



legislative activity, that growth does not appear to be slowing.<sup>5</sup> In addition, many of these programs are designed specifically for students with disabilities: of the 36 programs established since 2010, 13 are designed primarily or exclusively to serve students with disabilities.<sup>6</sup> With their rapid expansion, it is important to establish how these programs can responsibly provide for the needs and rights of the students they serve.

Public and private schools do differ in the protections they offer to students with disabilities, but it is wrong to assume those differences uniformly empower students in public schools and disenfranchise those in private schools. In this article, we explain how federal laws, including IDEA, apply differently in private and public school contexts, providing functionally distinct accountability structures and affording families different mechanisms for recourse. We further argue that, rather than restricting the rights of students with disabilities, private school choice programs actually complement these students' rights by expanding their pool of educational options.

This article consists of five sections. The first summarizes the federal laws protecting students with disabilities and explains how they apply differently in public and private schools. The second section introduces state private school choice programs, with a focus on those tailored to students with disabilities. The third section describes the legal arrangements built into these programs to protect students with disabilities, contrasts the accountability mechanisms in public and private school programs, and discusses how programs differ across states. The fourth section outlines arguments commonly leveled against private school choice programs, including that participating students with disabilities lose legal protections and that such programs harm public schools, and offers responses to those arguments. The final section summarizes our argument supporting these programs.

## I. FEDERAL PROTECTIONS FOR STUDENTS WITH DISABILITIES

IDEA is the primary federal law providing protections for students with disabilities in public schools. It requires that each student with disabilities receive an individualized education program (IEP), a legally enforceable document that delineates the "special education and related services" the district will provide to the student.<sup>7</sup> An IEP is developed collaboratively by an IEP team, which includes the student's parents, teachers, and other school officials.

Although IDEA is the main focus of this article, two other federal laws provide educational protections for students with disabilities. The Americans with Disabilities Act protects individuals with disabilities from discrimination in a broad array of settings, including private schools, and provides for

minor accommodations.<sup>8</sup> Section 504 of the Rehabilitation Act of 1973 provides a basis for accommodations in public schools for pre-K–12 students who have disabilities, including some students who do not qualify for an IEP under IDEA.<sup>9</sup> Under this law, students may qualify for a "504 plan," developed by school staff, students, and parents, that sets out the accommodations the school must provide.<sup>10</sup>

### A. Development of Federal Protections for Students with Disabilities

Prior to 1970, a number of state laws excluded children with disabilities from attending public schools, and the U.S. Department of Education reported that only 20 percent of children with disabilities attended public schools.<sup>11</sup> The first major federal effort to improve the education of students with disabilities was a grant program under the Elementary and Secondary Education Act in 1965.<sup>12</sup> In 1970, the Education of the Handicapped Act replaced that program with federal grants to states to fund projects and programs for students with disabilities,<sup>13</sup> but it provided little guidance for how the funds should be spent, and it produced minimal improvements.<sup>14</sup>

It was not until 1975, when Congress passed the Education for All Handicapped Children Act (EAHCA), that students with disabilities in states that accepted federal funding were guaranteed a "free and appropriate public education" (FAPE).<sup>15</sup> In addition to ensuring the right to FAPE, EAHCA's three other purposes were to protect "the rights of handicapped children and their parents . . . , to assist States and localities to provide for the education of all

5 *School Choice in America*, EdCHOICE (Apr. 13, 2017), <http://www.edchoice.org/school-choice/school-choice-in-america>.

6 EdCHOICE, *supra* note 4, at 17, 19, 23, 27, 41, 47, 49, 51, 61, 65, 77, 117, 139 (We do not include Arizona's ESA program in this count; although it was originally enacted to serve only students with disabilities, it has since been expanded to near-universal eligibility).

7 20 U.S.C. § 1414(d)(1)(A)(IV), (B).

8 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 (2012)).

9 Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112 (codified as amended at 29 U.S.C. § 701 (2012)). All students eligible under the IDEA are also protected by Section 504, but not all students considered "otherwise qualified handicapped individuals" under Section 504 are eligible for the IDEA.

10 Similar to a parent's rights under IDEA, parents have recourse through various procedural safeguards, or the courts, if Section 504 accommodations are not provided. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, PARENT AND EDUCATOR RESOURCE GUIDE TO SECTION 504 IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS 35-37 (Dec. 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf>.

11 U. S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 3 (2010).

12 Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

13 Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975).

14 U.S. DEP'T OF EDUC., *supra* note 11, at 5-6.

15 Education for All Handicapped Children Act, Pub. L. No. 94-142, was passed shortly after two prominent decisions, *Pennsylvania Ass'n for Retarded Citizens v. Com. of Pa.*, 334 F. Supp. 1257 (E.D. Pa. 1971), and *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972), found the provision of education for students with disabilities in public schools was inadequate and required the state to provide an individualized public education that provided some educational benefit. *See id.*

handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.”<sup>16</sup>

EAHCA was reauthorized by Congress in 1990 as the Individuals with Disabilities Education Act (IDEA)<sup>17</sup> and again in 2004 as the Individuals with Disabilities Education Improvement Act (IDEIA).<sup>18</sup> IDEA established the due process rights around FAPE that remain in place today for students with disabilities.

### B. Defining Special Education Services Under IDEA

Under IDEA, the process for developing a program to provide FAPE for individual students is well defined, but the educational content and services required to ensure the adequacy of FAPE are not. Since the needs of students with disabilities vary widely, the special education and related services a district will provide as part of FAPE are outlined in each student’s unique IEP.<sup>19</sup>

IDEA envisions a collaborative process for developing a student’s IEP. An IEP team, which includes the student’s general and special education teachers, therapists, a school administrator, and parents, defines the specific services the district will offer the student. An IEP describes the student’s current strengths and academic, developmental, and functional needs; establishes annual goals for the student; and specifies the services that the district will provide to help the student meet those goals. As part of the IEP team, parents participate in the development of their student’s IEP; however, school officials have the final authority on what is and is not included in the IEP. The IEP is supposed to be developed based on the needs of the individual student and is not to be driven by the district’s costs in meeting those needs. This is the “free” in FAPE. IDEA requires school districts to provide FAPE in the “least restrictive environment” to minimize the exclusion of students with disabilities from schools’ general education programs.<sup>20</sup> In other words, under IDEA, students are to be placed in general education classrooms to the maximum extent possible.

