

# **12 Myths and Realities About Private Educational Choice Programs**

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## Introduction<sup>1</sup>

Educational choice programs—defined broadly as programs that provide parents with financial aid to help their children opt out of the traditional public school system—are a hallmark of meaningful educational reform. Yet despite widespread news coverage of such programs, polls show that most Americans are unfamiliar with how educational choice programs work.<sup>2</sup> Opponents of educational choice routinely take advantage of this knowledge gap by promoting various myths intended to confuse legislators and policymakers and thereby deter them from enacting educational choice programs.

In recognition of this dynamic, the Institute for Justice (IJ) created this publication. Our goal is to dispel 12 of the most commonly circulated myths so that legislators and the public can make well-informed decisions about the merits of giving parents more control over their children’s education.

There is no better time to talk about reform than right now. Publicly funded education needs real and dramatic change and educational choice programs are a powerful catalyst for reform. These programs take power away from an education establishment (public sector unions, reform-blocking state departments of education, and self-serving school administrators) that seeks to preserve the status quo. The programs then transfer that power back to parents, who know better than almost anyone what kind of educational environment will best suit the needs of their children. Rather than empowering an administrator whose institutional interests do not always align with students and families, school choice programs empower parents and children to get the education that is right for them.

As the nation’s leading legal defender of educational choice, IJ stands with families nationwide who simply want to make the best choices for their children. With this publication, we seek to set the record straight on educational choice. By bringing together the mountain of evidence on the effectiveness and constitutionality of educational choice, IJ hopes to better inform parents, the public, the media, and lawmakers as they examine this issue.

## What does IJ mean when it uses the phrase “educational choice program?”

This publication uses the phrase “educational choice program” rather than “school choice program” because of the growing popularity of programs that provide families with more than private school tuition aid. These programs cover everything from traditional costs like books to tutors or home education, as well as customized learning for things like speech and occupational therapies. Accordingly, when we talk about an “educational choice program,” we mean a program that provides parents with the means to choose from *any* of a variety of private educational options for their children.

We make this distinction because, while there is a slowly increasing trend of providing greater parental choice within the traditional public school system, we believe those measures are frequently insufficient. Inter- and intra-district transfer options, charter schools, public online schools, and magnet schools operate within an educational framework that has hardly changed since its inception in the 19<sup>th</sup> century. Choice within or among public options alone presents no real competitive challenge to the traditional public school system’s monopoly over students whose parents cannot afford to either move to a better school district or send their children to private schools.

## What are the main types of private educational choice?

1. A state or even local government can give **publicly funded scholarships**, often referred to as vouchers, directly to parents. Parents may then select the private (and sometimes public) school of their choice, using the scholarship as partial or total payment, depending on the terms of the program.
2. Private scholarship-granting organizations can award parents with **scholarships that are funded by private donations from individuals or corporations**. These private scholarship-granting organizations are usually required to be 501(c)(3) nonprofit organizations and contributions to them make the donor eligible to claim a tax credit, most often against their state income taxes. In other words, individuals or companies can reduce their annual tax liability to the state by donating to a qualified scholarship-granting organization that will use that money to provide scholarships to eligible families.
3. State governments can offer **personal tax deductions or credits** directly to parents for the cost of tuition paid to either a private school or an out-of-boundary public school—or for other education-related expenses paid out of parents’ pockets. Because the cost of tuition often far exceeds parents’ tax liabilities, parental tax credits and deductions typically do not spur the sort of participation necessary to generate genuine competitive

pressure on the public school system. As a result, they have not been a particularly successful or compelling form of educational choice. If the tax credits were made refundable, however, essentially transforming the program into a hybrid type of publicly funded scholarship program, it could spur more participation than a typical personal deduction or tax credit program.

