

# Limited Choices: How the School-Choice Paradigm Subverts Equal Education for Students with Disabilities

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**LIMITED CHOICES: HOW THE SCHOOL-CHOICE PARADIGM  
SUBVERTS EQUAL EDUCATION FOR STUDENTS  
WITH DISABILITIES**

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ABSTRACT

*While there is no absolute right to education in the Constitution of the United States, legislation and litigation have created and elucidated specific rights of children to, at a minimum, equal opportunity in education. For students with disabilities, the right to equality in educational opportunity can be found in both federal statutes and under the Fourteenth Amendment to the Constitution. Rapidly developing education policy currently promotes increasing options for parents to use federal and state funds to send their children to schools other than their neighborhood public schools (“school choice”). However, the specific rights of students with disabilities have been largely overlooked. This Article will explain the ways in which school-choice laws and the rights of students with disabilities overlap and interact, expose gaps that leave students with disabilities vulnerable, and suggest actions that legislators and litigators can take to mitigate that vulnerability and ensure equal opportunity in education.*

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\* Acting Assistant Professor, New York University School of Law. I am grateful for the thoughtful commentary of the participants of the Clinical Law Review Writers’ Workshop and the Legal Scholars Colloquium at New York University School of Law. I would specifically like to thank Llezlie Green Coleman, Peggy Cooper Davis, Paulina Davis, Robert Dinerstein, Angela Gius, Marcy Karin, Jyoti Nanda and Dalit Paradis for their insights and guidance as I wrote this Article. Sondra Saporta also provided valuable assistance, and the student editors at the *Maryland Law Review* were terrifically helpful. I owe gratitude as well to my late spouse, Satadru Sen, whose support smoothed the way for the writing of this Article. All opinions are my own and do not necessarily reflect the views of those who provided advice and guidance.

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## INTRODUCTION

There is a private school in East Harlem, New York City that charges no tuition. Admission to students in pre-kindergarten through eighth grade is ostensibly by lottery; though, as with most school lotteries, priorities like sibling attendance are in place. The mission of this school, Storefront Academy, is:

[T]o provide children *of varied academic strengths* quality educational opportunities, preparing them academically, socially and emotionally to become critical thinkers, high-achieving students and well-rounded individuals. Working in partnership with fami-

lies and community members, Storefront Academy instills a powerful sense of self, and gives its students the tools to own the future and create meaningful adult lives.<sup>1</sup>

Storefront Academy serves students of varied academic strengths, from students with learning disabilities to very gifted students, and its students appear to succeed. Though an overwhelming majority of students come from economically disadvantaged backgrounds, ninety-five percent of graduating eighth graders go on to graduate from high school in a city in which about seventy percent of students graduate from high school.<sup>2</sup> The school itself has grown and expanded into a second site, this one funded as a charter school.<sup>3</sup>

Broadly, “school choice” refers to any scenario in which a parent can select a school for their child rather than simply being assigned to a public school, and Storefront Academy is a school choice success story. Indeed, the current principal of Storefront Academy Harlem states in her biography that she is “a proud supporter of school choice and education reform.”<sup>4</sup>

But, while Storefront Academy serves many students well, it is also emblematic of the limitations of school choice. The school has small classes and dedicated teaching assistants in each elementary school classroom, bringing the student-to-teacher ratios for both general education and special education students down to incomparable lows.<sup>5</sup> Those low student-to-teacher ratios—undoubtedly a key factor in the school’s success—are funded with private money and are simply not replicable under most public-school funding constraints.<sup>6</sup> And yet, even with unusually low student-to-teacher ratios, Storefront Academy does not typically serve students who have needs greater than mild learning disabilities or mild speech and language disorders. Only twelve percent of the student body has an Individualized Education Program

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1. *About Us*, STOREFRONT ACAD., <http://storefrontacademy.org/about-us> (last visited Feb. 18, 2018) (emphasis added).

2. *Results*, STOREFRONT ACAD., <http://storefrontacademy.org/results> (last visited Feb. 18, 2018); Elizabeth A. Harris, *Graduation Rate Made Little Progress, State Says*, N.Y. TIMES (Feb. 7, 2018), <https://www.nytimes.com/2018/02/07/nyregion/graduation-rate-new-york.html>.

3. *History*, STOREFRONT ACAD., <http://storefrontacademy.org/history> (last visited Feb. 18, 2018). The first Storefront school was founded as a non-profit and continues to be funded primarily by private grants, but also by federal and local government programs specifically designated for education, such as school lunch and pre-kindergarten. See *FAQs*, STOREFRONT ACAD., <http://storefrontacademy.org/faqs> (last visited Nov. 16, 2018); see also *Partners & Supporters*, STOREFRONT ACAD., <http://storefrontacademy.org/partners-supporters> (last visited Nov. 16, 2018).

4. *Leadership*, STOREFRONT ACAD., <http://storefrontacademy.org/leadership> (last visited Feb. 18, 2018).

5. *Our Model*, STOREFRONT ACAD., <http://storefrontacademy.org/our-model> (last visited Jan. 1, 2019). In a New York City public school, the class size for elementary school classes can be, and often is, thirty-two students with one teacher. *What Are the Class Size Limits for My Grade?*, UNITED FED’N OF TEACHERS, <http://www.uft.org/faqs/what-are-class-size-limits-my-grade> (last visited Mar. 2, 2019). At the Storefront, classes in the lower school were capped at twenty and had both a lead teacher and an assistant teacher. *Our Model*, *supra*.

6. See *supra* note 3.

(“IEP”)<sup>7</sup> as compared to seventeen percent of New York City public-school students.<sup>8</sup> The school “counsels out” students with intellectual disabilities and emotional or behavioral disorders, telling parents their child’s needs cannot be met at the school and they should seek a different educational environment.<sup>9</sup>

Are there parents who are thrilled that their child lucked into a seat at the Storefront Academy? Absolutely. For those parents, this is school choice at its finest. But a parent whose first grader has been asked to leave the school because his sensory needs require interventions that the school will not pay for does not have this kind of school choice. On a small scale, when there are viable public-education options available, this might seem like a small price to pay to optimize the educational options of other students, many of whom also face disadvantages such as poverty. But on a larger scale, as school-choice programs gain increasing traction and have begun to dominate entire school districts, including New Orleans and Washington, D.C., there is a need to protect the educational rights of the most vulnerable students. This is particularly true as funders and advocates push for increasingly broad school-choice policies, causing supporters of public schools to fear that funding and regulatory protections for public schools will disappear in some cities and states.<sup>10</sup>

Advocates for school choice, including parents, scholars, and politicians, come from many backgrounds. Some, like those who pushed for vouchers—public funding for the tuition for individual children to attend private schools instead of local public schools—in Milwaukee, put in place in 1990, are low-income, predominately black parents frustrated with the sub-optimal education available to their children in public schools.<sup>11</sup> Scholars and educators who are proponents of school choice see school choice as an

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7. *Results, supra* note 2.

8. ROBIN LAKE ET AL., CTR. ON REINVENTING PUB. EDUC., NEW YORK STATE SPECIAL EDUCATION ENROLLMENT ANALYSIS 8 (2012), <https://files.eric.ed.gov/fulltext/ED537477.pdf>.

9. As a “learning specialist” at Storefront Academy (then The Children’s Storefront) from 2006 to 2009, I worked with parents, teachers, and administrators to make educational decisions. In addition, I participated in meetings regarding students whom administrators and teachers sincerely believed the school did not have the capacity to appropriately educate, particularly students with intellectual disabilities. Many more students never even had the opportunity to apply. As the current principal said about her view of the Storefront before joining it, “It was almost like a hidden secret. No one kind of knew how you get in, what happens there, but there was this expectation that the kids did great things when they left.” Dartunorro Clark, *There’s a ‘Secret Sauce’ to Learning at Harlem’s Storefront Academy*, DNAINFO (Apr. 2, 2017), <https://www.dnainfo.com/new-york/20170402/east-harlem/alexis-thomas-storefront-academy>.

10. *See, e.g.*, Steven Greenhouse, *Billionaires v Teachers: The Koch Brothers’ Plan to Starve Public Education*, GUARDIAN (Sept. 7, 2018), <https://www.theguardian.com/us-news/2018/sep/07/arizona-fight-koch-brothers-school-vouchers>.

11. *E.g.*, DANIEL MCGROARTY, TRINNIETTA GETS A CHANCE: SIX FAMILIES AND THEIR SCHOOL CHOICE EXPERIENCE 7–8 (2001).

opportunity to expand educational options and encourage innovations.<sup>12</sup> Another set of advocates of school choice, including the current Secretary of Education, Betsy DeVos, have philosophical and economic objections to the dominance of public education in the United States and may even seek to see public education replaced altogether.<sup>13</sup>

Critics of school choice contend that school choice policies take resources from public schools and distract policy makers from more effective solutions, such as addressing the underlying poverty facing students in many struggling public schools.<sup>14</sup> Critics also point to the white supremacist history of school choice as a tool to avoid court-ordered integration of public schools,<sup>15</sup> evidence that school-choice policies intensify racial segregation,<sup>16</sup>

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12. *E.g.*, DAVID OSBORNE, *REINVENTING AMERICA'S SCHOOLS* 35–43, 84–88 (2017).

13. *E.g.*, NANCY MACLEAN, *DEMOCRACY IN CHAINS* 45–74, 207–34 (2017) (describing individuals and funds seeking to undermine public school systems in the United States); Kristina Rizga, *Betsy DeVos Wants to Use America's Schools to Build "God's Kingdom,"* MOTHER JONES, Mar.–Apr. 2017, <http://www.motherjones.com/politics/2017/01/betsy-devos-christian-schools-vouchers-charter-education-secretary/>.

14. *E.g.*, DIANE RAVITCH, *REIGN OF ERROR* 4–6 (2013); MERCEDES K. SCHNEIDER, *SCHOOL CHOICE: THE END OF PUBLIC EDUCATION?* 79–84 (2016).

15. *See, e.g.*, Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 362–63 (1997) (arguing that “[v]oucher proponents generally rely on a propagandized history of tuition vouchers that distorts the role of racial oppression in school privatization” and “the private school tuition voucher movement, in the context of its history and assumptions, demonstrably coincides with the white conservative pursuit of dominance and privilege”).

16. *See, e.g.*, ERICA FRANKENBERG ET AL., CIVIL RIGHTS PROJECT, *CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS* 9–11 (2010), <https://escholarship.org/uc/item/4r07q8kg> (“[C]harters exacerbate already rampant American school segregation, particularly for black students.”); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1114–17 (2014); Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 836–40 (2011). Parents of all races prefer schools in which their children would not be a minority. Justine S. Hastings et al., *Parental Preferences and School Competition: Evidence from a Public School Choice Program* 28 (Yale Econ. Applications & Policy, Discussion Paper No. 10, 2005), <http://ssrn.com/abstract=885537> (“[T]he average preferred school for each racial group was one in which [seventy percent] of the school was their own race.”). White parents, in particular, are reluctant to send their children to schools with large numbers of black children and use race as a proxy for determining quality. Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL’Y 1, 18 (2008) (footnotes omitted) (“[P]arents used the internet resource to reject schools having a significant majority of black students before they focused on other indicators of school quality . . . [and] race is closely related to parental perceptions of school quality. . . . [A]n increase of more than two percent in the African-American population of a student body correlated with a perception that the school’s quality had declined even when the objective criteria contradicted that perception.”). In North Carolina, charter schools are increasingly white as compared to district schools. Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359, 1401 (2018).

and the problematic ways that school-choice programs, which tend to be located in low-income urban areas, generate private income for individuals and private corporations.<sup>17</sup>

School choice can be beneficial to many individual children. Parents are generally happy with “choice schools,” charter schools and private schools funded by state vouchers that parents select themselves but that are paid for with state funds.<sup>18</sup> When faced with difficult problems in public education, many educators and parents turn to school choice as a solution for the children in front of them. Most people placing their children in choice schools, running choice schools, or teaching within them can generally be said to be acting in reasonable, rational, and sympathetic ways.<sup>19</sup>

That being said, public education guarantees much more than the ability of each parent to select the appropriate education for his or her individual child.<sup>20</sup> The United States Constitution and many state constitutions require equitable public education,<sup>21</sup> something school choice undermines by promoting increasingly separate and unequal educational spaces. Scholarship on school choice has identified ways in which school-choice policies create

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17. *See, e.g.*, SAMUEL E. ABRAMS, EDUCATION AND THE COMMERCIAL MINDSET 9–11, 192–95 (2016) (detailing the history of for-profit educational management organizations); RAVITCH, *supra* note 14, at 167–73 (describing ways that even non-profit charter schools generate income for for-profit companies); NOLIWE ROOKS, CUTTING SCHOOL: PRIVATIZATION, SEGREGATION, AND THE END OF PUBLIC EDUCATION 163–83 (2017) (describing ways in which charter and other participants in school choice profit legally and illegally from school choice in urban areas, negatively impacting those communities).

