I. INTRODUCTION

In many school systems across the country, children with disabilities are not receiving the education that they are entitled to by law and need in order to reach their full potential.\(^1\) Although there are certainly triumphant examples of school systems that have succeeded in supporting students with special needs,\(^2\) there are unfortunately far too many examples of neglect, misunderstanding, and, ultimately, failure across the country.\(^3\) Into this struggling system emerges an expanding and difficult challenge that only adds further pressure. Due to the growing numbers of children diagnosed with Autism and the level of expertise required to deal with many of the symptoms of this disorder, educating children with Autism has become a particularly pressing issue for both the school systems and the families of children with this disorder.\(^4\)

Confronting this struggling system to which additional pressure is being added, some state legislatures have proposed a dramatic rethinking of how to most effectively educate children with special needs. A number of state legislatures have moved forward with voucher programs that allow the families of disabled students to forgo public school and instead use public funds for a private school program that the family deems a better alternative for the student’s needs.\(^5\) While most of these programs cover

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\(^1\) See infra Part III.B and accompanying notes.

\(^2\) See infra Part III.A, C–D.

\(^3\) See infra Part III.B (discussing Utah’s Carson Smith Scholarship for Students with Special Needs), III.F (discussing Louisiana’s School Choice Pilot Program for Certain Students with Exceptionalities).

\(^4\) See infra Part II and accompanying notes.

\(^5\) See infra Part III and accompanying notes.
children with disabilities generally, a small number of these proposals have been Autism-specific.\footnote{6 See infra Part III.D and accompanying notes.}

Much of the debate surrounding these programs has been politically charged, with proponents of universal school voucher programs lauding these programs and teacher’s associations posing opposition.\footnote{7 See infra Part VI and accompanying notes.} There has also been significant debate and division within the disability community itself about the merits of these programs.\footnote{8 See Wendy F. Hensel, \textit{Vouchers for Students with Disabilities: The Future of Special Education?}, 39 J.L. \& EDUC. 291, 294 (2010).}

The legal academy, however, has spent little time examining this legislative solution to the disability education problem.\footnote{9 See id. at 293.} Moreover, the scholarly work that has engaged with this issue shares a fundamental flaw: failure to recognize that an imperfect solution may still be the best solution available.

This Article seeks to evaluate the advantages and disadvantages of special needs voucher programs within the context of the reality facing families of children with special needs. This Article will focus on how these programs affect the education of children with Autism because it is difficult to evaluate these programs without a more concrete context. This Article focuses on the pressing problem associated with educating the growing population of students with Autism, evidenced by the fact that some proposed voucher programs are specifically targeted for and limited to children with Autism.

Part II will give a brief definition of Autism Spectrum Disorders and then describe the harsh reality that many families of children with Autism face when trying to educate their children in public school systems.\footnote{10 See infra Part II.} Part III will survey the existing special needs voucher programs that have been created in response to problems in the public school systems.\footnote{11 See infra Part III.}

With that context in mind, Part IV will examine commentators’ criticisms of special needs voucher programs and will strive to evaluate those critiques without ignoring the reality that exists for children with disabilities, such as Autism, in many public school systems around the country.\footnote{12 See infra Part IV.} This Part will conclude that, while there are some valid concerns, ultimately the programs still give children with disabilities,
particularly children with Autism, and their families a better option than is available to them in public school systems.

Part V will suggest that there is an underlying, fundamental reason that opening up a private school option to children with serious special needs, such as Autism, offers a better policy solution to this complex and growing problem: because it allows both the school and the family of the child to choose one another. This element of choice allows a beneficial and trusting relationship to form between the school and the family, something that is unfortunately missing in some public school systems that are required to educate students with special needs. This overlooked and unappreciated aspect of the relationship between the school and the family is explored in a manner that illuminates the enormous significance that the relationship plays in accomplishing the difficult task of providing an appropriate individualized education.

Finally, Part VI will explain how the issue of special needs voucher programs has created a debate among partisan interest-group politics and will argue that politicizing the issue has turned what should be an open exploration of a creative solution to a serious problem into a symbolic battle of ideological purity.

II. AUTISM AND PUBLIC SCHOOLS

To evaluate special needs voucher programs in purely theoretical terms is to ignore the problems with the status quo that these programs are meant to address. Instead, one must understand the reality facing many students with Autism and their families in public schools across the country so that the programs may be measured in comparison to the current situation. To accomplish this end, Section A of this Part will briefly define Autism and discuss how a diagnosis of Autism affects the student’s entire family. Section B will discuss the problems many students with Autism and their families face in public schools across the country.

A. Students with Autism and Their Families

The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) defines Autism as a

13 See infra Part V.
14 See infra Part VI.
15 See infra Part II.A.
16 See infra Part II.B.
17 The American Psychiatric Association continues to revise its new Diagnostic and Statistical Manual of Mental Disorders, the DSM-5. DSM-5: Implementation and Support, (continued)
developmental disorder in which the child has “severe and pervasive impairment in the areas of social interactions, communication, and the presence of restricted [and] repetitive . . . patterns of behavior, interests, and activities.”

Many experts also believe that children with Autism experience sensory stimuli differently than typically developing children, a condition referred to as a “sensory integration dysfunction.” As a result, children with Autism may either underreact or overreact to sensory stimuli such as touch and sound and visual stimuli such as light. Autism is a “spectrum” disorder, meaning that children diagnosed with Autism may demonstrate various symptoms of the disorder on a continuum. It is common for parents and professionals to use the shorthand of mild, moderate, and severe to describe the child’s place on this continuum.

The rate of children diagnosed with Autism, and, therefore, the number of children with Autism in public schools across the country, has risen exponentially in the past decade. The most recent estimate from the Centers for Disease Control (CDC) places the number of children with Autism at one out of every eighty-eight children or approximately 1.14% of children. This finding, issued by the CDC in 2012, reflects a 23% increase in the population among children between 2006 and 2008 and a 78% increase from 2002 to 2008. Even before this most recent increase,
the rates of Autism in the United States had already surpassed those of childhood AIDS, all forms of childhood cancer, and childhood diabetes combined.\textsuperscript{26}

There are various well-established behavioral treatment approaches to alleviate the symptoms of Autism and allow children with the disorder to develop cognitively, despite their symptoms.\textsuperscript{27} However, such treatments require specially trained personnel to implement these research-based methodologies.\textsuperscript{28} Moreover, it is crucial that these interventions are employed as early as possible after the child is identified as having Autism.\textsuperscript{29}

The stress imposed upon the families of children diagnosed with Autism is great because, in part, of the great need for early and intense intervention. One researcher describes the complex situation succinctly:

> After a diagnosis of [A]utism is given, parents begin to feel what was once referred to as the “burden of care.” With the words “[y]our child has [A]utism,” the future that parents and other family members were working toward immediately and completely changes. Instead of spending savings on vacations, music lessons, sports, and college, money is quickly diverted to intervention services, medical needs, and long-term care. Time that was spent with a spouse and other children quickly diminishes as parents put all their attention, energy, and resources into caring for their child with [A]utism. It is important to keep in mind that while all of this is occurring, parents are trying to cope with the reality that their child is disabled, the guilt that perhaps they did something wrong, their anger and frustration, and feelings of isolation and depression.

> In addition to emotional stress, parents and families also experience stress related to what the future will hold, choosing and pursuing the right interventions, being

\textsuperscript{26} Michael B. Ruef et al., \textit{Learn by Doing: A Collaborative Model for Training Teacher-Candidate Students in Autism}, 44 \textit{Educ. & Training in Developmental Disabilities} 343, 343 (2009).

\textsuperscript{27} See Brief of Autism Speaks as Amicus Curiae in Support of Respondents at 5, Bd. of Educ. of the City Sch. Dist. of the City of New York v. Tom F., 552 U.S. 1 (2007) (No. 06-637) [hereinafter Brief of Autism Speaks as Amicus Curiae for Tom F.].

\textsuperscript{28} \textit{Id.} at 3.

\textsuperscript{29} \textit{Id.} at 5.
emotionally isolated from their child, maintaining a “normal” family life, and increased financial burdens. In relation to the future, parents worry most often about how and whether their child will function in the real world and who will care for their child when they become too old to provide care.\(^{30}\)

Divorce rates among parents with children with Autism are approximately 10% higher than in families of similar ethnic background and economic status with typically developing children.\(^{31}\) Moreover, a number of studies have determined that “parents of children with [A]utism [generally] experience more stress than parents of children with any other type of developmental disorder.”\(^{32}\)

B. Education for Students with Autism in Public Schools

Although there are some public schools that have successfully created programs to educate children with Autism,\(^{33}\) many public school districts lack the finances and personnel to provide the necessary intensive and specialized services.\(^{34}\) Educating children with Autism requires specially trained personnel able to apply research-based methodologies in an appropriately designed program.\(^{35}\) Both appropriate programming and personnel to implement those programs are in short supply across the country.\(^{36}\) The National Institute of Mental Health’s Autism Spectrum Disorder Expert Working Group found that “effective services ‘tend to be scattered, fragmented, and poorly coordinated.’”\(^{37}\)

Moreover, even where programs are available, there is often a shortage of qualified teachers to implement the programs.\(^{38}\) Special education

\(^{30}\) Praeger Handbook, \(supra\) note 18, at 167.

\(^{31}\) Autism and Other Neurodevelopmental Disorders 14 (Robin L. Hansen & Sally J. Rogers eds., 2013).

\(^{32}\) Id.

\(^{33}\) See Brief of Autism Speaks as Amicus Curiae for Tom F., \(supra\) note 27, at 3.


