")

270. See *infra* II.B.

271. Notably, however, one recent study concluded that the program, despite its cap of \$20,000, disproportionately serves wealthy families. Van Lier, *supra* note 88, at 16.

In short, it is indisputable that some children with disabilities will benefit, possibly significantly, from the implementation of voucher programs. From this reality, one might readily conclude that vouchers provide a welcome alternative for this population. It may be, however, that the benefits secured by these children are bought at a cost to the majority of children with disabilities who remain in public school. The remainder of this article explores global concerns with voucher programs in an attempt to assess the legitimacy of such concerns.

1. Diminished Public Resources to Educate Children with Severe Disabilities

It is relatively clear that special needs voucher programs primarily benefit students with mild to moderate disabilities. In Georgia, for example, nearly 68% of those served in the program were eligible because of learning disabilities (SLD), speech-language impairments, or other health impairments (OHI), a category that includes children with attention-deficit disorder.²⁷² This is true as well for Florida, where 62% of students participating in the 2008-2009 school year fell into these same categories.²⁷³ One study in Ohio concluded that students with severe autism would have difficulty using vouchers because a significant percentage of providers worked exclusively with less severely disabled children.²⁷⁴

These participation rates are not surprising given, as noted earlier, that many students participating in voucher programs enroll in schools with few or no specialized services for students with disabilities. These schools may offer lower class sizes and personal attention, but they are rarely equipped to handle the more demanding needs of children with

272. 2007-2008 GEORGIA SPECIAL NEEDS SCHOLARSHIP (GSNS) YEAR END REPORT 6, available at <http://www.doe.k12.ga.us/DMGetDocument.aspx/End%20of%20Year%20Report%20-%202007%20-%202008%20Georgia%20Special%20Needs%20Scholarship%20End%20of%20Year%20Report-%20report%20sent%20to%20Legislature%20120308.pdf?p=6CC6799F8C1371F6E1764D2812D6897813D7F6853FDFD50ADA3C9695FC2D495E&Type=D>.

273. See McKay Quarterly Report 2009, *supra* note 27, at 4. Notably, however, one study of Duval County reached the opposite conclusion, finding that the number of mild and moderately disabled students taking McKay scholarships was equivalent to their percentage in the public school population, while students with very severe needs opted for McKay vouchers at one and one-third times their representation in the student population. See Weidner, *supra* note 205, at 93. The author noted, however, that “the distributions of the [severity] in this study do not match the distributions found in the statewide McKay data[.]” *Id.*

274. Van Lier, *supra* note 88, at 10 (finding that 31% of providers “accept only less severely disabled children”).

severe impairments.²⁷⁵ Particularly in rural areas, there are few, if any, private schools providing services to children with significant disabilities.²⁷⁶ Many of those that do, moreover, can require tuition and fees well in excess of the modest amount of funding provided by public vouchers.²⁷⁷ In Georgia, for example, the tuition for many schools specializing in the education of students with disabilities easily exceeds \$20,000, while the average award provided to students in 2008-2009 was \$6,331.²⁷⁸

The predominance of mildly-impaired students in voucher programs, although predictable, is problematic in many respects. As moderately-impaired students elect to exit the public schools, the population of students who remain behind disproportionately will have more severe disabilities. These children are likely to have the most intense needs for specialized instruction and related services in the school environment, requiring a potentially significant expenditure of resources. The pool of funding available to meet these needs, however, becomes smaller as students exit through the voucher option.

Theoretically, a school district will only lose that state money which otherwise would have been spent to educate a student when he or she elects to accept a private school voucher. Some school districts have reported, however, that state vouchers also divert local money.²⁷⁹ Significantly, moreover, there are a number of fixed costs incurred by districts for the education of students with disabilities that do not easily alter with a smaller population. Districts will incur training and salary expenses for instructional staff regardless of class size. In most cases, they must retain the services of speech-language pathologists, occupational therapists and other therapeutic professionals on staff whether or not they serve a large or small pool of children.²⁸⁰ The costs of adminis-

275. See, e.g., Greene and Winters, *supra* note 9, at *6 (“Among the McKay-eligible, students diagnosed with SLD . . . likely have the greatest access to private school alternatives. Some SLD students are not much different from non-disabled students, and thus pose fewer educational challenges for private schools.”).