18. *See, e.g.*, JAY P. GREENE & GREG FORSTER, VOUCHERS FOR SPECIAL EDUCATION STUDENTS: AN EVALUATION OF FLORIDA’S MCKAY SCHOLARSHIP PROGRAM 1, 15 (2003), [https://www.manhattan-institute.org/pdf/cr\\_38.pdf](https://www.manhattan-institute.org/pdf/cr_38.pdf) (describing satisfaction of parents who participate in the McKay Scholarship program as high, though only sixty-two percent of former participants were happy with their choice school). I use “choice schools” to describe charter schools and private schools to which parents affirmatively choose to enroll their children and that receive public funding of one type or another. Parents are also generally happy with neighborhood public schools. DeJarnatt, *supra* note 16, at 16 n.88. Data over several decades indicate that students in neighborhood public schools and choice schools alike have mixed educational attainment, with no particular advantage to students in charter or voucher schools. MARTIN CARNOY, SCHOOL VOUCHERS ARE NOT A PROVEN STRATEGY FOR IMPROVING STUDENT ACHIEVEMENT 1, 3–7, 10 (2017), <http://www.epi.org/publication/school-vouchers-are-not-a-proven-strategy-for-improving-student-achievement/>; CTR. FOR RESEARCH ON EDUC. OUTCOMES, MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 1–6 (2009).

19. *See, e.g.*, Elizabeth Adamo Usman, *Reality over Ideology: A Practical View of Special Needs Voucher Programs*, 42 CAP. U. L. REV. 53, 77 (2014) (describing parents’ reasonable decisions to move their own children with special education needs to private school). *See generally* MCGROARTY, *supra* note 11 (describing the positive experiences of several families utilizing school choice).

20. Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 447 (2013) (“Public education entails the provision of common experiences under conditions consistent with equal protection, due process, free speech, and religious neutrality. A consumer-based system allows for too much educational variation and opens the door to individual biases that are contrary to public education.”).

21. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); Black, *supra* note 16, at 1359, 1403.

tension between, on the one hand, parental interests in choosing the best publicly-funded educational options for their own children, and on the other, public goals and constitutional requirements of equal treatment. Professor Martha Minow of Harvard Law School identified ways in which the rhetoric of school choice both promotes values of equality and liberty and serves to “channel[]—or paper[] over—deep conflicts over religion, race, immigration, [and] national identity.”<sup>22</sup> Most recently, Professor Derek W. Black identified ways in which school choice “stratif[ies] opportunity,” “intensif[ies] segregation,” and violates state constitutions that mandate that public education be a “first-order right.”<sup>23</sup>

Most school-choice advocates emphasize that they are advocating for *all* students to have access to high-quality education. The Center for Education Reform, which advocates for school choice, states, “[O]ur [m]ission [is] [t]o expand educational opportunities that lead to improved economic outcomes for all Americans, particularly our youth, ensuring that the conditions are ripe for innovation, freedom and flexibility throughout U.S. education.”<sup>24</sup> The American Federation for Children Growth Fund, a national organization that advocates for vouchers, state-funded scholarships to private schools, and tax-credit programs to pay for private-school educations, describes its mission as, “To improve our nation’s K-12 education by advancing systemic and sustainable public policy that empowers parents, particularly those in low-income families, to choose the education they determine is best for their children.”<sup>25</sup>

But, as noted above, and as will be shown in this Article, adequate options prove to be elusive for many students in choice systems. Rather than increasing educational opportunity, broad school-choice programs can leave students with inadequate educational opportunities. This is especially true for children with disabilities. Ultimately, school choice sets the rights and interests of some parents against the rights and interests of other parents in ways that our current legal framework does not adequately address. Students with disabilities, ostensibly protected by bipartisan-supported federal law,<sup>26</sup> are left to bear the brunt of this shortcoming.

This Article will address the rights of students with disabilities in light of the ever-increasing movement towards greater school choice and suggests

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22. Minow, *supra* note 16, at 816.

23. Black, *supra* note 16, at 1359.

24. *About*, CTR. FOR EDUC. REFORM, <https://www.edreform.com/about/> (last visited Dec. 26, 2017).

25. *About Us*, AM. FED’N FOR CHILDREN GROWTH FUND, <https://afcgrowthfund.org/about-us/> (last visited Dec. 26, 2017) (emphasis omitted).

26. *See* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1421 (2012); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012); Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012).

ways in which attorneys and policy makers should address the inequalities that increase for students with disabilities within choice systems. The Article will focus on state-funded school-choice programs, particularly charter schools and voucher schemes. While there is now considerable data and information available about such programs, there is still relatively little legal scholarship on the subject, particularly with regards to students with disabilities and federal laws that protect those students, such as the Individuals with Disabilities Education Act (“IDEA”).<sup>27</sup> Scholars have identified the problems of “skimming”—the almost inevitable fact of choice schools excluding children with challenging learning needs and serving higher achieving children than their public-school counterparts.<sup>28</sup> In this process, students with disabilities are left out and left behind. Despite this, scholarship addressing the rights of students with disabilities and the ways in which those rights interact with school-choice laws and realities is limited.

The legal rights of students with disabilities are intertwined with and overlap with the rights of racial minorities. This is in part because minority students are over identified as having disabilities as compared to their white peers,<sup>29</sup> but primarily because federal and state constitutional principles of equality protect both racial minorities and students with disabilities.<sup>30</sup> For students with disabilities, those protections are defined through comprehensive federal and state laws supported by politicians from both major parties.<sup>31</sup>

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27. 20 U.S.C. §§ 1400–1482 (2012). Current, informative scholarship on private school voucher programs includes a focus on Milwaukee’s voucher program and the lawsuits that have challenged that program. Compare Wendy F. Hensel, *The Limits of Federal Disability Law: State Educational Voucher Programs*, 44 J.L. & EDUC. 199, 200–05 (2015), with Stephen A. Rosenbaum, *Preserving Public Values in the Private Sector: Unintended Consequences or Vouching for Ability-Free Schools?*, 45 J.L. & EDUC. 369, 373–81 (2016). See generally Julie F. Mead, *Private in Name Only: A Statutory and Constitutional Analysis of Milwaukee’s Private School Voucher Program*, 21 WASH. & LEE J. C.R. & SOC. JUST. 331 (2015).

28. See, e.g., Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002, 2006–09 (1996) (identifying policies that lead to skimming).

29. See, e.g., Ama Mazama & Garvey Lundy, *African American Homeschooling as Racial Protectionism*, 43 J. BLACK STUD. 723, 727–28 (2012) (“African American students are more than twice as likely to be labeled ‘mentally retarded’ as European American students, and although they make up only [seventeen percent] of the student population, they nonetheless represent [thirty-three percent] of those enrolled in programs for children with mental retardation.” (citations omitted)); John McKenna, *The Disproportionate Representation of African Americans in Programs for Students with Emotional and Behavioral Disorders*, 57 PREVENTING SCH. FAILURE 206, 206 (2013) (“African American students are disproportionately represented in educational programs for students meeting eligibility criteria for emotional disturbance.”).

30. See, e.g., Betty Y. Ashbaker, *History of Legal and Legislative Acts Concerned with Special Education*, in HISTORY OF SPECIAL EDUCATION 21, 21–45 (Anthony F. Rotatori et al. eds., 2011); Steven L. Nelson, *Special Education Reform Policies and the Permanence of Oppression: A Critical Race Case Study of Special Education Reform in Shelby County, Tennessee*, 60 HOW. L.J. 459, 461–62 (2017).

31. See Individuals with Disabilities Education Improvement Act of 2004, H.R. 1350, 108th Cong. (showing that the law passed with overwhelming majorities in both the U.S. Senate and the

Specifically, tailored legislation and regulation could possibly allow the positive goals of school choice—innovation and parental freedom to choose—to flourish, while inhibiting negative outcomes like racial segregation and marginalization of students with disabilities.

Addressing shortcomings in school-choice policies is more important than ever given the current momentum towards increasing school-choice programs. Recent decisions by the United States Supreme Court create an environment more favorable than ever to school choice by affirming the legitimacy of funding schemes that direct public money to private and parochial schools.<sup>32</sup> Politically and financially influential interest groups and individuals, such as Jeb Bush, Betsy DeVos, the Walton Family Foundation, and the Goldwater Institute, are heavily invested in promoting school choice.<sup>33</sup> The federal government also supports school choice. For example, former President Barack Obama’s administration implemented “Race to the Top,” a fund providing grants to states implementing specific reforms, such as improving assessments and data systems.<sup>34</sup> This fund promoted the creation of charter schools, which are schools established according to state law and funded by the state.<sup>35</sup> Furthermore, Betsy DeVos is a self-proclaimed advocate of school choice, including vouchers.<sup>36</sup> Particularly at a time when policy makers at the federal level are led by people who would like to see the traditional

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House of Representatives); *see also* *Roll Call Vote 108th Congress-2nd Session*, U.S. SENATE, [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=108&session=2&vote=00094](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=2&vote=00094) (last visited Jan. 9, 2019); *Final Vote Results for Roll Call 154*, OFF. CLERK U.S. HOUSE REPRESENTATIVES, <http://clerk.house.gov/evs/2003/roll154.xml> (last visited Jan. 9, 2019).

32. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019–25 (2017) (requiring that a state allow religious entities to compete for grants of public money alongside secular organizations); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649–52 (2002) (determining that public funds could be used to pay for religious education as long as parents directed the money through the use of vouchers); *see also* Emma Brown, *Why Betsy DeVos Is Cheering the Supreme Court’s Church Playground Decision*, WASH. POST (June 27, 2017), [https://www.washingtonpost.com/news/education/wp/2017/06/26/why-betsy-devos-is-cheering-the-supreme-courts-church-playground-decision/?utm\\_term=.9b662dcb6f4d](https://www.washingtonpost.com/news/education/wp/2017/06/26/why-betsy-devos-is-cheering-the-supreme-courts-church-playground-decision/?utm_term=.9b662dcb6f4d) (“Voucher advocates said that line of reasoning opens the way for the high court to rule in favor of allowing public funds to flow to parochial schools.”).

33. RAVITCH, *supra* note 14, at 22–23; ROOKS, *supra* note 17, at 154–59; SCHNEIDER, *supra* note 14, at 69–78.

34. *Race to the Top*, OBAMA WHITE HOUSE, <https://obamawhitehouse.archives.gov/issues/education/k-12/race-to-the-top> (last visited Feb. 15, 2019); SCHNEIDER, *supra* note 14, at 65–66.

35. *See, e.g.*, Katrina E. Bulkley, *Charter Schools . . . Taking a Closer Look*, 77 EDUC. DIG. 58, 58 (2012) (“[T]he Obama administration has highlighted charter schools under its Race to the Top fund and in regulations for its School Improvement Grant program.”). Charter schools are “public” schools but are run independently from and with greater freedom than traditional public schools. *Id.*

36. Chris Weller, *New Education Secretary Betsy DeVos Champions Vouchers and Charter Schools—Here’s What That Means*, BUS. INSIDER (Feb. 7, 2017), <http://www.businessinsider.com/what-are-charter-schools-2017-2>.

local-public-school model of public education replaced by choice systems,<sup>37</sup> it is important to understand the threat to the rights of special-education students created by broad school-choice policies and to mitigate that threat.

Part I of this Article will address the origins and history of school-choice policies. A major goal of school-choice policies is to limit the hand of government, giving more freedom to educators and parents. At key moments, however, school-choice policies have also deliberately or inadvertently exacerbated inequalities antithetical to well-established principles of law and public policy. Knowing how this has happened provides us with a better understanding of the importance of guarding those principles. Part II will provide a brief history and overview of federal law protecting students with disabilities, the IDEA; will introduce the legal requirement that students be educated in their “least restrictive environment” (“LRE”); and will explain the ways in which the funding structure of the IDEA is built around the structure of traditional public schools. Part III will discuss the interaction between the IDEA and school choice, describing the ways that current school choice laws and policies violate the spirit and letter of the IDEA and the constitutional principle of equal protection under the law. Part IV will elucidate the competing interests and rights underlying debates about school choice. Finally, Part V will suggest ways in which attorneys can utilize the IDEA, and the constitutional requirements underlying it, to insist on equal protection for students with disabilities in school choice programs.

## I. A BRIEF HISTORY OF SCHOOL CHOICE

### A. *Early School Choice*

As public schools and compulsory attendance laws developed in the early twentieth century in the United States,<sup>38</sup> parents and private schools challenged laws mandating that all children attend public schools. In 1925, the Supreme Court, in *Pierce v. Society of Sisters*,<sup>39</sup> agreed that children should not be required to attend public school to the exclusion of private or religious schooling and established the principle that parents have a constitutional right to direct the upbringing and education of their children absent a compelling state reason to the contrary.<sup>40</sup> This decision did not, however,

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37. Valerie Strauss, *DeVos: Picking a School Should Be Like Choosing Among Uber, Lyft or a Taxi*, WASH. POST (Mar. 29, 2017), [https://www.washingtonpost.com/news/answer-sheet/wp/2017/03/29/devos-picking-a-school-should-be-like-choosing-among-uber-lyft-or-a-taxi/?utm\\_term=.ae2b1c905bda](https://www.washingtonpost.com/news/answer-sheet/wp/2017/03/29/devos-picking-a-school-should-be-like-choosing-among-uber-lyft-or-a-taxi/?utm_term=.ae2b1c905bda).

38. DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 15–39, 66–68 (1974).

39. 268 U.S. 510 (1925).

