



School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice

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The Council of Parent Attorneys and Advocates, Inc.

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Protecting Rights. Creating Opportunities. Changing Lives.

The Council of Parent Attorneys and Advocates, Inc. (COPAA) is an independent, nonprofit unparalleled peer-to-peer network of attorneys, advocates, parents and related professionals dedicated to protecting and enforcing legal and civil rights of students with disabilities and their families at the national, state and local levels.

COPAA is premised on the belief that every child has the right to high-quality education and an equal opportunity to achieve his or her full academic potential. States, school districts and schools have obligations under federal and state law to ensure that each student receives an individualized education that prepares them for work, college, and participation in his or her chosen community.

We work to increase the quality and quantity of advocate and attorney representation. We believe the key to accessing individualized, effective educational programs is assuring that students with disabilities and their parents are equal members of the educational team.

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Executive Summary

As the Council of Parent Attorneys and Advocates (COPAA) has developed, implemented and supported the policy and advocacy priorities of our members, the issue of school choice and vouchers in particular, has become a frequent topic. To date, the only federal dollars spent on vouchers are those approved for the District of Columbia schools and their families; however, in the past several years, the push to bring vouchers forward in federal policy has been consistent and strong. Part of the federal push is reflective of state action to invest their dollars in voucher programs. Some of these voucher programs are designed specifically for students with disabilities and some are not. And, most importantly, not all of the state voucher programs distinctly protect the civil rights of children with disabilities under the Individuals with Disabilities Education Act (IDEA), the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) among other federal laws.

As a trusted resource for policy makers, including the U.S. Congress, COPAA is frequently brought into discussions about the voucher dilemma. In order to approach this fairly and to be responsive to the debate, we decided to:

- conduct an online survey of COPAAs' membership;
- analyze state voucher policies and practices, specifically through the lens of the civil rights of children with disabilities; and,
- develop guiding state and federal policy recommendations, reflecting our Mission to shape and influence the debate.

Key Findings

Looking through the lens of [the rights of] children in special education, the list of pros and cons about vouchers may seem straightforward. However, when you delve into it, our members and our analysis helped us understand that:

- Parents often choose a voucher *regardless* of the availability of civil rights protections due to the urgency of their child needing to change schools.
- Parents like knowing they can explore their options when vouchers are available, even if they end up keeping their child in the neighborhood public school.
- Little data exists with regard to families choosing vouchers that limit or terminate IDEA rights once those families leave the traditional public school.
- Voucher funding is rarely sufficient and generally does not cover the full cost of the child's education, meaning that only parents with adequate finances have a choice.
- Some schools accept children with a disability (and the voucher funds) and then expel them for behavior or other reasons forcing the children back into a poor or inappropriate school situation.
- Special-education specific voucher programs typically fail to include *all* students with disabilities and it is rare for programs to accept students who are twice exceptional.
- Too little data exists to compare the academic outcomes of students with disabilities [and other students] participating in voucher programs to public school students.

Federal Policy

- Consider and clarify the legal expectations that attach to schools receiving significant funding from states with voucher programs, as well as the impact of the required waiver of students' rights under the IDEA and all other civil rights statutes. Children with disabilities and their parents deserve clear evidence of the positive and negative consequences of policy decisions made for their benefit.
- Require schools that receive public funds to publish assessment score, graduation rates, and other outcome data of students with disabilities.
- Amend IDEA to create an express entitlement to rights under voucher programs. The purpose of a voucher is to provide choice, not to deny rights or abdicate responsibility.

The U.S. Departments of Education and Justice should issue a letter to:

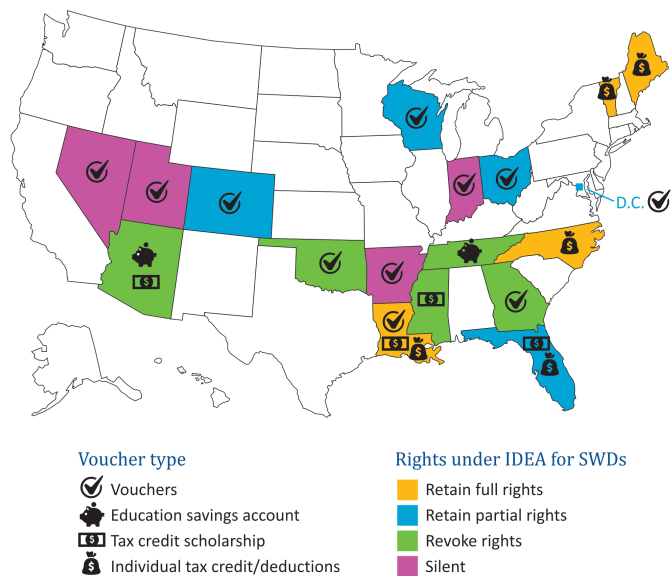
- Clarify civil rights violations that may be linked to failure to provide a free and appropriate public education under Section 504, or equal access under the ADA.¹
- Assure such programs are not creating a publicly financed (in whole or in part) segregated education system for students with disabilities. Vouchers should not be used for schools segregated on the basis of a specific disability or disability status more generally.²

State Policy

- Conduct studies to evaluate test scores, graduation and retention rates, harassment reports, and similar measures, both for students accepting vouchers and for those who remain in public schools.
- Protect the legal rights of children; including full alignment with the purpose and provisions of the IDEA, Section 504, the ADA and all other civil rights laws.
- Include reasonable costs for transportation or other services necessary to make the choice equitably available to all families.
- Retain the requirement that all schools accepting vouchers must ensure all students participate in statewide assessments, making all test results publicly available.
- Retain high standards for teacher qualifications as required by the State.
- Provide oversight and monitoring of participating private schools.
- Assure the same level of accountability of participating private schools as any other school.
- Provide tools and supports to parents and children for navigating the often complicated nuances of school choice and give special attention to 1) a student’s role in the school choice decision-making process, and 2) how best to educate families about their school choice options.

Our report clarifies that we still know far too little about the impact of voucher programs on students with disabilities and their families. Given the dearth of knowledge about best practices, protecting procedural safeguards and civil rights of children and the cost, both direct and indirect on children and families, it is too soon for the federal government to unilaterally make federal funds available for voucher programs. COPAA is deeply committed to assuring every child with a disability has the protections, support and opportunity to achieve their full potential in school and in society and we will continue to strive to reinforce those values as we develop and conduct our work. We look forward to partnering with our members, with policy makers and with other national organizations to see our Mission fulfilled.

Vouchers and Student Rights — A State by State Review



Introduction

Families of students with and without disabilities are caught up in the voucher wave. Many families that include a child who is eligible for services, accommodations and supports under the Individuals with Disabilities Education Act (IDEA) have chosen to give up some or all of their rights, or partial rights, under the IDEA to access voucher funds. It is clear, however, that not all understand the impact choosing to utilize a voucher program has on student and parent rights under the law.

Congress passed the Rehabilitation Act in 1973, the Individuals with Disabilities Education Act (IDEA) in 1975, and the Americans with Disabilities Act (ADA) in 1990 to end the exclusion of individuals with disabilities from society. Prior to these laws, most people with disabilities experienced discrimination, social isolation, low expectations, inadequate education and employment, and lack of opportunities across all areas of life. With the passage of these laws our nation began the shift from marginalizing people with disabilities to providing equal education, empowerment and inclusion. Still the gap between the promise of the laws and the reality of public schools' ability to serve students with disabilities remains enormous. Students with disabilities lag behind their peers without disabilities in performance on standardized tests, high school graduation, regular diploma attainment, and college completion rates—all of which have implications for careers, lifelong earning potential, and quality of life as well as for personal and societal prosperity.³

The weakness of public school education of children with disabilities in many school districts has led many families to seek alternatives, including the use of vouchers to access the individualized supports, services, therapies and instruction their children require to thrive. School choice

involving a voucher for payment can, therefore, be very appealing. The fact that the fundamental civil rights of the child are relinquished to access the voucher often is not understood until it is too late.



A parent's need to choose, and perhaps have a sense of control over the school their child attends in this climate, has created both new opportunities and new challenges with regard to the education of students with disabilities. Intense dissatisfaction with public schools, coupled with this desire to "choose" a school or an educational approach other than the traditional route has fueled the wave of state-funded voucher programs in many states. Recognizing the challenges public schools have faced in educating this population, a number of states have adopted voucher programs designed to provide students with a fixed dollar amount per year to attend the school of their choice. Programs differ in design throughout the country. To date, funds used to pay for voucher programs are state-level funds (with the exception of the DC Opportunity Scholarship Program first authorized in 2004); however, legislation has been introduced in Congress in recent

years to allow for the use of Federal dollars to fund voucher programs.

There is data, opinion and passion on both sides of the debate. COPAA members mirror the larger debate, with both critics and supporters of school voucher programs. COPAA is at the forefront of ensuring that students with disabilities and their families know their legal rights and have the support they need to access their right to a free, appropriate public education (FAPE) in the least restrictive environment (LRE) through their well-written Individualized Education Program (IEP). It is because of the role we play, and our belief that every child with a disability has the right to high-quality education and an equal opportunity to achieve his or her full individual potential, that we seek thoughtful consideration of vouchers.

COPAA members were surveyed to discover their opinion about the quality of vouchers in their state; pros and cons of giving families an additional option/opportunity to address the unique needs of their child. The range of opinions is broad. For example, the survey responses indicate that in Florida, in order to accept the voucher, there can be no outstanding complaint [by the family] against the district, making it impossible to pursue any sort of compensatory remedy for past, present or future claims.

Denying IDEA protections in the name of choice is actually a bar to compensatory services and a way for the state to skirt accountability for individual access to a free and appropriate public education. Under a voucher the protection may or may not be free (as many have to supplement the cost with personal funds), and no longer appropriate. A Wisconsin member, on the other hand, urged protections of the rights of families to determine for themselves and to choose their own educational options for

their children with disabilities, even when the choice is, as it so often is, simply the “least worse choice.” The concerns outlined in this paper are tied directly to COPAA member responses.

Recognizing the variance in perception and experience about state vouchers [and their treatment of IDEA rights], we do not purport to say that vouchers in their totality are good or bad, helpful or not for students with disabilities. What we do know emphatically is:

- all civil rights need to be upheld in the state-approved construct;
- increased access to quality education is necessary;
- the options must be affordable to all;
- the options must be accessible to all; and,
- private schools of choice must be held to the same accountability requirements to which public schools are held.

Evaluation of voucher programs needs to occur through that lens. Unfortunately, the lack of oversight of the federal Department of Education and the state education agencies, who have, to date, failed to address systemic violations of IDEA as well as the ADA by public schools, increases the likelihood that families will be forced to weigh the need to give up rights to be able to exercise school choice.

To promote an informed policy discussion regarding the implications of vouchers on students with disabilities COPAA has written this report. We seek to provide an overview of state voucher laws; share insights from COPAA members whose diverse experience informs the debate; and, make policy recommendations.

School Voucher Programs & Their Impact on Students with Disabilities

School voucher programs are, with the exception of Washington D.C., state-funded⁴ scholarships that pay for students to attend private school rather than public school or pay for other educational expenses for eligible students.