276. See, e.g., Georgia Dept. of Education, *supra* note 77, at 17 (identifying heavy urban concentration of schools participating in state’s voucher program).

277. *Id.* at 14-16.

278. See *id.* at 2.

279. Van Lier, *supra* note 88, at 36-37.

280. See Jay P. Greene, *Fixing Special Education*, 82 PEABODY J. EDUC. 703, 709-710 (Oct. 2007) (explaining that in special education, “most administrative expenses are fixed costs that do not increase with every new child. Schools need administrators, secretaries, psychologists, speech therapists, and other specialists, whether their special-education caseload is low or high.”).

trators to engage in child-find activities and assist in IEP development likewise are not subject to incremental reduction as individual students leave the district.

This problem is exacerbated by the potential loss of federal IDEA funds to students with disabilities in private school. OCR has taken the position that states must include voucher students when determining the proportionate IDEA funds to allocate to private school students with disabilities.²⁸¹ Because most private school students have relatively mild disabilities, this operates as a transfer of wealth away from students with the most significant needs toward those for whom a small classroom and individualized attention may suffice to address their educational challenges. In Palm Beach County, Florida alone, this resulted in the re-direction of \$1.25 million to serve private school students with disabilities.²⁸² District officials have testified that in the absence of the McKay scholarship, this “money would have been spent on students enrolled at public schools with more severe disabilities.”²⁸³ This raises difficult issues of equitable distribution that ultimately may pit the parents of children with severe impairments against those of children with more moderate limitations in the competition for scarce resources. Policies which place this vulnerable population at odds with one another weaken their ability to advocate effectively for all children with disabilities.

Further complicating this issue, some states do not impose re-eligibility provisions for students with disabilities accepting private school vouchers. Although the IDEA requires students in public schools to be reassessed at least every three years,²⁸⁴ a student who accepts a voucher in first grade in Florida and Georgia will receive his allocation of state dollars and divert federal funding through high school graduation whether or not he continues to qualify as a child with a disability. There is no inquiry into the child’s growth and development over what potentially could be the child’s entire academic career. This approach endorses an imagery of disability that is static and unchanging, a particularly faulty assumption in the con-

281. *See infra* at III.B.1.

282. *Special Education Today: Across the Nation* (May 10, 2006), specialconnection.com.

283. *Id.* (noting that the county “would have used that money for teacher aides, crisis intervention teachers, and substitute teachers who govern classes while special education teachers are in training.”).

284. 20 U.S.C. § 1414(a)(2)(B)(ii) (2006).

text of child development.²⁸⁵ It is likely to result in a dilution of public funding that may otherwise be available to serve children with disabilities. This apparently is true even in Utah, which requires re-assessment of voucher students every three years. Auditors in that state found that some students continued to receive Carson Smith scholarships even though “the disability that qualified them ceased to exist.”²⁸⁶

Even in the absence of this oversight, the cost of administering voucher programs is not inconsequential, and the question must be posed whether funding is better spent on administration than educating students with disabilities. The availability of vouchers is likely to increase child-find expenditures as an increasing number of parents request evaluations in the hopes of securing private school funding. Although many of these children would otherwise be entitled to and have sought assistance, in some cases such requests may come from parents who otherwise had no intention of enrolling their children in public schools. A significant percentage of time and money also will inevitably be directed to students who do not qualify for coverage.²⁸⁷ Administrative costs are likely to rise even in those states which choose to retain control over the IEP to some extent. In Ohio, which requires an annual IEP meeting for voucher recipients, districts incur higher meeting costs because schools must coordinate with outside service providers, who frequently provide insufficient information to conduct meaningful reviews.²⁸⁸

Administrative costs are a particularly significant issue in Utah, which permits students in private schools to apply for voucher funding. Utah has estimated that “[o]n average, districts spend about \$485 and 13.9 hours per . . . applicant in conducting assessment tests, reviewing assessments, meeting with other assessment team parties, and performing other administrative tasks.”²⁸⁹ More than 60% of students accepting

285. See Report to the Utah Legislature, *supra* note 56, at 33 (finding that several students received money during the three-year period of the scholarship although “the disability that qualified them ceased to exist”). If this is true in a state that requires an eligibility assessment every three years, one could speculate the numbers will be quite significant in those that have no re-eligibility provisions at all.

