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Promise or Peril: Reframing Parental Rights in Special Education Through School Choice Reform Initiatives

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PROMISE OR PERIL: REFRAMING PARENTAL RIGHTS IN SPECIAL EDUCATION THROUGH SCHOOL CHOICE REFORM INITIATIVES

SUSAN C. BON*

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INTRODUCTION

While several court rulings have recognized parental rights over education to varying degrees,[1] the emergence of a common public school agenda has led to an increasing establishment of barriers limiting opportunities for parents to exercise their rights and control over the

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1. *See* Prince v. Massachusetts, 321 U.S. 158, 165-66 (1944); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

upbringing of their children via school choice initiatives.[2] Parental rights and the exercise of choice are further complicated and restricted for parents of students with disabilities. Although the right to an education is protected under the Individuals with Disabilities in Education Act (IDEA),[3] parental choice is recast as parental participation in the educational decisions affecting children with disabilities. In other words, parents of students with disabilities have no meaningful choice and can exercise extremely limited control over the education and upbringing of their children if they want to enjoy the protections afforded under the IDEA.[4]

The desire to exercise parental control and choice is often driven by concerns about marked differences between personal beliefs and school curricular choices,[5] as well as the desire to raise children in accordance with family values and traditions.[6] Conflicts over curriculum have led to litigation by many parents, albeit largely unsuccessful. In these cases, parents were seeking relief from school board imposed instruction on topics ranging from homosexuality, transgender issues, non-traditional family depictions, and human sexuality in general.[7] Although parental exercise of choice with respect to their children's educational, moral, and religious upbringing has been at the core of many legal disputes between parents and school districts,[8] there are a myriad of other factors influencing parental choice motives, such as ideological beliefs,[9] child-benefit theories,[10] and special educational needs.[11]

Efforts to diminish parents' educational rights and choices have occurred through deliberate governmental actions that were motivated in part by fundamental beliefs about the role of public education in the furtherance of state and national interests and preparation of educated members of society.[12] For example, state legislatures have adopted limits on parental

2. Curtis Schube, *Public Schools are Replacing Parents: The Erosion of the Parental Right to Control the Educational and Moral Upbringing of Children*, 12 T.M. COOLEY J. PRAC. & CLINICAL L. 121, 121-45 (2010).

3. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1485 (2012).

4. *Id*.

5. Kenneth L. Townsend, *Education and the Constitution: Three Threats to Public Schools and the Theories That Inspire Them*, 85 MISS. L.J. 327, 330 (2016).

6. *See* Schube, *supra* note 2, at 137.

7. *See id.* at 121.

8. Pierce v. Soc'y of Sisters, 268 U.S. 510, 532 (1925); Wisconsin v. Yoder, 406 U.S. 205, 210-11 (1972).

9. Henry M. Levin, *The Public-Private Nexus in Education*, 43 THE AM. BEHAV. SCI. 124, 135-36 (1999).

10. Ira Bloom, *New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice?* 32 J.L. & EDUC. 139, 139-83 (2003) (identifying the legitimate interests of parents in improving educational opportunities for their children).

11. Forest Grove Sch. Dist. v. T. A., 557 U.S. 230, 234 (2009); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 359 (1985).

12. *See e.g.,* Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy*, 46 AM. J. JURIS. 277, 290-91 (2001); John Dewey, *The School as*

rights to control education and exercise choice in order to promote assimilation[13] and maintain separation between state government and religious entities through state constitutional amendments, such as the Blaine Amendments.[14] Additional boundaries exist, perhaps unintentional but with no less negative impacts, on parental rights and choice regarding the education of students with disabilities who qualify for services under the IDEA.[15]

Part I of this note examines the parental rights doctrine emerging from the U.S. Supreme Court and describes the historical perspectives on child development and educational interests that also factor into the discussion about parental rights over education. The limits on parental rights and control are analyzed in Part II, with specific attention on states' legal efforts—through constitutional and statutory provisions—to replace parental control over education and upbringing with state control. Part III examines the federal disability laws that apply specifically to protect the rights of students with disabilities as well as the rights of their parents or guardians. Part III also addresses the concerns of school choice opponents who assert the need for limits on state-supported choice initiatives given the perceived negative impacts of such programs on public education. Part IV summarizes the promises and perils of special education voucher programs (SVPs), which are often described as an emerging educational reform movement that seeks to expand school choice options for parents of students with disabilities[16] and identifies the need for legislative reform of the IDEA. Finally, the Conclusion offers concluding remarks and recommends expansion of the choice debate in order to reflect a continuum perspective of educational placements that empower parents of students with disabilities to preserve their family's values and beliefs while also securing a high-quality education for their children.[17]

I. THE PARENTAL RIGHTS DOCTRINE

The foremost exercise of parental choice is the *de facto* determination of where to live. In other words, parental choice regarding the education of children is primarily a factor of where parents decide to live

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a Means of Developing Social Consciousness and Social Ideals in Children, 1 J. SOC. FORCES 513, 516 (1923).

13. Mark E. DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551 (2003).

14. *See* Michael P. Dougherty, *Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?,* 77 MONT. L. REV. 41 (2016).

15. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (2010).

16. *See* Susan C. Bon, Janet Decker & Natasha Strassfeld, *Special Education Voucher Programs, Reflective Judgment, and Future Legislative Recommendations*, 91 PEABODY J. OF EDUC. 503 (2015).

17. Bloom, *supra* note 10.

given the tradition in the United States of using geographic boundaries to determine neighborhood public school attendance.[18] The notion of democratic localism[19] preserved, to some extent, the balance of control between parents and school districts. Namely, this theory proposed that parents could maintain control over their values and beliefs through local communities.[20] In other words, parental control could occur through the local community, which would make it unnecessary to formalize such control through educational choice options.