The local education agency (typically the school district) bears the responsibility to provide a student with the services agreed to in their IEP. If a student’s local public school cannot provide those services, the district may place the student at another public school or in a private school, at the district’s expense, that has the necessary personnel and expertise.<sup>21</sup> Students placed in

a private school by a public school district in order to fulfill its obligation to provide FAPE are considered “public placements” and retain all the rights to due process and recourse in the courts against their districts that are afforded to students in public schools under IDEA.<sup>22</sup>

### C. Sources of Conflict Between Parents and Public Schools Under IDEA

It is the “appropriate” in FAPE that causes problems for families seeking services. IEPs are typically developed collaboratively and often result in amicable agreements, but some disagreements are inevitable given the potentially conflicting goals of parents and public schools. Parents naturally want to maximize the provisions and benefits of their child’s IEP. Since they are guaranteed FAPE, regardless of what it costs the district, parents’ considerations are based on their views of what is necessary for their child. On the other hand, districts’ desire to constrain costs incentivizes them to meet the legal requirements for IEPs without cutting too deeply into the services they must provide other students. Though resource requirements are not supposed to circumscribe an IEP’s content, substantial case law on the “appropriateness” standard for FAPE suggests that, at a minimum, many parents believe they do.

The legal standard that governs whether a student’s IEP satisfies his or her substantive right to FAPE was established for mainstreamed<sup>23</sup> children in *Board of Education v. Rowley* in 1982.<sup>24</sup> In *Rowley*, the Supreme Court had affirmed that IDEA confers a substantive right to FAPE, but declined to adopt a specific standard for lower courts to apply when determining whether a student with disabilities had been denied FAPE. The Court held that “if the child is being educated in the regular classrooms of the public education system, [an IEP] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>25</sup> The *Rowley* standard was ambiguous enough to allow for substantive disagreements about what services are appropriate for a given mainstreamed student’s specific needs. Appropriate benefits for non-mainstreamed students with disabilities were even less clear.

What standard to apply to determine “when handicapped children are receiving sufficient educational benefits” under IDEA was at the core of the U.S. Supreme Court’s recent decision

16 U.S. DEP’T OF EDUC., *supra* note 11, at 5.

17 Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. § 1400 (2012)); *see also id.* at 6.

18 Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. § 1400 (2012)).

19 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

20 *Id.* § 1412(a)(5). The requirement for providing FAPE in the “least restrictive environment” is intended to limit segregation of students with disabilities and ensure they are integrated into the general education system as much as is appropriate.

21 IDEA governs children placed in, or referred to, private schools by public agencies and states that, in general, “Children with disabilities in private schools and facilities are provided special education and related services,

in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.” *Id.* § 1412(a)(10)(B)(i).

22 *Id.*

23 Mainstreamed refers to students with disabilities who are educated in a regular, or mainstream classroom, in contrast to students with disabilities educated in separate, or self-contained, classrooms.

24 *Board of Educ. v. Rowley*, 458 U.S. 176 (1982).

25 *Id.* at 203-04.

in *Andrew F. v. Douglas County School District*.<sup>26</sup> Andrew, who has autism, had an IEP in Douglas County Public Schools that his parents considered insufficient. After years of Andrew's poor progress under the district's IEP, his parents took the only immediate action they could: they placed him in a private school, where he thrived, and sued the district for failing to provide FAPE, asking for reimbursement of the private school tuition.

The 10th Circuit had ruled for the district by applying the "some educational benefit" standard, which required an IEP to provide educational benefits that were "merely more the de minimis," or more than no benefit at all. While several circuit courts have similarly applied the "some educational benefit" standard, other courts had applied a "meaningful educational benefit" standard, which sets a higher bar but still leaves a great deal of ambiguity. Andrew's parents argued for a yet higher standard which would require that students with disabilities receive educational opportunities that are "substantially equal to the opportunities afforded [to] children without disabilities."<sup>27</sup>

In *Andrew F.*, the U.S. Supreme Court ruled for the family, but rejected both the some educational benefit standard applied by the lower court and the equal opportunity standard argued for by Andrew's family. Instead, the Supreme Court said the standard should be whether the student's IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."<sup>28</sup> While the ruling resolved the lower court split by rejecting the trivial "some educational benefit" standard, it declined to provide concrete guidance as to how to apply the standard based on the "unique circumstances of the child for whom it was created."<sup>29</sup>

Unfortunately, this sort of ambiguous standard leaves room for significant discretion and interpretation, and thus will generate continued disputes. Although school districts are now slightly more constrained by the heightened standard required under *Andrew F.*, many parents will still be at a substantial disadvantage when negotiating their students' IEPs with district officials. Parents are always outnumbered in IEP proceedings, are unfamiliar with the process, face the "natural advantage"<sup>30</sup> of district officials' expertise, and are motivated to avoid conflict with the school officials who will educate their children.<sup>31</sup> These disadvantages in process are coupled with disadvantages in final decision making: if an agreement cannot be reached, the district has the authority to make the final decision on the provisions in an IEP, leaving parents with no option but to accept the IEP as it stands or challenge it in a convoluted, exhausting, and potentially very expensive due process hearing and appeals

process. To be successful on appeal, parents often need to pay for educational consultants and lawyers to challenge the school district's conclusions.

#### D. Recourse Under IDEA

If parents disagree with the school district's placement decision or the contents of their student's IEP, they have two options within the procedural framework of IDEA. They can appeal the decision through IDEA's due process procedures<sup>32</sup> or remove their child from the public school system and sue the school district for reimbursement of private school tuition.<sup>33</sup> There is a third option outside of IDEA, which is to unilaterally place their child in a private setting and pay the expenses out of their own pocket. This third alternative is discussed below in section I.E.