States providing these funds typically require that private schools meet minimum standards established by legislatures in order to accept voucher funds. Legislatures also set parameters for student eligibility that typically target subgroups of students. These can be low-income students that meet a specified income threshold, students attending chronically low

performing schools, students with disabilities, or students in military families or foster care. Currently, voucher programs exist in thirteen states and the District of Columbia. While some voucher programs target students classified as low-income, many school voucher programs have a focus on students with disabilities. Although details of the programs vary, most voucher programs for students with disabilities allow IDEA-eligible students to receive a voucher for a sum of money that may or may not be equal to the state-funded portion of the cost of their education in a public school.⁵ The states with voucher programs that are either exclusively for or include students with disabilities are: Arizona, Florida, Georgia, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, and Utah. State

2014-2015 Legislative Session:

- Forty states considered private school choice legislation to either create new programs or substantively amend existing ones. Of those,
 - 18 states considered legislation on traditional school vouchers
 - 20 states considered legislation on education savings accounts
 - 30 considered legislation on scholarship tax credits.
- Two states enacted traditional voucher legislation to either expand eligibility to include more students
 - Arkansas created a new voucher program
 - Utah expanded eligibility for the Carson Smith Scholarship program by reducing the age requirement from 5 years of age down to 3
- Five states enacted legislation on education savings accounts
 - Mississippi, Nevada, and Tennessee all created new ESA programs
 - Arizona expanded student eligibility to children living within the boundaries of an Indian reservation
 - Florida expanded eligibility to its ESA program by reducing the age requirement from 5 years of age down to 3
- Five states enacted scholarship tax credit legislation
 - Alabama, Arizona, Oklahoma, Montana, and Nevada

States such as Iowa, Pennsylvania, Minnesota, and New York, Rhode Island *have tax credits for corporations and/or individuals.*

voucher programs that do not specifically target students with disabilities exist in Maine, Vermont, Wisconsin and the District of Columbia. Forty states have voucher laws under discussion or pending legislative approval to either create new programs or substantially amend existing ones.⁶ Voucher programs range from traditional “choice” models that allow use of funds to enroll in the school that parents select, to education savings accounts, and tax credit allowances.

According to a recent report by the Center for Education Reform, private schools in some states, such as Indiana, are nearing capacity under the state’s three-year-old voucher program.⁷ In this past year alone, utilization of vouchers has nearly doubled due to changes in the law that extended access to students with disabilities and low-income families.⁸ Even while confronting a legal challenge from the U.S. Department of Justice, Louisiana’s recently expanded statewide voucher program has tripled the number of students served since 2012. Arizona created a voucher which funds personal Empowerment Scholarship Accounts that last year expanded to serve thousands of students attending low-performing schools.

Choice-Programs

As demonstrated in the chart in Appendix B, each program varies as defined by the state law under which it was created. Programs vary considerably according to how critical questions⁹ are considered, including:

- Value
- Scope
- Program jurisdiction
- Student eligibility
- School participation requirements
- Rights under current law

There are four basic constructs for school choice initiatives with vouchers making up one of the constructs: vouchers, education savings accounts, tax-credit scholarships and individual tax credits/deductions. A summary of each is provided. This report focuses on current state-funded programs and their effect on IDEA-eligible student and parent rights.

Vouchers

Vouchers, sometimes called scholarships, provide parents the option to send children to a private school using public funding to pay all or part of the tuition. Under such a program, funds typically expended by a school district for public schools are allocated to a participating family in the form of a voucher to pay partial or full tuition for the private school, including both religious and non-religious options.

Education Savings Accounts

Education savings accounts allow parents to receive a deposit of public funds into government-authorized savingsaccounts with restricted, but multiple, uses. The nature of the expenditures allowed varies by state. Typically, funds cover such costs as private school tuition and fees, online learning programs, private tutoring, community college costs, and other postsecondary education expenses.

Tax-Credit Scholarships

Tax-credit scholarships allow full or partial tax credits when there is a donation to nonprofits that provide private school scholarships. Eligible taxpayers can include both individuals and businesses. In some states, scholarship-giving nonprofits also provide innovation grants to public schools and/or transportation assistance to students choosing alternative public schools.



Individual Tax Credits/Deductions

Through individual tax credits and deductions, parents can receive state income tax relief for approved educational expenses, which can include private school tuition, books, supplies, computers, tutors, and transportation. Currently, there is no federal tax credit or deduction for private school attendance.

Voucher Value, Access & IDEA Rights

In most cases, voucher amounts are not set at rates high enough to cover the full cost of the education at a private school, and many of the programs do not cover critical costs to enable full access and participation, such as transportation. Some states, including a recent savings account program approved in Nevada, do cover fees for transportation required to travel to and from a participating provider or combination of providers, up to but not exceeding \$750 per school year. The range for vouchers and/or savings accounts is from \$2,000 (Mississippi) to \$27,000 (Ohio, students with autism). The median amount is between \$5,000 - \$7,000, which in many states is not enough to cover the full cost of tuition.

To advocates familiar with IDEA, the varying rates in voucher or savings account levels

seem to conflict with one of IDEA's most basic tenants -- that IEP teams can only lawfully determine each student's placement in the least restrictive environment based on that individual student's unique disability related needs as set forth in her IEP, not based on a diagnosis, a specific disability label, or because the student requires needed modifications in the general education curriculum.¹⁰ However, as discussed in the legal section, school districts do assign different rates for vouchers based on disability classification.

Some states that offer special education vouchers distinguish the voucher amounts depending on the disability of the student. Ohio's Jon Peterson Special Needs Scholarship Program provides students with disabilities with a range of maximum scholarships based on the student's disability.¹¹ Ohio also has an Autism Scholarship Program, providing public funding for students with₁₂ autism to attend their non-district school. All students with disabilities are otherwise eligible for the Jon Peterson Scholarship, with the amount depending on their disability category.¹³ Voucher amounts are determined through a complex funding formula that considers the average cost to educate a "typical student in a typical classroom" plus the estimated additional costs of providing special education and related services based on the child's disability.¹⁴ This past year, Louisiana implemented a "[School Choice Program for Certain Students with Exceptionalities](#)."¹⁵ This program provides vouchers for students with the following disabilities: autism, developmental delay, mental disability, other health impairment, specific learning disability, traumatic brain injury.¹⁶

The determination of whether there is discrimination in basing funding on disability classification may fall on the purpose for the discrimination. (See:

O'Connor v. Consolidated Coin Caterers Corp.), however, it doesn't appear that the laws differentiate voucher awards based on whether the person is in [the] protected class or not. Louisiana, for example, provides a flat scholarship that is equal to 50% of the state per pupil funding for the student's school district . . . and cannot exceed the cost of the private school tuition. SEE: [School Choice Program for Students with Certain Exceptionalities](#).

Vouchers are only available for students with certain disabilities¹⁷ residing in a parish with a population of at least 190,000. The legality of Louisiana's program has been under scrutiny. See a full discussion in Appendix A. In Florida the amount of the scholarship is equal to the amount the student would have received in the public school to which the student is assigned or the amount of the private school's tuition and fees, whichever is less. In 2012-2013, the average scholarship payment per student was \$7,019.¹⁸

In Colorado, vouchers are in the amount of tuition or a percentage of the districts per pupil revenues, whichever is less.¹⁹ It is likely that as long as the school system can demonstrate a motive that is not based on the disability itself, but rather on other facts related to the amount, that such variations in voucher amounts are legal.

Eligibility

Each state places limits on eligibility, such as whether the student enrolled in public school is eligible for a designated time period, meets a geographic limit (Colorado, only in Douglas County), or a specific diagnosis. Parochial schools are excluded in Maine. There is also considerable variation in the length of time approved. Some individuals remain eligible for the remainder of their school career; and, others must reapply every two to three years.

Example: Florida McKay Scholarship Program

The McKay Scholarships for Students with Disabilities Program was originally created in 1999 and provides scholarships for eligible students with disabilities to attend an eligible public or private school of their choice.

The amount of the scholarship is equal to the amount the student would have received in the public school to which the student is assigned or the amount of the private school's tuition and fees, whichever is less. In 2012-2013, the average scholarship payment per student was \$7,019.

Under this program, once parents use a voucher to transfer to a private school, they have opted out of all the due process rights and services to which their child is entitled under IDEA.

Requirements for eligible private schools include: maintaining a physical location where students attend classes, demonstrating fiscal soundness, and meeting state health, safety and welfare codes. Regarding teacher qualifications, schools are required to:

- contract with teachers who hold at least a bachelor's degree; or
- have at least three years of teaching experience in public schools; or
- have special skills, knowledge or expertise to provide instruction in subjects taught.

Teachers are not required to be "highly qualified" or otherwise certified. The program does not require standardized testing or assessments.

Parents who choose the private school option are responsible for the student's transportation, as it is not included in the scholarship.

Accountability

The level of accountability required varies considerably under each state. The range varies from:

- no accountability required,
- written progress report required,
- to state and district assessments required.

Ohio students, for example, must take standardized assessments and be reported, unless the requirement is waived through the IEP process. However, the two voucher programs in Ohio have very little state oversight. When schools can't educate students and parents are unhappy, students are then sent back into public schools and the students are further behind.²⁰

Rights under IDEA

As with other construct variables, whether or not the state requires parents and students to relinquish rights under IDEA as a condition of accepting the voucher varies considerably. Colorado and Nevada voucher laws are silent. Arizona doesn't specifically state that rights are terminated, however it does say that the state department will not monitor schools to ensure procedural or substantive rights are upheld. Parents in Arizona who feel rights are being violated have to file a complaint with the U.S. Office of Civil Rights (OCR). In Florida when parents opt to apply for the McKay Scholarship specifically for a child with a disability, their child's rights under IDEA are then revoked. Laws in Georgia and Oklahoma also revoke IDEA rights. Louisiana requires that the student IEP be followed, and in Ohio parents and students retain all

rights except the right to due process for denial of FAPE.

Many states, including the District of Columbia despite being silent on this issue in the law, consider opting to use a voucher the same as parental placement in a private school. For a student eligible under the IDEA, and under the parentally placed provision, such an action is a withdrawal and a relinquishment of rights under the IDEA and FAPE including special education and related services in connection with the private placement. Vouchers, however, represent a school choice initiative that authorizes use of government resources to allow parents to send their child to a school other than the one to which the child would be assigned under the public school program in the family's home community. Often, the reason for the voucher is the acknowledged failure of the public school to adequately provide an education.

Schools funded with a public voucher, as all other publicly funded schools, must follow U.S. civil rights laws and federal statutory laws²¹ including:

- Title I of the ESEA²²
- Title VI²³ (race, color, national origin)
- Title IX²⁴ (gender)
- Section 504²⁵ and Title II of the ADA (disability)²⁶
- IDEA²⁷
- General Education Provisions Act²⁸ and
- The Family Educational Rights and Privacy Act.²⁹

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

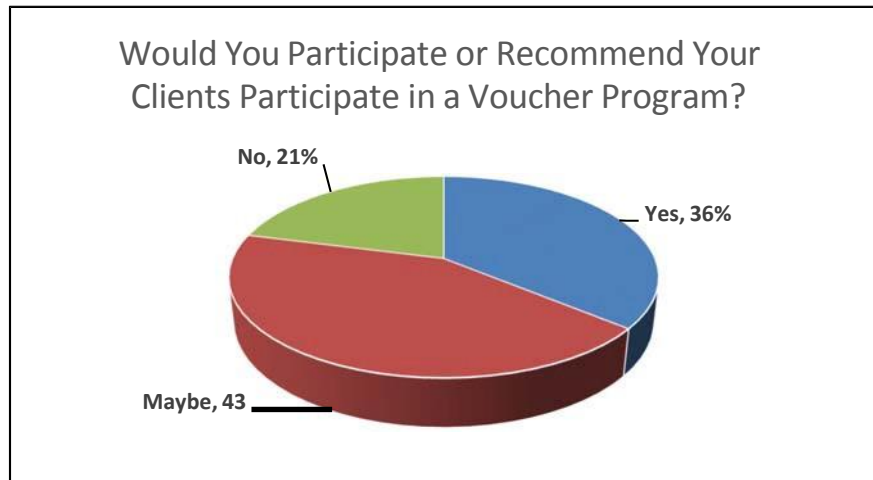
In sum IDEA rights, as a general rule, have not been viewed as extended to children and youth with disabilities who participate in voucher programs. Some states, however, have chosen to either align with IDEA or protect certain rights under IDEA. COPAA believes denying any civil right to access funds is unfair and harmful. A comprehensive legal analysis is provided in Appendix A.