4. Finally, there are **education savings account (“ESA”) programs**.<sup>3</sup> ESAs differ from traditional school choice programs in that parents can use the funds deposited in their student’s account not just for private school tuition, but also for a wide variety of educational goods and services, including tutoring, purchasing curricula for use at home, online instruction, special education and related services, and even saving for college tuition. More flexible than publicly funded or tax credit scholarship programs, ESAs allow unprecedented opportunities for parents to customize their children’s educations and take advantage of the rapid growth in educational technologies and resources.

## Why does this paper sometimes differentiate “traditional public schools” from “chartered public schools”?

Although most children are educated in traditional public schools that are operated by local school districts, a growing number of children are educated in schools that are operated by private individuals or companies (both for-profit and nonprofit) pursuant to a charter with an appropriate chartering entity. These chartered schools (commonly known as “charter schools”) are public schools and are therefore subject to more regulations than private schools.

One of the primary strengths of charter schools is that they often operate free from the restrictive and bloated bureaucracies that work closely with teachers’ unions. This allows charter schools to innovate with how they deliver education to children. For example, the Success Academy school system founded by education reformer Eva Moskowitz “produce[s] eye-popping test scores” among mostly low-income minority students taught by non-union teachers who are rewarded with merit pay and have the freedom to experiment outside rigid union guidelines.<sup>4</sup> Many other charter school systems produce similar results.

Still, it is important to note that while charter schools typically have some flexibility in their curriculum and instructional approach, thus differentiating their offerings from traditional public schools, they are not private schools and they remain subject to significant state oversight. However, the distinction between traditional public and charter schools is real, and this paper acknowledges those differences rather than merely lumping all public schools into the same category.

## Myth #1:

Educational choice programs drain resources from an already underfunded public school system.

## Reality #1:

The overwhelming majority of educational choice programs do not cause a negative fiscal impact on public schools or taxpayers. Moreover, in the years since the first school choice program was proposed, public school spending has skyrocketed on an inflation-adjusted, per-student basis, while learning gains have remained essentially the same.

## Explanation:

Educational choice programs allow funds to follow students to the school of their parents' choice, just as funds do whenever a child moves between school districts or enrolls in a charter school.<sup>5</sup> Any time a family moves between school districts or out of state, enrolls in a charter school, decides to educate their child at home, or transfers their student from a public school to a private school, the state stops sending public dollars to the student's prior public school.<sup>6</sup> Thus, with or without educational choice programs, public schools only receive funding for pupils actually enrolled in those schools. If a school is no longer educating a student, it is not "losing" money if the student goes elsewhere. It is merely no longer receiving funds to educate a child who is not attending the school.

Moreover, the overwhelming majority of studies show that educational choice programs save the state money or are revenue neutral. As of 2016, there were 28 empirical studies of the fiscal impact of educational choice programs on taxpayers and public schools.<sup>7</sup> Twenty-five of those studies found that the programs saved the state money, and three found that they were revenue neutral.<sup>8</sup> A subsequent 2019 study examining most existing educational choice programs found that all but one of them saved taxpayers money, and costs in the outlier program were vanishingly small.<sup>9</sup> Indeed, given the fact that most choice programs cost taxpayers only a fraction of what it takes to educate a public school student, and because the amount of the scholarship or ESA is usually less than what the state would have paid to the student's public school, it is no surprise that such programs have generated up to \$6.6 billion in cumulative taxpayer savings at anywhere from \$2,300 to \$3,100 per student.<sup>10</sup>

Meanwhile, over the past 50 years, public school spending per student has skyrocketed, while student academic performance

has remained essentially unchanged. For example, between 1960 and 2015, public school spending per student quadrupled in real dollars.<sup>11</sup> Presumably, if significant increases in spending produced better results, we should have seen significant improvement over this period of time.<sup>12</sup> And yet, academic performance has remained stagnant in the 40-year period between 1970 and 2010.<sup>13</sup> These same dismal results are seen "across the socioeconomic spectrum," where the achievement gap between rich and poor has remained the same for 50 years.<sup>14</sup> In sum, even with gargantuan amounts of money being poured into our nation's public schools, there is no empirical evidence that adding yet more money into the system would improve those schools.<sup>15</sup>