IDEA permits parents to file a complaint and receive an impartial hearing before a hearing or review officer of the state or local education agency; either side may appeal the final administrative decision to a state or federal district court.<sup>34</sup> Parents may file complaints about the school district's determination of ineligibility for an IEP, the contents of an IEP, and the failure of the school district's assigned program or placement to meet the IEP's provisions.<sup>35</sup> Pending the resolution of these administrative proceedings, IDEA requires that the student remain in his or her current educational placement.<sup>36</sup>

Parents' second option, sometimes referred to as "place and chase,"<sup>37</sup> carries substantial risk because it requires parents to bear the upfront costs of a private school education with no certainty of reimbursement. The burden of proof lies with parents to prove that the education offered in the public school was inadequate. This is especially difficult because, under legal precedents including *Andrew F.*, courts are to give substantial deference to the expertise of school officials.<sup>38</sup> Parents who place and chase enter the private market because they view that option as superior to the education offered by the school district, though only parents with adequate financial resources can realistically consider this option. Additionally, absent a judgment in their favor, individual protections under IDEA do not apply to students while their parents pursue place and chase.

Both of these options are risky, because they can be long and expensive, and the outcomes are uncertain. If parents appeal the district's decision through the administrative process, their student stays in a free but arguably inappropriate education setting, and they face lost time and risk foregoing private educational alternatives that could meet their student's needs. Alternatively, they may place their child in a private program they believe to be sufficient, but they do so at their own expense unless and

<sup>26</sup> *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017).

<sup>27</sup> *Id.* at 1001.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Schaeffer v. Weast*, 546 U.S. 49, 60 (2005).

<sup>31</sup> See generally Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423 (2012) (discussing parents' disadvantages in the IEP process).

<sup>32</sup> 20 U.S.C. § 1415.

<sup>33</sup> *Id.* § 1412(a)(10)(C)(ii).

<sup>34</sup> *Id.* § 1415(i)(2)(A).

<sup>35</sup> *Id.* § 1415(b)(6)(A).

<sup>36</sup> *Id.* § 1415(k)(4)(A).

<sup>37</sup> Martin A. Kotler, *Distrust and Disclosure in Special Education Law*, 119 PENN ST. L. REV. 485, 496 (2014).

<sup>38</sup> *Andrew F.*, 137 S. Ct. at 1001-02.

until a judge rules in their favor and requires the school district to reimburse their costs.

#### *E. Parental Recourse Outside the Protections of IDEA*

IDEA's guarantees are only valuable if they can be enforced. When parents believe their student's right to FAPE has been withheld, or that the promised accommodations have not been delivered, their only immediate recourse is to turn to private education providers (regardless of whether they pursue a place and chase strategy). Such parental placement—as opposed to public placement by the school district—in private school does not remove IDEA protections from the student, it just removes the student from the public school system where those protections apply. This is different because the student retains the right to return to public school if the private school proves unsatisfactory, so the student still has access to the rights guaranteed by IDEA, but simply elects not to exercise them by entering the private school market.

Moreover, under both *Rowley* and *Andrew F.*, IDEA only guarantees a minimally “appropriate” free education. While FAPE may well represent an acceptable education under federal law, parents really want the best available education for their children. Such an education may require services far above and beyond the minimally appropriate services required of public schools by IDEA's FAPE standard.

Public and private schools have markedly different roles in offering educational services to students with disabilities, and students' rights vary with those roles. Public school districts are required to serve all district students; private schools are not. The ability of private schools to refuse to enroll students with particular disabilities often offends people at first glance. However, differences in purpose, capacity, scale, and mission between school districts and private schools reveal why imposing similar requirements is inappropriate. First, unlike public school systems, private schools do not have access to public revenue sources and the public tax base. They provide their services on a contractual basis direct to paying customers (parents). Second, given their small scales, private schools do not have all of the options public districts have to find an appropriate placement. Thus, when private providers are not well suited to educate a student with a given disability, they are free to decline enrollment, whereas public schools that are not up to the task must place the student elsewhere at their own expense. Finally, if private schools had to accept all students, then there could be no private schools that narrowly focus on students with particular disabilities, such as schools for the deaf or schools for students with autism; a universal-acceptance policy that effectively outlawed specialized education services like these would do more harm than good.

IDEA implicitly accepts the distinct roles of public and private schools in that it requires publicly funded services to be made available to serve students in both sectors, but it has different requirements for each. IDEA requires that public school districts provide services to students placed in private schools using IDEA funds.<sup>39</sup> School districts, or Local Education Agencies (LEAs), are

required to conduct a thorough “child find” process to identify all students with disabilities that attend private schools located within the district's boundaries. Districts are required to spend a proportionate amount of federal IDEA funds, as determined by a statutory formula, to provide equitable services to this group of children, and to consult with parents and private school representatives as they design and provide public services for students with disabilities in private schools. These requirements show that Congress considered students with disabilities attending private schools to be protected under IDEA, but did not see fit to subject those schools to the requirements placed on public schools to ensure the provision of educational services.

The private market gives parents options for securing educational services that are different from what is available in public schools fully subject to IDEA. In the private market, parents bear the direct responsibility of securing an appropriate education independently from the determinations of public officials. Parents and private schools are voluntary participants in negotiating the specific terms of the education of the privately enrolled student (e.g., a student with a limited range of disabilities might only need general education and a few targeted programs on the side, while a student with acute needs might need a comprehensive focused program); parents' primary legal protection when they independently place their student in private school is the contract they make with the private school. Of course, they also retain recourse in the market; those who find the private school services inadequate always have the choice to send their student, and their tuition money, to a different private school, or to reenroll their child in a public school and accept the services that are provided pursuant to IDEA.

Increasing parent choice is the *raison d'être* for the private educational choice programs discussed below, but it must be acknowledged and communicated to parents that these programs rely on accountability mechanisms that are different from those contained in IDEA, and that those differences allow private schools to provide parents with additional and distinguishable educational choices, while shifting the burden of ensuring that they meet basic standards onto parents.

#### *F. Educational Choice Programs Offer Parents an Alternative to IDEA's Procedural Protections*

Where available, educational choice programs offer another path for families that are dissatisfied with the IDEA-guaranteed IEP by giving them financial assistance to access non-public educational alternatives. Importantly, they do this without subjecting parents to the costly and time-consuming litigation or drawn-out due process procedures they would face under IDEA alone. When viewed through this lens, educational choice programs supplement and expand existing rights under IDEA by enabling parents to seek educational alternatives without forcing them to navigate the complexities of the IDEA remedial process.