COPAA Member Views on Vouchers

In order to better understand COPAA member views and to create a foundation on which to build key policy recommendations, COPAA polled its membership in 2014 on this topic and compared the answers with reports in the literature.

When asked if they would recommend their clients participate in a voucher program if

one existed in their state, the majority said yes or maybe, and only 21% said “No.” COPAA members appear to mirror the larger public debate of whether vouchers are a good idea or not, with both critics and



supporters. The reasons for this may be many; however, responses to the survey fell into three main themes:

1. Whether or not one believes that public funds should only be used for public education — not private or religiously affiliated school voucher schemes that benefit only a few.
2. The construct of the voucher program in the member’s individual state. The type of structure, policies, and procedures that are incorporated into a voucher program profoundly affect the rights of students and families; produce different legal issues; and, may also produce significantly different outcomes.³⁰
3. Whether or not parents have been able to access options via vouchers without having to participate in lengthy and costly due process.

Recognizing the variance in perception and experience about state vouchers [and their treatment of IDEA rights], we do not

purport to say that vouchers in their totality are good or bad, helpful or not helpful for students with disabilities.

COPAA believes being forced to relinquish one's civil right(s) in order to access public education funds is unfair and harmful.

What we do know, emphatically, is that in the state-approved construct:

- civil rights must be upheld;
- increased access to a quality education must be provided;
- the options must be affordable and accessible to all; and,
- private schools of choice must be held to the same accountability requirements to which public schools are held.

COPAA members were surveyed on their opinion about the quality of vouchers in their state; including the pros and cons of giving families an additional option and/or opportunity to address the unique needs of their child. The range of opinions is broad.

For example, the survey responses indicate that in Florida, in order to accept the voucher, there can be no outstanding complaint [by the family] against the district, making it impossible to pursue any sort of compensatory remedy for past, present or future claims. Denying IDEA protections in the name of choice is actually a bar to compensatory services and a way for the state to skirt accountability for individual access to a free and appropriate public education. Under a voucher the protection may or may not be free (as many have to supplement the cost with personal funds), and no longer appropriate.

A Wisconsin member, on the other hand, urged protections of the rights of families to determine for themselves and to choose their own educational options for their children with disabilities, even when the choice is, as it so often is, simply the “least worse choice.” Unfortunately, the lack of oversight of the federal Department of Education and the state education agencies, who have, to date, failed to address systemic violations of IDEA as well as ADA by public schools, increases the likelihood that families will be forced to weigh the need to give up rights to be able to exercise school choice.

The full range of pros and cons expressed by members, studies or reports that back up those opinions, and statutes, guidance or policy on each pro or con are discussed below.

How Vouchers Help Students with Disabilities

Increased Parental Satisfaction

“I would rather my child, and the children of my clients, have the opportunity to attend the small private school which uses evidenced-based practices in a small classroom setting to educate different learners. The bloated, bureaucratic public school needs a huge overhaul, and my child does not have time to wait.”

One of the great beliefs surrounding vouchers is the perception that families are more satisfied with services and outcomes from private school. While there was some indication of this in our survey response, evidence is unclear whether increased parental satisfaction is a myth or an actual benefit to families through a voucher. COPAA members indicated that it's worth the exploration, as “what we're doing now doesn't seem to be working.” There is evidence suggesting a high level of parental satisfaction with school voucher programs.³¹ Families who have children

who are already floundering in traditional schools are eager to have their children experience some success. Parents report their children are happier and they are spending less time in trouble, even if the students aren't learning any more than in public schools.

Additional Benefits

"My child's tiny private school uses evidenced-based practices and he has made significant academic and behavioral progress. It costs us \$22,000.00/year out of pocket."

In general, there is very little formal, research-based exploration of the benefits of voucher programs on students with disabilities. One study found that students who used Florida's McKay scholarships to attend a private school experienced less bullying, had smaller class sizes, and exhibited a significant reduction of behavior problems.³² This study was based on a telephone survey of parents who were or previously had participated in the McKay program.

The Washington DC Opportunity Scholarship Program has been studied extensively and not only have several reports identified serious efficacy and accountability failures, the reports do not show any indication of improvement in reading or math achievement; there was no effect on student satisfaction, motivation or engagement, or on student views on school safety.³³

Flexibility

"They generally provide sufficient funds, at least for students who do not require significant related services."

Some of the vouchers include lists of services that may be allowed, such as Tennessee's payment for private therapies. Arkansas provides reduced eligibility requirements for dependents of active duty members of the military; Indiana's

Private/Homeschool Deduction program allows for payment of fees, computer software, textbooks, etc.; Mississippi Dyslexia Therapy Scholarship for Students with Dyslexia specifically targets students with dyslexia and Mississippi's Nate Rogers Scholarships for Students with Disabilities specifically targets students with speech-language therapy needs; Ohio has an Autism Scholarship Program for eligible students with autism.

Catalyst to Avoid or Counteract IDEA Due Process

"Vouchers may prevent a significant amount of anguish, frustration, anger, and litigation, by giving the parents an alternative education placement."

School vouchers have the potential to benefit individual students in certain circumstances, such as when a school district fails to provide FAPE and the student's parents are unable to compel the district to comply with the IDEA. In instances in which a child is not provided with adequate services, a child is being unlawfully restrained and/or secluded or the parents are engaged in a bitter dispute with the school district, school vouchers could provide a desperately needed option where none currently exist. The voucher program can also serve as a catalyst to due process settlements for private placements, since the district reimbursement amount is less on a voucher than a litigated private placement would cost. Maine currently utilizes "superintendent agreements" to allow certain students (often with disabilities) to be served in districts other than where a student resides, and the state DOE has the last word on whether such a transfer would be in the student's interest. So, although there is no technical "voucher," the program allows much the same level of flexibility and school choice for parents of children with unique needs.

The Impact of Vouchers for Students with Disabilities

Loss of IDEA Protections

“Some parents love it and it does give options for bad situations in public schools. BUT... there are so many times that the voucher goes to a school that does not provide sufficient services and there is no recourse. Once you take the voucher in Florida, you give up your rights to IDEA. So, I do not favor the voucher program. There is no accountability on so many levels. I am not saying there would be no way to establish a good voucher program but there has to be assurance that the services are provided and that there is due process if those services are not [provided].”

In the majority of school voucher programs, when students use vouchers to attend a private school, they relinquish their rights under the IDEA, including the right to an IEP, FAPE and procedural protections.³⁴ When a voucher is used for a school that does not provide sufficient services, parents have no recourse. If a private school fails to meet a student’s needs, the student will not be entitled to compensatory services. In many states, private schools do not have to follow the IEP and are able to easily remove the student from the program. COPAA members indicate that in order to accept the voucher, there can be no outstanding complaint [by the family] against the district, making it impossible to pursue any sort of compensatory remedy for past, present or future claims. Under a voucher the protection may or may not be free (as many have to supplement the cost with personal funds), and no longer appropriate.

Contested Eligibility

“Even children with one of the inclusive disabilities will be deemed ineligible if they are simultaneously identified as gifted or talented”

COPAA members indicate that in states where a child must be IDEA eligible to participate in the voucher program,

eligibility may be contested by the public schools, who believe parents are seeking an IEP in order to qualify the child for the voucher. This is especially true for children with “non-visible disabilities” (e.g. ADHD, Specific Learning Disabilities, Sensory or Anxiety Disorders, etc.)



Lack of Accountability of Private Schools

“There is little accountability and these schools are free to teach whatever education they please while taxpayers pick up the tab.”

With few exceptions, school voucher programs for students with disabilities do not require that accepting schools participate in standardized state assessments and do not require public reporting of results on any tests students do take.³⁵ There is little to no supervision or monitoring of the quality of education at schools receiving vouchers. Some COPAA members indicated dismay that under many voucher programs sending students to a private school system, which is predominantly comprised of religious schools, that such schools benefit greatly by not only receiving tuition fees, but also government funding. Many programs have

arisen solely to take advantage of this available public money. There are instances (notably in Florida) where public school graduation requirements do not apply to voucher private schools. The Florida Department of Education (FDOE) does not monitor the voucher private schools' curriculum or course content or religious content. Curriculum in voucher private schools is not required to be aligned with any standards. Students in voucher private schools are not required to take any particular courses. The McKay Program does not require private schools to administer any standardized test. FTC students must take a standardized test, although not the ones required of public school students that are aligned with the State standards. One school uses the Terra Nova, which has a standardized test for Bible study.

Inadequate Dissemination to Families

"In Florida, a parent would have to read the statute to discover that their rights are being taken away."

Marketing and publicity (including word-of-mouth) varies significantly from locality to locality. There is wide variability in how parents are informed about the availability of a program. For example, the Florida McKay Scholarship information does not mention that IDEA rights will be dissolved, nor is this mentioned on generic information sites such as Ed Choice. In Georgia, the materials do plainly state the case about IDEA rights; however, the information is vague, ambiguous and not very well written, leaving parents with many unanswered questions. In Ohio, as of 2015, schools are required to provide parents information about the voucher programs at their IEP meeting.

Limited Achievement Gains, Lack of Specialized Instruction and Harmful Regression

"I find that the dance between leaving the public school, spending some nonproductive time in a McKay school, and then returning to public education is very harmful to kids. In addition, that break in the educational cycle allows the public school to blame all lack of progress or regression on the McKay school."

There is little scholarly research on the impact of vouchers on students with disabilities.³⁶ Some research on voucher programs finds relatively small achievement gains for students attending private schools through school voucher programs.³⁷ It must be noted that this research is not specific to students with disabilities. Other research finds that vouchers have had no clear positive effect on student academic achievement, and mixed outcomes for students overall.³⁸ A recently released study from the Education Research Alliance indicates that the students who utilized the Louisiana Scholarship Program (LSP) had a negative academic achievement in the areas of math and reading.³⁹ There is evidence that the majority of children with disabilities using vouchers attend private schools with little or no differentiated programming.⁴⁰

Anecdotally, we know that some children have returned to public schools after participating in voucher programs, several grade levels behind peers, despite positive progress reports from the private school.

Limited Teacher Qualifications

"Voucher programs lack quality control of their teachers and have minimal requirements for teacher qualifications."

When asked if schools receiving voucher funds to educate students with disabilities have the capacity to provide services, supports and accommodations to meet the unique needs of each student with a

disability that attends the school, 83% of respondents were unsure or disagreed. School voucher programs lack quality control of their teachers, have minimal requirements for teacher qualifications and in fact are not required to assure teachers are “qualified” in accordance with state and federal laws. In Oklahoma for example, the statute requires teachers who work in private schools to hold a bachelor’s degree or higher, however, it exempts this requirement for those who have taught for at least three years or who “have special skills, knowledge, or expertise that qualifies them to provide instruction in subjects taught.”⁴¹ Neither the statute nor the Oklahoma Department of Education guidance indicates what “special skills” might qualify under this provision, opening the door to potentially wide-ranging qualifications. Some schools may not understand how to provide special education instruction and services or have the staff and professional capacity to serve all students with disabilities.