\(^{35}\) Id. at 10.

\(^{36}\) Id. at 11.

\(^{37}\) Id.

\(^{38}\) Id.
teachers are chronically in short supply, and they have been for decades.\(^{39}\) The shortage is particularly serious as related to the field of Autism spectrum disorders, in part because of the specialized training in the behavioral and social aspects of Autism that teachers need in order to effectively work with children on the Autism spectrum.\(^{40}\) The National Research Council’s Committee on Educational Interventions for Children with Autism has found that teachers and other school staff are particularly lacking in these aspects.\(^{41}\)

Other students can also be a source of problems for students with Autism in public schools. A national study conducted by the Kennedy Krieger Institute found that children with Autism in regular public schools were more likely to be victims of bullying than children with Autism in regular private schools and special education private schools.\(^{42}\) Children with Autism are 1.54 times more likely to be bullied in a regular public school than a regular private school and 2.39 times more likely to be bullied in a public school than a special education private school.\(^{43}\) The Kennedy-Krieger study noted that bullying presents an especially significant problem for children with Autism:

> Children with [Autism Spectrum Disorders] are already vulnerable in multiple ways. To have to face teasing, taunts, ostracism, or other forms of spite may make a child who is already struggling to cope completely unable to function. If a child was anxious, or dealing with issues of self-control, or unable to focus before there was any bullying, imagine how impossible those issues must seem when bullying is added to the mix. Cruelest of all is the fact that bullying may further impair the ability of a child

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\(^{40}\) Brief of Autism Speaks as Amicus Curiae for T.A., supra note 34, at 10–12.

\(^{41}\) Id.; see also BLUE RIBBON COMMISSION, supra note 39, at 50.


\(^{43}\) Id.
with [Autism Spectrum Disorder], who is already socially disabled, to engage with the social world.\textsuperscript{44}

In theory, parents faced with a public school that is not properly serving their child should be able to use the procedures available under the Individuals with Disabilities Education Act\textsuperscript{45} (IDEA) to remedy the situation. This ideal, however, is far from a reality. Much has been written about the inadequacy of the procedural safeguards available to parents under the IDEA, especially for lower-income and less educated parents.\textsuperscript{46} As one scholar describes:

Notwithstanding the procedural protections set forth in the Act, scholars and parents are virtually unanimous in criticizing the manner in which the Act functions. Ambiguity and disagreement regarding what constitutes a substantively "appropriate" program are commonplace. The formalistic procedures to protect parental rights have not served to level the playing fields between parents and educators. Procedural protections all too often have been reduced to mere empty ritual for all but the most educated and wealthy.\textsuperscript{47}

Additionally, there is some evidence suggesting that if the parents do challenge a school district using the procedures available under the IDEA, they are unlikely to succeed.\textsuperscript{48} Under the IDEA, "Due Process" hearings are the first formal grievance step for parents.\textsuperscript{49} In an anonymous interview, one Due Process hearing officer in Missouri stated, "[t]he system is rigged," explaining that:

State Departments of Education have many ways to control a hearing's outcome. One common way is to shorten the hearings. Some states limit hearings to two to

\textsuperscript{44} Id.
\textsuperscript{47} Kotler, supra note 46, at 341.
\textsuperscript{48} Amy D. Quinn, Comment, Obtaining Tuition Reimbursement for Children with Special Needs, 80 UMKC L. REV. 1211, 1228–29 (2012).
four days. Most hearings where parents prevail are long, often entailing ten days or more of testimony. . . . Because witnesses cannot be compelled to testify, parents may need extended time to convince reluctant witnesses to speak frankly to the board. Many teachers, the most likely witnesses, fear they will lose their jobs in retaliation for testifying.

Another way to decrease the parents' likelihood of prevailing before a hearing board is to manipulate which officers may sit on the board. On the three-member panels in Missouri, one officer is the chairperson assigned to the case by the Department of Elementary and Secondary Education (DESE), and the other two officers are each chosen by opposing parties from a list provided by DESE. Of the approximately 150 hearing officers in the state, 5 are private child-advocates, 10 are DESE attorneys, and the other nearly 135 officers are school district personnel. Within the past five years, DESE has enacted a “strike off” procedure, allowing each party to strike one proposed hearing officer. Parents face the problem of limited options when only five officers are independent of the public school system, and usually one is the parent's advocate, leaving a choice between three officers if the school district strikes the original choice. In stark contrast, school districts have over 130 officers to choose from once the parents have utilized their single strike.50

Moreover, parents often feel hindered in challenging the school district’s services due to a fear of injuring their relationships with the educators who are likely to remain a part of their child’s education on a daily basis, whether they win or lose the challenge.51 As one scholar explains,

Many parents also believe that insistence upon their child’s rights is incompatible with cultivating desired relationships between their family, the educational system, and the community. The world they envision for their

50 Quinn, supra note 48, at 1228–29.
child consists of a fabric of relationships that include their child’s peers, teachers, therapists, aides, neighbors, and relatives. For themselves, they envision a mutually supportive, ongoing relationship with the [educators in the local school] and the school district in general. In both of these imagined worlds, the assertion of rights is a discordant, alienating element that could attenuate or destroy relationships that might have value for other purposes. Although claims of rights violations can emphasize the child’s equality and his or her right to integration, they can at the same time compound the problem of “difference”... and may be interpreted as an assault upon the school system and, indirectly, the very community the child seeks to join.52

Yet another reason the procedural safeguards under the IDEA are often not sufficient to remedy the problems that children with Autism face in the public schools is simply a matter of time. The process can be time consuming, and time spent in an inadequate educational setting can be devastating for children with Autism.53 Autism Speaks, the largest not-for-profit organization dedicated to Autism research, education, and treatment explains the necessity of early intervention and the impetus on parents to secure that intervention:

Parents of children with [A]utism simply cannot allow their child to languish in an inappropriate setting when every passing moment means the loss of developmental opportunities that can never be regained. For these children and their parents, every moment counts. Early and intensive educational intervention is critically important to the future of a child with [A]utism. Almost all children with [A]utism will benefit from early and appropriate services, and a significant number will even be able to join regular education classrooms and grow into adults able to enjoy independent and productive lives. But the window of opportunity is widest when the child is

52 Id. at 202.

53 See Brief of Autism Speaks as Amicus Curiae for Tom F., supra note 27, at 2.
young, and the damage to the child’s development if this opportunity is not seized can never be undone.\textsuperscript{54}

With Autism, damage from missed opportunities earlier in life cannot be made up for at a later date.\textsuperscript{55} There are procedures in place under the IDEA to allow parents to withdraw a child with special needs from an inadequate public school in order to place the child in a private school that meets the child’s needs.\textsuperscript{56} Parents can then be reimbursed for the cost of tuition.\textsuperscript{57} However, the parents who choose this option must both have the funds to finance the private school tuition at the outset and must be able to run the risk of never being reimbursed if the outcome of the necessary litigation is not in their favor.\textsuperscript{58}

\section*{III. Existing Special Needs Voucher Programs}

Over the course of approximately a decade, seven states have passed legislation creating special needs voucher programs in response to public school struggles with educating special needs children and the parental frustrations involved therewith.\textsuperscript{59} Further, there has been legislation

\begin{footnotesize}
\begin{enumerate}
\item[54] Id.; see also \textit{Sally J. Rogers et al., An Early Start for Your Child with Autism: Using Everyday Activities to Help Kids Connect, Communicate, and Learn} 328 (2012).
\item[57] See id.
\item[58] Elisa Hyman et. al., \textit{How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering}, 20 \textit{Am. U. J. Gender Soc. Pol'y & L.} 107, 121 (2011).
\item[59] North Carolina created a tax credit program that allows families of students with special needs who switch from public to private school to claim up to a $6,000 tax credit for funds paid for the private school tuition. \textit{N.C. Gen. Stat.} § 105-151.33 (2011). Likewise, Arizona has created a program structured as a tax credit. \textit{Ariz. Rev. Stat. Ann.} § 43-1184 (2013). These programs are included as a “voucher” program in some literature. See, e.g., Stuart Buck, \textit{Special Education Vouchers Are Beneficial: A Response to Hensel}, 41 \textit{J.L. & Educ.} 651, 652–53 (2012). However, tax credit programs are structured so differently than other voucher programs that distinct policy considerations are at issue. See H. Lillian Omand, \textit{Note, School Choice Legislation: A Supply-Side Market Effects Analysis}, 20 \textit{J.L. & Pol.} 77, 120–22 (2004). Specifically, in these programs, funds do not flow directly from a local school system to pay for private school tuition. See id. at 121. Therefore, these programs are not a focus of this Article.
\end{enumerate}
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introduced, but not enacted, in at least a dozen more states. Before the proliferation of these programs, much of the special education reform had occurred on the federal level. With these programs, state legislators are stepping into the special education reform arena.

Although these programs differ in various respects, the essential element in each program is the ability of children with special needs to leave their public school and use funds otherwise intended for their public education to attend a private school of their choice. This Part gives an overview of the current programs. The oldest and most established program, Florida’s McKay Scholarship Program for Students with Disabilities, will be examined in the greatest detail because many of the more recent programs are modeled after it.

A. Florida’s McKay Scholarship Program for Students with Disabilities

First offered in the 2000–2001 school year, the McKay Scholarship Program for Students with Disabilities is the oldest special education program in the nation. In its current form, the program provides an option for Florida public school students with a covered disability to either attend another public school or use a scholarship to attend a private school. The scholarship would be in the amount the student’s public home district would have received for the student from the state for the student to attend. Additionally, the scholarship may only be used to attend a private school that has registered with the state as eligible to...