The reality is that IDEA's guarantee that public schools must provide FAPE to students with disabilities is not a guarantee that public schools will provide students with the *best available*

<sup>39</sup> See generally 34 C.F.R. § 300.141 (2016) (describing LEA requirements under IDEA for students with disabilities privately placed in private schools); U.S. DEP'T OF EDUC., THE INDIVIDUALS WITH DISABILITIES

EDUCATION ACT: PROVISIONS RELATED TO CHILDREN WITH DISABILITIES ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS 3 (2008), <https://www2.ed.gov/admins/lead/spced/privateschools/idea.pdf>.

education. Public schools need only provide an *appropriate* education. Thus, if a public school district determines it can provide a student with an appropriate education, even when the student's parents believe the best available education would be in a private school, IDEA permits the district to decline to place that student in a private school and instead provide inferior special education services itself.

Indeed, the benefits private schools can provide are illustrated by the willingness of some parents to undertake the financially risky place and chase approach to securing special education services. But private educational choice programs avoid the risk-reward calculation inherent in the place and chase approach and make additional private options immediately available to parents of students with disabilities. Parents who choose a private placement do so deliberately, making the calculation that sacrificing IDEA's FAPE and IEP requirements, as well as its procedural safeguards, is worth it for their student's particular situation. A variety of state educational choice programs give families of students with disabilities—including those who would not be able to afford it without state assistance—the option to make those choices.

## II. INTRODUCTION TO PRIVATE SCHOOL CHOICE PROGRAMS

In the 2016-2017 school year, fifty-six private school choice programs operated in 25 states and the District of Columbia.<sup>40</sup> Twenty programs were limited to students with disabilities, and several more gave additional consideration to such students.<sup>41</sup>

All private school choice programs share two features. First, they allow families to choose to send their children to private schools in lieu of available public schools by providing funding to offset some or all of those students' tuition or other educational

expenditures.<sup>42</sup> Second, they are state programs and, with few exceptions,<sup>43</sup> are available statewide to qualifying students.

Beyond these features, private school choice programs differ in their eligibility requirements, funding mechanisms, and associated regulations. Most often, choice programs are classified into one of four categories—voucher programs, education savings accounts, tax-credit scholarships, and individual tax credits and deductions—all of which can benefit students with special needs. Each of these categories is summarized below.

### A. Publicly Funded Scholarships, or Vouchers

Publicly funded tuition scholarships or grants, often referred to as vouchers, are the most common type of private school choice program. Typically, these programs give families some or all of the state's per-pupil education funding for district schools in the form of a check or warrant that parents can use toward tuition at participating private schools. In 2016-17, 23 voucher programs operated in thirteen states, serving approximately 178,000 students in total.<sup>44</sup> Almost all existing programs are targeted to specific student populations, with 12 limited to students with disabilities and nine others limited to low-income families.<sup>45</sup> Private schools accepting vouchers must often meet state-specific participation requirements, which can relate to health and safety, financial disclosures and audits, curriculum, test administration, staffing, tuition limits, and student performance. State requirements determine which schools are eligible to receive vouchers, but no voucher programs give the state direct power over private schools' operations.

### B. Education Savings Accounts

Education savings accounts (ESAs) allow parents to withdraw their student from public schools and receive funds, either directly from the state or through a tax credit mechanism,<sup>46</sup>

<sup>40</sup> Two choice programs, the Douglas County Choice Scholarship Program and Nevada's Education Savings Account program, existed, but were not in operation in 2017. The Douglas County program, which is a county rather than a state program, was enjoined by the Colorado Supreme Court in *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015). However, the U.S. Supreme Court vacated that decision on June 27, 2017 and remanded the case back to the Colorado Supreme Court to reconsider the case in light of its June 26, 2017 decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, No. 15-577, 2017 WL 2722410, holding that the state of Missouri violated the Free Exercise Clause of the First Amendment when it excluded a church-run preschool from an otherwise religiously neutral and generally available grant program. Nevada's program was ruled constitutional by the state supreme court in 2016, but the funding mechanism was blocked by the court, suspending the program until the state appropriates new funding for the program. See *Schwartz v. Lopez*, 382 P.3d 886 (Nev. 2016).

<sup>41</sup> See generally EdCHOICE, <https://www.edchoice.org> (updated list of school choice programs in the U.S.).

<sup>42</sup> Counts of private choice programs often include two similar programs in Vermont and Maine, which provide vouchers to students in towns that have no public schools. We do not include these in our count because these programs are designed to provide education to students where no public education is furnished, in contrast to other choice programs which provide students with private options in addition to public schools.

<sup>43</sup> The Douglas County Choice Scholarship Program, which was not operational in 2016-17 and is not included in our count, is the only existing choice program that was enacted at the county level. Two Wisconsin programs are restricted to Milwaukee and Racine school districts, but these are supplemented by a third statewide program, and all three programs are established in state law. The Cleveland Scholarship Program is also a state-authorized program that was originally a pilot program restricted to students in the Cleveland Metropolitan School District. Ohio has other similar voucher programs targeted at low-income students, students in low-performing schools, and students with disabilities.

<sup>44</sup> EdCHOICE, *supra* note 4, at 8. Several states have multiple voucher programs, including LA (2), MS (2), OH (5) and WI (4).

<sup>45</sup> Of the two voucher programs that have neither of these limitations, the Cleveland Scholarship program gives priority to low-income families and the Ohio Educational Choice Scholarship Program is limited to students in low-performing schools.