40. *Id.* at 534–35 (“[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under

open the door to public funding of private and parochial schools. Public funding remained limited to public schools.<sup>41</sup>

The push to fund private education with state money came several decades after *Pierce*, following the landmark 1954 Supreme Court case, *Brown v. Board of Education*.<sup>42</sup> In *Brown*, the Court held that racially segregated schools were inherently unequal and violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution.<sup>43</sup> This decision set off decades of federal court monitoring of state and local efforts to desegregate or avoid desegregating their schools.<sup>44</sup>

The year after *Brown*, Milton Friedman, an economist at the University of Chicago, known for his advocacy of free-market capitalism and widely considered the “father of school choice,” began writing on the issue.<sup>45</sup> In a 1955 essay, he theorized that government was overly involved in education and proposed an early version of vouchers: A system of state-funded subsidies that parents could use to fund a school of their choice, including parochial schools.<sup>46</sup> Friedman theorized, “The adoption of such arrangements would make for more effective competition among various types of schools and for a more efficient utilization of their resources.”<sup>47</sup>

It was not long before southern states, seeking to avoid racial integration of public schools following *Brown*, began using the rhetoric and ideas for school choice in the United States more broadly. In the 1950s and 1960s, states including Virginia, South Carolina, Alabama, and Louisiana passed legislation and amended state constitutions to allow or even force school districts to close in the face of court orders to desegregate.<sup>48</sup> They authorized vouchers to fund racially segregated private schools.<sup>49</sup> The language of choice was common in state efforts to prevent full desegregation. South Carolina’s act began with a broad statement of choice:

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their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

41. Minow, *supra* note 16, at 819–20.

42. 347 U.S. 483 (1954).

43. *Id.* at 495.

44. GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION* xxi–xxiii (1996) (listing significant federal court cases regarding desegregation orders).

45. SCHNEIDER, *supra* note 14, at 27–29.

46. Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123 (Robert A. Solo ed., 1955).

47. *Id.* at 134.

48. SCHNEIDER, *supra* note 14, at 16–25.

49. *Id.*; Minow, *supra* note 16, at 821–24.

The General Assembly finds that the cause of primary and secondary education in South Carolina will be advanced if individual children of school age, their parents and guardians, *are made free to choose between public and private educational institutions*. Provision has been made for the transfer of pupils from one public school to another, subject to such limitations as may be necessitated by local conditions, and *it is considered highly desirable that the freedom to choose among available educational institutions* be extended and enlarged by providing scholarship grants for children entitled to attend primary and secondary public schools who wish to attend private or independent institutions, such scholarship grants to be furnished from State funds supplemented by local school districts.<sup>50</sup>

These voucher laws did not last long. State and federal courts, including the Supreme Court, declared the actions of states that closed public schools in favor of vouchers for private schools unconstitutional insofar as they were designed primarily to maintain segregated schools.<sup>51</sup> The Supreme Court held that closing some public schools and requiring that students go to segregated private schools with state funding denied these children equal protection under the Fourteenth Amendment to the Constitution.<sup>52</sup> The United States District Court for the District of South Carolina saw through the language of choice in South Carolina's act and determined that the clear motivation behind the act was to avoid desegregation. The court held:

A review of the record, including the historical background of the Act, clearly reveals that the purpose, motive and effect of the Act is to unconstitutionally circumvent the requirement . . . that the

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50. *Brown v. S.C. State Bd. of Educ.*, 296 F. Supp. 199, 200 n.1 (D.S.C. 1968) (emphasis added) (quoting 1963 S.C. Acts 498–500).

51. *See, e.g., Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 231 (1964) (“Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.”); *Hall v. St. Helena Parish Sch. Bd.*, 197 F. Supp. 649, 651 (E.D. La. 1961) (finding a Louisiana act tasking “the school board of the parish where the public schools have been ‘closed’ . . . with responsibility for furnishing free lunches, transportation, and grants-in-aid to . . . children attending . . . ‘private’ schools” to be “a transparent artifice designed to deny the plaintiffs their declared constitutional right to attend desegregated public schools”); *James v. Almond*, 170 F. Supp. 331, 338 (E.D. Va. 1959) (“[N]o one public school or grade in the county or city may be closed to avoid the effect of the law of the land while other public schools or grades remain open at the expense of the taxpayers.”); *Harrison v. Day*, 106 S.E.2d 636 (Va. 1959) (holding that the Virginia constitution required the state to maintain public schools but allowed the state to make tuition grants to private schools).

52. *Griffin*, 377 U.S. at 230–31.

State of South Carolina not discriminate on the basis of race or color in its public educational system.<sup>53</sup>

Voucher programs withered following these decisions.<sup>54</sup>

### *B. School Choice Moves into the Mainstream*

The charter-school movement propelled school choice into the mainstream in the 1990s. Developed in the 1980s primarily by Ray Budde, a professor of education at the University of Massachusetts, and then American Federation of Teachers President Albert Shanker, the original concept of charter schools envisioned teacher-designed and run schools that would have freedom to innovate.<sup>55</sup> In Budde and Shanker's conception of charter schools, parents would have the option to send or not send their children to these experimental, teacher-run schools, thus "empower[ing] both teachers and parents."<sup>56</sup> As in Friedman's proposal for a voucher system, the goal was to foster innovation by reducing government oversight. Shanker also supported giving parents the ability to "shop around" amongst public schools.<sup>57</sup>

The first state charter-school law was passed in Minnesota in 1991, and the first charter school opened there in the 1992 to 1993 school year.<sup>58</sup> Charter-school laws were quickly passed in other states, including California, New York, Colorado, and Michigan.<sup>59</sup> Conceptually, charter schools were viewed as healthy competition to local schools, enrolling students from

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53. *Brown*, 296 F. Supp. at 202–03. Later, some school boards also attempted to use choice as the primary means of desegregating their schools, a mechanism that proved ineffective at best and disingenuous at worst. Minow, *supra* note 16, at 824–29. The Supreme Court noted that a Virginia "freedom of choice" plan, which a defendant school board claimed was an effort to desegregate rather than maintain segregation, had not been shown to be effective and held that "if there are reasonably available other ways, such . . . as zoning, . . . 'freedom of choice' must be held unacceptable." *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 439–42 (1968). The federal courts later also rejected magnet programs as a tool of integration. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70 (1995) (reversing a district court decision ordering a comprehensive magnet program to address segregation between city and suburban schools in the Kansas City metropolitan area).

54. A few states tried to use vouchers and magnet schools to desegregate their schools, but federal courts largely deemed those steps inadequate after an attempt to use a voucher program to meet desegregation requirements was struck down by the Supreme Court in *Green*. *See supra* note 53; *see also* Minow, *supra* note 16, at 824–29 (describing court actions).

55. SCHNEIDER, *supra* note 14, at 46–52.

56. *Id.* at 52, 60.

57. William K. Stevens, *Shanker Proposes Parents Be Allowed to Pick Child's School*, N.Y. TIMES (Feb. 7, 1971), [http://www.nytimes.com/1971/02/07/archives/shanker-proposes-parents-be-allowed-to-pick-childs-school.html?\\_r=0](http://www.nytimes.com/1971/02/07/archives/shanker-proposes-parents-be-allowed-to-pick-childs-school.html?_r=0).

58. EILEEN M. AHEARN ET AL., SPECIAL EDUCATION AS REQUIREMENTS IN CHARTER SCHOOLS: FINAL REPORT OF A RESEARCH STUDY 4 (2001), <http://www.nasdse.org/Portals/0/Documents/ProjectSearch.pdf>.

59. SCHNEIDER, *supra* note 14, at 59–63.

across public school districts.<sup>60</sup> Indeed, “[m]ost state charter-authorizing statutes specifically identify expanding choice options as a reason for creating charter schools.”<sup>61</sup>

Despite the initial conception of the charter school as a sort of laboratory of innovative education, in practice, this has not been their most significant role. Charter schools are often used to replace public schools in reorganizations of struggling urban school districts.<sup>62</sup> After Hurricane Katrina, New Orleans replaced its entire school district with a choice-based district, the “Recovery School District” (“RSD”).<sup>63</sup> As will be discussed below, this kind of broad use of school choice is especially constraining for parents seeking integrated schools that will meet their children’s educational needs. Even in cities that are not replacing large numbers of public schools with charter schools, large organizations, like the Knowledge is Power Program (“KIPP”) and the for-profit Edison Project, have dominated charter-school development,<sup>64</sup> not local teachers.

Vouchers and tuition tax credits have been used in recent decades to facilitate government funding of private schools.<sup>65</sup> Tax credits allow parents to deduct tuition paid to private schools when they file their income taxes.<sup>66</sup> These tax credits benefit primarily upper-income families who pay significant amounts of income tax and can afford to pay for private schools in the first place.<sup>67</sup> Vouchers provide direct public funding to private schools by giving parents the option of directing a certain amount of public money for their child to go to a school of their choosing. Objections to such funding

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60. Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 667 (2012).

61. *Id.* (citing state statutes such as 105 ILL. COMP. STAT. ANN. 5/27A-2(b)(6), IND. CODE ANN. § 20-24-2-1(2), and N.Y. EDUC. LAW § 2850(2)(e) (McKinney 2009)).

62. Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans’ Charter Schools*, 40 CONN. L. REV. 125, 142–47, 155–57 (2007); *see also* ABRAMS, *supra* note 17, at 55–95 (describing the ultimately unsuccessful takeover of four Baltimore schools by a for-profit charter school enterprise, the Edison Project).

63. Alice Huff, *Re-forming the Post-Political City?*, in ONLY IN NEW ORLEANS 87–102 (Luis Mirón et al. eds., 2015); *see also* OSBORNE, *supra* note 12, at 27–33 (describing the financial and physical destruction of the New Orleans public schools, which were already struggling financially and academically, in the wake of Hurricane Katrina and the subsequent process of turning the school district into the Recovery School District).

64. *See, e.g.*, ABRAMS, *supra* note 17, at 55–95. KIPP’s students are almost entirely low-income students of color in urban areas. ROOKS, *supra* note 17, at 44.

65. Matt Barnum, *The Rise of Tax Credits: How Arizona Created an Alternative to School Vouchers—and Why They’re Spreading*, CHALKBEAT (Sept. 18, 2017), <https://www.chalkbeat.org/posts/us/2017/09/18/the-rise-of-tax-credits-how-arizona-created-an-alternative-to-school-vouchers-and-why-theyre-spreading/>.

66. Isabel Chou, Comment, “Opportunity” for All?: *How Tax Credit Scholarships will Fare in New Jersey*, 64 RUTGERS L. REV. 295, 305 (2011).

67. Mei-lan E. Wong, Note, *The Implications of School Choice for Children with Disabilities*, 103 YALE L.J. 827, 833–34 (1993).

have not succeeded in the courts so long as the funding has been guided by parents' individual choice rather than decided by the state. In 2002, the Supreme Court opened the door to public funding for parochial schools, finding that voucher programs do not violate the Establishment Clause of the First Amendment to the Constitution as long as parents themselves select the schools to receive funding on their behalf, not the state.<sup>68</sup>

Since 2002, voucher programs have grown in the United States with overwhelming legislative support.<sup>69</sup> As of 2014, fourteen states and the District of Columbia have legislation authorizing voucher programs.<sup>70</sup> That legislation was overwhelmingly passed after 2002. Charter schools have been growing alongside voucher programs. Between 2000 and 2016, the number of charter schools nationwide increased from four percent to seven percent of all public schools.<sup>71</sup> As the number of charter schools grew, so did their student bodies, as evidenced by increases in the number of charter schools with large numbers of students.<sup>72</sup>

In sum, school choice has a lengthy history as a tool through which interest groups with many different goals seek to shape public education. School boards unsuccessfully attempted to use school choice to avoid court-ordered desegregation. Parents have sought the right to educate their children religiously, at first simply as a right to opt out of public education and more recently as a right to use public funds for parochial schools. Charter schools have been used to restructure large swaths of public-school districts. All of these uses of school choice intersect with and impact the application of laws designed to protect students with disabilities, which will be discussed below.<sup>73</sup>

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68. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649–52 (2002) (“[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.” (first citing *Mueller v. Allen*, 463 U.S. 388 (1983); then citing *Witters v. Wash. Dep’t of Servs. for Blind*, 474 U.S. 481 (1986); and then citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)).

69. NAT’L CONFERENCE OF STATE LEGISLATURES, *SCHOOL VOUCHER LAWS: STATE-BY-STATE COMPARISON* (2014), <http://www.ncsl.org/documents/educ/StateByStateVoucherComparison.pdf>. Two states, Maine and Vermont, have long-standing voucher programs that provide vouchers only to students who live in a town without a public school. *Id.*

70. *Id.*

71. *Fast Facts*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=30> (last visited Feb. 23, 2018).

72. *Id.*

73. *See supra* Part III.