Amount Awarded is Frequently Insufficient and Inequitable

“When the child requires a 1:1 paraprofessional, occupational, physical therapy or speech and language therapy, it falls short.”

The dollar amount provided through a school voucher frequently covers only a portion of the costs of a private school education, and families must supplement the remainder of the cost.⁴² Low-income families and families who are unable to supplement the remainder of the cost could be effectively excluded from the program.⁴³ For example, members report that the Florida McKay Scholarship highest amount awarded is about \$13,000, when most private school tuitions are 40-100 thousand dollars a year. A member from Georgia commented: “I must say, the voucher payments have been very helpful to some of my clients. However, it is never enough

to cover the costs of private schooling and certainly not a solution for lower to lower-middle income folks.” 82% of COPAA members in voucher states report that the voucher does not cover the full private tuition – with the additional cost needed ranging between \$2,500 – \$14,000 and therefore, most clients would still not be able to afford private schools.

The Emergence of Fraudulent Private Schools

“Some schools accept children, get their voucher money, and then kick the child out for behavior or other reasons. [This] often means that the parents have to come limping back to a bad public school situation.”

A number of scandals have been reported regarding “schools” that opened to take advantage of the funding available in school voucher programs. Administrators who received funding from the Florida McKay Scholarships include individuals previously convicted of drug dealing, kidnapping and burglary.⁴⁴ COPAA members indicate that some schools accept children, get their voucher money, and then kick the child out for behavior or other reasons. Many members also indicated that there is little to no supervision or monitoring of the quality of education or even the fiscal responsibility in these schools. Vouchers often leave the state department of education to shrug its shoulders when major issues of fraud, misuse of funds, and mistreatment of children occur in schools receiving scholarship funds.



Promotes Segregated Education

“My biggest concern is that money for vouchers is taken away from the public schools.”

Encouraging students to leave public schools with the enticement of school vouchers is a threat to inclusive public education, is a move in the direction of segregated education and flies in the face of the least restrictive environment mandate.⁴⁵ One survey respondent noted “[the movement to vouchers] is bringing us back to the days of excluding students with special needs from the mainstream; we are moving toward de facto segregation/separation. Rather than keeping the money in the public school to improve education, funding for public education is being reduced and the quality of public education is being compromised.”

Preferential Treatment

“Actually, some districts won’t identify students as having autism or as being IDEA eligible so that parents can’t access {the scholarship} since much of the money comes out of the district’s budget.”

States like Louisiana which limits availability of vouchers to only students with “exceptionalities relating to: autism, a mental disability, emotional disturbance, developmental delay, other health impairment, specific learning disability, or traumatic brain injury” are intentionally excluding children with other impairments covered by the IDEA, including speech language impairments, hearing impairments, visual impairments, or orthopedic impairments.⁴⁶

Policy Recommendations

School voucher programs in their current form are inconsistent in construct and scope, which makes it very difficult to determine successful programs that benefit all students equally. Receipt of public voucher funds should not require students

with disabilities to surrender their rights under IDEA.

To assess whether voucher programs advance the interests of students with disabilities, COPAA recommends the following:

Federal Policy

- Consider and clarify the legal expectations that attach to schools receiving significant funding from states with voucher programs, as well as the impact of the required waiver of students’ rights under the IDEA and all other civil rights statutes. Children with disabilities and their parents deserve clear evidence of the positive and negative consequences of public policy decisions purportedly made for their benefit.
- Require schools that receive public funds to publish assessment score, graduation rates, and other outcome data of students with disabilities.
- Amend IDEA to create an entitlement to rights under vouchers. The purpose of a voucher is to provide choice, not to deny rights or abdicate responsibility.

The U.S. Departments of Education and Justice should issue a letter to:

- Clarify civil rights violations that may be linked to failure to provide a free and appropriate public education under Section 504, or equal access under the ADA.⁴⁷
- Assure such programs are not creating a publicly financed (in whole or in part) segregated education system for students with disabilities. Vouchers should not be used for schools segregated on the basis of a specific disability or disability status more generally.⁴⁸

State Policy

Any state with voucher programs or a state considering a voucher program should:

- Conduct studies to evaluate the test scores, graduation and retention rates, harassment reports, and similar measures of success, both for students accepting vouchers and for those who remain in public schools.
- Protect the legal rights of children; including full alignment with the purpose and provisions of the IDEA, Section 504, the ADA and all other civil rights laws.
- Include reasonable costs for transportation or other services necessary to make the choice equitably available to all families.
- Retain the requirement that all schools accepting vouchers must ensure all students participate in statewide assessments, making all test results publicly available.
- Retain high standards for teacher qualifications as required by the State.
- Provide oversight and monitoring of participating private schools.
- Assure the same level of accountability of participating private schools as any other school.
- Provide tools and supports to parents and children for navigating the often complicated nuances of school choice and give special attention to: 1) a student's role in the school choice decision-making process, and, 2) how best to educate families about their school choice options.

Conclusion

COPAA is engaged in the important discussion on voucher programs because children with disabilities should have the right to attend a school that provides the quality education to which they are entitled. Our members are actively working with families each day and understand the multitude of challenges facing children and

their parents as they navigate the nation's public education system. Given the stakes for children, voucher programs are only an option when they fully embrace and support educational opportunity in combination with the protections under federal civil right statutes so that children and families have the protection, support and opportunity in a school that provides these in the most robust, fair and equitable ways.

Appendix A: The Legal Landscape

Court challenges abound regarding construct of voucher laws, most notably focused on state constitutional challenges to school choice focused on application of the United States Constitution's First Amendment Establishment Clause (otherwise known as the Federal Establishment Clause) and state establishment clauses.

School Vouchers and the Federal Establishment Clause of the U.S. Constitution

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

School Vouchers and the 14th Amendment of the U.S. Constitution

Brumfield v. Dodd is a 1975 case in Louisiana requiring oversight of the state Board of Education by the federal courts for any public funding provided to private schools due to equal protection violations. The order issued in that case had no expiration, and currently the federal government is using that order to look into the state's new school voucher program.⁴⁹ This case is also about ensuring the state doesn't promote segregation in public schools, and thus the voucher program calls for new procedures. "This case is about the Constitution and *Brown v. Board of Ed*," he said, referring to the U.S. Supreme Court's landmark 1954 decision outlawing "separate but equal" public schools. "The court has an obligation ... to take reasonable steps in the process whereby the voucher program is not being used to promote segregation."⁵⁰

In the 1970s, Louisiana had a complex system by which school districts and schools, both public and private, could receive textbooks, funding for transportation, and other school materials. By the start of the 1969-70 school year, federal courts in Louisiana had ordered Louisiana public schools to desegregate. In some parishes, there were some black students who were integrated into white schools, but very few instances of white students moving into black schools. Instead, enrollment at private, white-only schools began to increase. These schools continued to receive funding from the state and local school boards.

In the original *Brumfield v. Dodd* case, families of black students filed a class action lawsuit on equal protection grounds against the state of Louisiana's Board of Education, its superintendent, and the school boards of a handful of parishes in the state. There, the court found that the state Department of Education and local schools had violated equal protection by providing funding to private schools that discriminated on the basis of race and ordered them to recoup the materials and funds that the private schools had received. The court also ordered the State Board of Education to initiate a certification procedure to determine eligibility of private schools to receive such materials and funding⁵¹.

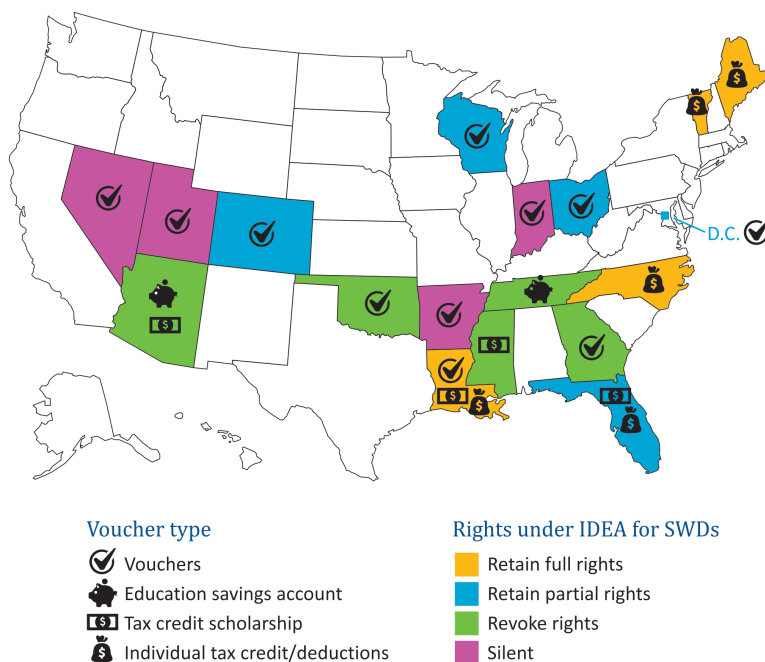
Over the course of the next year, 10 schools had been denied eligibility under the new procedure. The schools disputed the decision of the court. The schools argued that they were indispensable parties not joined in the original suit, and thus the court had no jurisdiction over them. The court disagreed, and concluded that the schools were not indispensable parties. 10 years after this, the court issued a Consent Decree, reiterating that "The [State] Department [of Education] will not provide any monies or assistance to any private school which the subject of any court order or injunction under which any local school district or parish or any other entity is enjoined from providing assistance to the private school because of reasons related to racial discrimination."⁵²

In 2012, the Louisiana legislature implemented a voucher program. In 2013, the Department of Justice (DOJ) filed a motion to compel discovery. The memo in support of the motion stated that the United States wanted to seek additional information as contemplated by the Consent Decree, relevant to determining whether the new statewide educational voucher program complied with the court’s orders in the case. The memo also alleged that “most of the private schools participating in the program have student enrollments that are all or almost all one race.”⁵³ On August 22, 2013, the DOJ filed a motion to enjoin the state’s voucher program from awarding school vouchers to students attending school in districts operating under federal desegregation orders unless the state received authorization from appropriate federal court overseeing the applicable desegregation case. On November 10, 2015 the 5th Circuit Court of Appeals ruled that the DOJ does not have the authority to regulate Louisiana’s school voucher program. In a 2-1 decision written by Judge Edith Jones, the appeals court stated that a district court had no jurisdiction to let DOJ collect data and monitor the voucher program.

On November 17, 2015 the DOJ announced its intention to no longer block the school voucher program.⁵⁴

School Vouchers and the IDEA

Vouchers and Student Rights — A State by State Review



Congress has the power to disperse funding based upon the state’s compliance with specific conditions, but those conditions must be set out unambiguously.⁵⁵ In order “to be bound by federally imposed conditions, recipients of federal funds must accept them voluntarily and knowingly.⁵⁶”

All federally funded schools are required by IDEA to provide each eligible student a FAPE that meets the standards of the SEA and is consistent with the student’s IEP.⁵⁷ The right to FAPE ensures these students’ full and meaningful opportunities to participate in the same curriculum that is being taught to students without disabilities and to meet the same high academic standards that are set for all students.⁵⁸ Multiple provisions, including those regarding IEP development and implementation, ensure that each student shall be involved and make progress in the

general education curriculum – i.e., the same curriculum as that provided to students without disabilities.⁵⁹ Moreover, consistent with IDEA’s least restrictive environment (“LRE”) requirement, students with disabilities are to be educated to the maximum extent appropriate with students without disabilities; removal from the regular education environment is to occur “only when the nature or severity of the disability of a child is such

that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”⁶⁰

IEP teams lawfully determine each student’s LRE based on the student’s unique disability related needs as set forth in her IEP, not based on a diagnosis, a specific disability label, or because the student requires needed modifications in the general education curriculum.⁶¹ Such placement decisions cannot be based on the availability of placement options, administrative convenience, institutional barriers to providing supportive, related services in charter school settings, or based on the nature of students’ particular disabilities rather than their individual needs.