286. *Id.* at 33.

287. *Id.* at 28 (noting that at least 37 students were denied eligibility during the 2006-2007 school year).

288. Van Lier, *supra* note 88, at 32 (noting that “this can mean up to 25 hours to chase down reports from providers and write one IEP”).

289. Report to the Utah Legislature, *supra* note 56, at ii.

Carson Smith scholarships were not enrolled in public school at the time of the scholarship application.²⁹⁰ Money spent to educate private school students with no prior connection to public education is a direct loss of revenue available to provide special education and related services to children in public schools with few private options.²⁹¹

2. Increased Segregation of Students with Disabilities in Public Schools

As an increasing number of moderately-impaired students elect to take vouchers, the potential exists for special education in public schools to change from a set of services provided to a place for students with disabilities. Children with more moderate impairments have the greatest likelihood of succeeding in a general education classroom. The loss of these students from public schools will increasingly segregate students with disabilities from their typically-performing peers, exacerbating disability discrimination and eroding many of the gains secured since passage of the IDEA.

Society has relegated people with disabilities to the margins of the community throughout its history. The existence of any physical or mental impairment has been sufficient to place a child with a disability into the category of "other" and well outside the normal social order.²⁹² Until the 1970s, children with disabilities were often restricted to segregated classrooms or excluded from public school altogether.²⁹³ The requirement in EAHCA and IDEA to educate children with disabilities in the least restrictive environment reflected a monumental shift in this regard. Placing children with disabilities into mainstream classrooms simulta-

290. *Id.* at 7, 9-10 (finding in an audit of 5 districts that 62% of those receiving scholarships were enrolled in private school at the time of the application). There is some evidence in Ohio suggesting that a number of participating students would have remained in a private setting whether or not the voucher was provided. Notably, 50% of participants are preschoolers with no prior experience with public education. Van Lier, *supra* note 88, at 38.

291. Some critics have argued that voucher programs have the potential to create resources for students remaining in public school to the extent that "the cost of educating disabled students truly exceeds the funding provided[.]" See Greene and Winters, *supra* note 9, at *3. Notably, however, there appears to be no empirical support for this proposition.

292. See, e.g., Hensel, *supra* note 2, at 1180 (detailing historical exclusion of people with disabilities from mainstream society).

293. See Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 355-56 (1990) (discussing "legislative, administrative, and judicial activity either permitting or requiring the exclusion of these children from public education" prior to 1975).

neously expanded their educational opportunities and diminished the stigma of otherness and isolation that formerly served as the hallmarks of public education.²⁹⁴

There is little doubt that children with less severe impairments have the best chance for meaningful integration and success in general education classrooms. Many children with learning disabilities, for example, can succeed in general education when provided with additional individualized instruction or alternative methods of delivery that often enhance the learning opportunities of other children in the classroom.²⁹⁵ The daily interaction of these students with their typical peers diminishes the stigma of otherness associated with disability and normalizes children's understanding of impairments.²⁹⁶

It is this same category of students, however, that is most likely to participate in special needs vouchers.²⁹⁷ If these students depart public schools in significant numbers, it will negatively impact the normalization of disability in education and American society more generally.²⁹⁸ Children with severe disabilities are more likely to require self-contained classrooms to meet their educational needs. Although these children are likely to interact on occasion with students in general education, they are less likely to do so on a footing of peer or friend.²⁹⁹ As in the past, the identification of disability becomes tied to children who are separate and apart from the general school population, causing the stigma of disability potentially to rise.³⁰⁰

294. Hensel, *supra* note 2, at 1180-1181.

295. See, e.g., Wade F. Horn & Douglas Tynan, *Time to Make Education "Special" Again*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY* 23, 42 (Chester E. Finn, Jr., et al., eds., 2001).

296. See Hensel, *supra* note 2, at 1181; Joshua K. Harrower, *Educational Inclusion of Children with Severe Impairments*, 1 J. POSITIVE BEH. INTERVENTIONS 215, 217 (1999) (discussing study finding a "significant increase in positive attitudes toward children with severe learning disabilities among the children in the integrated classroom"). Cf. Van Lier, *supra* note 88, at 41 (concluding Ohio's Autism Scholarship is not "sound education policy" because its exclusionary aspects "undermine the idea of public schools as a place where a diverse group of children can learn together and begin to create a common civic culture.").