<sup>46</sup> See JASON BEDRICK, JONATHAN BUTCHER & CLINT BOLICK, CATO INSTITUTE, TAKING CREDIT FOR EDUCATION: HOW TO FUND EDUCATION SAVINGS ACCOUNTS THROUGH TAX CREDITS (2016).

to cover a wide range of educational expenses, including but not limited to online programs, tutoring, programs at community colleges and other postsecondary institutions, and tuition and fees for private schools. ESAs allow parents to customize their child's education by drawing from multiple providers. ESAs are currently operational in four states, and all four initially limited eligibility to students with special needs, though Arizona recently expanded its ESA to near-universal eligibility.<sup>47</sup> Nevada's ESA, which is not operational pending a new funding source from the state, also has universal eligibility for public school students.<sup>48</sup> ESAs include strict financial accountability requirements because they are predicated on giving parents full decision-making authority over how the funds are spent. Although the first ESA program only became operational in 2011, about 11,000 students already used ESAs in 2016-17.<sup>49</sup>

### C. Tax-Credit-Funded Scholarships

Tax-credit-funded scholarship programs allow individuals or businesses to receive tax credits when they donate to nonprofits that provide private school scholarships. Scholarships are limited to the cost of tuition at a participating school, a percentage of the state's per-pupil spending, or a specific dollar amount. Twenty-one tax-credit-funded scholarship programs operated in 17 states in 2016-17, serving about 257,000 students.<sup>50</sup> Only two of these programs were limited to students with disabilities. States do not obtain any additional authority over participating schools as a result of these programs, though some programs require participating students to take certain assessments.

### D. Individual Tax Credits and Deductions

Individual tax credits and deductions provide some state income tax relief for parents' approved educational expenses, which can include private school tuition. Four states provided tax deductions and five states provided tax credits in 2016, and only one state's program was limited to students with disabilities.<sup>51</sup> Although the amount of tax relief these programs provide is far less than the amount of funding provided by the first three types of programs, about 880,000 students benefitted from these programs in 2016-17.<sup>52</sup>

## III. LEGAL ARRANGEMENTS GOVERNING PRIVATE EDUCATIONAL CHOICE PROGRAMS FOR STUDENTS WITH DISABILITIES

This section explores how federal law categorizes students with disabilities who leave their public schools to attend a private

school using funds from a state's educational choice program. This section also addresses how particular states' programs regulate participation and what legal protections exist for participating students.

### A. Students with Disabilities Who Participate in Educational Choice Programs Are Considered Parentally Placed Students Under IDEA

One constant across all educational choice programs is that participation by a student with a disability has the same legal effect as a parental placement under IDEA.<sup>53</sup> Given that IDEA accustoms parents of students with disabilities to the substantive and procedural rights discussed in section I, it is very important that parents understand that participating in a private school choice program has significant implications under IDEA.

While parents whose children participate in an educational choice program are subsidized with either state or privately-donated dollars, because those parents unilaterally decide to remove their child from the public school system and either enroll them in a private school or provide them with some other form of non-public education, their child is not entitled under federal law to FAPE, an IEP, or any of IDEA's due process protections that are available to students enrolled in a public school or to publicly placed students. Thus, parental placements into private schools do not come with the panoply of substantive and procedural rights that attach to public placements under IDEA. Table 1 provides a side-by-side comparison of the rights of publicly placed students and those of privately placed students.

<sup>47</sup> By the 2020–21 academic year, all students who previously attended a public school for at least 100 days in the prior year will be eligible to receive an ESA, along with students who are entering kindergarten. *See* S.B. 1431, 53rd Leg., 1st Reg. Sess. (Ariz. 2017).

<sup>48</sup> NEV.REV.STAT. §§ 353B.850-880; 388D.100-140; 392.070(3).

<sup>49</sup> EDCHOICE, *supra* note 4, at 8.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 124-42.

<sup>52</sup> In 2014, the largest educational choice tax-credit program was in Illinois, where 285,000 credits were given averaging \$280. The largest educational choice tax-deduction program was in Minnesota, where 210,000 deductions were taken, averaging \$1,150. *Id.* at 128, 136.

<sup>53</sup> *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-712, SCHOOL CHOICE: PRIVATE SCHOOL CHOICE PROGRAMS ARE GROWING AND CAN COMPLICATE PROVIDING CERTAIN FEDERALLY FUNDED SERVICES TO ELIGIBLE STUDENTS 7 (August 2016) ("Parentally placed' children with disabilities would include those students with disabilities enrolled by their parents in private schools through private school choice programs.").

Table 1: Comparison of Rights of Publicly Placed Students Under Federal IDEA with the Rights of Parentally Placed Students Participating in an Educational Choice Program

<b>Rights of Publicly Placed Students under IDEA</b>	<b>Rights of Parentally Placed Students Participating in a School Choice Program</b>
Public school districts are required to evaluate students with suspected disabilities, including students who attend private schools.	Public school districts are required to evaluate students with suspected disabilities, including students who attend private schools.
Public school officials have the final say about a student's educational placement.	Parents have the final say about their student's educational placement.
Student is entitled to FAPE.  Special education and related services are provided at no cost to parents.	Student is not entitled to FAPE.  Parents may be charged for the cost of tuition and/or special education and related services not covered by the amount of the voucher, tax-credit scholarship, or ESA.
Student is entitled to an IEP.  Student is entitled to special education and related services consistent with the IEP.  If the IEP is not fully implemented, parents can avail themselves of IDEA's remedial processes and seek compensatory services.	Student is not entitled to an IEP at all unless the educational choice program requires the student to have an IEP as a condition of eligibility.  There are no government-mandated remedial processes that parents can avail themselves of to seek relief if the student's IEP is not fully implemented.
Remedial processes include mediation, complaints, and due process hearings when parents dispute the identification, evaluation, or educational placement of a student with a disability, or the provision of FAPE or the implementation of the student's IEP.	Parents retain access to remedial processes (mediation, complaints, and due process hearings) regarding the school district's identification and evaluation of students, but parents do not have access to remedial processes regarding the provision of special education and related services or the implementation of the student's IEP.
Public school districts must review the student's IEP annually.	There is no right to any review of the student's IEP (if one was created in the first instance).
Student is entitled to transportation to the educational facility (public or non-public) selected by the public school district.	Student is not entitled to transportation to the non-public educational facility selected by the parent.