School choice reform efforts, on the other hand, reflect deliberate attempts by parents to exercise control over educational decisions for their children by challenging established educational norms and asserting their rights to circumvent the monopoly of public schools.[21] While some have argued that past choice initiatives were motivated by racial animus,[22] the counter argument for choice is premised on ideological beliefs about values, liberty, and freedom.[23] In fact, parents' desires to avoid influences over their children that are inconsistent with their family values and beliefs are not recent developments. Rather, parents have previously sought to advance their religious interests and parental control over education in the courts.[24]

The essential role and influence of education on a child's development, according to Locke,[25] establishes the importance of maintaining parental control over the child's educational experience.[26] Through clarification about the unique roles of parents as leaders of the family, churches as guardians of religion, and government as protectors of civil society, Locke describes the boundaries and expectations regarding these three distinctive societies.[27] Despite varying interpretations of Locke's many essays, his assertions about the roles of parents, churches, and

18. John Merrifield, *The Twelve Policy Approaches to Increased School Choice*, 2 J. SCH. CHOICE: INT'L RES. & REFORM 4, 6 (2008).

19. MICHAEL B. KATZ, CLASS, BUREAUCRACY, AND SCHOOLS: THE ILLUSION OF EDUCATIONAL CHANGE IN AMERICA 17 (2d ed. 1975).

20. ANTHONY S. BRYK ET AL., CHARTING CHICAGO SCHOOL REFORM: DEMOCRATIC LOCALISM AS A LEVER FOR CHANGE 254 (1998).

21. JOHN CHUBB & TERRY MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 189 (1990); *see also* Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 665 (1998).

22. Mark A. Gooden, Huriya Jabbar & Mario S. Torres, Jr., *Race and School Vouchers: Legal, Historical, and Political Contexts,* 91 PEABODY J. EDUC. 522, 523 (2016).

23. MILTON FRIEDMAN, CAPITALISM AND FREEDOM, CHAP. VI: THE ROLE OF GOVERNMENT IN EDUCATION (M. Friedman, ed. 1962).

24. Wisconsin v. Yoder, 406 U.S. 205, 210-11 (1972).

25. John Locke has written extensively about education and is cautiously described as an "educationist" given his general theories which relate significantly to his work on education. JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION (1989).

26. NATHAN TARCOV, LOCKE'S EDUCATION FOR LIBERTY 3 (1999).

27. Alex Tuckness, *Locke on Education and the Rights of Parents*, 36 OXFORD REV. EDUC. 627, 628 (2010).

government reveal that the three societies are related, yet distinctly responsible for particular roles.[28]

Locke asserts that the parents, as founders of the family, are uniquely responsible for the care and education of their children.[29] With respect to religion, Locke asserts that spiritual endeavor is both the foundation of churches and the responsibility of churches to pursue and cultivate.[30] He further explains that neither the civil society nor government is responsible for, nor should it impede, religious ends.[31] Instead, society benefits from the formation of governmental structures that are designed to pursue the civil interests of citizens through economic, military, and other necessary structures that protect life and property.[32]

As revealed in Locke's essays, there exists an impending tension between parental interests over controlling their children's education and the goal of government to promote education for the good of society.[33] While affirmation of these concurrent rights is enshrined in the United States Constitution, efforts to balance the potentially conflicting rights emerge in the courts where the constitutional rights are interpreted with deference to the varying contexts in which such disputes arise.[34] Despite assertions that there is not a specified parental right to control the educational upbringing of children, a series of judicial affirmations regarding parents' rights to select homeschooling as well as private school enrollment in fulfillment of compulsory attendance laws is evidence that courts recognize parental rights to choose from among a continuum of options when determining their children's educational settings.[35]

Three U.S. Supreme Court cases are presented in this article as historical evidence of the legally recognized rights and responsibilities of parents to educate their children.[36] These cases fall along two controlling lines of theories regarding the parental rights doctrine. First, in two bulwark cases, the Supreme Court asserts that parents have clearly-established Fourteenth Amendment liberty interests to direct their children's education.[37]

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28. *Id.* at 634.

29. *Id.*; *See also* Rachel E. Taylor, *Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education*, 29 INT'L J. L., POL'Y & THE FAM. 15-35 (2015) (discussing a similar initiative in the United Kingdom).

30. TARCOV, *supra* note 26.

31. *Id.*

32. *Id.*

33. AMY GUTMANN, DEMOCRATIC EDUCATION 49-50 (1987).

34. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

35. Chad Olsen, *Constitutionality of Home Education: How the Supreme Court and American History Endorse Parental Choice*, 2 BYU EDUC. & L.J. 399, 410 (2009).

36. Eric M. Zimmerman, *Defending the Parental Right to Direct Education:* Meyer *and* Pierce *as Bulwarks Against State Indoctrination*, 17 REGENT U. L. REV. 311, 311 (2004/2005); Heather M. Good, *The Forgotten Child of Our Constitution: The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641, 646-48 (2005).

37. Olsen, *supra* note 35, at 410-11.

Second, the Supreme Court recognized a higher standard of review required when parents exercise their liberty interests in connection with their free exercise of religion rights.[38]

A. Fundamental Rights Claim: Fourteenth Amendment Liberty Interest

The parental liberty interest doctrine emerged from a direct conflict between a state legislature and foreign language teacher.[39] Interestingly, the state's interests were in direct conflict with both the teacher's and parent's interests in providing an education to the child.[40] As the Supreme Court observed, the "right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment."[41] Although some might argue the primary outcome of *Meyer v. Nebraska* was to protect the right to teach,[42] the oft-quoted opinion suggests the Court was especially influenced by a similar desire to protect parental rights over their children.[43]

The *Meyer* Court explicitly hesitated to define the exact meaning of liberty interests under the Fourteenth Amendment protections, "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[44] Nonetheless, the Court explained that liberty interests have been defined with certain clarity to include

> the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[45]

Accordingly, Justice McReynolds asserted that the statute requiring English-only instruction in the public schools was an unreasonable and

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38. *Id*. at 411-12.

39. Meyer v. Nebraska, 262 U.S. 390, 396-97 (1923).

40. *Id.*

41. *Id*. at 400.

42. David M. Wagner, *Homeschooling as a Constitutional Right: A Close Look at* Meyer *and* Pierce *and the* Lochner-*Based Assumptions They Made About State Regulatory Power*, 39 OKLA. CITY U. L. REV. 385, 389 (2014).

43. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

44. *Meyer,* 262 U.S. at 399.