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60 States that have had legislation pending at some point include: Alabama, Arkansas, Colorado, Kansas, Kentucky, Maryland, Missouri, Mississippi, Nevada, Oregon, South Carolina, and Texas. See Hensel, supra note 8, at 306. Several proposed voucher programs are Autism-specific. See id. at 306–07. Recently, another special needs voucher program was introduced, but failed to become law in Wisconsin; however, it is being reintroduced again in the 2013 legislative session. See generally Brendan Fischer, What Will Scott Walker Lift from the ALEC Agenda in 2013?, PR WATCH (Jan. 9, 2013), http://www.prwatch.org/news/2013/01/11935/what-will-scott-walker-lift-alec-agenda-2013; Jessica VanEgeren, School Vouchers Spreading Across the U.S., Not Just in Wisconsin, CAP. TIMES, Feb. 21, 2013, at 20. Additionally, New York’s Governor Cuomo vetoed special needs voucher legislation in 2012 that was directed toward honoring the religious home life of the special needs child. See Anne Barnard, Bill Vetoed on Placing Students in Schools, N.Y. TIMES, Aug. 1, 2012, at A18.

61 See Hensel, supra note 8, at 292.

62 Id. at 299.

63 Id. at 297.

64 FLA. STAT. ANN. § 1002.39 (West 2012).

65 Id.
receive McKay Scholarship students. The actual amount of the scholarship is calculated according to the severity of the disability. The list of covered disabilities is broad; students are covered if they have documentation of:

[A]n intellectual disability; a speech impairment; a language impairment; a hearing impairment, including deafness; a visual impairment, including blindness; a dual sensory impairment; an orthopedic impairment; [another] health impairment; an emotional or behavioral disability; a specific learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; a traumatic brain injury; a developmental delay; or [A]utism spectrum disorder.

Students must also have an individualized education plan (IEP) in place and, in most circumstances, must have attended public school the previous year.

After its inception, the program had problems with fraud by sham schools that were set up simply to reap the benefits of the scholarship money, some of which did not even have a physical location. In response, additional legislation was passed in an attempt to curb this abuse. Registered schools currently must meet minimum standards of quality, including maintaining a physical site where students regularly attend classes, demonstrating fiscal soundness, and satisfying health and safety codes. Teachers must have a baccalaureate degree and three years of teaching experience “or have special skills, knowledge, or expertise that qualifies them to” teach a particular subject. Any personnel with direct

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66 Id.
67 See id. § 1002.39(10)(a)(2).
68 Id. § 1002.39(1)(b).
69 Id. § 1002.39(2)(a)(3).
70 See, e.g., Gus Garcia-Roberts, Rotten to the Core, MIAMI NEW TIMES, June 23, 2011, at 15–19; S. V. Date, Lack of Voucher Accountability Comes Back to Sting Proponent, PALM BEACH POST, June 30, 2004, at 13A.
71 See FLA. STAT. ANN. § 1002.421 (West 2012).
72 Id. § 1002.421(8)(d).
73 Id. § 1002.421(f).
74 Id. § 1002.421(g).
75 Id. § 1002.421(h).
student contact must undergo a background check and be fingerprinted. 76 The school is not required to conduct any standardized testing, but it is required to cooperate with the parents if they wish to have their child take part in state standardized testing. 77 At a minimum, the school must give parents a written report of their child’s progress annually. 78 It is the Florida Department of Education’s responsibility to verify that these standards are met, and it is authorized to perform random site visits to that end. 79

Both the number of participating students and schools has risen steadily since the program’s inception. In the June 2012 quarterly report published by the Florida Department of Education, the Department reports that, in the 2011–2012 school year, a total of 24,194 students used McKay Scholarships at 1,086 participating schools. 80 Of those students, 53% were nonwhite and 48% were on free or reduced lunch programs. 81 Of the participating schools, approximately 64% were religiously affiliated. 82 The average scholarship payment for students was $6,849. 83 Approximately 9% of the McKay Scholarship students were documented as having an Autism Spectrum Disorder as their primary disability. 84

As the longest running program, the McKay Scholarship program is perhaps also the most widely studied program. One early study of the program concluded, among other things, that students who participated in the program were much less likely to be bullied in their private schools and that there was a notably high level of parental satisfaction with the program. 85

76 Id. § 1002.421(i).
77 Id. § 1002.39(5)(f), (8)(c)(2).
78 Id. § 1002.39(8)(c)(1).
79 Id. § 1002.39(f).
81 Id. at 6.
82 Id. at 3.
84 McKay Program 2012 Report, supra note 80, at 4.
B. Utah’s Carson Smith Scholarship for Students with Special Needs

Utah’s Carson Smith Scholarship for Students with Special Needs first became available in the 2005–2006 school year.86 Under the program, qualified students with special needs are given a scholarship to attend a private school that has registered with the state to accept voucher students.87 Unlike the McKay Scholarship program, attending another public school is not an option. Similar to the McKay Scholarship program, the list of qualifying disabilities in the Utah program is broad.88 Students are covered if they have:

(i) [A]n intellectual disability; (ii) a hearing impairment; (iii) a speech or language impairment; (iv) a visual impairment; (v) a serious emotional disturbance; (vi) an orthopedic impairment; (vii) [A]utism; (viii) traumatic brain injury; (ix) other health impairment; (x) specific learning disabilities; or (xi) a developmental delay, provided the student is at least five years of age . . . and is younger than eight years of age.89

Additionally, unlike Florida’s McKay Scholarship, students must be reassessed for eligibility every three years.90

The statute indicates that covered students must have attended a public school and have an IEP in place,91 but then provides an exception to this requirement if (1) the student is attending a private school that has served disabled students in the past92 and (2) an assessment team can determine with “reasonable certainty” that the student “would qualify for special education services, if enrolled in the public school,”93 as well as what the level of those services would have been.94 Therefore, unlike the McKay Scholarship, students need not attend public school at all before using the

88 Id. § 53A-1a-704(2)(b).
89 Id.
90 Id. § 53A-1a-704(6).
91 Id. § 53A-1a-704(2)(d).
92 Id. § 53A-1a-704(3)(a).
93 Id. § 53A-1a-704(3)(b)(i).
94 Id. § 53A-1a-704(3)(b)(ii).
voucher. A 2008 state audit on the Utah program surveyed a sample of school districts and found that 62% of the students using vouchers in those districts had not attended public school the year before using the voucher.95

The legislation provides for some basic minimum requirements for registered private schools very similar to the McKay Scholarship, including maintaining a physical site where students attend classes and have regular contact with teachers,96 demonstrating fiscal soundness,97 and satisfying health and safety codes.98 Teachers must have a baccalaureate degree,99 three years of teaching experience,100 or “have the necessary special skills, knowledge, or expertise that qualifies them to” teach a particular subject and to teach students with a particular special need.101

Like in Florida’s McKay Scholarship program, a private school is required, at a minimum, to annually assess each student’s progress102 and report the results to the parents of the student.103 Additionally, unlike in the McKay program, the Utah program requires the private schools to disclose “the special education services that will be provided . . . including the cost of those services” prior to enrolling the student.104 The school is also required to disclose teacher credentials to parents.105 However, the legislation makes clear that parents are responsible for assessing this information; parents must sign a form indicating, among other things, that “[a] private school may not provide the same level of special education services that are provided in a public school.”106 In the 2012–2013 academic-year, forty-three schools were eligible to enroll voucher students.107

95 Utah Performance Audit, supra note 86, at 7, 9–10.
97 Id. § 53A-1a-705(1)(b).
98 Id. § 53A-1a-705(1)(d).
99 Id. § 53A-1a-705(1)(g)(i).
100 Id. § 53A-1a-705(1)(g)(ii).
101 Id. § 53A-1a-705(1)(g)(iii).
102 Id. § 53A-1a-705(1)(f)(i).
103 Id. § 53A-1a-705(1)(f)(ii).
104 Id. § 53A-1a-705(1)(e).
105 Id. § 53A-1a-705(1)(h).
The legislation makes clear that the scholarship is meant only as a partial tuition scholarship and that parents are financially responsible for the remainder of the private school tuition. A parent is required to sign a form indicating, among other things, that “I will assume full financial responsibility for the education of my scholarship student.” The amount of the scholarship varies in part based on the severity of the disability. In another difference from the McKay program, if the number of students applying for scholarships exceeds the total expenditure funded by the legislature for the program, the legislation allows for the creation of a lottery system to allocate the scholarships. A lottery is currently in place for the 2013–2014 academic year.

C. Georgia’s Special Needs Scholarship Act

Georgia’s Special Needs Scholarship Act first took effect in the 2007–2008 academic-year. The legislative findings that support the legislation state that “[p]arents are best equipped to make decisions for their children, including the educational setting that will best serve the interests and educational needs of their children.”

Georgia’s program is similar in most respects to the Florida McKay Scholarship. Eligible students must have attended a public school the year before using the voucher and must have an IEP in place. The list of covered disabilities is broad: “(A) Autism; (B) Deaf/blind; (C) Deaf/hard of hearing; (D) Emotional and behavioral disorder; (E) Intellectual disability; (F) Orthopedic impairment; (G) Other health impairment; (H) Specific learning disability; (I) Speech-language impairment; (J) Traumatic

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108 See Utah Performance Audit, supra note 86, at 1 (“The purpose of the scholarship is to provide limited financial assistance by paying for a portion of the tuition at a private school the assisted family believes will best serve the needs of their child.”).