Florida and Mississippi must waive all IDEA rights, and other states such as Utah and Ohio retained limited rights. In Ohio the guidelines state that the district will no longer be responsible for FAPE; however, when a child receives a scholarship the participating school is required to maintain an IEP for the student, and all records and documentation relating to the IEP and progress must also be provided to the public school district, as is also the case in Utah. Any school wishing to provide services under the scholarship program must sign an affidavit also stating that they will comply with laws regarding the delivery of services to children with disabilities, including IDEA and ADA.

Weber (2007) asserts that under the current Individuals with Disabilities Education Act, there is not an explicitly established individual entitlement to special education services for any private school child, nor does it require that services provided to private school children be delivered on the site of the private schools or by means of private school personnel. It affords few procedural rights to parents of private school children to challenge decisions about services.⁶² Weber’s premise is tied to the IDEA provisions (changed in 2004) relating to services for children placed voluntarily by their parents in private schools.

As shown in *Zobrest*, *Kiryas Joel*, and *Agostini*, the district does have an IDEA mandate to provide some limited services to students enrolled in private schools, however, they are not required to provide the same level of special education services the child would receive if enrolled in a public school. Under Child Find IDEA requirements, the district is required to assess all students within their district, even those homeschooled or in private school settings. There are limitations on the other services: (1) these services must be only supplemental services, not the student’s primary services for education, (2) the amount provided is limited to a small proportion of the Federal IDEA funds provided to the district, and when those funds are expended, the district is not required to spend more, (3) the district may choose to not serve all parentally placed students, (4) the full range of special education services may not be available, and (5) the provisions of FAPE are not available.⁶³

Mills v. Board of Education of District of Columbia held that “no [handicapped] child eligible for a publicly supported education in District of Columbia public schools shall be excluded from a regular school assignment...unless provided (a) adequate alternative educational services suited to the child’s needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing.”⁶⁴ The holding did not indicate a requirement of any particular substantive level of education. *Rowley*, 458 U.S. at 193.

The court balanced between providing more than just the services available to non-handicapped children and “furnishing every special service necessary to maximize each handicapped child’s potential.”⁶⁵ “No congressional legislation has required a precise guarantee for handicapped children, i.e. a basic floor of

opportunity that would bring into compliance all school districts with the constitutional right of equal protection with respect to handicapped children.”⁶⁶

The purpose of the Act was to provide a basic floor of opportunity and would consist of “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”⁶⁷ The responsibility of choosing the most appropriate educational method to suit the child’s needs was left in the hands of the states and LEA in conjunction with the parents.⁶⁸

The express purpose of the IDEA is to “ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs. . . .”⁶⁹ Under IDEA in exchange for receipt of federal funds, when the state has agreed, the state is required to guarantee a FAPE to every child who has a disability.⁷⁰ A FAPE is provided to a child with disabilities through the development of an IEP, which is both a “comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.”⁷¹ An IEP must be reasonably calculated to enable the child to receive educational benefits.⁷² The IEP is required to identify both the services and a particular school at which the offered instruction and services are to be implemented.⁷³ An IEP that fails to offer a school, “as a matter of law... [is] not reasonably calculated to enable [the child] to receive educational benefits.”⁷⁴

Some scholars suggest that laws should consider the role of the IEP team in making the placement decision. If the IEP team together has made the placement choice, not the parents alone, (2) the public school district still retains the primary responsibility to provide FAPE and will stay in a working relationship with the private school, and (3) the private school has been chosen by the team as a means to provide FAPE, and in doing so, the child retains all IDEA rights and all substantive requirements (such as development of an IEP) must be followed.⁷⁵

Any allowable choice in this context must only require that the parents and the school agree that the voucher will allow school funds to follow the child to the school of their choice. Parents or students should not have to give up either procedural or substantive requirements under IDEA, nor their right to an impartial due process hearing when the school fails to comply. The IEP must remain the cornerstone of providing individualized special education and related services designed to meet their unique needs.

As noted in Wendy F. Hensel, “*Vouchers for Students with Disabilities: The Future of Special Education?*”, although the waiver of meaningful protection under the IDEA is problematic for parents accepting vouchers, the consequences of such 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, and as such, are precluded from discriminating on the basis of disability. Among other things, this prohibition requires private schools to make reasonable modifications to policies, practices, and procedures where such modifications are necessary for students with disabilities and do not represent a fundamental alteration of the academic program. Title III also precludes private schools from refusing to allow a qualified student with a disability to participate in their programs or imposing unnecessary eligibility requirements that tend to screen out such students. To ensure inclusion, private schools must provide auxiliary aids and services where

necessary to facilitate communication with students with disabilities, and architectural barriers must be removed where it is readily achievable to do so.

When a school district offers a school placement that cannot implement the offered instruction and services at the time that the parents have to decide whether to accept or reject the school placement offer, in this case at the IEP meeting, courts have found that the school district failed to offer the child a FAPE.^{76,77}

A 1990 Office for Civil Rights (OCR) staff memorandum states that students who are placed in private schools through the Milwaukee Choice Program are considered to be parentally placed in private schools and are not covered by the IDEA's protections.⁷⁸ A 2001 OCR letter, *Letter to Bowen*, reiterated this point, stating that participating students in Florida's McKay Program "are considered 'private school children with disabilities' enrolled by their parents... [S]uch parentally placed private school students with disabilities have no individual entitlement to a free appropriate public education including special education and related services in connection with those placements."^{79, 80}

However, in 2013 The Department of Justice (DOJ) issued a letter to the Wisconsin Department of Public Instruction (WDPI) in which DOJ concluded that under Title II of the ADA "the State cannot, by delegating the education function to private voucher schools, place students beyond the reach of the federal laws that require Wisconsin to eliminate disability discrimination in its administration of public programs." DOJ reasoned that government agencies are obligated under Title II to "take appropriate steps . . . to prohibit discrimination against individuals with disabilities, regardless of whether services are delivered directly by a public entity or provided through a third party." See, Wendy F. Hensel, *Recent Developments in Voucher Programs for Students with Disabilities*, 59 Loy. L. Rev. 323, pp. 7-8 (2013).

The letter also explicitly states that Title II's nondiscrimination requirements do not compel the DPI to provide students with special education and related services pursuant to the IDEA. However, a student with a disability who is eligible for a voucher and attends a private school with that voucher is entitled to the same opportunity as their peers without disabilities to attend the voucher school of their choice and meaningfully access the general education curriculum offered by that school.

School Vouchers and Section 504

Under Section 504 of the Rehabilitation Act of 1973, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to regulatory procedures.

The *Letter to Bowen* also states that because the Florida SEA receives federal financial assistance, Section 504 and the ADA apply to the SEA's administration of the program. "The SEA must ensure that participating private schools do not exclude a Scholarship Program student with a disability 'if the person can, with minor adjustments, be provided an appropriate education within the school's program... However, the SEA would not be required to ensure that the participating private schools 'provide an appropriate education to ... students [with disabilities] with special educational needs if [the participating private schools do] not offer programs designed to meet those needs."

IDEA contains a statutory FAPE provision and allows private causes of action only for prospective relief. Section 504 contains a broadly-worded prohibition on discrimination against, exclusion of and denial of benefits, under which the U.S. DOE has promulgated regulations containing a FAPE requirement worded somewhat differently from the IDEA FAPE requirement. Section 504 can be privately enforced to provide, in addition to prospective relief, compensatory but not punitive damages for past violations.⁸¹

FAPE under §504 is defined to require a comparison between the manner in which the needs of children with and without disabilities are met and focuses on the "design" of a child's educational program.⁸² FAPE requires education and services "designed to meet individual educational needs of handicapped persons *as adequately as* the needs of non-handicapped persons are met" (emphasis added).⁸³

In 2012, school districts in Oklahoma sued to prevent the voucher legislation which served students with disabilities under the IDEA but excluded students with disabilities with accommodation plans developed under § 504 of the Rehabilitation Act of 1973. On March 27, 2012, a Tulsa district court agreed with the school districts and struck down the Lindsey Nicole Henry Scholarships for Students with Disabilities Program as unconstitutional. The Oklahoma Supreme Court, on February 16, 2016 upheld the constitutionality of the Lindsey Nicole Henry Scholarships for Students with Disabilities Program stating: "Because the parent receives and directs the funds to the private school, sectarian or non-sectarian, we are satisfied that the state is not actively involved in the adoption of sectarian principles or directing monetary support to a sectarian institution,"

Recently, Nevada has adopted a school voucher program.⁸⁴ The Nevada voucher program has been challenged on constitutional grounds by the ACLU arguing in a lawsuit filed on August 27, 2015 that the program violates the state's prohibition against using public money for religious purposes.⁸⁵ The Nevada program, created this year by the state's Republican-controlled legislature, creates "educational savings accounts" that would allow any parent, regardless of income, to pull a child from the state's public schools and take tax dollars with them to pay for private or parochial school. Other states increasingly have allowed tax dollars to be used for private school tuition, but most limit the programs to students with disabilities or from low-income families. Nevada's law is unique because all of the state's 450,000 K-12 public school children are eligible to take the money to whatever school they choose. In January 2016, Judge James Wilson of the First Judicial District Court of Nevada (Carson City) ruled in *Lopez v. Schwartz* that the state's school voucher law (SB 302) enacted last summer by the Legislature violates two provisions of the Nevada constitution. Judge Wilson issued a preliminary injunction to prevent the state from implementing the law. The case challenging the voucher law was filed by parents of Nevada public school children from across the state. They argued that the program would divert scarce funding from public schools, triggering cuts to essential programs and services for their children and all other children attending Nevada's public schools.⁸⁶

School Vouchers and the Americans with Disabilities Act

Title II of the Americans with Disabilities Act (ADA) requires the provision of services in the "most integrated setting" appropriate to the needs of individuals with disabilities.⁸⁷ The district court refused to dismiss the parents' claim that the school district violated the law by automatically segregating children with autism in a separate private school.

A 2013 Letter from the U.S. Department of Justice to the Wisconsin Department of Public Instruction (DPI) states that because the school choice program is funded and administered by the state, the program is subject to Title II requirements of the ADA. "[T]he state cannot, by delegating the education function to private

voucher schools, place students beyond the reach of federal laws that require Wisconsin to eliminate disability discrimination in its administration of public programs.” DPI is required to collect accurate information about participating schools and ensure that services are provided in a manner that does not discriminate.⁸⁸ DOJ reasoned that government agencies are obligated under Title II to “take appropriate steps . . . to prohibit discrimination against individuals with disabilities, regardless of whether services are delivered directly by a public entity or provided through a third party.”