45. *Id.*

arbitrary interference with established parental rights as well as the teacher's rights. [46]

Pierce v. Society of Sisters[47] further strengthened the parental liberty interest doctrine and serves as a watershed case, in combination with *Meyer*, for the parental choice movement.[48] Parents of students with disabilities who seek to exert choice and control over their children's educational opportunities have consistently relied on *Pierce* as support for private school enrollment decisions.[49] In *Pierce*, the right of parents to choose a private school emerged as a liberty interest as a result of a conflict between two private schools and the state of Oregon over the enforcement of compulsory attendance laws.[50] According to the Court, the parents' liberty interest was unreasonably burdened when the state sought to "standardize its children by forcing them to accept instruction from public teachers only."[51] This case did not, however, negate states' legitimate interests in educating all children residing within their states and communities. As such, parents could not preserve unlimited parental rights solely through geographic choices.

In *Pierce*, the Court applied the *Meyer v. Nebraska*[52] doctrine as a bar against state action that would unreasonably interfere with the "liberty of parents and guardians to direct the upbringing and education of children under their control" secured by the Fourteenth Amendment liberty protections.[53] Subsequently, in *Griswold v. Connecticut*,[54] the Supreme Court asserted "the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments," and added, "[W]e reaffirm the principle of the Pierce and the Meyer cases."[55] Further, the Court noted that even though the parents' rights to choose public, private, or parochial are not mentioned in the Constitution or Bill of Rights, the spirit of the First Amendment includes such peripheral rights.[56]

The parental rights doctrine has repeatedly been endorsed by the courts, as a fundamental liberty interest protected by the Fourteenth

46. *Id*. at 403.

47. *Pierce*, 268 U.S. at 534.

48. Zimmerman, *supra* note 36, at 325.

49. *See* Debra Drang & Margaret J. McLaughlin, *Special Education Services for Parentally Placed Private School Students*, 21 J. SPEC. EDUC. LEADERSHIP 3 (2008).

50. Wagner, *supra* note 42, at 411.

51. *Pierce,* 268 U.S. at 535.

52. *See* 262 U.S. 390 (1923).

53. *Pierce,* 268 U.S. at 534-35.

54. *See* 381 U.S. 479 (1965).

55. *Id*. at 482-83. ("The right to educate a child in a school of the parents' choice -- whether public or private or parochial -- is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.").

56. *Id.* at 483.

Amendment.[57] For example, in *Prince v. Massachusetts*,[58] the Supreme Court recognized *Meyer*[59] and *Pierce*[60] as long standing precedents that affirmed parents' fundamental interests in the education and religious upbringing of their children.[61] More recently, in *Gruenke v. Seip*, the Third Circuit Court recognized that "[t]he right of parents to raise their children without undue state interference is well established."[62]

The *Meyer-Pierce* cases demonstrated that parents might be able to find recourse within the courts in response to governmental intrusions and interferences in their exercise of parental rights to direct the education and upbringing of their children. The section below describes how the hybrid rights claim gained recognition when the parental rights doctrine, in combination with a free exercise of religion claim, was asserted in a case involving a conflict between the parent's control over the child's religious and educational upbringing and the state's interest in promoting education.

B. Hybrid Rights Claim: Liberty Interest & Free Exercise of Religion

The parental rights doctrine established in *Pierce* and *Meyer* was reasserted in *Wisconsin v. Yoder*,[63] by Amish parents who refused to send their children to a public school beyond a certain age, despite compulsory attendance laws to the contrary.[64] The Amish parents asserted that the state compulsory attendance law imposed an undue burden on their First Amendment free exercise and Fourteenth Amendment substantive due process rights regarding the direction of their children's religious upbringing.[65] While the Court recognized the state's interest in education, it rejected the imposition on parents' fundamental rights under the Free Exercise Clause of the First Amendment and on parents' traditional interest in overseeing the religious upbringing of their children.[66]

The Court concluded, "[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment."[67] Additionally, the Court asserted

57. Gruenke v. Seip, 225 F.3d 290, 303 (3rd Cir. 2000).
58. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
59. Meyer v. Nebraska, 262 U.S. 390, 401 (1923).
60. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).
61. *Gruenke,* 225 F.3d at 303.
62. *Id*.
63. Wisconsin v. Yoder, 406 U.S. 205, 243 (1972).
64. James G. Dwyer, *Religious Schooling and Homeschooling Before and After* Hobby Lobby, 16 U. ILL. L. REV. 1393, 1407 (2016).
65. *Yoder*, 406 U.S. at 213.
66. *Id*.
67. *Id.* at 233.

that "parental educational rights as a form of religious liberty . . . were due the same consideration afforded free exercise rights—rights which had trumped competing state interests since '[l]ong before' anyone acknowledged a need for public education."[68] The Supreme Court's decision in this case is noteworthy given the recognition of a hybrid rights claim requiring more stringent judicial review when examining combined claims based on parents' First Amendment free exercise and Fourteenth Amendment liberty interests.[69]

Despite assertions that hybrid rights claims are merely dicta,[70] and thus Fourteenth Amendment liberty interests and First Amendment free exercise rights are not strengthened to the extent of raising the level of scrutiny required,[71] the Supreme Court has previously made this very claim. Specifically, in *West Virginia State Board of Education v. Barnette*, the Court noted:

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.[72]

Barnette reinforces credibility of the hybrid rights claims by recognizing the enhanced protections necessary when Fourteenth Amendment liberty interests are combined with First Amendment protections.[73]

In fact, the Supreme Court has continued to affirm the parental rights doctrine as it applies to educational choices when parental interests conflict with state interests.[74] In *Troxel v. Granville*,[75] the Supreme Court affirmed the rights of parents to homeschool their children and to select private school options to meet state compulsory attendance laws. In essence, the Court reaffirmed that parents may choose from a continuum of options when

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68. Matthew Steilen, *Parental Rights and the State Regulation of Religious Schools*, 2009 BYU EDUC. & L.J. 269, 274 (2009).

69. *Id.* at 339 (asserting that strict scrutiny may be the appropriate standard of review when both religious and parental rights doctrines are violated by state action).

70. Kyle Still, *Smith's Hybrid Rights Doctrine and the* Pierce *Right: An Unintelligent Design*, 85 N.C. L. REV. 385, 409 (2006); Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231 (3rd Cir. 2008).