Accordingly, while parents cannot be charged for a public placement in a private school because IDEA requires the district to cover the cost, parents using a private school choice program could be required to pay at least part of the cost of their child's education if the private school they choose costs more than the amount of financial assistance provided by the school choice program. Parents of special needs students using a choice program have no more recourse against the private school than any other parents who unilaterally place their students in the school. In other words, under a public placement, the private school is accountable to the public school district, not the parent. But under a private placement, the private school is directly accountable to the parent, with the district playing no role at all. The ultimate recourse for parents who privately place their child in a private school and are dissatisfied with the result is to remove their child and send her to a different school, public or private.

In short, using an educational choice program to opt out of the public school system means that the student is no longer entitled to FAPE or any of the other procedural and substantive rights under IDEA, just as if the parents used their own money to send their child to a private school. However, that does not mean that children who are eligible to participate in a state's school choice program enter a completely unregulated system. States protect the rights of students with disabilities who participate in educational choice programs with eligibility requirements for participants, regulations imposed on participating schools, notice provisions, and instructions to school districts regarding disability evaluations.

#### *B. Determining Eligibility for State Educational Choice Programs*

As a general matter, students with disabilities are eligible to participate in any private school choice program in the country, if they otherwise meet the program's eligibility criteria. For example, Pennsylvania's Opportunity Scholarship Tax Credit Program defines student eligibility broadly (including non-disabled students), but offers students with disabilities additional scholarship funds.<sup>54</sup> However, not every program makes every student with a disability eligible. For instance, any student with a disability who is currently enrolled in Florida's public schools is eligible to participate in the John M. McKay Scholarship Program for Students with Disabilities,<sup>55</sup> but only Ohio students with autism may participate in Ohio's Autism Scholarship Program.<sup>56</sup> Furthermore, most choice programs that limit scholarships to students with special needs require that an otherwise qualifying student first be enrolled in a public school for some minimum period of time before becoming eligible to apply for a scholarship,<sup>57</sup> although there are often exceptions for

<sup>54</sup> 24 PA. CONS. STAT. § 20-2009-B. In Pennsylvania, scholarship amounts are determined by the private entities that administer the program, but scholarships are capped at \$8,500 for non-disabled students and \$15,000—or the amount of tuition and fees, whichever is less—for students with disabilities.

<sup>55</sup> FLA. STAT. § 1002.39.

<sup>56</sup> OHIO REV. CODE ANN. § 3310.41(A)(7)(a).

<sup>57</sup> *E.g.*, Arkansas' Succeed Scholarship Program for Students with Disabilities, ARK. CODE ANN. § 6-41-802(a)(1)(A); North Carolina's Special

some students, such as those entering kindergarten and children whose parents are active duty military.<sup>58</sup> One state even requires that students seek and be denied access to public schools outside of the student's home district before becoming eligible for a private school scholarship.<sup>59</sup>

Several programs require that students have an active, or recently active, IEP at the time they apply.<sup>60</sup> Other states simply require that the student be identified by their public school district as being eligible for special education and related services.<sup>61</sup> It should be noted that a school district's evaluation and determination of eligibility is distinct from a medical diagnosis. Indeed, a district may determine that a child with a medical diagnosis of autism, for example, is either not eligible for special education and related services or that the student is only entitled to limited services because the student does not fit the district's determination of what constitutes a student on the autism spectrum. On the other hand, a district may determine that a student with no particular medical diagnosis is eligible for special education and related services because the district determines the student has a learning disability.

In light of IDEA's goal of providing all students with disabilities access to an appropriate education, it is worth asking whether any requirement beyond eligibility for special education and related services should be necessary for students with disabilities to access school choice programs. Why require the additional step of creating an IEP if parents believe that anything the public school offers will be inadequate? Requiring that students have an IEP in place in order to be eligible to participate, rather than allowing parents to decide whether to create one, can lead to an inefficient use of resources. Given that developing an IEP requires a significant investment of time and resources by public school districts and parents, policies that permit students to participate any time after a district determines

that a student qualifies for special education and related services would be more efficient.

In a handful of states, one justification for requiring an IEP is that participating private schools must agree to implement the student's existing IEP.<sup>62</sup> However, even those states do not require participating private schools to follow that IEP to the letter.<sup>63</sup> The only case in which requiring an IEP seems to make sense is when the IEP determines the dollar value of a student's scholarship. For example, Florida's ESA program allows parents of students with a disability who qualify for the program without an IEP to request an IEP in order to determine the services the child would receive in the public schools, which affects the value of the student's scholarship.<sup>64</sup>

### C. Requirements Imposed on Private Schools

Educational choice programs often regulate the private schools that accept participating students. Some programs only allow private schools that have been in operation for a certain period of time to enroll students.<sup>65</sup> Such regulations stymie entrepreneurship in ways that do not necessarily affect school quality, and they create unnecessary barriers to opening new schools that serve students with disabilities. Tennessee's ESA program encourages participating parents to choose private schools that educate students with disabilities alongside

---

Education Scholarship Grants for Children with Disabilities, N.C. GEN. STAT. § 115C-112.5(2)(f); Tennessee's Individualized Education Account Program, TENN. CODE ANN. § 49-10-1402(3)(C)(i).

58 *E.g.*, Georgia's Special Needs Scholarship Program, GA. CODE ANN. § 20-2-2114(a)(3)(A); North Carolina's Special Education Scholarship Grants for Children with Disabilities, N.C. GEN. STAT. § 115C-112.5(2)(f)(4), (5).

59 Wisconsin's Special Needs Scholarship Program, WIS. STAT. § 115.7915(2)(a)(1).

60 *E.g.*, Arkansas' Succeed Scholarship Program for Students with Disabilities, ARK. CODE ANN. § 6-41-802(a)(2)(B); Georgia's Special Needs Scholarship Program, GA. CODE ANN. § 20-2-2114(a)(3)(B); Oklahoma's Lindsey Nicole Henry Scholarships for Students with Disabilities, 70 OKLA. STAT. § 13-101.2(A); Tennessee's Individualized Education Account Program, TENN. CODE ANN. § 49-10-1402(3)(B); Utah's Carson Smith Special Needs Scholarship Program, UTAH CODE ANN. § 53A-1a-704(2)(d)(ii); Virginia's Improvement Scholarships Tax Credit Program, VA. CODE ANN. § 58.1-439.25.