## II. IDEA HISTORY AND GOALS

### A. *History and Public Policy Rationale for the Principle of “Least Restrictive Environment” in Special Education Law*

As public schools became common in the nineteenth century, students with special needs, including cognitive disabilities, vision impairments and severe health problems, were educated in separate settings from their general-education peers.<sup>74</sup> Many children with disabilities were entirely excluded from public schools.<sup>75</sup> Those who did attend public schools often did not receive adequate instruction, as many public schools lacked sufficient resources.<sup>76</sup> In the first half of the twentieth century, most educators espoused segregated education for students with special needs.<sup>77</sup> It wasn't until the 1940s that educators began to recognize the merits of integrating students with disabilities with mainstream students.<sup>78</sup> Nevertheless, the education of students with disabilities remained primarily institution based through the 1950s and into the 1960s.<sup>79</sup> During this time, national organizations, such as the National Association of the Deaf, the National Association for Retarded Children and the Council for Exceptional Children, pushed to change both laws and public perception of people with disabilities.<sup>80</sup>

*Brown v. Board of Education*, which ordered racial integration of public schools, also prompted significant movement in federal law regarding the education of children with disabilities on the principle of equal protection under the Fourteenth Amendment to the Constitution.<sup>81</sup> Following the Supreme Court decision in *Brown*, federal courts articulated constitutional requirements for equal protection under the law for children with disabilities. In 1972, the United States District Court for the District of Columbia ordered that children with special needs had to be “provided with a publicly-supported education[.]” and that state boards of education had a “clear duty to include and retain these children in the public school system.”<sup>82</sup> Also in 1972, the United States District Court for the Eastern District of Pennsylvania enforced a consent agreement that required that children with disabilities have access to the same free, public education as provided to other children.<sup>83</sup>

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74. ROBERT L. OSGOOD, *THE HISTORY OF INCLUSION IN THE UNITED STATES* 22–33 (2005).

75. *See, e.g.*, DEBORAH N. ARCHER & RICHARD D. MARSICO, *SPECIAL EDUCATION LAW AND PRACTICE* 3 (2017).

76. 20 U.S.C. § 1400(c) (2012).

77. OSGOOD, *supra* note 74, at 25–31, 43.

78. *Id.* at 43–54.

79. *Id.* at 54–57.

80. *Id.* at 56–72.

81. Ashbaker, *supra* note 30, at 21–45; Nelson, *supra* note 30, at 460–61.

82. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876, 880 (D.D.C. 1972).

83. *Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972).

Shortly after these decisions, Congress enacted the Rehabilitation Act of 1973,<sup>84</sup> of which Section 504 bans discrimination on the basis of disability by recipients of federal funding, including schools.<sup>85</sup> This was quickly followed by the passage of the Education for All Handicapped Children Act (“EAHCA”)<sup>86</sup> in 1975, which emphasized a congressional preference for teaching students with disabilities in a mainstream classroom.<sup>87</sup> These laws were enacted before any decision was made by the Supreme Court on the requirements of the Equal Protection Clause of the Fourteenth Amendment as pertaining to students with disabilities.

The clearly articulated federal preference for “mainstreaming”<sup>88</sup> continues today.<sup>89</sup> The IDEA, the successor of the EAHCA, states: “Almost [thirty] years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible.”<sup>90</sup>

The preference for mainstreaming students with disabilities is also recognized internationally. In 1994, representatives of ninety-two countries met under the auspices of the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) and created the Salamanca Statement, saying, among other things,

[T]hose with special educational needs must have access to regular schools which should accommodate them within a childcentered pedagogy capable of meeting these needs, [and] regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all; more-

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84. Pub. L. No. 101-476, 104 Stat. 1142 (codified as amended in scattered sections of 29 U.S.C.).

85. 29 U.S.C. § 794 (2012); Wong, *supra* note 67, at 838.

86. Pub. L. No. 94-142, 89 Stat. 773 (1975) (amended 1990).

87. See Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 425 (2001) (“[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” (alteration in original) (quoting 20 U.S.C. § 1412(a)(5)(A) (1994))).

88. “Mainstreaming” is a term for integrating special education students into general education classrooms and providing educational support in that environment as much as possible. *What Does Mainstreaming Mean?*, MASTERS IN SPECIAL EDUC., <https://www.masters-in-special-education.com/faq/what-does-mainstreaming-mean/> (last visited Feb. 18, 2019).

89. Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1239–41 (1995); Losen & Welner, *supra* note 87, at 425.

90. 20 U.S.C. § 1400(c)(5) (2012).

over, they provide an effective education to the majority of children and improve the efficiency and ultimately the cost-effectiveness of the entire education system.<sup>91</sup>

Countries worldwide are increasingly moving towards these ideals in practice.<sup>92</sup>

### *B. Current Law*

Federal law, primarily the IDEA, governs special education.<sup>93</sup> All states have enacted statutes that conform with the IDEA.<sup>94</sup> The Americans with Disabilities Act (“ADA”)<sup>95</sup> and Section 504 of the Rehabilitation Act<sup>96</sup> also provide protections for students with disabilities. Unlike the IDEA, which applies only to public schools, Section 504 applies to all schools that receive federal funds.<sup>97</sup> Similarly, the ADA applies to all places of education that affect commerce,<sup>98</sup> though “religious organizations or entities controlled by religious organizations” are exempted.<sup>99</sup>

The IDEA, however, provides far more protections for students with disabilities than the ADA or Section 504.<sup>100</sup> The core requirement of the IDEA is that states must provide all students with disabilities a free, appropriate public education (“FAPE”).<sup>101</sup> To provide a FAPE, a public school must create and implement educational programs designed for a student to

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91. World Conference on Special Needs Education: Access and Quality, *The Salamanca Statement and Framework for Action on Special Needs Education*, viii–ix, U.N. Doc. ED-94/WS/18 (June 7–10, 1994).

92. Nienke M. Ruijs & Thea T.D. Peetsma, *Effects of Inclusion on Students with and Without Special Educational Needs Reviewed*, 4 EDUC. RES. REV. 67, 67–68 (2009).

93. 20 U.S.C. §§ 1400–1482.

94. Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1091–92 (2010). The IDEA is rooted in federal constitutional requirements for equal protection and due process. *Id.* at 1092; *see also* 20 U.S.C. § 1400(c)(6) (“While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.”).

95. Equal Opportunity for Individuals with Disabilities (Americans with Disabilities Act of 1990), 42 U.S.C. §§ 12101–12213 (2012).

96. 29 U.S.C. §§ 701, 794 (2012).

97. *Id.* § 794.

98. 42 U.S.C. § 12181(7) (2012).

99. *Id.* § 12187.

100. The ADA and Section 504 are primarily anti-discrimination laws, while the IDEA provides affirmative and funded mandates to provide appropriate education to special education students. 20 U.S.C. § 1412 (2012).

101. *Id.* § 1412(a)(1).

make appropriate progress that is “merely more than *de minimis*.”<sup>102</sup> One of the central features of the IDEA is the requirement that students with disabilities be educated in their LRE. This means that they should be educated with general education peers as much as possible, only being removed when absolutely necessary for the students to make progress.<sup>103</sup>

Inclusive special education is far from perfect in the United States. Stigma attached to students identified as having disabilities results in lowered teacher expectations and can possibly account for lower academic performance.<sup>104</sup> Parents, who are generally more concerned about stigmatization and segregation of their children than are educators, often resist defining their children through the label of disability.<sup>105</sup> Educators, on the other hand, tend to see disability labels as useful tools for identifying educational needs.<sup>106</sup> This can slip into a preference for removing students with disabilities from the general education classroom. As a 2015 study of implementation of the LRE mandate noted in the discussion:

Teachers should . . . be aware of the over-reliance on the use of separate environments for students as a mechanism to relieve their perceived student frustration. . . . When special educators retreat into their separate habitats, they leave general education teachers without the resources and supports necessary to make their academic and social environments healthy for all students.<sup>107</sup>

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102. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 1000–01 (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203–04 (1982).

103. 20 U.S.C. § 1412(a)(5)(A) (“To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”).

104. *See, e.g.*, Dara Shifrer, *Stigma of a Label: Educational Expectations for High School Students Labeled with Learning Disabilities*, 54 J. HEALTH & SOC. BEHAV. 462 (2013) (describing lowered expectations for students carrying learning disability label). Stigma and segregation also limit students’ social opportunities. *See, e.g.*, Priya Lalvani, *Disability, Stigma and Otherness: Perspectives of Parents and Teachers*, 62 INT’L J. DISABILITY, DEV. & EDUC. 379, 384–86 (2015).

105. Lalvani, *supra* note 104, at 382–85 (discussing how parents of children with disabilities tend to position their children in terms of their similarities with other children).

106. *Id.* Educators often attribute parents’ insistence on maximizing their children’s opportunities as “denial” about their children’s disabilities. *Id.* at 388–89; *see also* James M. Kauffman & Jeanmarie Badar, *How We Might Make Special Education for Students with Emotional or Behavioral Disorders Less Stigmatizing*, 39 BEHAV. DISORDERS 16, 16, 18–22 (2013) (recommending using plain language to talk about differences, “accepting the reality” and recognizing value of special educators’ skills to reduce “stigma”).

107. Laura C. O’Laughlin, *The Least Restrictive Environment Clause of the Individuals with Disabilities Education Act and Institutional Ableism* 126 (May 2013) (unpublished Ph.D. dissertation, Clemson University), [https://tigerprints.clemson.edu/all\\_dissertations/1114/?utm\\_source=tigerprints.clemson.edu%2Fall\\_dissertations%2F1114&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://tigerprints.clemson.edu/all_dissertations/1114/?utm_source=tigerprints.clemson.edu%2Fall_dissertations%2F1114&utm_medium=PDF&utm_campaign=PDFCoverPages).

Parents whose children do not receive an appropriate special education in their LRE can bring a complaint through an administrative process.<sup>108</sup> Parents can ask an administrative hearing officer to order either a change in their child's IEP,<sup>109</sup> compensatory services (like tutoring to help a child catch up on what they theoretically would have learned had an appropriate education been provided), or tuition for a private school that meets the student's needs.<sup>110</sup> In order to obtain tuition to a private school, parents have to show that the private school is appropriate, although private schools are not subject to the same requirements as public schools and do not have to educate students in their LRE.<sup>111</sup>

*C. Explanation of Local Education Agencies and their Basic Obligations to Students with Special Needs*

Local Education Agencies ("LEAs") are administrative agencies or other units that administer groups of public schools.<sup>112</sup> LEAs are responsible for implementing federal special education requirements—for providing students with disabilities with a FAPE—and are the units to which funding is distributed (through states) for such purposes.<sup>113</sup> The most common LEAs are school districts. When passing the EAHCA, the predecessor to the IDEA, in 1975, Congress recognized the importance of economies of scale.<sup>114</sup> It required small school districts to form consolidated programs to comply with

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108. 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507(a) (2018); *see also* Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act*, 58 ADMIN. L. REV. 401, 402–03 (2006) ("The cornerstone for resolving disputes between parents and districts as to eligibility, FAPE, and other issues under the IDEA, is an impartial administrative adjudication conducted by a hearing/review officer (H/RO). The IDEA gives states the choice of having a one-tiered system, consisting solely of an impartial due process hearing, or a two-tiered system, which includes an additional officer level review. Subsequent to exhausting this administrative adjudication, the aggrieved party has the right to judicial review in state or federal court." (footnotes omitted)).

109. An IEP is a plan that lays out, among other things, a student's educational setting, services, and goals. Under federal law, each IEP must be reconsidered and written anew annually by a team that includes the child's parent and teacher. 20 U.S.C. § 1414(a)(2)(B).

110. Zirkel, *supra* note 108, at 408–16 (describing the authority of the hearing officer to order various types of injunctive relief).

111. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Florence Cty. Sch. Dist. v. Carter*, 510 U.S. 7, 15 (1993).

112. 20 U.S.C. § 7801(26)(A) (defining LEAs as "public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools").

113. 20 U.S.C. § 1413.

114. Garda, *supra* note 60, at 671.

the EAHCA's mandates.<sup>115</sup> Larger LEAs are able to pool resources, for example, by grouping students with particular needs together in a school with specialized teachers and services providers,<sup>116</sup> which helps them allocate these resources to students more efficiently.

These efficiencies all but disappear in the charter school realm. Charter schools are established by state law. They are fairly new to the U.S. education system, having first been established in the 1990s.<sup>117</sup> While federal laws regarding students with disabilities apply to charter schools,<sup>118</sup> they are not necessarily designed to be compatible with these federal laws, leading one scholar to call charter schools the “square peg” in the “round hole” of special education.<sup>119</sup> States handle the question of charter schools' LEA status differently. Some states require charter schools to be part of a larger LEA, while others establish charter schools as their own LEA.<sup>120</sup> Still others allow charter schools to choose between being part of a larger LEA or being their own LEA.<sup>121</sup> When a charter school is its own LEA, the charter school must provide services to students with disabilities itself.<sup>122</sup> When part of a larger LEA, the LEA retains the responsibility of providing appropriate services to students with disabilities.<sup>123</sup> While the IDEA encourages states to require small LEAs that are not “of sufficient size and scope to effectively meet the needs of children with disabilities” to combine with other LEAs to provide adequate special education services to students, as of 1997, the IDEA excludes charter schools from this provision, saying that state educational agencies cannot require charter schools to combine with other LEAs unless “explicitly permitted to do so under the State's charter school law.”<sup>124</sup>

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115. *Id.*

116. *See, e.g., id.* at 703.

117. AHEARN ET AL., *supra* note 58, at 4.

118. 34 C.F.R. § 300.209 (2018); U.S. DEP'T OF EDUC., FREQUENTLY ASKED QUESTIONS ABOUT THE RIGHTS OF STUDENTS WITH DISABILITIES IN PUBLIC CHARTER SCHOOLS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2016), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/faq-idea-charter-school.pdf> (providing guidance regarding 20 U.S.C. §§ 1400 et. seq. and 34 C.F.R. Part 300).

119. Garda, *supra* note 60, at 655–67.

120. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-543, CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 3–4 (2012).