71. Still, *supra* note 70, at 414.

72. W. Va. St. Bd. of Educ. v. Barnette, 319 U. S. 624, 639 (1943).

73. Schube, *supra* note 2, at 129-140.

74. *See* Bloom, *supra* note 10, at 177.

75. Troxel v. Granville, 530 U.S. 57 (2000) (asserting that the substantive due process protections affirmed in *Pierce* guaranteed the fundamental liberty interests of parents to control their children's education).

determining their children's educational settings.[76] According to the Court, parents' interest "in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."[77]

Although the opponents of school choice are generally concerned about the use of public funds to support private schools rather than focused on limiting parents' exercise of control over education, the difficulty lies in trying to achieve balance between the states' interests and parental rights to control education.[78] For example, parents' concerns range from disputes over curriculum choices that offend parents' religious beliefs and family values,[79] to politically motivated concerns about curriculum that conflicts with parents' ideals.[80] School choice opponents do not appear to disagree with parental choice when it is exercised individually with no impact on the public school's authority over education, but rather focus on how the unregulated exercise of choice affects the rights of students remaining in public school systems. Despite assertions that *Pierce* and *Meyer* were, in essence, focused on the extent of governmental limits regarding education rather than about assuring parental rights,[81] these cases along with *Yoder* are consistently used to guide decisions that require balancing state interests against parental control over their children's education. The exercise of parental control over the education and upbringing of children is increasingly sought through the adoption and spread of school choice reform initiatives. Yet, efforts to reform education through choice initiatives have been met with opposition.[82]

Notably, discussions about parental choice have historically neglected the rights of parents to exercise control and choice regarding the education of students with disabilities.[83] However, critical examination of school choice reform initiatives, such as charter schools and voucher programs, has revealed that both programs were largely unavailable to students with disabilities until recently. Now that discussions are evolving within the education reform choice movement to include options such as vouchers for students with disabilities, such efforts have encountered resistance from states and school choice opponents.[84]

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76. *See* Bloom, *supra* note 10, at 169.

77. *Troxel,* 530 U.S. at 65.

78. *See* Good, *supra* note 36, at 670.

79. *See e.g.,* Mozert v. Hawkins Cty. Public Schs., 827 F.2d 1058, 1060-61 (6th Cir. 1987).

80. Maxine Eichner, *Who Should Control Children's Education: Parents, Children, and the State,* 75 U. CIN. L. REV. 1339, 1369 (2006-2007).

81. *See* Wagner, *supra* note 42, at 404.

82. Martha Minow*, Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 819 (2011); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1086 (2014).

83. *See* Bon, Decker, & Strassfeld, *supra* note 16.

84. *Infra* Part II.

II. LIMITS ON PARENTAL RIGHTS AND CHOICE

Despite general perceptions that the U.S. Constitution is the foundation upon which the Supreme Court established a parental rights doctrine,[85] competing perspectives offer an alternative view in an effort to limit parental rights and the exercise of choice.[86] Specifically, several lower court decisions recognize limits on the fundamental parental rights doctrine.[87] Similarly, a few legal scholars have argued that the Supreme Court has established a parental rights doctrine only insofar as the Court recognized that a state may not unreasonably restrict parental control over their children, particularly with respect to education.[88]

The parental rights movement peaked at the state level in 1996 when a general election ballot measure was introduced to amend the Colorado Constitution.[89] The amendment would have established parents' inalienable right to determine the education, values, and discipline of their children.[90] Although this initiative failed, the perception remains that parents need protection from state (and federal) efforts to exert undue influence over the upbringing and education of their children.[91]

As a result of tensions between state interests and parental control, parents have sought relief in the courts from perceived governmental overreach with respect to education and parental control over children in general. Given the overwhelming lack of success by parents who challenged school curricular choices across the states,[92] parents had to seek other

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85. *See* Meyer v. Nebraska, 262 U.S. 390, 401 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

86. *See generally* JEFFREY SHULMAN, THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD (2014).

87. *See e.g.*, Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 533 (1st Cir. 1995) ("We need not decide here whether the right to rear one's children is fundamental because we find that, even if it were, the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude on this right."); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005) ("While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child.").

88. *See generally* SHULMAN, *supra* note 86.

89. Linda Lane, *The Parental Rights Movement*, 69 U. COLO. L. REV. 825, 825 (1998).

90. *Id.*

91. *Hot, Sexy & Safer Prods., Inc.*, 68 F.3d at 530; Zimmerman, *supra* note 36, at 312; Bruce H. Schwartz, *Parental Rights: Educational Alternatives and Curriculum Control*, 36 WASH. & LEE L. REV. 277, 285 (1979).

92. For an overview of parents' unsuccessful state cases challenging curriculum, *see* Schube, *supra* note 2, at 132-37; *see also* Mozert v. Hawkins Cnty. Public Schs. 827 F.2d 1058, 1070 (1987) (finding that a public school's requirement to study a particular Holt reader series "does not create an unconstitutional burden under the Free Exercise Clause when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion. There was no evidence that the conduct required of the students was forbidden by their religion. Rather, the witnesses testified that reading the Holt series 'could' or 'might' lead the students to come to conclusions that were contrary to teachings of their and their parents' religious beliefs.").

alternatives through education reforms that endorsed parental choice. These alternatives included charter school movements, homeschooling, and voucher programs, among others. In other words, parents who perceived that "the states are . . . stripping the parents of their right to guide their children's moral and religious upbringing"[93] began searching for another avenue to protect their rights. Charter schools appear to offer a viable option to some parents, who desire the control to choose educational options that are different from "the curricular rigidity of a common schooling," and are not necessarily seeking a religious school option.[94]

The use of vouchers, however, is possibly more vulnerable than charter school options to constitutional or legislative barriers that limit the use of public funds for religious schools, due to concerns that such intermingling would violate the Establishment Clause. To some degree, the vulnerability of voucher programs is a result of anti-Catholic bias that swept the country and led many states to adopt state constitutional amendments that prohibited state support for religious schools.[95]

This anti-Catholic bias emerged despite the failed efforts of Congressman James Blaine to introduce a constitutional amendment that would prohibit the distribution of state funds to religious schools.[96] Blaine's efforts sparked widespread adoption of constitutional provisions that restricted the flow of state funds to religious schools.[97] The resulting Blaine Amendments were fostered in growth by Protestant unease with an increasing Catholic presence and resistance to the Protestant dominated public school curriculum.[98] The following section briefly discusses the impact of the Blaine Amendments on parental choice, examines the collective purpose of education in society, and identifies the historic impact of racial animus on the rise of voucher programs.