DOJ position in the letter seemingly contradicts existing state and federal precedent holding that students are “parentally-placed” when they participate in voucher programs, such that state and federal laws applicable to governmental entities do not apply. DOJ stated:

Title II’s nondiscrimination requirements do not compel DPI to require that voucher schools affirmatively provide students with disabilities special education and related services pursuant to the Individuals with Disabilities Education Act (“IDEA”). See 20 U.S.C. §1400, et seq. However, a student with a disability who meets income requirements for the school choice program, and voluntarily foregoes IDEA services in order to attend a voucher school, is entitled to the same opportunity as her non-disabled peers to attend the voucher school of her choice and to meaningfully access the general education curriculum offered by that school.⁸⁹

State Vouchers and State Constitutions

The Arizona Scholarship for Pupils with Disabilities, which was implemented in 2006, was struck down by the Arizona Supreme Court on the grounds that the program violated the Aid Clause of the Arizona state constitution. The Aid Clause prohibits any "appropriation of public money made in aid of . . . private or sectarian school[s]." In 2011, the Arizona state legislature enacted the Empowerment Scholarship Account (ESA) Program for students with disabilities. Although the legality of this program was also challenged, the Arizona Court of Appeals and Arizona Supreme Court upheld the constitutionality of this program, finding no violation of the Religion Clause or the Aid Clause of the Arizona state constitution. The court distinguished the ESA from the predecessor program because:

The specified object of the ESA is the beneficiary families, not private or sectarian schools. Parents can use the funds deposited in the empowerment account to customize an education that meets their children's unique educational needs. As we have noted, parents may use the funds for tuition, educational therapies, tutoring services, curriculum, online learning programs, standardized tests, or advanced placement examinations.

Other State Constitution Challenges

In Alabama, the Montgomery County Circuit Court struck down the Alabama Accountability Act, which contains the Parent-Taxpayer Refundable Tax Credit program. The Circuit Court ruled that the Act violated provisions in the Alabama Constitution and the manner in which the legislation was passed. Further, the Court found that it also violated provisions restricting the use of public funds. The decision was appealed by the Alabama Attorney General and parents participating in the Accountability Act’s school choice program. The Alabama Supreme Court upheld the constitutionality of the Alabama Accountability Act.

In Colorado, the Colorado Supreme Court ruled the Douglas County Choice Scholarship Pilot Program unconstitutional. *Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.* 351 P. 3d 461, 2015 Colo. LEXIS 589. The Douglas School District has filed a petition for certiorari with the United States Supreme Court on October 28, 2015.

In Florida, the five-year-old lawsuit was amended in 2014 and makes the following claims: the McKay Program does not require private schools to hire certified teachers, teach any required courses, administer any standardized test, align curriculum with State standards, nor be accredited. Further, private schools are not responsible for transportation; they do not offer services to meet the needs of English Language Learners; they require tuition and fees beyond the scholarship amount; and the vast majority of these schools are sectarian. Nor do they serve all students as they admit or expel students for a variety of reasons. Importantly, even though this program targets students with disabilities, there is no requirement that the private schools provide appropriate special education services or provide parents procedural protections as required by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

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

Blaine State Amendments:

Introduced in 1875, the original Blaine Amendment was an attempt to amend the U.S. Constitution by explicitly banning any government funds from going to “sectarian” institutions. The amendment gained its name from Senator James G. Blaine, who had just finished three terms as Speaker of the House and had his eye on the Republican nomination for the White House. Eventually, all but 11 states (Arkansas, Connecticut, Louisiana, Maine, Maryland, New Jersey, North Carolina, Rhode Island, Tennessee, Vermont, and West Virginia) passed laws that meet the general criteria for designation as “Blaine Amendments,” in that they ban the use of public funds to support sectarian private schools. In some states the laws were included in constitutions drafted by newly formed states concomitant with their admission to the Union and are thus technically not “amendments”.⁹⁰

It is clear that development of voucher, savings accounts, or tax programs is a complex task, and the need of children with disabilities adds another facet to the challenge. In designing a comprehensive program that may serve all children as well as meet legal requirements, there may be three key issues: the presence of Blaine Amendments in a state constitution, inclusion of IDEA principles, and current oversight of private schools in the states. States in which private schools have some type of working relationship with the state (such as registration, approval, accreditation, or licensing, depending on state terminology) already have a framework in place, theoretically allowing for special education services to flow more effectively between public school districts and private schools.⁹¹

Appendix B: State Chart

	Regulation	Type	Average Amount	Limits	Accountability	Prerequisites	Under IDEA
Arkansas	Ark. Code Ann. §§ 6-18-1901 through 1908	Targeted Voucher	Public school foundation funding amount for the current school year (\$6,584 in 2015–16), up to but not exceeding the amount of tuition and fees at the private school.	Students must be accepted for admission to a private school and have an IEP and	National	Be either (A) enrolled in an Arkansas public school for at least one year or (B) dependents of active-duty members of the military	Silent
Arizona	A.R.S. 15-2401 A.R.S. 15-2402.A.R.S. 15-2403 A.R.S. 15-2404	Targeted Voucher	\$4,648	Eligible if identified as having a disability under the IDEA or Section 504, or if in the Arizona foster care system. Must also either be an enrollee in a kindergarten or prekindergarten private school program for students with disabilities, a public school student for the prior semester of the current school year or at least 90 days in the previous year, or a dependent of an active-duty member of the military.	None	Student must meet ONE of the following prerequisites:• Student has a MET or IEP from an Arizona public school (for preschool and grades K-12), OR• Student has a 504 plan from an Arizona public school (for grades K-12 only), OR• Student was placed at one time in the Arizona foster care system (for grades K-12 only and will be verified with the Arizona Department of Economic Security	SDE will not monitor schools to ensure that student IEPs are being followed. Parents who feel rights are being violated have to file an OCR complain, not under Department of Education
Arizona	Ariz. Rev. Stat. §§ 15-2401-04	Savings Account	Amount 5,300 - 14,500	Allowed to spend on tuition or services 90% of cost per pupil "Empowerment Scholarship Accounts" In the 2013-14 school year, eligibility expanded beyond the original pool of students with special needs to students assigned to public schools or school districts with a "D" or "F"	No testing mandates	Students must have previously either (1) attended public school for at least 100 days of the prior fiscal year, (2) received a special education tax-credit scholarship from a School Tuition Organization (STO), (3) participated in the ESA program, or (4) received money from an STO under Lexie's Law. However, students	Not enroll the qualified student in a school district or charter school and release the school district from all obligations to educate the qualified student. This paragraph does not relieve the school district or charter school that the qualified student previously attended from the obligation to conduct an

	Regulation	Type	Average Amount	Limits	Accountability	Prerequisites	Under IDEA
				letter grade, children of active-duty military members, and youth adopted from the state's foster care system		eligible to attend kindergarten do not need to meet those requirements if they otherwise qualify for the ESA program. New accounts are capped at 0.5 percent of the previous year's total number of public and charter school students; that cap is removed in 2019.	evaluation pursuant to section 15-766.
Colorado	Douglas County Choice Scholarship program is the country's first district-created, nearly universal school voucher program. The program, which is authorized by the public school district, was enacted and launched in 2011. The program is currently in operation after the Colorado Supreme Court ruled the program unconstitutional in June 2015. The case has been submitted for review by the Supreme Court of the United States. https://eboardsecure.dcsdk12.org/attachments/7432a5fd-dc5f-43fb-b456-39183197465e.pdf	Universal Voucher	(\$4,575 average) capped at 500	Geographic Limit: District (Douglas County) Eligible students can receive a voucher worth the lesser of the private school tuition or 75 percent of the per-pupil public revenue. A family is allowed to supplement the voucher with additional funds.	Choice Scholarship Office may determine which State and district assessments are appropriate	Prior Year Public School Requirement.	The parent of a Choice Scholarship student shall acknowledge that the District will not create specialized programs in Private School Partners. Participation in the Choice Scholarship program will be viewed as a voluntary parental placement in the private school for purposes of special education services, and students will receive the level of services provided by the Private School Partner.
Florida	passed in 2014 http://www.leg.state.fl.us/Statutes/index.cfm/index.cfm?App_mode=Display_Statute&Search_String=&URL=1000-1099/1002/Sections/1002.385.html	Florida - Personal Learning Scholarship Account Program	average for the 2014-15 school year is approximately \$10,000	Eligible to enroll in kindergarten through 12th grade who have an IEP or have been diagnosed with one of the following: autism, Down Syndrome, Intellectual	State achievement tests or nationally recognized norm-referenced tests	none	The parent is responsible for procuring the services necessary to educate the student. When the student receives a PLSA, the district school board is not obligated to

	Regulation	Type	Average Amount	Limits	Accountability	Prerequisites	Under IDEA
				disability, Prader-Willi syndrome, Spina-bifida, Williams syndrome, and kindergartners who are considered high-risk			provide the student with a FAPE. For purposes of s. 1003.57 and the Individuals with Disabilities in Education Act, a participating student has only those rights that apply to all other unilaterally parentally placed students, except that, when requested by the parent, school district personnel must develop an individual education program or matrix level of services.
Florida	Fla. Stat. §§ 1002.39 and 1002.421	McKay Scholarship Program Targeted Voucher	Per pupil expenditure, up to cost of private school tuition; Average voucher value: \$6,744	Parents of a child with a disability who currently has an IEP from a public school may request voucher if dissatisfied with progress for their child in the public schools	None	Students with disabilities—who have Individualized Education Plans or a 504 plan—enrolled in public school for at least one year are eligible.	Once parents use a voucher to transfer to a private school, they have opted out of all the due process rights and services to which their child is entitled under IDEA
Georgia	O.C.G.A. §§ 20-2-2110 through 20-2-2118	Targeted Voucher to Special Needs	Per pupil expenditure up to cost of private school Average voucher value: \$5,386	None	None	Must have been enrolled in a Georgia public school for the entire prior school year; preschool programs do not count. Student must also have received special education services under an IEP at any point in that year. When parents accept a GSNS scholarship for their children they are refusing to provide parental consent for special services under IDEA and a participating private school is not required to	Acceptance of scholarship shall have the same effect as a parental refusal to consent to services pursuant to the Individuals with Disabilities Education Act, 20 U.S.C.A. Section 1400, et seq.

	Regulation	Type	Average Amount	Limits	Accountability	Prerequisites	Under IDEA
						follow a student's IEP nor is it required to provide special education services to a student.	
Indiana	Ind. Code § 6-3-2-22	Universal Tax Deduction	tax deduction up to \$1,000 per child – no cap	Deductions are available for parents' expenditures on either private schools or homeschooling for their children.	Schools participating in the Choice Scholarship program must submit data for category placement under Indiana's accountability system.	None	Silent
Louisiana	La. Rev. Stat. § 17:4031	Universal and Special Needs Vouchers -- also has individual tax deduction, and tax-credit scholarships	50% of state funds or value of tuition, whichever less. Average \$2200	School must have provided services to a student with disabilities for at least 2 years/ No new Private Schools	Mandatory State Testing for Universal; Voucher for Students with Exceptionalities Does Not Require	The student has been evaluated by a local education agency as defined in R.S. 17:1942, is determined to be in need of services for autism, a mental disability, emotional disturbance, developmental delay, other health impairment, specific learning disability, or traumatic brain injury, and has an Individual Education Plan or a services plan in accordance with Title 34 of the Code of Federal Regulations Part 300.37.(b) The student is eligible to attend public school.(c) The student is not deemed to be gifted or talented.	Retain Rights
Maine	20 A M.R.S. §§2951-2955	Town Tuition	Average Cost Per Pupil Voucher Cap: \$7,933 (K-8) / \$10,339 (9-12)	Can attend either a public school in another town or a non-religious private school. Cannot use for religious schools	National	Allows students from a town without a public school to attend another school, see limits	Private schools that operate programs for children with disabilities shall conform to the applicable provisions of this