121. *Id.* In this report, the Government Accountability Office, in consultation with the Department of Education, evaluated the under representation of students with disabilities in charter schools and concluded that action should be taken to encourage charter schools to better serve students with disabilities. *Id.* at 21–22.

122. *Id.* at 3–4.

123. *Id.* at 4.

124. 20 U.S.C. § 1413(e)(1) (2012). The IDEA states:

A State educational agency may require a local educational agency to establish its eligibility jointly with another local educational agency if the State educational agency determines that the local educational agency will be ineligible under this section because

Unlike charter schools, private and parochial schools are not themselves regulated under the IDEA and are under no obligation to provide students with disabilities with a FAPE or any other standard of education.<sup>125</sup> On the other hand, LEAs are required to provide services to students with disabilities in private schools to some extent. LEAs are responsible for finding, evaluating, and offering services to all children with disabilities in their enrollment district<sup>126</sup> and for providing services to children with special needs who are enrolled in private schools, provided that the expenditure not benefit the school as a whole or the general education population of the private school.<sup>127</sup>

### III. INTERACTION OF THE IDEA WITH SCHOOL CHOICE

In any system dominated by private and charter-school options, students with disabilities, particularly disabilities that require more intensive school resources such as autism and intellectual disabilities, will have inadequate opportunities to be educated in their LRE. Both charter schools and private schools accept a lower share of students with special needs than are served in public schools.<sup>128</sup> Skimming—which we see happening in charter schools despite current federal mandates and which is entirely legal in private schools—is already restricting the choices of students with disabilities, denying them equal opportunities.<sup>129</sup> Current remedies are inadequate to confront the problem. The only way to address a failure to place a student in their LRE is to order a school district to place a student appropriately in a more mainstreamed environment—something that can only happen if there is appropriate placement available. As it stands, too few choice schools offer students with disabilities appropriate placements.

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the local educational agency will not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities.

*Id.* § 1413(e)(1)(A). The charter school exception states: “A State educational agency may not require a charter school that is a local educational agency to jointly establish its eligibility under subparagraph (A) unless the charter school is explicitly permitted to do so under the State’s charter school law.” *Id.* § 1413(e)(1)(B); *see also* Garda, *supra* note 60, at 671–72 (citing Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 613(e)(2), 111 Stat. 37, 76 (codified as amended at 20 U.S.C. § 1413(e)(1)(B) (2006))).

125. *E.g.*, *Special Sch. Dist. No. 1 v. R.M.M.*, 861 F.3d 769, 772 (8th Cir. 2017).

126. 34 C.F.R. § 300.131 (2018). *See generally* U.S. DEP’T OF EDUC., THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: PROVISIONS RELATED TO CHILDREN WITH DISABILITIES ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS (2011), <https://www2.ed.gov/admins/lead/spced/privateschools/idea.pdf>.

127. 34 C.F.R. § 300.141.

128. *See infra* notes 129–133 and accompanying text.

129. *See supra* note 28 and accompanying text.

A. *Charter Schools' Limitations for Students with Disabilities*

Enrollment statistics indicate that charter schools underserve the population of students with special needs.<sup>130</sup> As a whole, students with disabilities make up a smaller percentage of total students in charter schools than they do in public schools.<sup>131</sup> A study, commissioned by a charter-school network, found that in New York “[t]he average rate of enrollment of students with disabilities in charter schools (14.3[%]) falls below the average enrollment rate in the district-run schools (18.2[%]).”<sup>132</sup> Similar discrepancies have been found in other localities.<sup>133</sup> Moreover, a disproportionate number of students with disabilities who attend charter schools enroll in specialty charter schools with high numbers of students with special needs.<sup>134</sup> This likely indicates that the charter school population is even more segregated with regards to students with disabilities than the overall enrollment numbers indicate because overall enrollment averages do not account for segregation of students with disabilities into specialty charter schools.

Charter schools face practical barriers to fully serving students with disabilities, especially students whose disabilities require costly support. As Professor Robert Garda, Jr. notes, “[The IDEA] presumed the existence of a district with a bureaucracy of sufficient size to handle burdensome procedural requirements and to capitalize on economies of scale for service provision to

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130. AHEARN ET AL., *supra* note 58, at 4–5; *see also* Garda, *supra* note 60, at 681–83 (citing private and government findings showing that charter schools serve lower proportions of students with special needs than public schools at both the national and state levels).

131. The United States Government Accountability Office examined enrollment of students with special needs in all U.S. charter schools in the 2009 to 2010 school year. It found that 8.2% of students in charter schools identified special needs, while 11.3% of the total public-school population identified special needs. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 120, at 6–7. Of the entire school-age population, 11.2% identified special needs. *Id.*

132. LAKE ET AL., *supra* note 8, at 4.

133. *See, e.g.*, Black, *supra* note 16, at 1385; Robert Garda, *Searching for Equity amid a System of Schools: The View from New Orleans*, 42 *FORDHAM URB. L.J.* 613, 647 (2015) (“In 2010, charter schools educated sixty percent of the public school students in New Orleans, but enrolled only thirty-eight percent of the students with autism, thirty-seven percent of the students with severe emotional disturbances, and twenty-three percent of the students with multiple disabilities.”).

134. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 120, at 8–9 (“We also found that, relative to traditional public schools, the proportion of charter schools that enrolled high percentages of students with disabilities was lower overall and generally tapered off the greater the enrollment of students with disabilities. Specifically, the enrollment of students with disabilities was [eight] to [twelve] percent at [twenty-three] percent of charter schools and [thirty-four] percent of traditional public schools. Further, when the enrollment of students with disabilities reached [twelve] to [sixteen] percent, about [thirteen] percent of charter schools compared to [twenty-five] percent of traditional public schools had these enrollment levels. However, when compared to traditional public schools, a higher percentage of charter schools enrolled more than [twenty] percent of students with disabilities. During an interview with Education, an official noted that there has been an increase in charter schools for students with disabilities, such as schools for students with autism, for example, which may help explain this difference.”).

disabled students.”<sup>135</sup> Public school districts are able to pool and disburse resources, while “the limited resources and lack of economies of scale are particularly problematic for public charter schools.”<sup>136</sup> The Government Accountability Office concurs: “Anecdotal accounts . . . suggest that some charter schools may be discouraging students with disabilities from enrolling and denying admission to students with more severe disabilities because services are too costly.”<sup>137</sup>

Charter and other choice schools are also discouraged from enrolling students with disabilities because the primary mechanism by which schools are evaluated is through standardized test scores, and test scores for students with disabilities tend to be lower than those of general education students.<sup>138</sup> Test scores vary between students, and the average test scores for students diagnosed with some disabilities, like speech and language disorders, are higher than those of students diagnosed with other disabilities, like intellectual disabilities, giving charter and other choice schools further incentive to educate only students who present as having disabilities that require fewer resources than other students.<sup>139</sup>

Given these realities, it is perhaps not surprising that charter schools underserve students with disabilities. They reduce their special education populations in several ways. For example, it is not uncommon for charter schools to “counsel out” students with disabilities, particularly disabilities requiring more intensive services, by advising them that their needs would

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135. Garda, *supra* note 60, at 670.

136. PAUL T. O’NEILL & LAUREN MORANDO RHIM, EQUITY AT SCALE: HOW PUBLIC CHARTER SCHOOL NETWORKS CAN INNOVATE AND IMPROVE SERVICES FOR STUDENTS WITH DISABILITIES 4–5 (2015), [https://static1.squarespace.com/static/52feb326e4b069fc72abb0c8/t/54d4f576e4b0fafca6766ce8/1423242614524/equity\\_at\\_scale\\_011215.pdf](https://static1.squarespace.com/static/52feb326e4b069fc72abb0c8/t/54d4f576e4b0fafca6766ce8/1423242614524/equity_at_scale_011215.pdf) (“Whereas a district may employ a variety of special-ists and instructional and support staff at the school and district levels, an independent public charter school is likely to have to make do with a single special education coordinator and a handful of special education teachers.”).

137. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 120, at 12.

138. *See, e.g.*, Garda, *supra* note 133, at 647 (“Accountability requirements create strong incentives to deny admission to . . . lower performing students.”). Being a teacher and administrator at a private school serving low-income students made clear to me the importance of test scores even for independently funded schools. Foundations and donors look to test scores, as do parents, to formally and informally evaluate schools.

139. *See* Ellen L. Trexler, *Categorical Differences in Statewide Standardized Testing Scores of Students with Disabilities 67–69* (2013) (unpublished Ph.D. dissertation, Keiser University) (demonstrating differences in average standardized test scores across disability categories); Christian P. Wilkens, *Students with Disabilities in Urban Massachusetts Charter Schools: Access, Inclusion, and Policy 12–15* (2009) (unpublished Ed.D. thesis, Harvard University) (noting significant differences in enrollment in charter schools across disability categories).

be better met elsewhere.<sup>140</sup> Charter schools can also actively shape their applicant pools through their marketing, their curricular focus, and their capacity to meet the needs of students with special needs.<sup>141</sup> If the school does not offer classes and resources that students need, parents are less likely to enroll their children in the school in the first place. Charter, magnet, and other schools in choice systems also sometimes prefer students who paid tuition in previous years, children who live in specific neighborhoods, and children who qualify through test scores or other selective processes, among other preferences.<sup>142</sup>

Being underserved has concrete consequences for students with disabilities. The Southern Poverty Law Center conducted an analysis of the New Orleans RSD, a fully choice school district, and found:

- Only 6.8% of RSD students with disabilities exit with a high school diploma, while across the state, the average is 19.4%.
- In the 2008–09 school year, RSD schools suspended nearly 30% of all students with disabilities—a rate that is 63% higher than the state average. . . .
- On average, school districts throughout Louisiana have identified 12.2% of their students as eligible for special education services. New Orleans Public Schools have identified only 8% of their students as eligible for special education services. Comparable school districts throughout the country identify almost twice as many students with disabilities.<sup>143</sup>

One woman in Louisiana described trying to obtain an appropriate education for her son in the New Orleans RSD:

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140. See, e.g., Garda, *supra* note 60, at 686–87 (citing reports and lawsuits across numerous states); Garda, *supra* note 133, at 639–43 (describing the impact of retention policies on students in New Orleans).

141. Black, *supra* note 16, at 1383–84.

142. See, e.g., Garda, *supra* note 133, at 634–37 (describing selective admission processes that continue to exist in New Orleans even after the process was simplified); W. David Stevens et al., *Barriers to Access: High School Choice Process and Outcomes in Chicago*, in *SCHOOL CHOICE AND SCHOOL IMPROVEMENT* 125, 125–33 (Mark Berends et al. eds., 2011) (discussing ways that parents' choices for schooling were limited in Chicago).

143. SHAKTI BELWAY, S. POVERTY LAW CTR., *ACCESS DENIED: NEW ORLEANS STUDENTS AND PARENTS IDENTIFY BARRIERS TO PUBLIC EDUCATION* 10 (2010), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/SPLC\\_report\\_Access\\_Denied.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC_report_Access_Denied.pdf) (footnotes omitted); see also Garda, *supra* note 133, at 646 (“[Charter schools] have long been blamed for denying admission to students with disabilities, ‘cherry-picking’ students with mild disabilities, providing a one-size-fits-all program instead of a full continuum of placements, failing to follow proper disciplinary procedures, and failing to identify students as disabled. These accusations are particularly strong in New Orleans.” (footnotes omitted)).

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The [RSD] told us about specific schools that would be appropriate for our son but when we tried to enroll him, they were already full.

....

I've gone to eight different charter schools. Of those schools, five said they would take my application but could not accommodate my son with disabilities. Another said they would work with him but were stretched pretty thin.

Most charters said they don't have the staffing, training or materials. One woman literally said, "I don't think we're hurting kids with special needs but I know we're not helping them. You don't want your son to go here."<sup>144</sup>

Other parents, whose seventeen-year-old son had an IEP for autism, described their son's experience in a charter school:

One of the things the school principal made known to us was they were going to treat him just like a regular kid. They were not going to treat him like a special education student. They said they would call the police on our son for anything he does wrong. And they actually did call. And, it just went downhill after that.

....

After all of this has gone on, we're very reluctant to let him stay in school. He's gotten to the point where he doesn't want to stay and we don't want him to be there, so we'll just let him transition out and get him into something else, into a vocation.<sup>145</sup>

State funding mechanisms tend to assume that the distribution of special-education students in charter schools and in district schools is equivalent, resulting in over funding of charter schools.<sup>146</sup> Some states, like Massachusetts, distribute funds to charter schools based on the average cost of educating all students in a district.<sup>147</sup> This results in charter schools receiving equal funds to educate relatively fewer students with high-cost educational needs. Other states, like Pennsylvania, provide additional funds for students who have IEPs, but those additional funds are also based on averages—the average cost to the sending school district for educating a child with disabilities.<sup>148</sup> The cost of special education varies widely across disabilities and between individual students. Reimbursement for special-education students

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144. BELWAY, *supra* note 143, at 12.

145. *Id.* at 13.

146. *See, e.g.,* Wilkens, *supra* note 139, at 18–19.