A. Blaine Amendments

Voucher programs will frequently involve the use of public dollars to fund private, oftentimes religious, schools. This use of public money in a religiously affiliated setting has led to criticism and conflict regarding application of the Fourteenth Amendment and the Blaine Amendment provisions that widely exist in state constitutions.[99] Special education voucher programs—often referred to as scholarships—have been successfully challenged in several state courts based on the invocation of the

93. Schube, *supra* note 2, at 121.
94. SHULMAN, *supra* note 86, at 162-63.
95. *See e.g.*, DeForrest, *supra* note 13, at 583-84; Dougherty, *supra* note 14, at 42.
96. Dougherty, *supra* note 14, at 44.
97. *Id.* at 44-45.
98. *Id.*
99. Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291, 311 (2010).

Blaine provisions in state constitutions.[100] On the other hand, the majority of challenges under the Fourteenth Amendment Establishment Clause, which is frequently cited when justifying the need for separation of church and state, have been unsuccessful.[101]

Despite the widely-accepted anti-Catholic bias of the Blaine Amendments,[102] the Supreme Court is seemingly reluctant to squarely address the constitutionality issue.[103] Yet, the issue was implicated in *Trinity Lutheran v. Comer*,[104] when the Supreme Court ruled in favor of religious liberties by holding a state policy denying grants to religious entities violated the First Amendment Free Exercise Clause. Despite tentative predictions that *Trinity* could prove the death knell for the Blaine Amendments,[105] the Court drew upon the previous attempt to balance the Establishment and Free Exercise Clauses instead of ruling directly on the constitutionality of the Blaine Amendments.[106]

B. Education's Collective Purpose

Opponents of school choice reform initiatives have often expressed concerns about parental choice reforms interfering with the important societal role of education in building collective purpose.[107] In fact, the state's argument in *Yoder* was premised in part on the ideals espoused by Thomas Jefferson, who "pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[108] This essential argument about the greater purpose of education was rejected in *Yoder*, insofar as it interfered with the Amish parent's combined liberty interest and free exercise rights.

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100. Cain v. Horne, 202 P.3d 1178, 1184 (Ariz. 2009); Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 351 P.3d 461, 479 (Colo. 2015). (Both state supreme courts invalidated the voucher programs which permitted public funds to be used by students with disabilities to attend private schools on Blaine Amendment grounds.).

101. Zelman v. Simmons-Harrris, 536 U.S. 639, 648-49, 662-63 (2002); Shannon S. Taylor, *Special Education, Private Schools, and Vouchers: Do All Students Get a Choice?*, 34 J.L. & EDUC. 1, 7 (2005).

102. DeForrest, *supra* note 13, at 570; Dougherty, *supra* note 14, at 42.

103. DeForrest, *supra* note 13, at 553.

104. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017).

105. Nicole S. Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 51 (2017).

106. Widmar v. Vincent, 454 U. S. 263, 276 (1981) ("[T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause.").

107. Jay P. Greene & Stephen Buck, *The Case for Special Education Vouchers*, 10 EDUC. NEXT, 36, 42 (2010); Minow, *supra* note 82, at 842.

108. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

C. Race and School Vouchers

Historically, evidence suggests that vouchers have been used to avoid desegregation efforts[109] and to provide segregated publicly funded educational options for middle-class parents.[110] In *Griffin v. County School Board of Prince Edward County*,[111] the Virginia General Assembly authorized the use of state funds to support public or non-sectarian private schools, which subsequently led a Virginia county to close all public schools and adopt vouchers for purposes of funding attendance at all-white private educational institutions. This historical context has contributed to numerous concerns about the risks associated with school vouchers.[112]

Drawing from the Supreme Court's rationale in *Milliken v. Bradley*,[113] the scope of remedies to address racial discrimination found to be in violation of the equal protection clause is not unlimited. As such, the Supreme Court rejected the proposed plan requiring compulsory transfer of students across the Detroit public school system and the suburban districts bordering Detroit.[114] Analogous claims to limit private school vouchers for students with disabilities, because permitting such choice would impact the civil rights of other students, are similarly problematic because such restraints transfer the burden from school districts to individual parents and children. The following section seeks to extend discussion beyond the balance of state and parental interests, by embarking on an examination of the federal government's impact on parental control over education, particularly given the strict limitations on financial support available via the federal disability legislation, the Individuals with Disabilities Education Act (IDEA).[115]

III. EDUCATION AND FEDERAL DISABILITY LAWS

For purposes of this article, it is helpful to have a basic understanding of the essential federal disability laws protecting the rights of students with disabilities as well as the rights of their parents or guardians. Thus, this Part briefly summarizes the key legal provisions of the Individuals with Disabilities Education Act (IDEA),[116] Section 504 of the Rehabilitation Act of 1974 (Section 504),[117] and the Americans with Disabilities Act of 2008

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109. Gooden, Jabbar & Torres, *supra* note 22, at 523.

110. M. T. O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 364 (1997).

111. Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218, 221 (1964).

112. Rachel E. Taylor, *supra* note 29, at 2.

113. Garnett, *supra* note 105, at 11.

114. Milliken v. Bradley, 418 U.S. 717, 741 (1974).

115. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (2010).

116. *Id.*

117. 29 U.S.C. § 794 (2016).

(ADA).[118] Particular focus is paid to the IDEA given the targeted application of this federal law on ensuring educational benefit, meeting the individualized needs of students with disabilities, and guaranteeing parental rights and control over their children's education.