297. See *infra* at IV.B.1.

298. See Van Lier, *supra* note 88, at 27 (discussing the impact of the inclusion of children with disabilities on non-typical peers).

299. See David S. Palmer et al., *Taking Sides: Parent Views on Inclusion for Their Children with Severe Disabilities*, 67 EXCEPTIONAL CHILDREN 467, 467-68 (2001) (noting the increased trend toward inclusion for students with disabilities and parental concerns about socialization); Harrower, *supra* note 296, at 216-17 (discussing peer relationships between students with severe disabilities and typical peers in middle and high schools).

300. See Hensel, *supra* note 2, at 1181.

It may be that such concerns are largely overstated because the number of students participating in voucher programs is low relative to the number of eligible students with disabilities. Most programs, however, are in their early days. Florida's program has experienced "remarkable growth" in its voucher program over the last decade.³⁰¹ The McKay scholarship, moreover, has been identified as having "the largest potential number of participants of any voucher or tax-credit program in the nation."³⁰² If its example holds true for other states, in some grades as many as 12% of the eligible special needs students could ultimately exit into private schools.³⁰³

It is also significant to note that Ohio's program has resulted in the segregation of those children accepting vouchers. 75% of children electing vouchers use providers "created to primarily or exclusively serve disabled students."³⁰⁴ As a result, these students are largely precluded from interacting with their typical peers on a regular basis.³⁰⁵ Although parents may justifiably be more concerned about the services provided to their children than their degree of integration, this reflects a troubling step away from the LRE requirement of the IDEA and has the potential to negatively impact students' educational development.³⁰⁶

3. "Meaningful" Choices: The Implications of Wealth & Race

Critics of voucher programs contend that they primarily serve affluent families who can afford to pay private school tuition and fees in excess of the scholarships awarded by states.³⁰⁷ Because only a small percentage of minority children with disabilities fall into this category, there is concern that vouchers will disproportionately aid white students with impairments.³⁰⁸ The population remaining in public schools correspondingly will be made up of minority families and the poor.

The evidence on the ability of less affluent students to benefit from voucher programs is mixed. There is an encouraging report in Florida

301. See McKay Scholarships, *supra* note 36.

302. Enlow, *supra* note 10, at 26.

303. See McKay Quarterly Report 2009, *supra* note 27, at 2. See also Report to the Utah Legislature, *supra* note 56, at 5 (predicting "the Carson Smith Scholarship program will continue to grow").

304. Van Lier, *supra* note 88, at 25.

305. *Id.*

306. *Id.*

307. See Greene and Winters, *supra* note 9, at 2 (discussing critiques of McKay program).

308. *Id.*

that identifies 42% of the students receiving McKay scholarships as eligible to receive free or reduced-price lunch, an indicator used by many scholars to suggest a low socio-economic status.³⁰⁹ There is equally significant evidence, however, which supports a contrary finding, even within Florida. Studies of McKay parents in Duval County have found, for example, that they have “higher incomes [and] more education . . . compared to the public school[s],”³¹⁰ “lend[ing] credence to the argument that vouchers, without income restrictions and without restrictions on the level of tuition charged by private schools, would be used by more advantaged parents”³¹¹ In Georgia, only 32% of those who elected vouchers were eligible for free or reduced lunch,³¹² which is noticeably less than the 52% of Georgia’s public school children who are classified as low-income.³¹³ A study in Ohio likewise reported that students in affluent communities “tend to take advantage of the autism voucher to a greater extent” than those in less affluent communities.³¹⁴ The author concluded that “it seems inevitable that the program will damage Ohio’s public system” because it would “leav[e] more disadvantaged students in the public system.”³¹⁵

The participation of minority students would seem more positive. Slightly more than half of all students receiving vouchers in Florida fall in this category, which is roughly equivalent to the percentage of special education students in the state.³¹⁶ In Georgia, 41% of those participating in 2008-2009 were Black or Hispanic, suggesting that its program does not unduly screen out minority students.³¹⁷ Although such reports are encouraging, there is some evidence to suggest that this population is disproportionately served by religious schools.³¹⁸ A Duval County, Florida

309. McKay Quarterly Report 2009, *supra* note 27, at 3.

310. Weidner, *supra* note 205, at xiii.

311. Virginia R. Weidner & Carolyn D. Herrington, *Are Parents Informed Consumers: Evidence from the Florida McKay Scholarship Program*, 81 PEABODY J. OF EDUC. 27, 32-33 (2006).