147. MASS. GEN. LAWS ANN. ch. 71, § 89(ff) (West 2018); Wilkens, *supra* note 139, at 20.

148. 24 PA. STAT. AND CONS. STAT. ANN. § 17-1725-A (West 2016).

can be several times that of reimbursement for general-education students.<sup>149</sup> On the other hand, some students with disabilities require relatively low-cost services, while others require very-high cost services, including dedicated paraprofessionals.<sup>150</sup> Some charter-school funding, like Massachusetts's and Pennsylvania's, is based on averages without concurrent requirements for provision of services proportional to those provided by traditional public schools.<sup>151</sup> As a result, charter schools are financially incentivized to enroll students who have IEPs but whose needs can be met at relatively low-cost, and disincentivized to serve students with higher-cost disabilities.<sup>152</sup>

### B. Private Schools

Private and parochial schools occupy a curious intersection with the IDEA. In all but one scenario, private and parochial schools are not accountable for implementing any provisions of the IDEA.<sup>153</sup> Nonetheless, private and parochial schools may provide, and be reimbursed by the state for, services for students with disabilities.<sup>154</sup>

There are several routes by which students with disabilities may attend private or parochial schools with some or all of their educational costs paid for by the state. One option is for parents to place their children in a private or parochial school at their own expense. In that situation, the LEA in which a private school is located is responsible for identifying, evaluating, and, to some extent, funding appropriate services to students with disabilities.<sup>155</sup> The LEA may not pay for any instruction above and beyond the direct needs of the student, however, and the funding may not go towards any administrative costs or the instruction of general education students in the private or parochial school.<sup>156</sup> Another route by which students may attend private school with funding from the state is for a parent to show, through an administrative process, that the LEA responsible for their child has not provided a FAPE. In that case, the LEA can agree or be ordered to pay tuition to an appropriate private school for the school year during which the LEA did not provide the

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149. Black, *supra* note 16, at 1371–72 (“Consider Morrisville Borough, for instance, where the reimbursement for regular education students was \$11,000 per pupil and \$42,642 for special education students.” (citing *Charter School Funding: 2016–2017 Tuition Rates*, PENN. DEP’T OF EDUC., <http://www.education.pa.gov/K-12/Charter%20Schools/Pages/Charter-School-Funding.aspx#tab-1> (last visited Oct. 18, 2017))).

150. *Id.*

151. *See id.*; *supra* notes 146–147 and accompanying text.

152. Black, *supra* note 16, at 1370–72.

153. *See* 20 U.S.C. § 1412(a)(10)(B) (2012).

154. 34 C.F.R. §§ 300.130–300.148 (2018).

155. *Id.* § 300.131.

156. *Id.* § 300.141.

FAPE to which the child was entitled.<sup>157</sup> To obtain funding, a parent must show that the private school can provide an appropriate education, but it need not be in the child's LRE.<sup>158</sup> Finally, in some states, parents can place their children in private or parochial schools using vouchers or state-sponsored scholarships, such as Florida's McKay Scholarship. Parents who enroll their children in private or parochial schools in this way lose the rights they would otherwise have under the IDEA, just as they would if they were paying the full tuition themselves.<sup>159</sup> In only one situation do parents retain the full substantive and procedural rights provided by the IDEA: when LEAs, in agreement with the child's parent, directly place students in private school pursuant to the child's IEP. In that case, and in that case only, the private school, in connection with the LEA, has an obligation to comply with the IDEA.<sup>160</sup>

Private schools are not required to accept all students.<sup>161</sup> Though they must abide by the requirements of the ADA and Section 504 of the Rehabilitation Act, they are responsible only for providing accommodations that would not be an "undue burden" on the school and that would not "fundamentally alter" the nature of its services.<sup>162</sup> Private schools are free to establish their own admission criteria absent discrimination on the basis of race,

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157. 20 U.S.C. § 1412; 34 C.F.R. § 300.148; *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

158. 34 C.F.R. § 300.148; *Florence*, 510 U.S. at 13–15.

159. See *McKay Scholarship Program FAQs*, FLA. DEP'T OF EDUC., <http://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/mckay/mckay-faqs.stml> (last visited Feb. 19, 2018) ("A public school district's obligations to a student with disabilities placed in a private school by his or her parents are different from its responsibilities to a student enrolled in public school. When a student with a disability withdraws from public school, the district is no longer obligated to provide all of the services contained in the student's IEP. Districts are required to spend a proportionate amount of IDEA federal funds to provide equitable services to private school students; however, the amount and type of services may differ from the services the student would receive if placed in a public school by the parents. The procedural safeguards for parents of public-school students under IDEA are not in effect for parents of students in private schools (with the exception of child find), including those private schools participating in state scholarship programs. Parents of scholarship students are encouraged to take care to choose a private school that provides the curriculum, services, and educational approach that will meet the needs of their students."); see also IND. CODE § 20-51-4-4.5 (2016) (authorizing the transfer of special education funds to private schools for choice scholarship recipients eligible for special education); 511 IND. ADMIN. CODE ANN. 7-34-6 (LexisNexis 2014) (stating that due process procedures are not available for disputes regarding FAPE when parents place their children in private schools).

160. 20 U.S.C. § 1412(a)(10)(B); see also *A.C. v. Scranton Sch. Dist.*, 191 F. Supp. 3d 375, 390 (M.D. Pa. 2016) ("Thus, since [Scranton School District ("SSD")] placed, at its expense, A.C. in New Story, a private facility allegedly contracted by SSD to provide education to district students, plaintiffs have sufficiently shown that New Story was subject to the same statutory standard for providing A.C. a FAPE as SSD.").

161. See, e.g., Suzanne E. Eckes et al., *Dollars to Discriminate: The (Un)intended Consequences of School Vouchers*, 91 PEABODY J. EDUC. 537 (2016) (reviewing state voucher laws for nondiscrimination provisions and finding few).

162. 42 U.S.C. § 12182(b)(2)(A) (2012) ("[D]iscrimination includes . . . a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary

color, or national origin.<sup>163</sup> Many schools that utilize public funds through vouchers openly discriminate against lesbian, gay, bisexual, transgender, and queer students.<sup>164</sup> Parents who want to participate in state voucher programs must obtain admission for their child to the private school, just as anyone else would.<sup>165</sup> If a private school can plausibly say that providing an appropriate education to a student with a disability would be an “undue burden” or “fundamentally alter” the nature of its services, federal law does not require that school to accept the student, even if the school receives some public funding.<sup>166</sup>

In voucher programs, oversight of private and parochial schools is minimal. In 2017, the *Orlando Sentinel* published a comprehensive three-part investigative report detailing problems resulting from the lack of oversight of private schools participating in Florida voucher programs, including numerous cases of private schools providing inadequate educational services under dubious circumstances.<sup>167</sup> Florida law expressly states, “It is the intent of the Legislature *not* to regulate, control, approve, or accredit private educational institutions.”<sup>168</sup> The accountability requirements for private schools

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to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations; [and] a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden . . . .”); see also Lynn M. Daggett, “*Minor Adjustments*” and *Other Not-So-Minor Obligations: Section 504, Private Religious K-12 Schools, and Students with Disabilities*, 52 U. LOUISVILLE L. REV. 301, 314–20 (2014) (describing the obligations of private schools under the ADA).

163. See, e.g., AM. CIVIL LIBERTIES UNION OF MD., FACT SHEET ON PRIVATE SCHOOLS, DISCRIMINATION AND THE LAW, [https://www.aclu-md.org/sites/default/files/field\\_documents/non-public\\_schools\\_discrim\\_factsheet.pdf](https://www.aclu-md.org/sites/default/files/field_documents/non-public_schools_discrim_factsheet.pdf) (last visited Mar. 7, 2019).

164. As many as a third of private schools in Georgia that accept vouchers have or are part of organizations that have explicit anti-gay biases. S. EDUC. FOUND., GEORGIA’S TAX DOLLARS HELP FINANCE PRIVATE SCHOOLS WITH SEVERE ANTI-GAY POLICIES, PRACTICES, & TEACHINGS 1–2 (2013), <http://www.southerneducation.org/getattachment/857328be-3d6b-415f-af8b-da7bd3b75519/Georgia%E2%80%99s-Tax-Dollars-Help-Finance-Private-Schools.aspx>. North Carolina schools accepting vouchers have also been documented as having explicit anti-gay biases. Chris Fitzsimon, *More Taxpayer Funding for Voucher Schools that Openly Discriminate Against LGBT Students and Parents*, NC POL’Y WATCH (July 27, 2016, 6:19 AM), <https://www.ncpolicy-watch.com/2016/07/27/more-taxpayer-funding-for-voucher-schools-that-openly-discriminate-against-lgbt-students-and-parents/print/>.

165. In Indiana’s “scholarship” (voucher) program, if more applicants apply “who meet the requirements for admission” than there are seats available, the school must make selections of those applicants by lottery. IND. CODE ANN. § 20-51-4-3 (LexisNexis 2016).

166. 42 U.S.C. § 12182(b)(2)(A).

167. Lisa Postal et al., *Schools Without Rules*, ORLANDO SENTINEL (Oct. 17, 2017), <http://www.orlandosentinel.com/features/education/os-florida-school-voucher-investigation-1018-htmstory.html>.

168. FLA. STAT. ANN. § 1002.42(h) (West 2016) (emphasis added).

participating in the Florida McKay voucher program are minimal, consisting of an annual “written explanation of the student’s progress” and cooperation with state assessment should the parent wish.<sup>169</sup> Oversight of private-school voucher programs is similarly limited in other states as well.<sup>170</sup> The voucher program can also offer perverse incentives to public schools, which can encourage parents of students who are expensive to educate, and who may not score well on standardized tests, to use the scholarship to attend a private school.<sup>171</sup>

#### IV. COMPETING INTERESTS

##### A. *Right of Individual Choice vs. Obligation for Equal Protection*

The Supreme Court has made clear that parents have the right to choose to educate their children in private and religious settings rather than public schools. In *Pierce v. Society of Sisters*, the Court stated:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>172</sup>

However, all states have an obligation under the Equal Protection Clause of the Fourteenth Amendment to the Constitution to provide equal opportunity to all students.<sup>173</sup> This obligation is clearly articulated by the original *Brown v. Board of Education* decision<sup>174</sup> and following desegregation orders; the Virginia state and federal decisions preventing Virginia from shutting down some school districts if others in the state remained open;<sup>175</sup>

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169. *Id.* § 1002.39(8)(c)(1). One protection that students with disabilities do have is that “[a] student with a disability may only be recommended for suspension or expulsion in accordance with State Board of Education rules.” *Id.* § 1002.20(4)(a).

170. See, e.g., Rob O’Dell & Yvonne Wingett Sanchez, *Oversight of Arizona ESA School-Voucher Program ‘Almost a Sham’*, REPUBLIC (June 22, 2017), <https://www.azcentral.com/story/news/local/arizona-education/2017/06/22/oversight-arizona-esa-school-voucher-program-almost-sham/407961001/>.

171. Gus Garcia-Roberts, *McKay Scholarship Program Sparks a Cottage Industry of Fraud and Chaos*, MIAMI NEW TIMES (June 23, 2011), <http://www.miaminewtimes.com/news/mckay-scholarship-program-sparks-a-cottage-industry-of-fraud-and-chaos-6381391>.

172. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

173. See U.S. CONST. amend. XIV, § 1.

174. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

175. *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218 (1964); *James v. Almond*, 170 F. Supp. 331 (E.D. Va. 1959); see also *supra* Section I.A.

and in special education decisions *Pennsylvania Association for Retarded Children v. Pennsylvania*<sup>176</sup> and *Mills v. Board of Education*.<sup>177</sup>

When Americans talk about school choice today, it is usually described using Friedman's language of competition.<sup>178</sup> There is, however, another motive driving many proponents of choice: religious separation. A desire for separation drives religious conservatives like Betsy DeVos, the current Secretary of Education under President Donald Trump.<sup>179</sup> Significant Christian leaders and organizations have called on parents to take their children out of public schools, and home schooling and Christian education is increasing.<sup>180</sup> In Indiana, more parents cite a desire for a more religious environment as their reason for using the voucher program to send their children to private school than any other reason, including academic reasons.<sup>181</sup>

At the same time, teachers and officials in Indiana express growing concern about the decreased funding for public schools due to vouchers.<sup>182</sup> There is a vast difference between allowing parents to enroll their children in parochial schools, on the one hand, and using public funds to support parochial schooling to the detriment of the goal of equal protection, including an appropriate education in the LRE for students with disabilities, on the other. Recently, "[w]hen pollsters [for EdNext] asked survey participants whether they supported 'government funds' being used for private school tuition—versus giving families 'wider choice'—vouchers received less support."<sup>183</sup>

In many ways, the divide over Milwaukee's voucher program mirrors the current conundrum about school vouchers.<sup>184</sup> On one hand, proponents,

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176. 343 F. Supp. 279 (E.D. Pa. 1972).

177. 348 F. Supp. 866 (D.D.C. 1972).

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

179. Rizga, *supra* note 13 (describing Betsy DeVos's history of philanthropic giving to Christian schools as evidence of her desire to expand Christian education and quoting her saying, "There are not enough philanthropic dollars in America to fund what is currently the need in education . . . . Our desire is to confront the culture in ways that will continue to advance God's kingdom").

180. KATHERINE STEWART, *THE GOOD NEWS CLUB* 245–56 (2012).

181. Meghan Mangrum, *Religious Schooling Is the Top Reason Parents Use Vouchers, Survey Finds*, CHALKBEAT (June 28, 2016), <https://www.chalkbeat.org/posts/in/2016/06/28/religious-schooling-is-the-top-reason-parents-use-vouchers/>; see also Stephanie Mencimer, *Mike Pence's Voucher Program in Indiana Was a Windfall for Religious Schools*, MOTHER JONES (Dec. 2, 2016), <http://www.motherjones.com/politics/2016/12/mike-pence-voucher-program-religious-schools/>.