110 Id. § 53A-1a-704(5)(a)(2).

111 See id. § 53A-1a-706 (2); Utah Performance Audit, supra note 86, at 3.


113 Carson Smith Scholarship, supra note 107.


116 Id. § 20-2-2114(a)(3) (Supp. 2013).
Eligible students have a choice to attend either a participating private school or a different public school. Scholarship amounts vary in part according to the severity of the disability.

The requirements for participating private schools are also very similar to the McKay requirements. There must be a physical location for the school, students must have “direct contact with the school’s teachers,” the school must demonstrate fiscal soundness, and the school must comply with health and safety codes. Teachers must either have a minimum of a bachelor’s degree or “have at least three years of experience in education or health.” The school must annually provide the relevant teacher’s credentials to the parents and must also “regularly report to the parents . . . on the student’s academic progress.” Unlike the Utah program, there is no reassessment of qualifying disability once the initial determination is made.

The program has grown steadily since its inception. In the inaugural school year, 899 students were granted scholarships. In the 2011–2012 school year, a total of 2,933 students were granted scholarships. The number of participating schools has also risen from 117 to 208. In the inaugural year of the program, 45% of the participating students were nonwhite and 34% were eligible for free or reduced lunch. In the 2011–2012 school year, 47% of the participating students were nonwhite and

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117 Id. § 20-2-2114(a)(2).
118 Id. § 20-2-2113(b)(4) (2012).
119 Id. § 20-2-2113(b)(1), (2).
120 See id. §§ 20-2-2116(a), 20-2-161 (Supp. 2013).
121 Id. § 20-2-2115(a)(1) (2012).
122 Id. § 20-2-2115(a)(2).
123 Id. § 20-2-2115(a)(4).
124 Id. § 20-2-2115(a)(7).
125 Id.
126 Id. § 20-2-2115(a)(6).
127 Id. § 20-2-2114(e) (Supp. 2013).
18% were eligible for free or reduced lunch. In 2011–2012, the average scholarship amount was $7,038 and Autism was the identified disability for approximately 12% of the students.

D. Ohio’s Autism Scholarship Program and Ohio’s Jon Peterson Special Needs Scholarship Program

In the 2006–2007 school year, Ohio instituted the Autism Scholarship Program—a special needs voucher program restricted to children diagnosed with Autism. In the 2012–2013 school year, Ohio instituted the Jon Peterson Special Needs Scholarship Program—a special needs voucher program that covers any student with special needs who has an IEP, including children with Autism. Thus, children with Autism in Ohio are eligible for a scholarship under either program. To take part in the program, the student must have an IEP in place, but need not actually ever attend a public school; therefore, children already enrolled in private schools are eligible under the programs.

Although there are some basic similarities with the previously discussed programs, including the option to attend either an alternative public school or a private school, the major difference in the Ohio programs is in the increased accountability provisions and the involvement of the public school in those provisions. The public school must complete an IEP for each student that opts to use the voucher, and the private school of choice must implement that IEP. The public school remains

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133 Id. at 3, 12. The legislation creating the Georgia Special Needs Scholarship Act requires that the Georgia Office of Student Achievement, in conjunction with the Georgia Department of Education, compile an annual report on the program and post it on the Office of Student Achievement’s website. GA. CODE ANN. § 20-2-2118 (2012). However, after the inaugural report, the annual reports appear to be posted on the Department of Education’s website, rather than the Office of Student Achievement’s site. See, e.g., 2010–2011 Special Education Annual Report, GA DEP’T OF EDUC., http://archives.gadoe.org/ReportingFW.aspx?PageReq=105&PID=37&PTID=51&CTID=60&Source=K-12%20Placement&StateId=ALL&T=1&FY=2011 (last visited Oct. 17, 2013).
135 Id. § 3310.52 (West 2012).
136 Id. § 3310.51(F)(5). A child cannot obtain a scholarship under both programs, however. Id.
137 Id. § 3310.51(F).
138 See id. § 3310.58.
139 See id. §§ 3310.51(A)(1), 3310.52(A).
140 Id. §§ 3310.51(A)(1), 3310.52(A).
responsible for monitoring progress through communication with parents and the private schools and, ultimately, for updating the IEP in conjunction with the student’s parents each year. The private schools must notify the parents in writing regarding the “[m]ethods of instruction that will be utilized” to provide services to the student as well as the relevant teacher qualifications. The private school is responsible for creating quarterly progress reports on each student and for administering all state assessment tests to scholarship students.

For the Jon Peterson Special Needs Scholarship Program, the number of scholarships available is capped at 5% of the students with special needs in the state. In 2012, Ohio had approximately 235,000 students with an IEP, making approximately 11,750 scholarships available. In the first part of 2012, the program was at 12% of its capacity.

The amount of money awarded for each scholarship is specifically tied to the type of disability. The legislation categorizes various disabilities by severity and increases the amount of the scholarship for each category. A child with Autism, which is in the highest category, may receive a scholarship up to $20,000.

**E. Oklahoma’s Lindsey Nicole Henry Program**

Under Oklahoma’s Lindsey Nicole Henry program, which began in the 2010–2011 school year, vouchers may be granted to students who attended a public school the previous year before requesting the voucher if

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141 Id. § 3310.53(B).
142 Id. § 3310.521(B).
143 Id. § 3310.58(G).
144 Id. § 3310.522.
145 Id. § 3310.52(B).
148 OHIO REV. CODE ANN. § 3310.56 (West 2012).
149 Id.
150 Id.
152 Id. § 13-101.2(A).
they have an IEP in place. \(^{153}\) This program has minimum requirements similar to that of the Florida, Utah, and Georgia programs—it mandates the following: a physical location and regular contact with teachers;\(^ {154}\) fiscal soundness;\(^ {155}\) compliance with health and safety codes;\(^ {156}\) and teacher qualifications of a bachelor’s degree, three years of experience, or “special skills, knowledge, or expertise” that qualifies them to teach a particular subject.\(^ {157}\) The state department of education is responsible for ensuring that private schools who apply to participate in the program meet the minimum requirements, including that the school “[w]ill be academically accountable to the parent or legal guardian for meeting the educational needs of the student.”\(^ {158}\) Currently, there are approximately fifty participating private schools.\(^ {159}\)

In 2011, several school districts refused to process Lindsey Nicole Henry scholarships, contending that the program was unconstitutional under the Oklahoma State Constitution.\(^ {160}\) Eventually, both the parents and school districts themselves filed suits.\(^ {161}\) The myriad ensuing litigation effectively ended with the Oklahoma Supreme Court dismissing the case for lack of standing on the part of the school districts.\(^ {162}\)

**F. Louisiana’s School Choice Pilot Program for Certain Students with Exceptionalities**

In the 2011–2012 school year, Louisiana’s legislature enacted the School Choice Pilot Program for Certain Students with Exceptionalities.\(^ {163}\) The two-year pilot program, launched in parishes\(^ {164}\) having populations in

\(^{153}\) Id. § 13-101.2(A), (B)(1).

\(^{154}\) Id. § 13-101.2(D).

\(^{155}\) Id. § 13-101.2(H)(2).

\(^{156}\) Id. § 13-101.2(H)(4).

\(^{157}\) Id. § 13-101.2(H)(6).

\(^{158}\) Id. § 13-101.2(H)(5).


\(^{161}\) Spry, 292 P.3d at 19; Kimery, 2011 WL 2912696, at *1

\(^{162}\) See Spry, 292 P.3d at 20.

\(^{163}\) LA. REV. STAT. ANN. § 17:4031 (2013).

\(^{164}\) Louisiana is divided into subunits called “parishes,” much like other states are divided into counties. See generally About Louisiana, LOUISIANA.GOV, http://louisiana.gov/ (continued)
excess of 190,000,\textsuperscript{165} allows students with certain listed special needs to use “educational certificates”\textsuperscript{166} to attend private schools “of their parents’ choosing that provide educational services that specifically address the needs of such students.”\textsuperscript{167} Eligible students must have an IEP and “be in need of services for [A]utism, a mental disability, emotional disturbance, developmental delay, other health impairment, specific learning disability, or traumatic brain injury.”\textsuperscript{168}

The amount of the certificate cannot be more than 50% of the per pupil allocation of state funds to the school district in which the student resides.\textsuperscript{169} The private schools participating in the program must have existed for at least two years and have “an established program in place at the school that includes instruction by teachers holding appropriate certification in special education or other appropriate education or training as defined by the department and that is in accordance with a student's Individual Education Plan.”\textsuperscript{170}

In May of 2012, the pilot program was extended to a permanent program for certain parishes and the legislature is considering extending the program statewide.\textsuperscript{171}

G. Arizona Empowerment Scholarship Accounts Program

The most recent program, the Arizona Scholarship Accounts Program, began in the 2011–2012 school year and is singular in its structure.\textsuperscript{172} Under the program, students with special needs who choose to forgo a public school education are entitled to receive 90% of the funds that would

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Explore/About_Louisiana (last visited Sept. 27, 2013). The origin of the term is Louisiana’s Roman Catholic heritage from French and Spanish rule; in French and Spanish colonial periods, local governance was based on ecclesiastical parishes.\textsuperscript{Id.}

\textsuperscript{165} LA. REV. STAT. ANN. § 17:4031(B)(1) (2013).

\textsuperscript{166} Id. § 17:4031(C)(1).

\textsuperscript{167} Id. § 17:4031(A).

\textsuperscript{168} Id. § 17:4031(B)(2)(a).


\textsuperscript{170} LA. REV. STAT. ANN. § 17:4031(D)(1)(c) (2013).