312. Georgia Dept. of Educ., *supra* note 77, at 5.

313. Steve Suits, *Crisis of the New Majority: Low-Income Students in the South’s Public Schools*, SOUTHERN SPACES, Apr. 16, 2008, <http://www.southernspaces.org/contents/2008/suits/1a.htm>.

314. Van Lier, *supra* note 88, at 16.

315. *Id.* at 1.

316. McKay Quarterly Report 2009, *supra* note 27, at 3. *See also* Sara Mead, *Information Underload: Florida’s Flawed Special-Ed Voucher Program*, EDUCATION SECTOR REPORTS, June 2007, at 3.

317. Georgia 2008-2009 Preliminary Report, *supra* note 77, at 4.

318. Weidner and Herrington, *supra* note 311, at 37 (concluding that “African American and Hispanic students make up greater percentages of the private religious schools’ voucher population than they represent in the McKay sample as a whole.”).

study found that only 15% of African Americans and 1.5% percent of Hispanic students in the sample attended non-religious schools while using McKay.³¹⁹ This may be explained by the fact that minorities are disproportionately represented in low socio-economic households,³²⁰ and that religious schools can be among the most affordably-priced private schools, particularly in urban areas.³²¹ Although this correlation may be benign, it is troubling to the extent that many religious schools offer no specialized programming, creating the risk that they are less likely to meet the needs of special education students.³²² This conclusion is supported to some extent by a study finding that “whites were moderately more satisfied than nonwhites with services addressing the child’s disability and with teacher quality.”³²³ If correct, this suggests that those most at risk from voucher programs are disproportionately minorities and the poor. Further study is needed to determine the significance of these concerns.

Advocates of vouchers have argued that the existence of such programs will lead to an expansion of private schools capable of educating children with special needs. There is no question that the number of schools willing to serve voucher students seems to grow in each year of a program’s existence.³²⁴ This growth, however, is no assurance of quality in the absence of clear accountability measures. Florida, for example, has experienced some difficulty ensuring the integrity of its participating schools, particularly in the early years of its program.³²⁵ It remains to be seen whether schools entering the market will ensure that all voucher participants have an equal opportunity for individualized instruction and quality programming.

319. *Id.* at 37-38.

320. See Sarah Fass and Nancy K. Cauthen, *Who are America’s Poor Children?*, Fact Sheet, National Center for Children in Poverty, October 2008, at 2, available at http://www.nccp.org/publications/pdf/text_843.pdf (reporting that 34% and 29% of Black and Hispanic children live in poverty respectively, compared to only 10% of white children).

321. See, e.g., Gerald M. Cattaro, *Catholic Schools Enduring Presence in North America*, 35 EDUC. AND URBAN SOC. 100 (2002) (noting that Catholic schools did not abandon education in urban society); Martha Minow, *Vouching for Equality*, WASH. POST, Feb. 24, 2002, at B5 (“Unlike higher-income, white families, most poor black and Hispanic families cannot choose the neighborhoods they live in. So the chief route out of local public schools in urban areas is through parochial—usually Catholic—schools that are relatively affordable.”).

322. See *infra* n. 218.

323. Greene and Forster, *supra* note 12, at 6.

324. See *infra* Part II.A.

325. See S.V. Date, *Private Educators Seek to Limit Vouchers to Accredited Schools*, PALM BEACH POST March 24, 2004, at 6A; Kimberly Miller & S.V. Date, *Brokers Get a Piece of School Vouchers*, PALM BEACH POST, August 10, 2003, at 1A.

4. Enhanced Tension with School Administrators and General Education

Proponents of vouchers suggest that by allowing parents to exit public schools on demand, they will decrease the tension that currently exists between parents and school administrators.³²⁶ There no longer will be a need for protracted arguments about whether or not services will be provided—if parents are unhappy, they can find a school that better suits their child without the need for litigation or expense. A close look reveals, however, that voucher programs may simply shift this tension to the eligibility determination, which has the potential to deny services to students who otherwise would be eligible under the IDEA. In addition, because the profile of the majority of students using vouchers is relatively similar to that of students in general education, it has the potential to create friction between the parents of children in special and general education that may ultimately diminish the resources directed to students with disabilities.