Unfortunately, despite the demonstrable lack of return on investment, this is a myth that refuses to go away. One recent example of spending more money on our nation's public school system without any appreciable effect on academic achievement is the Obama administration's School Improvement Grant Program. A U.S. Department of Education study released by the Obama administration itself found that the program, which doled out a staggering \$3.5 billion from 2010–2015 to some of the nation's worst performing public schools, failed to produce any meaningful results.<sup>16</sup> Schools receiving program funds showed no significant improvement in test scores, graduation rates, or college enrollment compared with similar schools not receiving the funds.<sup>17</sup>

This is not an isolated phenomenon: In 2016, New York City Mayor Bill de Blasio committed \$773 million to his city's poorly performing public schools, but three years later had nothing to show for it in terms of improvements. The chastened mayor's verdict?

"I would not do it again that way."<sup>18</sup>

## Myth #2:

There is no evidence that choice programs improve educational outcomes for students who participate in the programs, and recent studies show that such programs harm student performance.

## Reality #2:

Empirical evidence overwhelmingly demonstrates that educational choice programs improve academic, educational, and life outcomes for those who participate in the programs.

## Explanation:

More than two decades of empirical evidence overwhelmingly demonstrate that educational choice programs improve participant academic outcomes, as well as other educational indicators. In a 2016 survey<sup>19</sup> of the most rigorous research on academic achievement, an education researcher sums it up:

Eighteen empirical studies have examined academic outcomes for school choice participants using random assignment, the gold standard of social science. Of those, 14 find choice improves student outcomes: six find all [choice] students benefit and eight find some benefit and some are not visibly affected. Two studies find no visible effect, and two studies find Louisiana's voucher program—where most of the eligible private schools were scared away from the program by an expectation of hostile future action from regulators—had a negative effect.<sup>20</sup>

It is also important to understand that academic outcomes are only one measure of educational success. Choice programs have consistently assisted students in attaining academic goals that are “typically measured by benchmarks such as high school graduation, college enrollment, persistence in college, and college graduation. Higher levels of educational attainment are associated

with a longer, healthier life; higher lifetime earnings; and lower probabilities of divorce, welfare receipt, and incarceration.”<sup>21</sup> For example, five studies of choice participants in D.C., Milwaukee, Florida, and New York all showed attainment effects that were “both statistically significant and substantively large.”<sup>22</sup> Given these facts, it is perhaps unsurprising that students enrolled in the nation's largest private school choice program, Florida's Tax Credit scholarship program, are also more likely to go to—and graduate from—college than their peers in public school.<sup>23</sup>

Finally, students enrolled in choice programs have been consistently shown to benefit in other important ways outside the classroom. For example, one study determined that choice programs correlate with lower suicide rates and improved mental health,<sup>24</sup> while another study showed a marked decline among choice beneficiaries in paternity suits and criminal activities, particularly for males and low-achieving students.<sup>25</sup>

In sum, the evidence demonstrates that these programs not only improve academic performance, but also raise the educational attainment benchmarks that are critical to becoming a happy and productive member of society.



### Myth #3:

There is no evidence that educational choice programs encourage traditional public schools to improve.

### Reality #3:

There is abundant evidence that choice programs positively impact traditional public schools.