\textsuperscript{171} 2012 La. Sess. Law Serv. 424 (West).

\textsuperscript{172} James G. Dwyer, No Accounting for School Vouchers, 48 WAKE FOREST L. REV. 361, 386 (2013).
have been expended on their education during a school year. The funds are put into an educational savings account controlled by the student’s parents. The funds may be spent on tuition at a private school of the parents’ choosing, but need not be. The funds may also be spent for a variety of other education-related expenses, including tutoring, education-related specialist services, textbooks, transportation, and post-secondary education. If the funds are spent for tuition at a private school, the only qualification specified in the statute is that the school has a nondiscrimination policy in place. The funds accrue from year to year in the educational fund and may be used for qualified expenses through the student’s post-secondary education, at which time any unused funds revert to the state.

To enroll a student for an empowerment scholarship account, the parent of the student must sign an agreement indicating that the parent will “[p]rovide an education for the qualified student in at least the subjects of reading, grammar, mathematics, social studies and science” and “[n]ot enroll the qualified student in a school district or charter school and release the school district from all obligations to educate the qualified student.” The statute indicates that “[a] parent must renew the qualified student’s empowerment scholarship account on an annual basis,” but it is unclear what the result of nonrenewal and return to public school would be.

The wide latitude that this program gives to parents in choosing how to spend the funds and the extremely minimal accountability provisions relating to private schools that receive the funds as tuition set this program apart from the standard McKay Scholarship model. In many ways, this program is the stark opposite of Ohio’s programs in which the school system stays involved in the child’s education through the IEP process.

174 Id. § 15-2402(C).
175 Id. § 15-2402(B)(4)(a).
176 Id. § 15-2402(B)(4).
177 Id. § 15-2401(5).
178 See id. § 15-2402(C), (I); see also Empowerment Scholarship Accounts: FAQ, ARIZONA DEP’T EDUC., http://www.azed.gov/esa/faq (last visited Oct. 26, 2013) (“What happens if I don’t use all my funds in one quarter? Any unspent funds will continue to roll over into the next quarters.”).
180 Id. § 15-2402(F).
181 See supra Part II.D and accompanying notes.
IV. CRITICAL EVALUATION OF SPECIAL NEEDS VOUCHER PROGRAMS

With the significant needs of students with Autism and the corresponding inability of many school systems across the country to meet those needs as a backdrop, the benefits and drawbacks of the voucher solution can be more readily and accurately assessed. Understanding the problem clarifies the question. The question is not whether the programs are free from drawbacks, but rather whether the programs are better than both the status quo in the public school systems and any other viable solution.

The obvious benefit to the programs is that parents who determine that the public school system is not meeting their child’s needs have a choice other than protracted litigation within the school system, as they are able to exit the public school system quickly for an alternative option that they feel will better suit their child’s needs. Critics, however, contend that these programs may not benefit children the way the parents intend and, moreover, that the programs create inequities. This Part will address each of the common critiques of special needs voucher programs, keeping in mind the context in which the programs arose and the context in which the parents who make the decision to leave the public school are operating.

A. Lack of Government Oversight in Private Schools

Various criticisms of special needs choice programs revolve around the lack of government oversight of the private programs for which students may use their vouchers. For instance, commentators point out that, unlike in public schools, private schools to which voucher students matriculate are not required to have teachers trained in special education or to implement the equivalent of an individualized education plan that tailors the curriculum to the needs of the student. Likewise, the schools are not required to administer standardized testing to the students to evaluate

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182 See ARIZ. REV. STAT. ANN. § 15-2402(C).
183 See Hensel, supra note 8, at 333.
184 See id. at 331–32; Margaret M. Wakelin, Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates, 3 NW. J.L. & SOC. POL’Y 263, 263–64 (2008).
185 Hensel, supra note 8, at 322.
186 Id. at 322–23, 326.
their progress.\textsuperscript{187} The commentators argue that this lack of public oversight leaves parents vulnerable to unwittingly enrolling their child in a school that cannot meet the child’s needs.\textsuperscript{188}

Many parents of special needs children are not only capable of determining whether a particular private school is able to meet their child’s needs and certainly whether their child is thriving at that school, but they are also, in fact, in a better position than a governmental regulatory body or standardized testing mechanism to make this determination.\textsuperscript{189} “Parents’ strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children’s best interests in most circumstances. In contrast, the state’s knowledge of and commitment to any particular child is relatively thin.”\textsuperscript{190} School districts lack this special motivation to spend weeks and months researching the educational alternatives and advances related to a particular child’s disability and to pursue the best sources of information and advice on how to optimize the child’s development.\textsuperscript{191}

There still exists, however, a real possibility that parents may be misled into believing that a particular school is appropriate when, in fact, the school cannot meet the student’s needs; this is particularly true if the school affirmatively tries to mislead parents. Indeed, schools that misled parents simply for financial gain became a problem early in the implementation of Florida’s current special needs voucher program.\textsuperscript{192}

However, there are ways to combat these problems within the legislation that creates the voucher program. One obvious solution is to provide guidance to parents as to what questions to ask, assurances to get, observations to make, and benchmarks to look for to assure that a school is appropriate for their child. This parental education could take the form of literature available on a government website. Another legislative solution, employed by at least one current special needs voucher program, is to require private schools that accept vouchers to register with the state and file paperwork assuring that the school meets certain basic levels of

\begin{itemize}
  \item[\textsuperscript{187}] Id. at 327–28.
  \item[\textsuperscript{188}] Id. at 327, 332.
  \item[\textsuperscript{189}] See Wakelin, supra note 184, at 283 ("Congress and the courts agree that parents are the best advocates for the rights of their children.").
  \item[\textsuperscript{190}] Emily Buss, "Parental" Rights, 88 Va. L. Rev. 635, 647 (2002).
  \item[\textsuperscript{191}] CATO HANDBOOK FOR CONGRESS, supra note 46, at 309.
  \item[\textsuperscript{192}] Hensel, supra note 8, at 328.
\end{itemize}
educational quality. Yet another voucher program has gone so far as to require that schools accepting vouchers implement an IEP that the parents and the public school system develop.

While the relative merits of these legislative solutions may be debated, it is clear that there are options available to combat the concern that parents may enroll their student in a program that is not appropriate for their child. This concern is a valid reason to refine voucher programs, rather than to abandon them. Moreover, it is also important to recognize that, for many of the families that want to take advantage of a voucher program, despite government oversight, their child is currently enrolled in a school that is not meeting their child’s needs: the public school which they are seeking to leave. A voucher program gives parents the option to seek out a school that can do better than the status quo at the public school.

B. Paucity of Appropriate Private Schools for Those with Moderate and Severe Disabilities and Corresponding Disproportionate Benefit to Children with Mild Disabilities

Another criticism of special needs voucher programs is that there are simply not enough existing private schools capable of meeting the needs of special education students, especially for those students with moderate to severe special needs. Therefore, commentators argue that voucher programs disproportionately benefit children with mild special needs, such as children with mild Attention Deficit Disorder. The result is that children with mild special needs use vouchers to attend private schools to enjoy some of the general benefits of these schools, such as smaller class size, but they do not receive any special education per se. Underlying this criticism appears to be a concern that voucher programs are not benefitting those children who they are intended to benefit and those who need them most.

It is hard to evaluate this critique without getting more specific because “disability” is such a broad term. Commentators appear to be referring to cognitive rather than physical disabilities when making this critique. Focusing on the specific cognitive disability of Autism, it is true that, in many states, there are not as many private schools capable of serving

196 Id. at 336–37.
197 Id.
198 Id. at 337.
children with moderate to severe Autism as there are students who would seek out those schools if given the opportunity. However, the very existence of voucher programs would at least help to solve the problem. Vouchers will increase the demand for schools that are capable of serving such students, which will encourage schools to create programs to meet these needs. Moreover, in at least one prominent special needs voucher program, there is some evidence that “students with more severe disabilities were no more likely than students with mild disabilities to have difficulty in finding an acceptable school.”

The second aspect of this critique—that voucher programs disproportionately benefit those with mild disabilities—is really a question of legislative intent and good legislative drafting to reflect that intent. It is debatable whether voucher programs should be so broad as to cover children with mild disabilities who do not need special education per se, but rather need small accommodations, such as smaller class size. Some perceive that the inclusion of such students would be either unfair to typical students who would also benefit from smaller class size or, at least, perceived as unfair by the families of typical students. Proponents of including students with mild disabilities in voucher programs would argue that, even if the needed accommodation is small, it is nonetheless a special need due to a diagnosed disability that the public school is unwilling or unable to accommodate and, therefore, it is appropriate to open voucher programs to these students.

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201 Civic Report 38, supra note 85, at 11.

202 See Hensel, supra note 8, at 347.

203 See id. at 323–24, 347 (“Voucher programs are also likely to create tension between the parents of general education students and those of students with disabilities . . . .” Id. at 347. “[T]he majority of children using special needs vouchers are matriculating into programs which offer little more than smaller class size and enhanced personal attention. There are many general education students languishing from large class size and poor instruction that would similarly benefit from such programs.” Id.).

204 Civic Report 38, supra note 85, at 11.
debate, the desired result can be drafted into the special needs voucher legislation. If the goal of the program is to accommodate even mild special needs, programs may be drafted with broad language covering “disabilities” generally. Because there are more students with mild disabilities than there are with more severe disabilities, it is not surprising, nor is it problematic, that these students will be disproportionately benefited if the legislature makes such a policy decision.205 This is only problematic if legislators decide, as a policy matter, that the programs should not cover these children. If that is the case, legislators can draft laws to include only specifically defined moderate and severe disabilities.