The explicit provisions of the IDEA protecting parental rights regarding the education of their children are a fundamental aspect of this federal law. Understanding these rights, not only in the public school setting but also in a wider education arena, is a critical element of this article. According to the IDEA, public schools are required to provide a free appropriate public education (FAPE) in the least restrictive environment (LRE) to students with disabilities.[119] While the onus is clearly placed on public schools to comply with the IDEA mandate, parents are similarly burdened because the critical IDEA financial support and legal protections are lost by parents who exercise choice over the education and upbringing of their children. Specifically, public schools enjoy financial benefits and funding along with the strict legal mandates of the IDEA, and students with disabilities receive only what has been determined by the schools and school officials to be appropriate. Furthermore, private schools and other educational choice options are simply unavailable to the majority of students with disabilities because in these alternative settings, the students are not provided with financial support nor protected by the legal mandates that would benefit students with disabilities.

The IDEA also addresses parental participation through mandates such as the due process hearing protections that ensure parents are included in the processes of identifying, evaluating, and placing their children in appropriate educational settings.[120] Furthermore, parental rights and interests in providing for the educational needs of children with disabilities are directly addressed in our national disability policy, which furthers parents' interests to pursue "equality of opportunity, full participation, independent living, and economic self-sufficiency" for their children with disabilities.[121]

Parental interests in achieving these educational outcomes are further protected under the IDEA through guarantees to access the necessary and appropriate educational programs and services at no expense to the parent.[122] In order to achieve this provision of the IDEA, the unique educational needs of students with disabilities are to be identified in an individualized education program (IEP).[123] Parents are critical members of the IEP development process and public schools are required to take specific steps that ensure parental participation in the development of the IEP during the IEP team

118. Equal Opportunity for Individuals with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2009).

119. 20 U.S.C. § 1411(e)(3)(F) (2010).

120. 20 U.S.C. §§ 1414(d)(1)(B)(i), 1414(f) (2010).

121. 20 U.S.C. § 1400(c)(1) (2010).

122. 20 U.S.C. §§ 1401(9), 1412(a)(1)(A) (2010).

123. 20 U.S.C. §§ 1401(14), 1414(d) (2010).

meeting.[124] Furthermore, public schools "must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement"[125] and the provision of FAPE to the child.[126]

The FAPE provision has been interpreted as an essential provision of the IDEA requiring public schools to provide educational benefits to students.[127] This benefit must meet more than a *de minimis* standard.[128] As cited by the Supreme Court in *Endrew F. v. Douglas County School District RE-1,* "[A] student offered an educational program providing 'merely more than de minimis' progress from year to year can hardly be said to have been offered an education at all."[129]

Although several in the disability community commended *Endrew* for dramatically improving the likelihood of positive educational opportunities for students with disabilities, it is still unclear if the decision will have any impact on parental choice or control over children with disabilities.

Parental rights are generally protected with respect to educational choices such as the decision to enroll children in private school settings or homeschool children; however, the rights guaranteed under the IDEA are not guaranteed to parents who exercise these choices. Specifically, the public school system is not required to offer a FAPE to the student, whose parents have chosen education in a private school or home school setting. In other words, if parents fail to consent to the provision of services offered in the public school setting, the public school's responsibility under the IDEA is essentially terminated. Furthermore, if the parents opt unilaterally to place their child in a private-school setting because they disagree or are unhappy with the public school IEP, services, or placement, there are limited circumstances in which the parents may seek reimbursement for the private school tuition or financial support for the home schooling option.

Private school placements are an option, and tuition may be reimbursable under the IDEA in two general circumstances. First, tuition reimbursement of a private school placement may occur if the IEP team determines that the appropriate education, including placement, programs, and services, must occur in a private school setting to ensure the student receives FAPE.[130] This first scenario is achieved through the cooperative efforts of parents and school officials, and the private school placement must be provided at no cost to the parents.[131] In the second scenario, tuition reimbursement for private school placement may occur when parents are able

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124. 20 U.S.C. §§ 1414(e), 1415(b)(1) (2010); 34 C.F.R. § 300.322 (2006).

125. 34 C.F.R. § 501(c)(1) (2006).

126. 20 U.S.C. §§ 1414(e), 1415(b)(1) (2010).

127. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 177 (1982).

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

129. *Id*.

130. 34 C.F.R. § 300.145-300.147 (2006).

131. 34 C.F.R. § 300.104 (2006).

to demonstrate that the public school failed to provide an appropriate education.[132]

In general, decisions about private school enrollment are made following an interaction and consultation between parents and public school officials. Private school attendance is oft-viewed as an option reserved solely for wealthy and privileged individuals and can prove especially difficult to access for parents of students with disabilities.[133] Given the legal parameters of the IDEA as explained in this Part, parents of students with disabilities are typically forced to take legal action in order to access private school options using public funds to support tuition expenses.

Typically, the educational options available to parents of students with disabilities are determined by the IEP team or through litigation. Recently, however, the Eleventh Circuit Court affirmed that public funds could be available to cover tuition for a student with a disability whose parents select the home schooling option.[134] In this case, the court recognized that parents may request financial support for home instruction given the broad remedial authority of IDEA.[135]

If special education voucher programs were available to parents of children with disabilities, this would provide increased choice, but also an alternate pathway for parental control over the upbringing of their children. Although the lure of choice appears to provide a distinct advantage to parents, some critics assert that parents and students with disabilities could be vulnerable in a private educational setting if it is not fully sanctioned by the public school.[136] In other words, if parents do not pursue litigation to force a school board to award tuition reimbursement for the private school or do not succeed in convincing the school board to establish a private school setting as the appropriate placements ensuring FAPE, their choice of enrolling their child in a private school setting would result in the loss of federal funding and the protection afforded by the IDEA.

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132. Burlington Sch. Comm. v. Mass. Dept. of Educ., 471 U.S. 359, 360 (1985) (Ruling by the U.S. Supreme Court in 1985, in the landmark case, affirmed that tuition reimbursement for private school may be provided to parents who successfully assert that the public school has failed to provide an appropriate education to their child, who qualifies as a student with a disability); Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993) (finding parents are eligible for tuition reimbursement even though their child is placed in a non-approved private school because the child's right to FAPE exceeds limits established by the administrative and procedural aspects of the IDEA).