	Regulation	Type	Average Amount	Limits	Accountability	Prerequisites	Under IDEA
							chapter and chapters 301 and 303. [2005, c. 662, Pt. A, §7 (AMD).]
Mississippi	Equal Opportunity for Students with Special Needs Program Miss. Code § 37-173-7 (2013)	Savings Account	Annual award value: \$6,500	While participating in this program, students are not eligible for either a Dyslexia Therapy Scholarship or a Nate Rogers Scholarship.	None	Students must have been enrolled prior year and had an Individualized Education Plan (IEP) within the past 18 months.	Parents have to agree not to enroll their participating student in a public school and to acknowledge as part of the agreement that the home school district has provided clear notice to the parent that the participating student has no individual entitlement to a free appropriate public education (FAPE) from their home school district, including special education and related services, for as long as the student is participating in the program.
Mississippi	Nate Rogers Scholarship for Students with Disabilities Program Miss. Code Ann. §§ 37-175-1 through 29	Targeted Scholarship	Maximum voucher amount is equal to the Mississippi Adequate Education Program base student cost	Grades K-6 - Diagnosed with Speech and Language Impairment	No Mandatory Testing - need to Annually provide the parents of voucher students a written explanation of the student's progress	Limited to students with special needs	A parent or legal guardian who applies for a Mississippi Speech-Language Therapy Scholarship is exercising his or her parental option to place his or her child in a nonpublic school. No liability shall arise on the part of the state based on the award or use of a Mississippi Speech-Language Therapy Scholarship.
Mississippi	Dyslexia Therapy Scholarship Dyslexia Program MISS. CODE ANN. §§ 37-173-1-37-17-31	Targeted Scholarship - Students with Dyslexia K-6 Only	50% of state funds or value of tuition, whichever less. Averages \$2,000	Must be a school that specializes in Dyslexia Intervention	Written explanation of student progress	Cannot be in Juvenile Justice, Virtual School or home school	A parent or legal guardian who applies for a Mississippi Dyslexia Therapy

	Regulation	Type	Average Amount	Limits	Accountability	Prerequisites	Under IDEA
							Scholarship is exercising his or her parental option to place child in a nonpublic school.
Nevada	Current injunction against Jan 11, 2016 http://nevadajournal.com/assets/uploads/2016/01/lopez-injunction.pdf	Education Savings Account targeted by income	For students with special needs or those that live in families with incomes up to 100 percent of the free and reduced-price lunch program, annual account payments may be worth 100 percent of the statewide average basic support per pupil (\$5,710 in 2015–16). For all other students, annual account payments may be worth 90 percent of the statewide average basic support per pupil (\$5,139 in 2015–16)	Public, Charter, or Private Schools	State/National testing	Must attend school for 100 days; must sign an agreement to ensure the student will receive instruction in Nevada from a private school, post-secondary educational institution, a distance learning program, a tutor or tutoring agency, or themselves (although homeschoolers are not eligible for the program)Use program funds only for authorized purposes	Silent
Nevada	Nevada’s Educational Choice Scholarship https://www.leg.state.nv.us/Session/78th2015/Bills/AB/AB165_R1.pdf	K-12 Students	All students receiving scholarships under this program must come from families whose household incomes are at or below 300 percent of the federal poverty line maximum scholarship is \$7,775	Scholarship	Each school in which a pupil is enrolled for whom a grant ⁶ is provided by a scholarship organization shall maintain a record ⁷ of the academic progress of the pupil. The record must be maintained in such a manner that the information may be ⁹ aggregated and reported for all such pupils if reporting is required ¹⁰ by the regulations of the Department of Education.	Any Student who attends at least 100 days; Additionally, children of active duty military members and those under 7 years old qualify immediately.	Silent
North Carolina	N.C. Rev. Stat. §§ 115C-112.5–9	Tax Credit	\$34,000 per eligible student, per semester; or tuition, whichever less	Can only be used for private school, home school or related services. A re-evaluation	National	To qualify, students must require an Individualized Education Plan (IEP) and receive special	Retain Rights

	Regulation	Type	Average Amount	Limits	Accountability	Prerequisites	Under IDEA
				occurs every 3 years.		education services on a daily basis. Additionally, students must have either been (1) enrolled in a North Carolina public school during the previous semester, (2) received special education services as a preschooler during the previous semester, (3) received a voucher under this program during the previous semester, or (4) be eligible for enrollment in kindergarten or first grade.	
Ohio	Jon Peterson Special Needs Scholarship OHIO REV. CODE ANN. § 3310.53(B) Ohio Rev. Stat. § 3313.97.4 thru § 3313.99;	Targeted Voucher: Started with Autism, expanded to students with specific disabilities / One Cleveland/ One Universal	Amount determined by Disability Category Range \$7,000-\$20,000	Cannot use for private, supplemental services	Must participate in statewide testing unless exempted pursuant to an IEP	District of residence develops IEP, provider may modify with consent of eligible applicant	For purposes of Chapter 3323. of the Revised Code and the "Individuals with Disabilities Education Act," a Peterson scholarship recipient has only those rights that apply to all other unilaterally parentally placed children, with the exception of the right to have a public school district develop an IEP in accordance with division (B) of section 3310.53 of the Revised Code
Oklahoma	Okla. Stat. §§ 70-13-101.1 and 101.2	Targeted Voucher - Students with Disabilities	Equal to per pupil state and local funding	Any student with an Individualized Education Program (IEP) in effect	None	Had to spend previous year at public school; exception in Armed Forces	Acceptance of a Lindsey Nicole Henry Scholarship shall have the same effect as a parental revocation of consent to service pursuant to 20 U.S.C., Sections 1414(a)(1)(D) and 1414(C) of the IDEA.

	Regulation	Type	Average Amount	Limits	Accountability	Prerequisites	Under IDEA
Tennessee	Tenn. Code Ann. §§ 49-10-1401 through 1406	Education Savings Account	100 percent of state and local funding formula plus special education funds to which the student would have otherwise been eligible for under IEP	Student K-12 with an IEP with specific disabilities	grades 3-8 are annually administered either a nationally norm-referenced test identified by the Tennessee department of education or the Tennessee state tests (TCAP) or any future replacements of the TCAP tests	Have been enrolled in a Tennessee public school during the previous two semesters, (2) be attending a Tennessee public school for the first time, or (3) have received an IEA in the previous school year.	Participation in the program shall have the same effect as a parental refusal to consent to the receipt of services under 20 U.S.C. § 1414 of the Individuals with Disabilities Education Act (IDEA).
Utah	Utah Code §§ 53A-1a-701-10	Targeted Voucher Students with Disabilities	State weighted pupil unit formula. Students who receive >3 hours of special education services per day get vouchers worth 2.5 times the weighted pupil unit, whereas students receiving <3 hours per day get vouchers worth 1.5 times the weighted pupil unit. In 2013-14, those values worked out to \$6,648 and \$3,989, respectively. The voucher may not exceed the private school's actual tuition and fees.	Limited to students with special needs; No enrollment cap	Mandates Testing - annual assessment of students' progress and report to parents; Submit to state audit and financial report, comply with federal nondiscrimination requirements, disclose special education services to be provided and cost of those services.) be enrolled in a Utah public school in the school year prior to the school year the student will be enrolled in a private school;(ii) have an IEP; and(iii) have obtained acceptance for admission to an eligible private school.	
Vermont	16 V.S.A. §§ 821-36	Town Tuition	Calculated Rate, Average \$14,000	Cannot use for Religious schools	None	When students are tuitioned at public schools, the sending town pays the receiving school district an amount equal to the receiving district's average per-pupil costs, as calculated by the Vermont Agency of Education.	None
Washington, DC	D.C. Code §§38-1851.01-1851.11	Voucher	Opportunity Scholarships are worth up to \$8,381 for K-8 students and \$12,572 for students in grades 9-12.	Current D.C. residents. Additionally, families must either receive benefits under the Supplemental	Administer a nationally norm-referenced standardized test; a comparative evaluation will be	Students may continue to receive vouchers in later years if their household income does not rise above 300 percent of the	Nothing in this division may be construed to alter or modify the provisions of the Individuals with Disabilities

	Regulation	Type	Average Amount	Limits	Accountability	Prerequisites	Under IDEA
				Nutrition Assistance Program (SNAP) or earn no more than 185 percent of the federal poverty level when they enter the program (\$44,863 for a family of four in 2015–16).		poverty level. Students are given priority if they come from public schools in need of improvement, or if they or their siblings already are participating in the program. Can only attend Schools in DC	Education Act (20 U.S.C. 1400 et seq.). Treated as parental placement, so limits some rights.
Wisconsin	Wis. Stat. §119.23	Voucher	7,214 for grades K– 8 and \$7,860 for grades 9–12. Each school year, maximum voucher payments increase by a dollar amount equal to the dollar amount increase in general school aid to Wisconsin	Students who live in Milwaukee and whose family income does not exceed 300 percent of the federal poverty level are eligible. Similar ones for Racine and Statewide	Administer state testing to voucher recipients in fourth, eighth, and 10th grade	All students must meet the prior year attendance and residency requirements every year	A Choice school may not discriminate against a child with special needs. Only required to offer those services to assist students with special needs that it can provide with minor

Appendix C: Additional Resources

National Conference of State Legislatures: <http://www.ncsl.org/research/education/school-choice-vouchers.aspx>

Hensel, Wendy, *Recent Developments in Voucher Programs for Students with Disabilities*, 59 Loy. L. Rev. 323 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2334507

Hensel, Wendy, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & Educ. 291 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1652793

¹ Arizona, Florida and Wisconsin's voucher programs explicitly include students with Section 504 Plans. <http://www.edchoice.org/school-choice/school-choice-in-america/>.

² NCD, *supra* note 6, at 61.

³ *National Disability Policy: A Progress Report* National Council on Disability, October 31, 2014, p. 46. https://www.ncd.gov/sites/default/files/Documents/NCD_Report_FINAL_CLEAN_09-22-14.pdf.

⁴ With the exception of the DC Opportunity Scholarship Program, at: <http://dcscholarships.org/>.

⁵ Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education*, 39 J.L. & Educ. 291, 292 (2010).

⁶ National Council of State Legislatures, www.ncsl.org.

⁷ Voucher Rankings Report The Center for Education Reform, 2014.

⁸ <http://www.ibj.com/articles/50309-number-of-indiana-students-using-vouchers-jumps-dramatically>.

⁹ *Ibid*.

¹⁰ 34 C.F.R. § 300.116(e).

¹¹ For example, a student with a specific learning disability could hope to receive a voucher of up to \$9,558 for FY2014, but students with more severe disabilities such as autism, traumatic brain injury, or hearing impairment could receive up to \$20,000. Jon Peterson Special Needs Scholarship Maximum Scholarship Amounts by Category, Ohio Department of Education (2013), at <http://education.ohio.gov/getattachment/Topics/Other-Resources/Scholarships/Special-Needs-Scholarship/Jon-Peterson-Scholarship-For-Providers/JPSNCAmounts.pdf.aspx>.

¹² ORC Ann. 3310.41.

¹³ ORC Ann. 3310.52.

¹⁴ Special Education Weighted Funds Fiscal Accountability Report, Fiscal Year 2009, Ohio Department of Education (2009), at <http://education.ohio.gov/getattachment/Topics/Finance-and-Funding/State-Funding-For-Schools/Financial-Reports/Special-Education-Weighted-Funding-Fiscal-Accounta/FY09-SE-FISCAL-ACCOUNTABILITY.pdf.aspx>.

¹⁵ La. Rev. Stat. § 17:4031.