C. Loss of Legal Protection

Another critique of voucher programs is that, by accepting voucher money and matriculating at a private school, the student loses the ability to use the legal protections within the IDEA for the duration of the enrollment at the private school and, as a result, they are unable to force the state to provide a free and appropriate legal education (FAPE).206 In other words, if the education the student receives at the private school is not adequate, the student has no legal recourse under the IDEA against either the private school or the state. However, because the programs are optional, they may always re-enroll in public school, where the protections of the IDEA would once again be in place.

Critics of voucher programs, however, emphasize that exiting a school is particularly problematic for children with certain special needs because they are already a vulnerable population and a disruptive change could negate educational progress made.207 Additionally, for children with certain special needs, such as Autism, change in routine can be particularly disruptive and can result in educational regression and behavior problems.208 One commentator described the decision to exit a private school as “a choice between the Scylla and Charybdis—either they must


206 See id. at 330.

207 See id. at 331–32.

208 See HANSEN & ROGERS, supra note 31, at 2.
burden their already struggling child with removal, or they must remain in a school that does not adequately meet their child's needs.\footnote{209}{Hensel, supra note 8, at 332.}

However, this view once again discounts the reality of why the families using a voucher program chose to leave the public school in the first place. Families who employ the voucher option were already faced with a school—the public school—that did not adequately meet their child’s needs. If the protections under the IDEA were adequate to address the deficiencies suffered by the family of the child with special needs, it is unlikely that the family would have sought out the private school option.\footnote{210}{See, e.g., CIVIC REPORT 38, supra note 85, at 8 (finding that 53.8% of current McKay Scholarship participants had conflict with the former public schools over their child’s IEP).}

Indeed, many scholars have questioned whether the private enforcement protections provided under the IDEA can realistically provide adequate, timely solutions to families who are dissatisfied with the school system’s treatment of their child with special needs, especially for lower-income families.\footnote{211}{Eloise Pasachoff, Special Education, Poverty, and the Limits of Private Enforcement, 86 NOTRE DAME L. REV. 1413, 1417 (2011); see also David M. Engel, Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference, 1991 DUKE L.J. 166, 202–03 (1991); Joel F. Handler, Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community, 35 UCLA L. REV. 999, 1010 (1988).}

Additionally, the adversarial nature of the IDEA can undermine relationships between parents and the public school educators, making meaningful dialogue for the benefit of the child extremely difficult.\footnote{212}{CATO HANDBOOK FOR CONGRESS, supra note 46, at 306.}

For many families of children with special needs, they are already between Scylla and Charybdis in the public school system: they can accept the inadequate services for their child, or they can go through protracted private enforcement mechanisms under the IDEA that are likely to strain their relationships with the people who will be educating their child every day. For these families, the possibility of having to leave a private school that did not meet their expectations is the less menacing option. It is also worth noting that one study of the Florida McKay voucher program concluded that parents who utilized a voucher reported “they were better served on virtually every measure” by their private school of choice than by the public school their child had previously attended.\footnote{213}{CIVIC REPORT 38, supra note 85, at 1.} Tellingly, this was true not only for parents that remained in the voucher program, but
also for parents who, for various reasons, decided to remove their child from the private school.\textsuperscript{214}

\textit{D. Diminished Public Resources for Children with Severe Special Needs}

Commentators contend that voucher programs will result in diminished public resources for children with more severe special needs.\textsuperscript{215} The argument is that, because children with mild special needs disproportionately use voucher programs and there is a paucity of private schools that have the capacity to serve children with more severe special needs, children with more severe special needs will be forced to remain in public schools, while those with mild special needs will leave to attend a private school.\textsuperscript{216} Although the public money that is lost when a child leaves to use a voucher at a private school should only account for the expenditure that would have otherwise gone to educate the child who left, critics contend that this does not take into account fixed costs.\textsuperscript{217} As one commentator explains, “Districts will incur training and salary expenses for instructional staff regardless of class size. In most cases, they must retain the services of speech-language pathologists, occupational therapists and other therapeutic professionals on staff whether or not they serve a large or small pool of children.”\textsuperscript{218}

If a legislature drafts voucher legislation that covers only moderate and severe disabilities, the underlying basis for this argument is lost. Those students who use the vouchers will, by definition, have more serious disabilities and, therefore, the disproportional loss from the public schools of children with mild disabilities will not be an issue.

If a special needs voucher program does include children with mild cognitive disabilities, there is some merit to this criticism. There are certainly some fixed costs that will not vary substantially with the number of students served. However, some of the expenditures that are considered “fixed costs” should vary more substantially with student numbers in order to ensure the proper attention is given to each child. Part of the problem in many public schools also is that therapeutic professionals are overworked, having too many children with special needs on their caseload.\textsuperscript{219}

\textsuperscript{214} Id.
\textsuperscript{215} Hensel, \textit{supra} note 8, at 336.
\textsuperscript{216} See id. at 336–40.
\textsuperscript{217} Id. at 337–38.
\textsuperscript{218} Id. at 337.
\textsuperscript{219} See Brief of Autism Speaks as Amicus Curiae for T.A., \textit{supra} note 34, at 11 (citing \textit{EDUCATING CHILDREN WITH AUTISM} 182, 184 (Catherine Lord & James P. McGee eds., \textit{continued})
Therefore, although it may be true that there will be diminished funds, it
does not necessarily follow that there will be diminished services. One
2008 study of the McKay voucher program concluded that there was a net
positive effect on special needs students who remained in public school
and theorized that this effect may be due to the diminished numbers of
special needs students remaining in public schools. That same study
concluded that, for children with the most severe special needs who
remained in the public schools, there was neither a benefit nor a detriment
from the effect of the voucher program.

E. Increased Segregation of Children with Disabilities

Another concern about special-needs voucher programs is that they
will result in an increase in the segregation of children with disabilities.
This concern is two-fold. First, as discussed above, commentators argue
that children with mild disabilities disproportionately use vouchers to
attend private school and, therefore, the population left in the public
schools must have more severe needs. This population is more likely to
need segregated special-needs classrooms to meet their educational needs
and, thus, will interact less with the student body than children with milder
special needs. Critics argue that “identification of disability becomes
tied to children who are separate and apart from the general school
population, causing the stigma of disability potentially to rise.”
Second, for children with more severe special needs, when they do exercise their
option to use a voucher at a private school, the private school is often
specifically designed for children with severe special needs and, as a result,
“segregated” by disability status.

2001)); see also Blue Ribbon Commission, supra note 39, at 50; see generally Teacher
Shortage Areas, supra note 39.

220 Civic Report 52, supra note 205, at 1–2 (“If, as many teacher groups and public
school advocates claim in debates unrelated to school choice, the true cost of educating a
student is greater than the resources that a school receives to educate him and if funding is
largely allocated on a per-capita basis, then losing students to school-choice programs could
mean more resources available for the students who remain.”).

221 Id.

222 Id. at 7–10.

223 Hensel, supra note 8, at 340–43.

224 Id. at 340–41.

225 Id. at 341.

226 Id.

227 Id. at 342.
The first aspect of this concern has an underlying flaw. As discussed previously, commentators contend the children that are disproportionately leaving public schools using vouchers have disabilities so mild that private schools without specific special-needs programming are meeting their needs.\textsuperscript{228} The quintessential example is a child with mild Attention Deficit Disorder that needs an accommodation such as a smaller classroom. However, for a child in this population, it is unlikely that a peer would know the child has been labeled as “disabled.” Therefore, in large part, the interaction between this student and peer does little to help minimize the stigma of disability. The stigma of disability is combated when peers recognize a child as different and nonetheless learn to meaningfully interact with and accept that student, rather than from peers interacting with students that they do not know, and likely will never know, are disabled.\textsuperscript{229} Therefore, the threat posed by these mildly disabled students leaving public schools is largely overstated. Moreover, to the extent this premise is incorrect and there is a benefit to typically developing students interacting with mildly disabled students in terms of combating the stigma of disability, the typically developing students in the private school of choice will fulfill that role and, therefore, benefits will still be gained. Finally, as discussed above, if legislatures decide that voucher programs should benefit students who are more severely disabled and draft legislation to reflect this policy choice, the perceived problem from the exodus of mildly disabled students would cease to be a concern at all.\textsuperscript{230}

The second aspect of the “segregation” concern—that more severely disabled students leave public schools to attend “segregated” schools—is a more complicated issue than the simplified, but often-touted view that disability-only schooling is always negative. One scholar suggests that there is room for, and benefit to, disability-only schooling when attendance is a true choice, rather than a forced segregation:

The field of disability discrimination is undertheorized; it conflates “separate” and “unequal.” Theories of justice

\textsuperscript{228} See supra Part IV.B.

\textsuperscript{229} Maggie Coleman et al., Inclusion and Students with Emotional/Behavioral Disorders, in Inclusion Practices with Special Needs Students: Theory, Research, and Application 25, 33 (Steven I. Pfeiffer & Linda A. Reddy eds., 1999) (“One of the basic premises of full inclusion is that students with disabilities, once they are placed in general education classrooms, will become less stigmatized and more accepted by their peers without disabilities.”).