Schools have an incentive to police the eligibility determination more carefully when a positive result carries the potential for loss of revenue. In some respects, this may be a positive development. Critics have argued that incentives exist under the current system to over-identify children with disabilities, especially those with mild impairments.³²⁷ For some groups of children, moreover, enhanced scrutiny is likely to lead to few changes in eligibility. Students with tangible physical impairments, for example, are rarely the subject of disputes over entitlement to IDEA services.

There is a great deal of controversy, however, over the identification of students with learning disabilities, the largest disability category in many states.³²⁸ Because eligibility depends to a large extent on actions taken by teachers and administrators, the potential for conflict with parents is heightened and potentially significant. In 2004, Congress amended the IDEA to provide that districts “shall not be required” to use the severe discrepancy model of diagnosing learning disabilities.³²⁹ The dis-

326. See, e.g., Greene and Forster, *supra* note 12, at 2.

327. See Marcus A. Winters and Jay P. Greene, *How Special Ed Vouchers Keep Kids From Being Mislabeled as Disabled*, MANHATTAN INSTITUTE 1 (August 2009) (noting that the growth in special education “may be the result of financial and other incentives that spur school systems to classify struggling students who may not truly suffer from a mental or physical disability as learning-disabled, and thus entitled, under various state and federal mandates, to receive more than ordinary attention, for which the school systems in question are compensated.”).

328. *Id.*

329. 20 U.S.C. § 1414(b)(6)(A).

crepancy model will identify learning disabilities when there is a significant deviation between a student's intellectual ability and his or her actual academic performance.³³⁰ In lieu of this model, Congress encouraged districts to employ "a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures."³³¹ Commonly referred to as "RTI," or Response to Intervention, this diagnostic model is triggered when a student experiences academic delays in the classroom, at which point teachers implement a series of research-based interventions to remediate the difficulties. Because students without disabilities are believed to be able to make satisfactory progress when presented with quality instruction and remedial services, a student's failure to respond to the interventions is viewed as evidence that an underlying learning disability exists.³³²

Given the rise of the RTI method of identifying students with learning disabilities,³³³ the disconnect between school districts looking to preserve state funding and the need for services of children with significant learning issues may grow. Diagnosing SLD through the RTI method can be difficult for administrators.³³⁴ The effectiveness of this diagnostic model depends to a large extent on teacher training and administrative willingness to follow through with progressive interventions.³³⁵ The potential for significant delays between the onset of difficulty in the classroom and the identification of disability is very real despite the IDEA's general mandate that eligibility assessments take place within sixty days.³³⁶ Districts cognizant of the fact that the identification of a learning disability potentially results in a loss of funds may have little incentive to conclude the process or move it forward expeditiously, raising tensions between parents and administrators.

330. See, e.g., Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J. LAW & EDUC. 217, 229-30 (2003) (describing aptitude achievement discrepancy model).

331. 20 U.S.C. § 1414(b)(6)(B).

332. See Hensel, *supra* note 2, at 1160-61 (describing RTI model).

333. See, e.g., Report to the Utah legislature, *supra* note 56, at 31-32 (noting the increased usage of RTI to determine eligibility for learning disabilities in Utah and noting that this approach "is the current focus in helping struggling students").

334. *Id.* at 32 ("Implementing the RTI method for SLD eligibility determination can be difficult.").

335. See, e.g., *id.* (concluding that "[i]mplementing the RTI method...can be difficult" in part "because it lacks development.").

336. 20 U.S.C. § 1414(a)(1)(C)(i)(I).

A recent study of the McKay scholarship supports this conclusion, finding a 15% reduction in the probability that a fourth, fifth, or sixth grade student will be identified as having an SLD in districts with private schools that compete for McKay students.³³⁷ The authors suggest that this is a positive result because “[t]here is reason to believe that the subjective nature of the SLD diagnosis has led to substantial overclassification” of students with learning disabilities.³³⁸ They conclude that voucher programs keep children from being mislabeled as disabled.³³⁹

It is equally possible, however, that the reduction in diagnoses of SLD is a response by schools to a loss of funding rather than a reflection of better eligibility assessments.³⁴⁰ There is nothing in the study to suggest that the students denied coverage were not, in fact, eligible for services under the criteria identified for SLD in the IDEA. To the extent that voucher programs create impediments to students with legitimate, intangible disabilities receiving services, they are highly problematic and contrary to the legislative goal of serving all students with disabilities.