¹⁶ Wendy F. Hensel, *RECENT DEVELOPMENTS IN VOUCHER PROGRAMS FOR STUDENTS WITH DISABILITIES*, 59 LOY. L. REV. 323, 326 n. 12 ("It would seem questionable whether Louisiana legitimately can exclude students with particular disabilities given that the Supreme Court has indicated that disability discrimination is actionable when one group of people with disabilities (e.g., those with mental disabilities) is intentionally treated worse than others with disabilities (e.g., physical disabilities).")

¹⁷ Those disabilities are autism, developmental delay, mental disability, other health impairment, specific learning disability, traumatic brain injury. La. RS 17:4031 (2014).

¹⁸ The Florida McKay Scholarship, retrieved at: <http://www.fl DOE.org/schools/school-choice/k-12-scholarship-programs/mckay/>
<http://www.ncsl.org/documents/educ/voucher-webinar.pdf>

²⁰ Ohio has the Ohio Autism Scholarship and the Jon Peterson Special Needs Scholarship Program. See OHIO REV. CODE ANN. §3310.41; OHIO REV. CODE ANN. §3310.52. See also, <http://education.ohio.gov/Topics/Other-Resources/Scholarships/Autism-Scholarship-Program>; <http://education.ohio.gov/Topics/Other-Resources/Scholarships/Special-Needs-Scholarship>.

²¹ 20 U.S.C. § 7221i(G), (I).

²² 20 U.S.C. § 6311(b)(2)(A); 34 C.F.R. § 200.12(b)(4).

²³ Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.

²⁴ Title IX of the Education Amendments of 1972, 20 U.S.C. §1681.

²⁵ Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

²⁶ Title II of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 *et seq*.

²⁷ 20 U.S.C. §§ 1400 *et seq*. (2010).

²⁸ 20 U.S.C. § 1221(2010).

²⁹ 20 U.S.C. §1232g (2010).

³⁰ Sailor, W. & Stowe, M., (2003) School Vouchers and Students with Disabilities, National Council on Disabilities.

³¹ *Id.* at 333. See also, Alexandra Usher and Nancy Kober, Center on Education Policy, *Keeping Informed about School Vouchers: A Review*

- ³³ US Dep't of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Final Report* xv, xix, 34 (June 2010) (*Final US Dep't of Educ. Report*); *Final US Dep't of Educ. Report* at 34; US Dep't of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After Three Years* 34 (March 2009) (*2009 US Dep't of Educ. Report*); US Dep't of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After Two Years* 34, 36-38 (June 2008) (*2008 US Dep't of Educ. Report*); US Dep't of Educ., *Evaluation of the D.C. Opportunity Scholarship Program: Impacts After One Year* xvii, 44, 46 (June 2007) (*2007 US Dep't of Educ. Report*). U.S. Gov't Accountability Office, District of Columbia Opportunity Scholarship Program: *Actions Needed to Address Weaknesses in Administration and Oversight*, Publication No. GAO-13-805 (Nov. 2013); <http://www.gao.gov/assets/660/658416.pdf> [hereinafter 2013 GAO Report]; US Gov't Accountability Office, *District of Columbia Opportunity Scholarship Program: Additional Policies and Procedures Would Improve Internal Controls and Program Operations*, Pub. No. 08-9 at 26 (Nov. 2007) <http://www.gao.gov/new.items/d089.pdf> [hereinafter 2007 GAO Report].
- ³⁴ National Council on Disability (NCD), *National Disability Policy: A Progress Report*, 60 (2012); Hensel, *supra* note 1, at 330.
- ³⁵ Hensel, *supra* note 1, at 327, 301. NCD, *supra* note 6, at 60.
- ³⁶ Wendy F. Hensel, *Recent Developments in Voucher Programs for Students with Disabilities*, 59 LOY. L. REV. 323, 324 (2013)
- ³⁷ Cecilia E. Rouse and Lisa Barrow, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions*, 1 Annual Review of Economics (2009);
- ³⁸ Alexandra Usher and Nancy Kober, Center on Education Policy, *Keeping Informed about School Vouchers: A Review of Major Developments and Research 11* (2011) <http://www.cep-dc.org/displayDocument.cfm?DocumentID=369> ("This report examines a decade's worth of research on school vouchers and concludes that vouchers have had no clear positive effect on student academic achievement, and mixed outcomes for students overall");
- ³⁹ Jonathan N. Mills and Patrick J. Wolf, *The Effects of the Louisiana Scholarship Program on Student Achievement After Two Years*, (February 22, 2016) <http://educationresearchalliancencola.org/publications/the-effects-of-the-louisiana-scholarship-program-on-student-achievement-after-two-years>
- ⁴⁰ Hensel, *supra* note 1, at 322-323.
- ⁴¹ Hensel
- ⁴² NCD, *supra* note 6, at 60.
- ⁴³ *Id.*
- ⁴⁴ *McKay Scholarship Program Sparks a Cottage Industry of Fraud and Chaos*, MIAMI NEW TIMES NEWS, June 23, 2011. <file:///Users/robinpick/Documents/COPAA/Vouchers/Fraud%20-%20McKay%20scholarship%20program%20sparks%20a%20cottage%20industry%20of%20fraud%20and%20chaos%20-%20-%20News%20-%20Miami%20-%20Miami%20New%20.html>
- ⁴⁵ See *When Schools Choose, Students with Disabilities Lose*, by Stop Special Needs Vouchers, <http://stopspecialneedsvouchers.blogspot.com/>
- ⁴⁶ 34 C.F.R. § 300.8(c) (2007); LA. REV. STAT. ANN. § 17:1942(B) (2008).
- ⁴⁷ Arizona, Florida and Wisconsin's voucher programs explicitly include students with Section 504 Plans. <http://www.edchoice.org/school-choice/school-choice-in-america/>
- ⁴⁸ NCD, *supra* note 6, at 61
- ⁴⁹ *Brumfield v. Dodd*, 405 F. Supp. 338 (E.D. La. 1975).
Brumfield v. Dodd, 425 F. Supp. 528 (E.D. La. 1976).
Brumfield v. Dodd, No. 71-1316, 2013 WL 360572 (E.D. La. Jan. 30, 2013).
Brumfield v. Dodd, 749 F.3d. 339 (5th Cir. 2014).
Brumfield v. Dodd, No. 13-31262, 2014 WL 3828724 (E.D. La. April 10, 2014).
http://www.nola.com/education/index.ssf/2015/06/louisiana_school_voucher_appea.html
- ⁵⁰ http://www.nola.com/education/index.ssf/2013/11/federal_government_has_right_t.html
- ⁵¹ *Brumfield v. Dodd*, 495 F.Supp. 338 (E.D. La. 1975).
- ⁵² *Brumfield v. Dodd*, 425 F.Supp. 528 (E.D. La. 1976).
- ⁵³ U.S. Memorandum in Support of Its Motion to Extend Time to Respond to Discovery, at: <http://www.gov.state.la.us/assets/docs/10-29-13%20-%20DOJ%20Motion%20to%20Postpone.pdf>
- ⁵⁴ <http://www.politico.com/story/2013/11/justice-department-louisiana-voucher-program-100072>
- ⁵⁵ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295-296 (2006) (citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (finding that expert fees are not included in costs for purposes of fee shifting within IDEA).
- ⁵⁶ *Pennhurst*, 451 U.S. at 17.
- ⁵⁷ 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. FAPE consists of "specially designed instruction" that adapts the content, methodology, or delivery of instruction "[t]o address the unique needs of the child that result from the child's disability; and ... [t]o ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3).
- ⁵⁸ 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.17(b), (c); 20 U.S.C. § 6311(b)(1), 34 C.F.R. § 200.1(a), (b), (c). Also see 34 C.F.R. § 104.33(a).
- ⁵⁹ 34 C.F.R. § 300.320(a)(1)(i), (a)(4).
- ⁶⁰ 34 C.F.R. § 300.114
- ⁶¹ 34 C.F.R. § 300.116(e).
- ⁶² Weber, Mark C. (2007) *Services for Private School Students Under the Individuals with Disabilities Education Improvement Act: Issues of Statutory Entitlement, Religious Liberty, and Procedural Regularity*, pp 3

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- ⁶³ Sailor and Stowe, 2003
- ⁶⁴ 348 F.Supp. 866 (DC 1972).
- ⁶⁵ *Id.* at 198-99
- ⁶⁶ *Id.* at 200
- ⁶⁷ *Id.* at 201.
- ⁶⁸ *Id.* at 207.
- ⁶⁹ 20 U.S.C. § 1400(d)(1)(A); *see Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 367 (1985)
- ⁷⁰ 20 U.S.C. § 1412(a)(1)(A)
- ⁷¹ *Burlington*, 471 U.S. at 367
- ⁷² *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 187-88, 203 (1982).
- ⁷³ *A.K. ex. Rel. J.K. & A.S. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 681 (4th Cir. 2007).
- ⁷⁴ *Id.*, (citing *Rowley*, 458 U.S. at 207)
- ⁷⁵ Taylor, S. S. (2006). *School vouchers: Views from a special education perspective*. *Journal of School Choice*, 1(3), 29-53. pp 37-38
- ⁷⁶ *R.E.*, 694 F.3d at 191-92.
- ⁷⁷ Cases in the Second Circuit are analogous because, while that Circuit has held that the IEP need not list a specific school, school districts are still required to recommend a school that can implement the instruction and services on the IEP. *See id; D.C. v. N.Y.C. Dep't of Educ.*, 950 F.Supp.2d 494 (S.D.N.Y. 2013) (holding department of education failed to offer the student a FAPE where the recommended school placement told the Mother that it could not implement a medical mandate on her son's IEP that he be educated in a seafood-free environment); *B.R. v. N.Y.C. Dep't of Educ.*, 910 F.Supp.2d 670 (S.D.N.Y. 2012) (holding that DOE failed in its burden to show that the proposed public school placement could implement the student's IEP).
- ⁷⁸ OCR Staff Memorandum, 22 IDELR 669(July 27, 1990)
- ⁷⁹ Letter to Bowen, 35 IDELR 129 (OCR March 23, 2001)
- ⁸⁰ Compare: *Lower Merion School District v. Doe* reaffirmed that private school students [in PA] have the right to seek services under IDEA from their LEA as dually enrolled students. 593 Pa. 437 (2007). *See: Lower Merion School District v. Doe*, 593 Pa. 437 (2007)
- ⁸¹ *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008)
- ⁸² 34 C.F.R § 104.33(b)(1)
- ⁸³ cf. 20 U.S.C. §§ 1401(9), 1414(d)(1)(A)(i)(II)
- ⁸⁴ http://www.huffingtonpost.com/rep-chris-taylor/back-to-alec-back-to-priv_b_8055540.html?utm_hp_ref=politics
- ⁸⁵ http://www.washingtonpost.com/local/education/aclu-says-its-suing-to-stop-nevadas-new-school-voucher-program/2015/08/27/db57dcd2-4cd0-11e5-902f-39e9219e574b_story.html
- ⁸⁶ Arizona, Florida and Wisconsin's voucher programs explicitly include students with Section 504 Plans. <http://www.edchoice.org/school-choice/school-choice-in-america/>.
- ⁸⁷ *L.M.P. v. School Bd. of Broward County*, 516 F. Supp.2d 1294 (S.D. Fla. 2007)
- ⁸⁸ U.S. Department of Justice, *Letter to Evers* (April 9, 2013) https://www.aclu.org/files/assets/04_09_13_letter_to_wisconsin_dpi_0.pdf
- ⁸⁹ *Ibid.*
- ⁹⁰ States with language similar to the Blaine Amendment are: Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. (Taylor 2006, p. 50).
- ⁹¹ Taylor, S, 2006 at 49.