133. *The Condition of Education 1997,* NATIONAL CENTER FOR EDUCATION STATISTICS 1, 148, https://nces.ed.gov/pubs97/97388.pdf (last visited Nov. 22, 2017); *See* Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections From the Frontlines of Special Education Lawyering*, 20 J. GENDER SOC. POL'Y & L. 107, 111 (2006).

134. R.L., S.L. *ex rel*. O.L. v. Miami-Dade Cty. Sch. Bd., 757 F.3d 1173, 1191 (11th Cir. 2014).

135. *Id.* at 1192.

136. *See generally* Bon, Decker, & Strassfeld, *supra* note 16.

Although the ADA and Section 504 of the Rehabilitation Act are not as extensive as the IDEA in terms of providing specialized protections for students with disabilities, these federal protections would provide minimal safeguards for parents who enroll their children in private schools through the special education voucher programs.[137] Specifically, private and public schools are not permitted to discriminate or prohibit access to individuals with disabilities who seek to participate in the schools' services, programs, and activities.[138] Even when the student would not qualify under the IDEA, Section 504 and the ADA are interpreted as coextensive laws protecting the rights of students with disabilities to be free from discrimination and provide parents an avenue to pursue litigation.[139] However, Section 504 and the ADA may not apply in all circumstances. For example, if the private school does not receive public funding, Section 504 does not apply; and if the private school has fewer than twenty-five employees or has a religious affiliation waiver, it is possible that accommodations may not be required in the private school setting.[140]

The efforts to hinder states from adopting special education voucher programs stem from essentially three basic concerns about the impact of vouchers on public schools and the well-being of students with disabilities. First, if students with disabilities are permitted to use vouchers to attend private schools, other students, whose parents choose not to access vouchers, will be left behind in underperforming public schools given the misdirection of public funds to private school settings.[141] Second, the vouchers flow into private school settings with limited accountability for the use or results of such funds.[142] Third and finally, if parents opt to enroll their child in a private school setting using a voucher, they will forfeit their rights and their children's rights to the IDEA legal protections.[143]

In response to the concerns raised by voucher opponents, proponents assert, "Rather than forcing dissatisfied families to accept subpar services or to pursue legal action for relief, vouchers permit a lower conflict, lower-cost method for resolving disagreements about the adequacy of public school

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137. *Id.*

138. Equal Opportunity for Individuals with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2009).

139. 42 U.S.C. §§ 12134(b), 12201(a) (2010).

140. *See, e.g.*, Shannon S. Taylor, *supra* note 101; Wendy F. Hensel, *Recent Developments in Voucher Programs for Students with Disabilities*, 59 LOY. L. REV. 323 (2013).

141. S*ee* Stephen A. Rosenbaum, *Preserving Public Values in the Private Sector: Unintended Consequences or Vouching for Ableism-Free Schools?*, 45 J.L. & EDUC. 369 (2016); Brian Gill et al., *Rhetoric Versus Reality: What We Know and What We Need to Know About Voucher and Charter Schools*, 2 RAND EDUC. 118 (2007).

142. Joseph O. Oluwole & Preston C. Green III, *School Vouchers and Tax Benefits in Federal and State Judicial Constitutional Analysis*, 65 AM. U. L. REV. 1335, 1433 (2016).

143. *See generally* Hensel, *supra* note 99.

efforts."[144] The potential promise of school reform efforts has not yet been adequately provided to students with disabilities. In other words, the opportunities to exercise parental control over the education and upbringing of children are not accessible to parents of students with disabilities. Through ongoing reiterations of the IDEA parental rights provisions, the quality of and opportunity to access educational programs and services have dramatically improved for students with disabilities, however.[145] Further, the long-term commitment to parental participation as a pivotal feature of the IDEA is evidence of the keen awareness of how critical it is for parents to be active participants in their children's educational decisions.[146]

Access to SVPs would provide parents of students with disabilities meaningful choice options and the ability to determine if a nonpublic setting might better meet the needs and preferences of their child and family. Although the IDEA envisions the possibility of private school placement for students with disabilities, this would typically involve a costly and time-consuming encounter with the public school, whether through a due process hearing or possibly even litigation in the courts. Special education voucher programs offer families a choice that currently is fairly limited. Furthermore, given the limits on federal funds provided in support of students who qualify for programs and services under the IDEA, the public school option is given preferential treatment as the best option for all students with disabilities.

Amidst the debate and increasing interest in the expansion of educational choices for parents, concerns have also arisen regarding the application of federal disability laws to public charter schools.[147] Fundamentally, the rigorous and prescriptive application of federal disability laws, such as the IDEA, on charter schools could likely curtail the very goal of independence and innovation enjoyed by charter school initiatives. Yet, without such laws, others express concern that students with disabilities might be neglected by the charter school reform movement. Further, without the IDEA accountability measures, students with disabilities and their parents risk access to essential programs and services to meet the child's individual needs.

Finally, given the extremely acrimonious nature of special education issues and the high number of due process and court cases initiated by parents, the benefits of IDEA are likely not enjoyed by all parents of students

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144. Jay P. Greene & Stephen Buck, *The Case for Special Education Vouchers*, 10 EDUC. NEXT 36 (2010).

145. Julie F. Mead & Mark A. Paige, *Parents as Advocates: Examining the History and Evolution of Parents' Rights to Advocate for Children with Disabilities Under the IDEA*, 34 J. LEGIS. 123, 142 (2008).

146. H. Rutherford Turnbull, III, *Individuals with Disabilities Education Act Reauthorization: Accountability and Personal Responsibility*, 26(6) REM. & SPEC. EDUC. 320 (2005).

147. *See* Jay P. Heubert*, Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation,* 32 HARV. C.R.-C.L. L. REV. 301 (1997).

with disabilities.[148] Special education voucher programs may provide a meaningful opportunity for parents to adopt an alternative to litigation. The following Part highlights the key aspects of special education voucher programs and proposes the legislative reforms needed to extend the rights and financial supports of the IDEA to parents of students with disabilities who exercise choice by deciding to educate their children in non-public school settings.