Voucher programs are also likely to create tension between the parents of general education students and those of students with disabilities, which may in turn lead to diminished resources for special education. In the absence of clear arguments reflecting that children with disabilities are differently situated, it is highly problematic to provide school choice for this group of children to the exclusion of all others. As discussed earlier, the majority of children using special needs vouchers are matriculating into programs which offer little more than smaller class size and enhanced personal attention.³⁴¹ There are many general education students languishing from large class size and poor instruction that would similarly benefit from such programs. This point is not lost on critics of special education or general education parents, who note the irony of some legislators’ support for special needs vouchers at the same time they reject legislation mandating smaller class sizes in public school.³⁴²

337. Winters and Greene, *supra* note 327, at 9.

338. *Id.* at 6.

339. *Id.*

340. See *id.* at 9 (acknowledging that “[o]ne could interpret the result” in this manner).

341. See *infra* VI.A.1.

342. See, e.g., Terry Jean Seligmann, *An IDEA Schools Can Use: Lessons From Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 761 (2001) (arguing that advocates “should not square off and fight over funds or services, playing tug of war between ‘regular’ and ‘special’ education or ‘regular education kids’ and ‘special education kids.’ Instead, we should use available funds in inclusive ways . . .”). Cf. Mark Kelman, *The Moral Foundations of Special Education Law*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 77, 78 (Chester E. Finn, Jr., Andrew

It may be that this friction is the intentional design of the school choice movement. The evidence strongly suggests that many voucher supporters have focused on children with disabilities not out of concern for this population, but because of the political viability of using vulnerable children as the standard bearers for such legislation.³⁴³ While this approach may benefit the school choice movement, it does lasting damage to the community of students with disabilities. Outside of the voucher context, a number of critics have argued that special education is draining the resources of general education, leading to calls to restrict eligibility under the IDEA.³⁴⁴ Singling out students with disabilities for unwarranted preferential treatment exacerbates this conflict and may ultimately lead to diminished resources for special education in public schools.³⁴⁵ Any program that pits parents against each other rather than working for the benefit of all children should be carefully scrutinized. This is especially true when the program has an admitted political purpose that may have little to do with its intended beneficiaries.

VI. CONCLUSION

The push for voucher programs as an alternative to special education and related services in the public schools is growing across the United States. If the genuine goal of voucher programs is to enhance the educational advancement of students with disabilities, they must be grounded in meaningful evidence of programmatic superiority for this population rather than long-standing political arguments on the merits of school choice. Although some individual children will indisputably benefit as a result of such programs, the lack of programmatic accountability and loss of legal protection strongly suggests that many will be left worse off when using vouchers. Those students with disabilities who remain in

J. Rotherham and Charles R. Hokanson, Jr., eds., 2001) (arguing that "we should be . . . wary of a system that forbids us from counting the educational interests of 'mainstream' students just as worthy as those of pupils with disabilities").

343. See *infra* Part I.

344. See Robert Worth, *The Scandal of Special Ed*, WASH. MONTHLY, June 1999, at 34 (arguing that "[i]n order to pay for special ed's enormous, ineffectual bureaucracy and skyrocketing enrollments, school districts are being forced to cheat their conventional students").

345. Hensel, *supra* note 2, at 1179-1180 (discussing trend toward restrictive eligibility). See also Van Lier, *supra* note 88, at 41 ("Rather than supporting a system that exacerbates inequity, public resources should be directed toward strengthening services for all.").

public schools, moreover, will be increasingly segregated from their typical peers and have diminished resources available to serve their needs.

The wide-spread dissatisfaction with the status quo for students with disabilities is not a simple result of the public schools' inability to meet the needs of these children. Instead, to a large extent, it is a product of the public's unwillingness to make meeting the needs of such students a priority. Legislators would be better served by looking to programs that help all students with disabilities achieve their academic potential rather than focusing on benefits for only a few.