### Explanation:

There have been 34 empirical studies of the effects of educational choice programs on traditional public schools.<sup>26</sup> The overwhelming majority—32—found that educational choice programs have a positive effect on such schools, while one found no effect and one found a negative effect.<sup>27</sup>

For example, numerous evaluations of Florida’s A+ Scholarship Program, in which students at chronically failing public schools could obtain scholarships to transfer to better performing public or private schools, found that the program raised achievement in Florida’s worst performing public schools and that the schools facing the greatest competition made the greatest academic gains.<sup>28</sup> The increased choices provided to students who were previously unable to afford to switch schools prompted changes in the institutional practices of traditional public schools, which were followed by improvements in test scores.<sup>29</sup>

The existence of Milwaukee’s Parental Choice Program has yielded similar benefits for that city’s traditional public schools. As one researcher reports: “The scores of the students in . . . the schools facing the most potential competition from vouchers . . .

improved by more in every subject area tested than did the scores of the students facing less or no competition from vouchers.”<sup>30</sup> Studies of educational choice programs in Indiana, Louisiana, Maine, and Vermont have likewise documented the positive effects that choice can have on traditional public schools.<sup>31</sup>

Tellingly, the one study that found no effect on traditional public schools was a study of the Washington, D.C., Opportunity Scholarship Program, where researchers concluded that both the size of the program and its funding structure were created to minimize its effect on traditional public schools.<sup>32</sup> And in the lone study that found a negative effect on traditional public schools, the authors acknowledged that they “are not currently able to explain” their finding.<sup>33</sup>

The empirical evidence overwhelmingly demonstrates that educational choice programs lead to improvements in the public school system’s performance. By forcing school districts to pay more attention to students eligible for educational choice programs, these programs benefit not only the families choosing to leave the public school system, but also the families choosing to stay in it.

### Myth #4:

Only the best and brightest students from affluent families benefit from educational choice programs, thus leaving the most disadvantaged and difficult-to-educate students in the public school system.

### Reality #4:

Educational choice programs primarily aid disadvantaged students, especially those with special needs or from low-income backgrounds.

### Explanation:

Affluent parents already exercise two forms of educational choice, either by choosing to live in neighborhoods with good public schools or by choosing to pay to send their children to private schools. Thus, educational choice programs are nearly always designed specifically with special-needs and low-income students in mind.

As of 2019, 25 of the 56 choice programs across the country limit eligibility to low- and moderate-income families.<sup>34</sup> Another 19 programs limit eligibility to children with special needs, and several more give additional consideration to such students.<sup>35</sup> Even programs that do not means test participants may still prioritize low-income families with means-preferred admissions.<sup>36</sup> And many programs are designed so that a significant portion of the eligible students must be transferring from a public school. This is the case for 31 of the 56 programs in 2019.<sup>37</sup>

In Florida, for example, tens of thousands of families participate in the state's John M. McKay Scholarship for Students with Disabilities Program. Under the McKay Program, parents are provided with a scholarship (worth about the same amount the state would have spent to educate the participating child in a public school) which they may use at a private or public school of their choice.<sup>38</sup> Since its inception in 2000, the program has enjoyed tremendous popularity amongst parents,<sup>39</sup> growing from two

participants in its first year to more than 30,000 today.<sup>40</sup> Several states have developed similar educational choice opportunities for students with disabilities to replicate the success of Florida's McKay Program.<sup>41</sup> And still others have created programs for students with specific disabilities. Ohio and Mississippi, for instance, enacted programs to benefit students with autism and dyslexia, respectively.<sup>42</sup>

In addition to serving students with disabilities, educational choice programs provide opportunities for students from all income classes and backgrounds. Contrary to what many educational choice opponents allege, educational choice programs primarily benefit low-income students—those who would otherwise be consigned to whatever education their school district provides. For example, in Indiana alone, more than 34,000 students in 2017 used publicly funded scholarships for which eligibility was limited to students with disabilities and students from low- and middle-income families.<sup>43</sup> In Arizona, it is estimated that over 16,000 low-income students were awarded tax-credit-funded scholarships that allowed them to enroll in a private school of their choice.<sup>44</sup> And in Kansas, low-income families and students who would otherwise be assigned to a failing public school are now eligible to receive tax-credit-funded scholarships.<sup>45</sup>

### Myth #5:

Educational choice programs exacerbate racial segregation.