\textsuperscript{230} See supra Part IV.D.
typically do not consider the example of disability, or if they do, they proceed from a pure "integrationist" perspective. Although an integrationist perspective played an important historical and structural role in helping to close some horrendous disability-only institutions, it fails to recognize that the government may need to retain some disability-only services and institutions for those who need or want them while protecting others from coercively being required to accept such services or being placed in such institutions. An absolutist integrationist perspective disserves the disability community by supporting an inappropriately high threshold for the development and retention of disability-only services and institutions. An anti-subordination perspective should replace it.\textsuperscript{231}

A family’s choice to move a student from an inclusive public school, which is not adequately serving their child, to a disability-only private school in order to maximize that student’s potential fits squarely within this anti-subordination perspective. Although most families would see the loss of daily school interaction with peers as a drawback, the family’s decision—that the benefits of a specialized school outweigh this drawback—should be respected.

Moreover, for some students and their families, daily educational interaction with typical peers may not be desirable.\textsuperscript{232} There is a rough parallel to be drawn between the decision to attend a historically black college or a women-only institution. There are benefits that flow from a disability-centered institution, including a sense of camaraderie and community, that some families may value over daily educational interaction with typical peers.\textsuperscript{233}

Finally, it is also worth noting that parents that do make the choice to educate in a disability-only educational institution can and do facilitate their child’s access to the child’s peer group in other ways, such as: church or civic groups; and group classes or activities of various kinds, such as gymnastics, swimming, art, or music, depending on their child’s

\textsuperscript{231} Ruth Colker, \textit{Anti-Subordination Above All: A Disability Perspective}, 82 Notre Dame L. Rev. 1415, 1415–17 (2007).

\textsuperscript{232} Id. at 1469–71.

\textsuperscript{233} Id.
While, for many students, this interaction may not be ideal, it is often the more logical alternative to gaining typical peer interaction in a public school, while having to seek outside educational opportunities, such as private tutoring, to compensate for the inadequacy of the education at the public school.

The anti-subordination perspective, however, rests on the presumption of true choice. It may be argued that the lack of appropriate private school options that offer an integrated environment with typical peers results in parents facing a Hobbesian choice between keeping their child in an inclusive public school that allows for daily educational interaction with typical peers, but does not offer the needed educational quality of attending a disability-only institution. Voucher programs, however, are part of the solution to this lack of private options. Across the country private schools geared toward typical students have started to create specialized programs that give children with special needs the opportunity to be part of the broader school, but also get the special-education curriculum that is appropriate for their needs. Armed with vouchers, more families will be able to seek a private school that offers both inclusion and special education, creating an incentive for existing private schools to create programs that meet this need.

F. Disproportionate Benefit to Wealthy and Nonminority Students

Critics of special needs voucher programs raise the concern that vouchers will not cover the full cost of tuition at private schools and, thus, are not a true choice for students from lower-income families that cannot afford to make up the difference in tuition cost. Moreover, to the extent

234 PATRICIA SCHETTER & KANDIS LIGHTHALL, HOMESCHOOLING THE CHILD WITH AUTISM: ANSWERS TO THE TOP QUESTIONS PARENTS AND PROFESSIONALS ASK 115–16 (2009).

235 For example, the Franklin Road Academy in Nashville, Tennessee has developed such a program for students with Down Syndrome. Heart to Heart, FRANKLIN ROAD ACAD., http://www.franklinroadacademy.com/admissions/heart-to-heart/index.aspx (last visited Oct. 7, 2013). The students have specialized instruction from special education teachers and other specialists as appropriate for their needs, but are also integrated into the regular education classrooms. Id.

236 See Greene & Buck, supra note 200, at 41 (discussing “market power” in relation to special needs voucher programs).

237 Hensel, supra note 8, at 342–44.
lower-income families are disproportionately racial minorities, voucher programs would disproportionately benefit non-minority students.  

However, there is mixed evidence on whether this is a legitimate concern in the existing special needs voucher programs. In one study of the McKay Scholarship program, there is encouraging evidence that the percentage of children from racial minorities that take advantage of the special needs voucher program is roughly proportional to the racial makeup in the public schools. There is also encouraging evidence that children from lower-income backgrounds are indeed taking advantage of the vouchers, in part by choosing to attend religious schools, which generally have a lower tuition cost than secular private schools. Additionally, there was evidence that students with the most severe disabilities were actually more likely than students with mild disabilities to pay nothing above the scholarship for the tuition at their private school of choice. This is most likely because the amount of a student’s scholarship in the McKay program is tied to the severity of the student’s disability. On the other hand, there is some contrary evidence indicating that more affluent families are more likely to take advantage of special needs voucher programs.

Once again, this issue must be viewed in light of the existing situation for families with special needs children in school systems across the country that are not meeting the children’s needs. Currently, only families with enough wealth to pay for both the high taxes associated with educational cost and private school tuition are able to make the choice to leave a failing public school for a school that can better meet the needs of

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238 Id.
239 Civic Report 38, supra note 85, at 10.
241 Civic Report 38, supra note 85, at 10 (“[A]mong current participants, students with major disabilities are significantly more likely than students with mild disabilities to pay nothing above the scholarship, and also less likely to pay $1,000 or more above the scholarship if they paid anything. This is probably because students with major disabilities receive a larger voucher, as public schools would have spent more on educating them.”).
242 Id.
their child with a disability. Creating a special needs voucher program puts this option within reach for a greater number of families.

Although voucher programs give more families the choice of sending their child to a private school that can meet their child’s needs, unless voucher programs cover the full cost of tuition, there will be some families in lower-income brackets for whom private school tuition is still out of reach. However, the pertinent question becomes whether creating the voucher program, and consequently giving more families a private school option, hurts the families that cannot use the vouchers due to financial constraints. In other words, the question is whether voucher programs diminish the education for children with special needs that remain in public schools. As discussed above, the evidence suggests this is not the case and, in fact, the opposite may be true.

G. Legality and Policy Implications of Public Money Used at Religious Schools

1. Legality

Both special needs and non-special needs school voucher programs have been the subject of suits challenging the legality of the programs, arguing that families using their vouchers at religiously affiliated private schools constitutes an Establishment Clause violation. However, in Zelman v. Simmons-Harris, a case involving an Establishment Clause challenge brought against a choice program that was not special needs specific, the Supreme Court held that, as long as the parents of the children were making a “genuine and independent private choice” to use vouchers at religious schools, there was no Establishment Clause violation. Therefore, at the federal level, Establishment Clause challenges are not a threat to the legality of special needs voucher programs that allow parents to use vouchers at religiously affiliated private schools. Likewise, it is unlikely that a state supreme court would interpret an establishment

244 HARRY BRIGHOUSE, SCHOOL CHOICE AND SOCIAL JUSTICE 208 (2000).
245 CIVIC REPORT 52, supra note 220, at 3.
246 U.S. CONST. amend. I.
249 Id. at 652.
provision in its state constitution to require more than the corresponding provision in the federal Constitution. State supreme courts generally follow lock-step with Supreme Court interpretations of parallel federal constitutional provisions. Moreover, the complex interrelation of the Establishment Clause and the Free Exercise Clause make this a particularly uninviting area for state deviation from federal precedent; if a state supreme court deviates too far from federal Establishment Clause precedent, there is a risk of creating a free exercise violation.

2. Policy

Although the constitutionality of using vouchers at religious schools is fairly settled, there is still debate whether, as a matter of policy, it is problematic that special needs vouchers are used disproportionately at religiously affiliated schools. In Florida, some critics of the McKay Scholarship program suggested that Governor Jeb Bush’s real motivation for supporting the special needs voucher programs was to publicly fund religious schools.

Religious schools, however, may provide the best option for a child with special needs who is using a voucher program to leave a school system that is not meeting the child’s needs. Many religiously affiliated schools are more likely than non-religious schools to view educating children with special needs as part of their mission, creating an atmosphere in which the school is engaged and energetic about making sure the child with special needs reaches full potential. Moreover, the tuition at religiously affiliated schools is, on average, lower than that at non-religiously affiliated private schools, an option that helps allay the wealth-

251 U.S. CONST. amend. I.
254 Id.
related concerns discussed above.\textsuperscript{256} The combination of lower cost and a mission of inclusion makes religiously affiliated schools an ideal option for many families.

\textbf{H. Legality of Funding Mechanisms Under State Constitutions}

Although religious-based challenges are fairly settled, other state challenges may be problematic to the legality of special needs voucher programs. In 2009, the Arizona Supreme Court struck down a special needs voucher program.\textsuperscript{257} In \textit{Cain v. Horne}, the Arizona Supreme Court held that the transfer of funds from the state to private schools violated a provision of the state constitution referred to as the “Aid Clause,”\textsuperscript{258} which prohibits “appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.”\textsuperscript{259} The problem lay in the direct transfer of funds, which the court reasoned created an “appropriation.”\textsuperscript{260} The court explained:

These programs transfer state funds directly from the state treasury to private schools. That the checks or warrants first pass through the hands of parents is immaterial; once a pupil has been accepted into a qualified school under either program, the parents or guardians have no choice; they must endorse the check or warrant to the qualified school.\textsuperscript{261}

Tax credits to such organizations, however, had previously been held unproblematic under the Aid Clause.\textsuperscript{262} After the court struck down the Arizona program, new legislation created a special needs “voucher” program based on a tax credit for tuition payments made to private schools,\textsuperscript{263} a system explicitly approved in the \textit{Cain} decision.\textsuperscript{264}

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other state constitutions have language similar to Arizona’s Aid Clause, revamping of the funds transfer mechanism may likewise solve any constitutional infirmity.

Additionally, the recent Arizona Empowerment Scholarship Accounts Program also appears to be a response to the constitutional infirmity found in *Cain*.

The program is careful to give parents a “choice” not to endorse the check to a private school, but instead to use the funds for other educational expenses. A suit was filed claiming this new program was unconstitutional. An intermediate Arizona court has since determined that the program is constitutional.