IV. LEGISLATIVE REFORM: SPECIAL EDUCATION VOUCHER PROGRAMS AND THE IDEA

Special education voucher programs (SVPs) are part of a growing educational reform movement focused on expanding school choice options to parents of students with disabilities.[149] "As is the case with many school-choice programs, SVPs are highly controversial and politically charged."[150] Specifically, voucher programs have sparked both ideological[151] and legal[152] debates among educational policy reformers regarding the burdens[153] and benefits[154] of permitting parents to use publicly-funded vouchers to pay for private school tuition or services. According to proponents of this educational reform, "special education vouchers essentially use public funds to democratize access to private placement by reducing legal and financial barriers."[155] Opponents, on the other hand, assert, for example, that SVPs are contrary to the civil rights agenda in that they lead to further segregation both economically and racially, which then leads to diminished educational opportunities for students unable to benefit from the vouchers. The opponents also indicated that SVPs may put the educational needs of students with disabilities at risk because the nonpublic settings are not obligated to adhere to the federal protections provided by the IDEA.

The likelihood of a dramatic increase in private school options is seemingly possible given recent momentum. While this momentum has included publicly-funded SVPs, lingering concerns about how federal disability laws apply in such settings reveal the need for legislative reform. Learning from statewide efforts to adopt SVPs, as well as the challenges from those who are opposed to such reform efforts, future initiatives should

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148. Hyman, Rivkin & Rosenbaum, *supra* note 133 (asserting that the complexity of IDEA systematically leads to the denial of educational opportunities for students from economically challenges families).

149. *See* Bon, Decker, & Strassfeld, *supra* note 16.

150. *See* Bon, Decker, & Strassfeld, *supra* note 16.

151. *See* Hensel, *supra* note 99.

152. *See* Oluwole & Green III, *supra* note 138; Susan Etscheidt, *Vouchers and Students with Disabilities A Multidimensional Analysis*, 16 J. DISABILITY POL'Y STUD., 156-58 (2005).

153. *See* Minow, *supra* note 82.

154. Greene & Buck, *supra* note 144, at 36.

155. *Id*.

incorporate several key protections.[156] Specifically, statewide reform initiatives must include critical IDEA provisions in the existing and proposed special education voucher programs.[157]

Extending the parental rights doctrine to protect students with disabilities can be achieved, in part, through choice initiatives such as the special education voucher programs emerging across the states.[158] Efforts to protect parental rights should also include legislative reform of the IDEA to revise provisions that limit the availability of guaranteed protections and funding to meet the educational needs of students with disabilities. In the present form, the IDEA serves as an unintended barrier to parents of students with disabilities who desire meaningful choice and control over the upbringing of their children.[159]

If the IDEA were amended to include a mechanism consistent with the child benefit theory,[160] this would enable parents to exercise true choice but not be forced to give up public funding, significant disability protections, accountability provisions, etc. In other words, by adopting a child benefit theory perspective, in essence an IDEA voucher could permit funding and protections that accompany the child beyond the traditional public school boundaries.

Legislative reform of the IDEA is consistent with previous Supreme Court rulings that extended governmental protections and funding to students in private school settings, in spite of concerns about perceived religious entanglement in violation of the First Amendment Establishment Clause. For example, in *Zelman v. Simmons-Harris*, the Supreme Court concluded that the school voucher program adopted by Ohio was neutral and exemplified "a program of true private choice."[161] Finally, according to the Court, the case presented no challenges to the Establishment Clause.

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156. *See generally* Bon, Decker, & Strassfeld, *supra* note 16 (proposing future SVP legislative recommendations that include model components such as a purpose statement, minimal federal disability law protections, notice and communication mechanisms, dispute resolution procedures, and accountability measures).

157. Marie Rauschenberger, *Resolving the Lack of Private-School Accountability in State-Funded Special Education Voucher Programs*, 2015 MICH. ST. L. REV. 1125 (2015).

158. Bon, Decker, & Strassfeld, *supra* note 16, at 505.

159. Joseph R. McKinney & Julie F. Mead, *Law and Policy in Conflict: Including Students with Disabilities in Parental-Choice Programs*, 32 EDUC. ADMIN. Q. 107 (1996).

160. Mueller v. Allen, 463 U.S. 388, 391 (1983) (permitting tax benefits for parents who spent money on "tuition, textbooks and transportation" for their children in both public and private schools because the money benefited the child directly and the religious school indirectly.); *See* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (finding state program that provided tuition assistance to blind students for higher education or training institutions directly benefited the individual student and thus did not offend the First Amendment Establishment Clause when student attended religious institution using the state provided funds).

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

CONCLUSION

Striking an appropriate balance between parental rights and state interests in educating children has been a recurrent theme in the courts for over eight decades.[162] The exercise of parental rights to control the upbringing of their children and to determine an appropriate education should not depend solely on governmental expectations regarding desired outcomes or societal benefits of education. Further, the rights of parents of students with disabilities should not be infringed upon or modified purely to achieve governmental interests that exceed the state's efforts or responsibilities to provide education.

As stated in *Meyer*, an individual's "liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."[163] Although special education voucher programs include potential challenges, such as economic, racially discriminatory, or exclusionary impacts on public school students who are left behind,[164] many of these challenges could be addressed through efforts to extend federal protections to parents who exercise choice.

This article advocates for a reform agenda that aligns with the child benefit theory,[165] because such efforts have the potential to create improved educational possibilities for students.[166] Furthermore, with this trend, observers note that the distinction between public and private sectors must continue to be blurred.[167] The changing political landscape is likely to facilitate renewed efforts to promote education reform agendas that include an emphasis on providing an increased number of choice options for parents of students with disabilities. The debate over parental rights is no longer narrowly focused on choice. Instead, parental choice should expand to incorporate a continuum of educational opportunities, especially for parents of students with disabilities, to secure education that is both high quality and consistent with parental values and beliefs.[168]

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162. *See e.g.,* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

163. Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

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

165. *Mueller*, 463 U.S. at 391; *see Witters*, 474 U.S. 481.

166. *See* Elizabeth Adamo Usman, *Reality Over Ideology: A Practical View of Special Needs Voucher Programs,* 42 CAP. U. L. REV. 53 (2014).

167. *See generally* Garnett, *supra* note 105.

168. *See* Bloom, *supra* note 10.