61 *E.g.*, Arizona's Lexie's Law for Disabled and Displaced Students Tax Credit Scholarship Program, ARIZ. REV. STAT. ANN. § 43-1505(E); South Carolina's Educational Credit for Exceptional Needs Children, SC BUDGET PROVISIO 109.15(A)(2)(a).

62 Ohio's Autism Scholarship Program, OHIO REV. CODE ANN. § 3310.41(B) ("Each scholarship shall be used only to pay tuition for the child on whose behalf the scholarship is awarded to attend a special education program that implements the child's individualized education program . . ."); Ohio's Jon Peterson Special Needs Scholarship Program, OHIO REV. CODE ANN. § 3310.52(A) ("The scholarship shall be used only to pay all or part of the fees for the child to attend the special education program operated by the alternative public provider or registered private provider to implement the child's individualized education program . . ."); Wisconsin's Special Needs Scholarship Program, WIS. STAT. § 115.7915(6)(h)(1) ("Each private school participating in the program . . . shall . . . [i]mplement the child's most recent individualized education program or services plan, as modified by agreement between the private school and the child's parent, and related services agreed to by the private school and the child's parent that are not included in the child's individualized education program or services plan.").

63 OHIO DEPT OF EDUC., FOR STUDENTS WITH DISABILITIES AND THEIR PARENTS: A COMPARISON OF RIGHTS UNDER IDEA AND CHAPTER 3323 TO THE JON PETERSON SPECIAL NEEDS SCHOLARSHIP PROGRAM (Nov. 2011) ("The scholarship shall be used only for the cost to attend a special education program that implements the child's IEP. However, there is no requirement that the scholarship provider provide all of the services set forth on the IEP."); WIS. DEPT OF PUB. INSTRUCTION, SPECIAL NEEDS SCHOLARSHIP PROGRAM: FREQUENTLY ASKED QUESTIONS FOR PARENTS—2017-18 SCHOOL YEAR (2016-2017 ed.) (Q: "Is the private school required to implement the student's IEP or services plan? [A:] SNSP schools are required to implement the IEP or services plan of SNSP students as modified by agreement between the private school and the student's parent/guardian.").

64 Gardiner Scholarship Program, FLA. STAT. § 1002.385(7)(a)(1).

65 Louisiana's School Choice Program for Certain Students with Exceptionalities requires private schools to not only have existed for two years, but to have "provided educational services to students with exceptionalities" for at least two years prior to enrolling students. LA. STAT. ANN. § 17:4031(D)(1)(c). This not only erects barriers to opening new schools, but also discourages existing schools from serving students with disabilities.

non-disabled students and requires private schools to notify the Department of Education of “whether the [private] school provides inclusive educational settings.”<sup>66</sup> Two programs go so far as to permit the state boards of education to regulate the private schools’ curriculum and textbooks and set the hiring criteria for administrators and instructors.<sup>67</sup> Given such onerous restrictions, it is not terribly surprising that one of these two programs has only three participating schools and serves a mere 159 students, while the other has no participating schools or students.<sup>68</sup>

#### D. Mandatory and Optional Re-evaluations

Finally, some programs require participating students to be re-evaluated by their districts at regular intervals.<sup>69</sup> To the extent that the scholarship amount varies based on the type and severity of a child’s disability, re-evaluations can be valuable to parents if the result is an increased scholarship amount to compensate for a previously undiagnosed disability. Of course, parents could also receive a smaller scholarship amount if the re-evaluation results in a less severe diagnosis. However, if an evaluation resulting in a smaller funding amount is the correct evaluation, meaning the participating student truly needs fewer financial resources to succeed in school, then the result is improved efficiency in the allocation of public funds, benefitting taxpayers or other students with disabilities.

### IV. SURVEY OF ARGUMENTS AGAINST CHOICE PROGRAMS

Critics of allowing students with disabilities access to private school choice programs commonly offer four rationales. These arguments focus on participating students’ foregone rights, uninformed decision-making, the limited funding available in many programs, and the harm to public schools. While all four deserve consideration, the first argument is based on flawed assumptions, and the remaining three should be considered primarily as concerns that should, and do, inform the design of these programs, rather than as reasons to oppose them.

#### A. Foregone Rights Under IDEA

The first and most common argument against private school choice for students with disabilities focuses on the legal protections and educational provisions these students enjoy in public schools and must, it is argued, give up to participate in choice programs. IDEA entitles students with disabilities in public schools to specific protections, including an IEP and due process rights. Since choice programs allow parents to place students in

private schools that are not subject to those protections, critics argue that these programs effectively take away these students’ rights.<sup>70</sup>

Similar arguments focus on broader accountability requirements under federal or state laws that apply to public but not private schools. For instance, the Every Student Succeeds Act requires public schools, but not private schools, to assess students annually and report the results by student subgroup, including students with disabilities. States also have certification requirements for public school special educators that typically do not apply to their private school counterparts.<sup>71</sup> Critics of choice programs argue that, since these programs allow students to attend schools that lack accountability through testing and teacher certification requirements, they effectively remove accountability for special education students.

The logic behind these criticisms contains two central flaws, both grounded in overconfidence in the legal and accountability protections in public schools. The first flaw is that the arguments assume that the private market offers no protections for students with disabilities. In fact, parents’ ability to make choices in the private market provides a distinct, but nonetheless effective, set of protections and recourse for families of students with disabilities who choose to enter that market. Private schools must provide students with an appropriate education, not out of fear of litigation, but in order to retain students. Likewise, private schools must ensure their students make educational progress and their teachers are competent in order to remain solvent, not to satisfy bureaucratic requirements. So protections do exist in the private market, but they depend on different mechanisms than those in public schools, requiring active decision-making by parents presented with an array of private and public options. A central question in this calculus is whether parents should be trusted to make the right decisions for their children. That may be debated, but if so, the private market mechanisms that rely on them can be equally or more effective than public protections that rely on administrators instead.

The second flaw in critics’ logic is the assumption that IDEA protections for public schools are sufficient to protect students’ interests. One can appreciate the fact that those protections serve

<sup>66</sup> TENN. CODE ANN. § 49-10-1403(d).