182. Shaina Cavazos, *Six Things to Know About Indiana's School Voucher Program, A Model Betsy DeVos Could Support*, CHALKBEAT (Nov. 30, 2016), <https://www.chalkbeat.org/posts/in/2016/11/30/six-things-to-know-about-indianas-school-voucher-program-a-possible-model-for-betsy-devos/>.

183. Arianna Prothero, *Public Support for Charter Schools Plummets, Poll Finds*, EDUC. WK. (Aug. 15, 2017), <https://www.edweek.org/ew/articles/2017/08/15/public-support-for-charter-schools-plummets-poll.html>.

184. While black parents and community members led the push for choice in Milwaukee, black parents and community members, most notably the National Association for the Advancement of

such as Professor Howard Fuller, founder of the Black Alliance for Educational Options, argue, “[M]ost of Milwaukee’s African-American students are trapped in failing schools. These kids’ parents, says Fuller, should have the right to choose a better school for their children because very little else that the African-American community has fought for has helped rescue poor black children in need of good schools.”<sup>185</sup>

Wendell Harris, on the other hand, was one of the original National Association for the Advancement of Colored People (“NAACP”) plaintiffs who sued the state of Wisconsin in 1990 to try to stop the voucher program.<sup>186</sup> Today, as a member of the Milwaukee School Board, he notes that private and parochial schools are not required to accept students with special needs and are not required to disclose suspension and expulsion rates. Of that, he says, “[P]rivate and public schools don’t play by the same rules. The issue of public money with no oversight, I have a problem with that.”<sup>187</sup>

School choice programs tend to lead to greater segregation in many respects. Mentioned above is religious separation, and this Article focuses on the limiting of integration of students with disabilities, but it is important to note that even when it is arguably not a deliberate goal, school choice tends to lead to increased racial segregation. This can be seen quite starkly in Minnesota, for example. In 1972, the United States District Court for the District of Minnesota ordered segregated Minneapolis to desegregate,<sup>188</sup> and by 1999, there were nine segregated elementary schools in the Minneapolis-St. Paul metro area.<sup>189</sup> In a dramatic reversal, as of 2008, there were forty-five.<sup>190</sup>

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Colored People (“NAACP”), also opposed the voucher program in Milwaukee. MCGROARTY, *supra* note 11, at 7–8.

185. Claudio Sanchez, *Lessons on Race and Vouchers from Milwaukee*, NPR (May 16, 2017), <https://www.npr.org/sections/ed/2017/05/16/523612949/lessons-on-race-and-vouchers-from-milwaukee>.

186. *Id.*

187. *Id.*

188. See *Booker v. Special Sch. Dist. No. 1*, 351 F. Supp. 799 (D. Minn. 1972).

189. Beth Hawkins & Cynthia Boyd, *Twin Cities-Area Schools More Segregated Than Ever*, MINNPOST (Nov. 17, 2008), <https://www.minnpost.com/politics-policy/2008/11/twin-cities-area-schools-more-segregated-ever> [hereinafter Hawkins & Boyd, *Twin Cities-Area Schools*]. Beth Hawkins and Cynthia Boyd explain:

Designed by researchers at the University of Minnesota’s Institute on Race and Poverty, this definition of segregation includes schools where the share of blacks, Hispanics or Asian students exceeds [fifty] percent, or schools with varying combinations of black, Hispanic and Asian students, where the relative share of white students in the schools does not exceed [thirty] percent. In predominantly white schools, the share of each non-white group is smaller than [ten] percent. Any school that is neither non-white segregated nor predominantly white is considered integrated.

Beth Hawkins & Cynthia Boyd, *The Definition of Segregation*, MINNPOST (Nov. 17, 2008), <https://www.minnpost.com/infodoc/2008/11/definition-segregation>.

190. Hawkins & Boyd, *Twin Cities-Area Schools*, *supra* note 189.

The increase in segregated schools coincided neatly with the increase of charter schools, which serve primarily minority students in Minneapolis.<sup>191</sup> In Minneapolis and St. Paul, charter schools are often designed to target a specific minority group, such as the Hmong International Academy and the Afrocentric Education Academy.<sup>192</sup> Charter schools have been explicitly promoted by the Federal Department of Education since 2009,<sup>193</sup> and segregated charter schools are increasingly common throughout the country.<sup>194</sup> Parents of all races prefer schools in which their children would not be a minority.<sup>195</sup> White parents, in particular, are reluctant to send their children to schools with large numbers of black children and use race as a proxy for determining quality.<sup>196</sup>

*B. Maximizing Individual Achievement of Some Children Does Not Adequately Serve the Public Policy Goal of Educating All Children*

An educated public is important for a functioning society and economy. As jobs require increasingly greater levels of knowledge and skills, all countries have a need for their citizens to have some significant level of education to continue economic growth.<sup>197</sup> All state constitutions require the state to provide a baseline standard of education to all children, though that baseline varies from state to state.<sup>198</sup>

Even as Friedman advocated for parental choice in education in a society that values individual freedom as its “ultimate objective,” Friedman recognized that “[a] stable and democratic society is impossible without widespread acceptance of some common set of values and without a minimum

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191. Katherine Kersten, *Don't Protest, Just Shop Somewhere Else*, WALL ST. J. (Mar. 2, 2006), <https://www.wsj.com/articles/SB114125788411186941>.

192. Beth Hawkins & Cynthia Boyd, *The Rise of Voluntarily Segregated Schools: New Trend, Familiar Problems*, MINNPOST (Nov. 19, 2008), <https://www.minnpost.com/politics-policy/2008/11/rise-voluntarily-segregated-schools-new-trend-familiar-problems>.

193. See U.S. DEP'T. OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY (2009), <https://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

194. FRANKENBERG ET AL., *supra* note 16, at 9–11 (“[C]harters exacerbate already rampant American school segregation, particularly for black students.”); James, *supra* note 16, at 1114–17; Minow, *supra* note 16, at 836–40.

195. Hastings et al., *supra* note 16, at 28 (“[T]he average preferred school for each racial group was one in which [seventy percent] of the school was their own race.”).

196. DeJarnatt, *supra* note 16, at 18 (“[P]arents used the internet resource to reject schools having a significant majority of black students before they focused on other indicators of school quality. . . . [and] race is closely related to parental perceptions of school quality. . . . [A]n increase of more than two percent in the African-American population of a student body correlated with a perception that the school’s quality had declined even when the objective criteria contradicted that perception.” (footnotes omitted)).

197. See, e.g., LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 2–8 (2010) (citing changes in the nature of the workforce and other countries’ efforts to educate their citizenry).

198. Black, *supra* note 16, at 1402–08.

degree of literacy and knowledge on the part of most citizens.”<sup>199</sup> So, while Friedman idealized a system in which all parents would be able to select educational options freely in a free market, Friedman also acknowledged that education is not merely a private good but a public necessity.<sup>200</sup> As laid out in Part II, federal law codifies the importance of educating children with disabilities.

Children with special needs generally make greater educational gains in inclusive settings than in classrooms segregated by ability.<sup>201</sup> These gains are important for students with disabilities to prepare for independence and employment. Overall, there is also a modest positive impact on general education students, both educationally and socially, when special education students are included in their general education classrooms.<sup>202</sup>

Many individual students win in school choice. There are countless stories of individual lives bettered by charter schools and by access to private schools through vouchers or scholarships. Advocates for charter schools regularly tell these stories, like that of Troy Simon, a New Orleans native who credits a charter school with turning his life around and enabling him to move from near illiteracy to becoming a student at Yale Divinity School.<sup>203</sup> These stories abound, not just about low-income or minority students generally, but also about students with disabilities, as can be seen in states like Florida, which has a disability-specific voucher/scholarship program.<sup>204</sup>

However, many individual students lose in school choice. Students who have disabilities often lose, as laid out in Part III. Parents of students with disabilities often have trouble locating appropriate schools for their children. After enrolling their children in private schools that seem to offer appropriate services, parents find out too late that their children are not receiving adequate services. At that point, there is less recourse to remedies than there would be in public schools under the IDEA.<sup>205</sup> Even the adamantly pro-

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199. Friedman, *supra* note 46, at 124–25.

200. *Id.* at 125.

201. Ruijs & Peetsma, *supra* note 92, at 69–71; see Geoff Lindsay, *Educational Psychology and the Effectiveness of Inclusive Education/Mainstreaming*, 77 BRIT. J. EDUC. PSYCHOL. 1, 8–11 (2007) (reviewing several years of studies conducted in the United States and the United Kingdom).

202. Afroditi Kalambouka et al., *The Impact of Placing Pupils with Special Educational Needs in Mainstream Schools on the Achievement of Their Peers*, 49 EDUC. RES. 365 (2007); Lindsay, *supra* note 201, at 15; Ruijs & Peetsma, *supra* note 92, at 74–78.

203. OSBORNE, *supra* note 12, at 47–48.

204. Jeff Barlis, *Scholarship, Kingdom Academy Spurred Turnaround for Miami Student*, STEP UP FOR STUDENTS (Nov. 14, 2017), <https://blog.stepupforstudents.org/scholarship-kingdom-academy-spurred-turnaround-miami-student/>.

205. See *supra* Section III.B.

school-choice Manhattan Institute reported that a significant number of parents of recipients of Florida's McKay Scholarship for students with disabilities had difficulty finding an "acceptable school" for their children.<sup>206</sup>

Choice also tends to reward families with high levels of information, social connections, and money—these families have greater access to the individual benefits choice can offer—while lower income families with less information find themselves with fewer choices. In voucher systems without significant income restrictions, wealthy parents can pay the difference between the value of a voucher and the cost of tuition, a difference that is sometimes substantial.<sup>207</sup> Distance, availability of transportation, and siblings' schools all impact actual availability of choices.<sup>208</sup> In choice systems, parents tend to choose what is familiar over what is unfamiliar and rely on their social networks to choose schools.<sup>209</sup> As a result, low-income children tend to choose schools where large numbers of students are from low-income backgrounds.<sup>210</sup> Segregation by class is sometimes more dramatic than segregation by race in school systems that feature some version of parental choice.<sup>211</sup> As Professor Osamudia R. James points out:

[I]f we acknowledge, as we must, that the drivers of underachievement in schools are concentrated poverty and isolation of students by race and class, then charters do little more than give parents more say in socially, politically, and fiscally vulnerable schools, at the expense of the democratic and anti-subordination values that integrated schools impart.<sup>212</sup>

Most parents across socio-economic and racial spectrums prefer neighborhood schools that provide positive educations for their children. But that is not always available to less wealthy families, particularly in urban areas.<sup>213</sup> When choice leaves many students without adequate options, substituting choice for acceptable local public schools actually leaves too many parents without any true choices.

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206. GREENE & FORSTER, *supra* note 18, at 11.

207. Annie Waldman, *Voucher Program Helps Well-Off Vermonters Pay for Prep School at Public Expense*, PROPUBLICA (June 2, 2017), [https://www.propublica.org/article/voucher-program-helps-well-off-vermonters-pay-prep-school-at-public-expense?utm\\_campaign=sprout&utm\\_medium=social&utm\\_source=facebook&utm\\_content=1496408041](https://www.propublica.org/article/voucher-program-helps-well-off-vermonters-pay-prep-school-at-public-expense?utm_campaign=sprout&utm_medium=social&utm_source=facebook&utm_content=1496408041).

208. James, *supra* note 16, at 1103 n.91.

209. DeJarnatt, *supra* note 16, at 18.

210. *Id.* at 18, 32–33; *see also* Stevens et al., *supra* note 142, at 125–45.

211. The introduction of magnet schools, an early version of school choice used by some cities to reduce racial segregation, led quickly to greater class segregation even as racial segregation decreased. Carmel McCoubrey, *Magnet Schools and Class*, N.Y. TIMES (June 23, 1999), <http://www.nytimes.com/1999/06/23/us/notebook-magnet-schools-and-class.html?emc=eta1>.

212. James, *supra* note 16, at 1117 (footnote omitted).

213. Anna Rhodes & Siri Warkentien, *Unwrapping the Suburban "Package Deal": Race, Class, and School Access*, 54 AM. EDUC. RES. J. 168S, 169S (2017).