In Florida, although the special needs voucher program remains unchallenged, the Florida Supreme Court struck down a voucher program called the Opportunity Scholarship Program, which allowed low-income students attending public schools that repeatedly failed to meet state-set benchmarks for educational quality to use vouchers to attend private schools. The court based its decision on a provision in the Florida Constitution that requires the state to provide “a uniform, efficient, safe, secure, and high quality system of free public schools.” The court reasoned that the constitutional provision restricted the legislature from carrying out the educational mandate only through public schools and, therefore, the diversion of state resources to private schools violated the provision. The court left open the possibility, however, that if a voucher program provided necessary services that public schools could not offer, the program may be constitutional. This is perhaps why Florida’s special need voucher program, which has many similarities to the Opportunity Scholarship Program, has not been similarly challenged.

Similarly, in Louisiana, the state supreme court recently struck down a school choice program because the funding mechanism violated the state

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264 *Cain*, 202 P.3d at 1183.
266 See supra notes 257–65 and accompanying text.
267 See supra Part III.G and accompanying notes.
270 Bush v. Holmes, 919 So. 2d 392, 407 (Fla. 2006).
271 *Id.* (quoting FLA. CONST. art. IX, § 1(a)).
272 *Id.*
273 *Id.* at 412.
constitution by diverting public funds to private schools.\textsuperscript{274} Although this ruling could have an impact on the funding mechanism for the state’s special needs voucher program, at the time of this publication, the special needs voucher program remained unchallenged.\textsuperscript{275}

In sum, although every state constitution contains an education clause,\textsuperscript{276} state courts’ interpretations of these provisions are inconsistent and difficult to predict.\textsuperscript{277} Parents seeking to force state funding of a private school education for their special needs child and a teachers’ association seeking to prevent the implementation of such measures may both potentially find recourse in a state constitution. In most states, the state constitution is unlikely to pose a barrier to implementation of a voucher program.\textsuperscript{278} However, assuming a barrier to the implementation of a voucher program under a state constitution exists, the violation may be redressible by altering aspects of the program.\textsuperscript{279} Ultimately, if a state court finds a constitutional deficiency, and there is not an alternative route around that violation, state constitutions are vastly easier to amend as compared to their federal counterpart.\textsuperscript{280}

V. FUNDAMENTAL BENEFITS OF CHOICE

Examining the common critiques of special needs voucher programs in light of the reality facing students with special needs in public schools across the country reveals that, while voucher programs may not be the perfect solution, the programs do offer families an option that can enhance

\textsuperscript{274} La. Fed’n of Teachers v. State, 118 So. 3d 1033, 1071 (La. 2013).


\textsuperscript{278} See generally Clint Bolick, The Constitutional Parameters of School Choice, 2008 BYU L. REV. 335 (2008) (discussing the impact of various state constitutional provisions on voucher program litigation).

\textsuperscript{279} Id.

the educational opportunities for their child with special needs. Moreover, careful legislative drafting can prevent many of the problems that can arise in special needs voucher programs. Therefore, the answer to the question of whether voucher programs offer a better alternative than the current public system, in many states across the country, is simply yes. The question remains, however, whether voucher programs are also better than any other viable solution to the immediate problem.

Improvement of special education within public schools is the obvious alternative solution. However, the possibility of meaningful improvement in a timeframe that would help families whose children are going through the school systems right now is highly doubtful. Many school systems across the country are struggling to educate regular education students. Given this situation, it is hard to imagine how a large-scale effort to remedy the problems in special education is feasible.

There is also a more fundamental reason that remedying the situation in public schools will be inherently difficult. The special education system currently set up by the IDEA is, in essence, an adversarial system that pits parents and educators at opposite ends of a negotiating table with separate goals. Parents come to the table wanting their child to reach full educational potential and expecting the school system to be an integral partner in achieving this goal. While it seems axiomatic that a child reaching full potential is every parent’s goal, for parents of children with special needs, maximizing their child’s potential is, arguably, of even greater consequence. Whether their child reaches full educational potential can be the difference between the child having some level of independence as an adult or none at all, being able to communicate with others or not being able to communicate even basic needs, or holding a job

281 See Brief of Autism Speaks as Amicus Curiae for T.A., supra note 34, at 9–14; BLUE RIBBON COMMISSION, supra note 39, at 51; see generally TEACHER SHORTAGE AREAS, supra note 39.


284 See Brief of Autism Speaks as Amicus Curiae for Tom F., supra note 27, at 2.
or being completely dependent on others. In short, the stakes are very high.

Meanwhile, the educators at the other end of the table do not necessarily have the same goal. Educators are required by law to provide an “appropriate” education for the student with special needs, which the Supreme Court has interpreted as less than maximization of each child’s potential. Instead, “adequate progress” is all that is required. This sets up a dynamic in which the educators are compelled to educate a child, but, because of limited resources, their goal in doing so is to expend as little of the school’s limited resources as possible to meet the minimum threshold of “appropriate” education. Evidence of this disconnect is present in the very terminology educators use in relation to IEP meetings. Educators have coined the term “Cadillac education” to describe parents who request services that push their students to meet their full potential.

In comparison to this dynamic in public schools, which is somewhat akin to a “shotgun marriage,” private schools are under no compulsion to agree to accept a particular child and parents are under no compulsion to choose a particular school. Thus, when both parties agree for a student to matriculate, it is a marriage of choice. That choice sets the stage for a beneficial and trusting relationship to form between the school and the child’s family. Various studies of voucher programs have determined that “[t]here is clear evidence suggesting that special needs vouchers are

\[285\text{See id.}\]
\[286\text{See id.}\]
\[288\text{Colker, supra note 231, at 1468–69 (“The standards for an ‘appropriate’ education, however, are very low. The Supreme Court in Board of Education v. Rowley made it clear that maximizing each child's potential ‘was further than Congress intended to go.’ Adequate yearly progress is sufficient under this standard, rather than evidence that the child with a disability has attained progress fully ‘commensurate with the opportunity provided to non-handicapped children.’”}).}\]
\[289\text{Judith DeBerry, Comment, When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?, 34 St. Mary's L.J. 503, 507 (2003) (“School districts are required to provide services that are necessary to supply an individual student with a FAPE. However, school districts must also face the reality that if they provide one student with specific accommodations, other students will want the same benefit. In an effort to control costs, school districts must balance the value and effectiveness of a given service for an individual student against the cost of the service and the likelihood other students may demand the same service.”}).}\]
\[290\text{Id. at 539.}\]
Commentators attribute this high level of satisfaction in part to the greater sense of control parents feel when they have a choice to leave a school. While this no doubt plays a part in the parental satisfaction data, it is still an explanation conceived in the adversarial framework that dominates public special education. Few commentators have looked at this same data from a view other than an adversary framework and considered whether parental satisfaction could be due to the simple fact that the parents are now sitting across from educators that fully share the same goals for their child.

VI. POLITICIZATION OF SPECIAL NEEDS VOUCHERS

 Rather than a constructive debate about the benefits and drawbacks of special needs voucher programs, the issue has become politicized for purposes beyond the question of special needs vouchers. Although legislators that are themselves parents of children with special needs have introduced many of the special needs voucher programs around the country, much of the debate has been dominated by groups that are for universal school choice and groups that are opposed to any type of school choice program. Some proponents for universal school choice see special needs vouchers as the tip of the universal voucher charge. The theory goes that, because it is politically unpalatable to oppose a measure that is for the benefit of a sympathetic group, such as children with special needs, these programs have a higher chance of successfully becoming law. Once these programs become the norm, universal choice programs will follow. On the other side, groups against universal school choice have adamantly opposed special needs voucher programs without a searching examination of whether these programs are justified by different

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291 Hensel, supra note 8, at 333.
292 Id.
293 Representative Jon Peterson, who has a daughter with Autism, introduced the Ohio Autism Scholarship Program. John Higgins, Autism Fund Pays Despite Concerns, COLUMBUS DISPATCH, Oct. 17, 2010, at B1. The Florida McKay scholarship is named for then-Florida Senate President John McKay, who is the father of a child with disabilities. CIVIC REPORT 38, supra note 85, at 1.
294 Hensel, supra note 8, at 293.
295 Id. at 296–97.
296 Id. at 295–96.
297 Id. at 296.
considerations and have different consequences than universal choice programs.298

Unfortunately, the most searching research studies done on special needs voucher programs also have the taint of partisan interest group politics. Groups with ties to one side or the other of this debate are the authors of major studies. For example, the Manhattan Institute, a group with a conservative mission, conducted the major studies on the McKay scholarship program.299 Policy Matters Ohio, a group described as a “liberal think tank,” conducted a major study on the Ohio Autism voucher program.300 Although this in and of itself does not invalidate the empirical results of any study, it does give the other side of the debate reason to question and discount the results.

Conservative and liberal ideological purity should not stand in the way of a searching and unbiased inquiry into whether special needs voucher programs are a viable solution to the problems surrounding special needs education in school systems across the country. Instead, this debate should be framed within the context of the current state of affairs in public schools for children with special needs. In this context, special needs voucher programs should be examined not as means to an end, whether it be creating universal voucher programs or stopping the spread of universal voucher programs, but, rather, as a possible real-time solution to the current inadequacies in the public education system for children with special needs.

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298 See Jay P. Greene et al., Education Myths: What Special Interest Groups Want You to Believe About Our Schools—And Why It Isn’t So 2–3, 179 (2005).
300 Amos, supra note 199, at B1.