<sup>67</sup> Mississippi’s Dyslexia Therapy Scholarship for Students with Dyslexia Program, MISS. CODE ANN. § 37-173-21; Nate Rogers Scholarship for Students with Disabilities Program, MISS. CODE ANN. § 37-175-21; see also LA. STAT. ANN. § 17:4031(D)(1)(c) (requiring private schools to employ teachers that hold the appropriate certification in special education or training that accords with a participating student’s IEP).

<sup>68</sup> *School Choice in America*, *supra* note 5, at 47, 49.

<sup>69</sup> See MISS. CODE ANN. § 37-181-5(8); WIS. STAT. § 115.7915(2)(h) (“The child’s parent or guardian consents to make the child available for a reevaluation, by the individualized education program team appointed for the child by the resident school district, within 60 days following a request for a reevaluation under this paragraph.”).

<sup>70</sup> NATIONAL EDUCATION ASSOCIATION, VOUCHER SCHEMES: A BAD IDEA FOR STUDENTS WITH DISABILITIES (2008), [http://www.nea.org/assets/docs/PB14\\_SpecEdVouchers08.pdf](http://www.nea.org/assets/docs/PB14_SpecEdVouchers08.pdf); COUNCIL FOR EXCEPTIONAL CHILDREN, A FALSE CHOICE: WHY VOUCHER PROGRAMS ARE WRONG FOR STUDENTS WITH DISABILITIES (2014), <https://www.ccc.sped.org/-/media/Files/Policy/Vouchers/voucher%20toolkit%202014%20FINAL.pdf>; MEG BENNER & REBECCA ULLRICH, CENTER FOR AMERICAN PROGRESS, BETSY DEVOS’ THREAT TO CHILDREN WITH DISABILITIES (February 2, 2017), <https://www.americanprogress.org/issues/education/reports/2017/02/02/298010/betsy-devos-threat-to-children-with-disabilities/>.

<sup>71</sup> NATIONAL EDUCATION ASSOCIATION, *supra* note 71; SELENE ALMANZAN & DENISE STILE MARSHALL, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., SCHOOL VOUCHERS AND STUDENTS WITH DISABILITIES: EXAMINING IMPACT IN THE NAME OF CHOICE (June 2016), [https://cymcdn.com/sites/copaa.site-ym.com/resource/resmgr/2016\\_Conferenc/COPAA\\_Voucher\\_paper\\_final\\_R6.pdf](https://cymcdn.com/sites/copaa.site-ym.com/resource/resmgr/2016_Conferenc/COPAA_Voucher_paper_final_R6.pdf); Tim Walker, *School Vouchers’ Empty Promise to Special Ed. Students*, NEATODAY (May 23, 2012), <http://neatoday.org/2012/05/23/school-vouchers-empty-promise-to-special-ed-students-2/>.



rather, it is to design adequately funded programs that provide real choices for students.<sup>75</sup>

#### *D. Harm to Public Schools*

A fourth category of criticism deals with the effects choice programs have on public schools. Again, this argument often begins with the observation that many choice programs are not adequately funded. That inadequate funding only delivers choice for students with less severe and therefore less expensive disabilities, for students whose families can afford to supplement public funding, or both. Since school districts that lose these relatively advantaged students to private choice programs also lose funding proportionally, they must provide for the remaining students, who have more acute disabilities and are relatively more expensive to educate, with a lower overall amount of financial support.<sup>76</sup>

These concerns are understandable, but they should not stand in opposition to the rights of individuals with disabilities in the context of choice programs any more than they do under IDEA. This argument shifts from a focus on individual rights to a focus on protecting public schools. More than a shift, this argument pits the individual rights of some students with disabilities (namely, those with minor disabilities or higher family incomes) against the needs of public schools. This argument is not made regarding students parentally placed and funded in private schools, not because students with higher incomes deserve more liberty, but because these students do not cause a shift in public school funding. Nor is it made regarding students with more severe disabilities, both because such students are less likely to be served by underfunded choice programs and because their participation would increase public schools' per-pupil resources. The students who might be parentally placed through school choice programs are the locus of the threat to public schools because they, and the funds that come with them, are viewed as the natural purview of public schools.

One solution to these concerns should be to design programs that, like Florida's McKay program, fund students equitably and in proportion to their individual needs. Programs designed in this manner will not result in sorting by funding amounts, but by students' individual needs. Said another way, such programs would not harm public schools and would give parents choices that are not based on the severity of their child's disability or their household income. Certainly, adjusting the funding mechanism is a solution more immediate to the problem than ending such programs.

#### V. CONCLUSION

Federal protections and funding under IDEA have been remarkably successful at improving the education of students with disabilities in the past half century. However, those provisions are not ideal or sufficient for all students. When school districts

fail to deliver FAPE, or when better private options are available at a reasonable cost, the concept of a single best system holds students back.

Well-designed educational choice programs provide additional options for students with disabilities and allow families to find the best placement for their child, regardless of their financial means. When parents pursue private options for their children, either using their own funds or through choice programs, they do so because they believe that private placement is best for their child. Parents should make such decisions carefully and with the understanding that parental placements do not enjoy the same legal protections as public ones, and that market protections are only effective when parents make active and informed choices. However, engaged parents are in the best position to make those decisions for their children and should be trusted to do so.

Critics' principal argument against educational choice programs is that they force students to forego the legal protections that apply in public schools, and thereby pose them harm. Those arguments are premised on the faulty assumption that those legal protections are uniformly sufficient to guarantee not only that students with disabilities receive FAPE, but also that a publicly provided FAPE will be the best fit for a student at a given cost. School choice programs provide students for whom that assumption is not true with options that they can take or reject. Since families unsatisfied with private schools can return to public schools at any time, choice programs do not limit students' rights under IDEA, but give them additional educational options beyond the public school system.

<sup>75</sup> Nat Malkus, *The Real Problem with School Voucher Programs*, AMERICAN ENTERPRISE INSTITUTE (May 2, 2017), <https://www.aei.org/publication/the-real-problem-with-school-voucher-programs/>.

<sup>76</sup> Lex Frieden, *School Vouchers and Students with Disabilities*, NATIONAL COUNCIL ON DISABILITY (April 15, 2003), <http://www.ncd.gov/publications/2003/April152003>.