Even when choice programs begin by specifically targeting underserved populations, they may expand to benefit primarily those who would already be in private school. In Indiana, the state voucher program began by requiring that recipients attend at least a year in public school. Former Indiana governor, now United States Vice President, Mike Pence pushed successfully to change that policy, and now more than half of Indiana voucher recipients have never attended public school.<sup>214</sup> The Indiana voucher program's income restrictions, which initially prioritized low-income students, were also loosened, allowing middle class families to qualify.<sup>215</sup>

Not only does school choice leave many students with unequal or inadequate educational options, it does not improve education as a whole. Data on school choice make clear that student achievement, as measured by standardized test scores, does not reliably improve when parents have greater choice in the schools their children attend. Data from Indiana and Louisiana, two of the largest school-choice projects, show that "public school students that received vouchers to attend private schools scored lower compared to similar students who did not attend private schools."<sup>216</sup> Stanford education professor Martin Carnoy reviewed two decades of data on the impacts of vouchers, and concluded that vouchers do not improve educational achievement for either students who receive them or students in school districts affected by voucher competition.<sup>217</sup> A longitudinal study of students in private and public schools found that any advantage private school students had over public school students was completely eliminated when the study's authors controlled for socioeconomic factors.<sup>218</sup> Data on charter schools is similarly uninspiring, with more charter schools underperforming on test scores than over performing as compared to the local district public schools.<sup>219</sup> The single measure by which choice schools consistently perform well is in parental satisfaction.<sup>220</sup> Several decades in, it is clear that school choice is not a cure

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214. Emma Brown & Mandy McLaren, *How Indiana's School Voucher Program Soared, and What It Says About Education in the Trump Era*, WASH. POST (Dec. 26, 2016), [https://www.washingtonpost.com/local/education/how-indianas-school-voucher-program-soared-and-what-it-says-about-education-in-the-trump-era/2016/12/26/13d1d3ec-bc97-11e6-91ee-1adddfe36cbe\\_story.html?tid=sm\\_tw&utm\\_term=.829d2cbabb06](https://www.washingtonpost.com/local/education/how-indianas-school-voucher-program-soared-and-what-it-says-about-education-in-the-trump-era/2016/12/26/13d1d3ec-bc97-11e6-91ee-1adddfe36cbe_story.html?tid=sm_tw&utm_term=.829d2cbabb06).

215. Waldman, *supra* note 207.

216. MARK DYNARSKI, ON NEGATIVE EFFECTS OF VOUCHERS 2 (2016), <https://www.brookings.edu/wp-content/uploads/2016/07/vouchers-and-test-scores.pdf>.

217. CARNOY, *supra* note 18, at 1–3; Carrie Spector, *Vouchers Do Not Improve Student Achievement, Stanford Researcher Finds*, STANFORD NEWS (Feb. 28, 2017), <http://news.stanford.edu/2017/02/28/vouchers-not-improve-student-achievement-stanford-researcher-finds/>.

218. Robert C. Pianta & Arya Ansari, *Does Attendance in Private Schools Predict Student Outcomes at Age 15? Evidence from a Longitudinal Study*, 47 EDUC. RES. 419, 429 (2018).

219. CTR. FOR RES. ON EDUC. OUTCOMES, *supra* note 18.

220. See, e.g., GREENE & FORSTER, *supra* note 18, at 1 (describing satisfaction of parents who participate in the McKay Scholarship program as high, though only sixty-two percent of former participants were happy with their choice school).

for educational problems, and while many parents are happy with their access to choice, many other parents are left without adequate choice in choice systems, perpetuating and even increasing inequality, particularly for students with disabilities.

V. SCHOOL CHOICE LEGISLATION SHOULD BE EXPLICITLY CONSISTENT WITH THE IDEA, THE EQUAL PROTECTION CLAUSE, AND CLEARLY ARTICULATED PUBLIC POLICY GOALS FOR INTEGRATION AND NON-DISCRIMINATION

A. *The Role of Advocates*

As *The Wall Street Journal* reported in 2011, “school choice is now here to stay.”<sup>221</sup> For many years, advocates against vouchers argued that voucher programs funding religious schools violated the Establishment Clause of the First Amendment to the Constitution. That argument cannot now be used to constrain voucher programs.<sup>222</sup> In *Zelman v. Simmons-Harris*<sup>223</sup> and then in *Trinity Lutheran Church of Columbia v. Comer*,<sup>224</sup> the Supreme Court made clear that religious schools could participate in federally funded programs.<sup>225</sup> Private schools, including parochial schools, can accept public payment for tuition through vouchers and through other payment schemes, and can directly accept government funds.<sup>226</sup>

Advocates against charter schools have challenged the legitimacy of funding charter schools under state laws and constitutions, but charter school development continues.<sup>227</sup> In Washington, teachers’ unions and other groups challenged state laws regarding charter schools, obtaining a state supreme court verdict that charter schools did not qualify as “common schools” and could not be funded using state general funds.<sup>228</sup> The state legislature promptly rewrote the law to fund charter schools from lottery proceeds.<sup>229</sup> Across the country, a school district in New Jersey challenged state approval

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221. Richard Komer, *School Choice Is Here to Stay*, WALL ST. J. (Aug. 29, 2011), <https://www.wsj.com/articles/SB10001424053111904787404576532201473726910>.

222. Black, *supra* note 16, at 1413.

223. 536 U.S. 639 (2002).

224. 137 S. Ct. 2012 (2017).

225. *Comer*, 137 S. Ct. at 2021–22; *Zelman*, 536 U.S. at 649–52.

226. *Comer*, 137 S. Ct. at 2022; *Zelman*, 536 U.S. at 652.

227. See Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PA. ST. L. REV. 43, 102 (2004) (“It seems clear that the outcome of charter school cases decided in state and federal courts have not served as a significant derailment to the growth of the charter school movement.”).

228. *League of Women Voters v. State*, 355 P.3d 1131, 1133–34 (Wash. 2015).

229. Melissa Santos, *Teachers Union, Others to Sue State over New Charter School Law*, NEWS TRIB. (Apr. 7, 2016), <http://www.thenewstribune.com/news/politics-government/article70646712.html>.

of a charter school expansion, arguing that it depleted the funding for the school districts' own students while educating large numbers of students from neighboring school districts.<sup>230</sup> The Appellate Division of the Superior Court of New Jersey denied the claim, holding that the court had only limited authority to review state administrative decisions and that the approval was within the bounds of state charter law.<sup>231</sup>

Despite the courts' reluctance to limit expansion of school choice programs, advocates can take action to hold states responsible for providing equal access to education as those programs are considered or implemented. The Supreme Court has made clear that, under the Equal Protection Clause, all states must provide equal access to the baseline education they provide to any group of students.<sup>232</sup> Equal access does not necessarily mean equal education. As a country, we have more or less accepted that inequality exists.<sup>233</sup> With respect to racial segregation, the Supreme Court has declined to recognize a role for the courts in limiting de facto segregation, instead limiting desegregation and monitoring orders to districts with at least de jure segregation.<sup>234</sup> Under the IDEA, school districts are required only to develop programs designed for students to make "meaningful progress," not necessarily maximize each student's progress.<sup>235</sup> Still, despite limitations, the Constitution demands a baseline standard of equality,<sup>236</sup> as do state constitutions,<sup>237</sup> and the IDEA provides a floor for adequate education and mainstreaming.<sup>238</sup> Consistently articulated public policy interests demand this as well.<sup>239</sup>

Students with disabilities are uniquely situated in that they have a clear statutory right in every state to a certain level of education and to education in a type of setting: the least restrictive setting.<sup>240</sup> School-choice programs

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230. *Highland Park Bd. of Educ. v. Hespe*, No. A-3890-14T1, 2018 N.J. Super. Unpub. LEXIS 158 at \*4-7 (N.J. Super. Ct. App. Div. Jan. 24, 2018).

231. *Id.* at \*10-19.

232. *See supra* Section II.A.

233. *See, e.g.*, MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* 8, 202-03 (2012) (noting, regarding students who have access to elite schools rather than failing ones, that "[w]here all good things are bought and sold, having money makes all the difference in the world").

234. *See, e.g.*, Jonathan Fischbach et al., *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491, 494 (2008) (examining overlaps between de jure and de facto segregation and potential future directions in court rulings on racial segregation and integration in schools).

235. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 996, 998 (2017).

236. U.S. CONST. amend. XIV, § 1; *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *see also supra* Section II.B. Derek Black argues that the Fourteenth Amendment actually "embedded education as an implicit right." Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 768 (2018).

237. *See, e.g.*, Black, *supra* note 16, at 1403.

238. *See supra* Section II.B.

239. *See supra* Section II.A.

240. *See supra* note 103 and accompanying text.

cannot operate in a way that impedes equal access to education for students with disabilities. Disrupting the rights specified in the IDEA for some students by not offering adequate placement options that are subject to and adhere with the standards of the IDEA significantly impedes the right to equal access.

Students who do not have identified disabilities can also be harmed when school choice envelops a school district.<sup>241</sup> The problems of students with disabilities, who have identifiable rights and accessible remedies though the IDEA, are, in some ways, the canaries in the coal mine warning of the dangers of choosing school choice policies over local public education. While students with disabilities have statutory protections, and the Constitution does not provide an explicit right to education, states that offer public education must provide equal access to the baseline education they provide to any group of students, as noted above. To the greatest extent possible, advocates should also look to protections offered by state constitutions to protect all students.<sup>242</sup>

### *B. Legislative Suggestions*

Although schools receiving federal funds are obligated to follow laws regarding discrimination, affirmative policies to promote equal access are also necessary. Restrictions on federal funds should be designed to remove incentives for school-choice programs to disadvantage students with disabilities and privilege middle and upper-middle class families who would send their general-education children to private or religious schools regardless of vouchers. Advocates should push for legislation and regulations that proactively protect vulnerable populations by putting affirmative obligations on *all* schools that accept public funds. Changes should be made at the federal and state levels to ensure that all schools receiving government funding—including charter, private and parochial schools—must comply with the IDEA and its legislative embodiment of the principals of the Equal Protection Clause of the Fourteenth Amendment.

There is currently no federal requirement for states to promulgate regulations holding private schools accountable for providing procedural protections to students with disabilities.<sup>243</sup> One option is for the federal government to change the standards under the IDEA to encompass private schools educating students with disabilities using federal funds. States could also do the same without federal action. Nothing in federal law prohibits states from

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241. *See supra* Part IV.

242. *See* Black, *supra* note 16, at 1359 (“[W]hile states may establish choice programs, they cannot systematically advantage choice programs over public education[, and] . . . choice programs[’] . . . practical effect cannot impede educational opportunities in public schools.”).

243. *St. Johnsburry Acad. v. D.H.*, 240 F.3d 163, 170 (2d Cir. 2001).

requiring all schools to meet the requirements of the IDEA should they accept students with state funding related to the IDEA. Some states, such as New Jersey, have already done so.<sup>244</sup>

Another change to consider would be to require schools receiving federal funds under the IDEA, voucher, or other funding schemes to address their LEA status. Right now, the onus of responsibility generally falls on the public-school district where a student lives or where the choice school is located.<sup>245</sup> In those states that allow charter schools to be their own LEA, the charter schools almost always lack sufficient resources to appropriately serve all comers, as discussed in Section III.A. Instead, Congress should promote coordinated pooling of resources and responsibility within communities and within charter schools or private-school systems (such as KIPP and Catholic dioceses).

Moreover, legislative changes should take into account the perverse incentives of increased standardized testing noted in Section III.A. School evaluations should become more holistic and less narrowly focused on standardized testing. Jack Schneider, an Assistant Professor of Education at College of the Holy Cross and Director of Research for the Massachusetts Consortium for Innovative Education Assessment, developed a model in Massachusetts that could serve as a foundation for those who wish to hold schools accountable but understand that standardized testing fails to do so.<sup>246</sup>

## VI. CONCLUSION

School choice can be beneficial to many individual children. Most people placing their children in choice schools, running choice schools, or teaching within them, are acting in reasonable, rational, and sympathetic ways.

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244. *P.N. v. Greco*, 282 F. Supp. 2d 221, 237–38 (D. N.J. 2003) (“The fact that, even in the case of private school placement, ‘responsibility for compliance with IDEA remains with the public agency,’ does not imply that the no responsibility falls upon the private school: it is not by any means illogical for both the public authority (which has the initial and ultimate obligation to educate the child) and the private school (which is actually entrusted with the task and given the requisite funds) to be subject to IDEA rules.” (citations omitted) (quoting *St. Johnsbury Acad.*, 240 F.3d at 171)). Minnesota has a slightly different provision, requiring public schools to provide a FAPE to students in private schools. A federal court recently ruled based on state law that the Minneapolis public school district was required to provide services that would provide a FAPE to a student enrolled in a private school. *Special Sch. Dist. No. 1 v. R.M.M.*, 861 F.3d 769, 770, 778 (8th Cir. 2017). Neither state vouchers nor any form of federal funding were at issue in this case or in the state law, and the burden fell entirely to the school district under state law, a solution that is not necessarily ideal, but it provides an example of a state looking to consider FAPE rights in the private school context.

245. *See supra* Section II.C.

246. *See* JACK SCHNEIDER, *BEYOND TEST SCORES: A BETTER WAY TO MEASURE SCHOOL QUALITY* 12 (2017); *see also* RAVITCH, *supra* note 14, at 261–73 (describing problems with relying on standardized test scores to measure student achievement and school quality and making suggestions for improvement).

That being said, school choice has not proven to be a panacea for troubles facing public school systems in this country. Moreover, implementing system-wide choice programs leads to troubling questions of access and, indeed, limited choices. We cannot ignore that increasing school choice makes students with disabilities more vulnerable. As a country, we have reached a consensus that students with disabilities are entitled to an appropriate education in public schools with general-education students to the greatest extent possible. Detailed regulations, however imperfect, have been instrumental in making that goal realistic for students with disabilities. Unchecked school choice threatens to undermine the ability of children with disabilities to receive that appropriate education. Since, as a country, we have decided to go down the path of choice, we must amend our legislation to actively protect the most vulnerable students. Even without amended legislation, attorneys should litigate to protect the rights of students with disabilities in federal and state courts based on the principle of equal protection under the law.