### Reality #5:

Educational choice programs promote racial integration.

### Explanation:

Ten empirical studies have examined educational choice programs and their impact on racial segregation in schools. A review of these studies summarizes the results: “Nine of those studies find school choice moves students into less racially segregated classrooms. The remaining study finds school choice has no visible effect on racial segregation. None finds choice increases racial segregation.”<sup>46</sup>

Despite the clear findings from these studies, opponents of school choice sometimes tar the school choice movement with accusations of segregation. For example, one opponent “proved” segregation<sup>47</sup> by cherry picking data that purportedly showed a decreasing percentage of minorities participating in a school choice program—ignoring the fact that the overall number of minorities exercising choice in that program sharply increased as the program grew in size.<sup>48</sup> Thus, while the racial and ethnic proportions of income-based scholarship recipients shifted as the program expanded, the total number of minority recipients dramatically increased over time.<sup>49</sup> Such numbers are consistent with school choice programs nationwide. As one scholar concluded, “Choice participants are considerably more likely to be low-income, lower-achieving, and African American, and much less likely to be white,

as compared to the average public-school student in their area.”<sup>50</sup>

By contrast, in the traditional public school system, students are assigned to schools based on their zip code. Often, these geographical boundaries are racially homogenous. As a result, students in predominantly minority neighborhoods tend to go to school with predominantly minority classmates, and students in mostly white neighborhoods tend to go to school with mostly white classmates.<sup>51</sup> As a result, while it has been more than 60 years since the U.S. Supreme Court struck down “separate but equal” in *Brown v. Board of Education*, America’s public schools remain staggeringly segregated by race and class.<sup>52</sup> In fact, in the last few decades alone, America’s public schools have seen a dramatic increase of “hyper-segregated” schools, or schools where at least 90% of students are minorities.<sup>53</sup>

The sad reality is that America’s history is fraught with segregation issues. Concerns about racial integration in America’s schools are legitimate and it is an unfortunate fact that integration is a hugely complex issue that cannot be solved by any one policy.<sup>54</sup> However, to the extent that choice impacts segregation one way or another, the evidence across multiple states shows that it increases integration.



## Myth #6:

Public schools are held accountable by state tests and curriculum mandates, while unregulated private schools are completely unaccountable.

## Reality #6:

Public schools lack sufficient accountability to parents because their children must attend their assigned public school regardless of the quality of the education students receive. Private schools are directly accountable to parents and must deliver a satisfactory educational experience or lose students.

## Explanation:

A substantial number of Americans must accept whatever assigned public school happens to serve their neighborhood because they lack the financial means to either move into a neighborhood with better public schools or to pay for private school tuition. Because these families have no place else to turn, the public schools to which they are assigned effectively operate as monopolies, and thus lack sufficient systematic incentives to provide a high-quality education to the students they serve. As a result, too many children are stuck in poorly performing—and sometimes dysfunctional—public schools.

Educational choice programs empower parents to leave any school that is not meeting their child's needs. This market-based approach is the most direct and effective accountability mechanism there is. Indeed, as discussed in detail in response to Myth #3, the threat of competition introduced by educational choice programs has been linked to statistically significant improvements in

educational outcomes in traditional public schools.<sup>55</sup>

And, of course, private schools are not the “unregulated” educational environments that educational choice opponents portray. All 50 states regulate private schools for basic health and safety.<sup>56</sup> And many states require private schools to obtain the state's approval to operate, file regular reports, and follow state curriculum guidelines to ensure adherence to accepted educational standards.<sup>57</sup> (Of course, expanding private educational choices, as a general policy, does not require the government to reduce or expand existing regulations of private schools in any way.)

Educational choice programs empower parents to choose the educational environment that best suits their child's learning style, regardless of whether that is a public or private institution. As such, educational choice programs hold both private and public schools directly accountable to parents.

## Myth #7:

Because they allow parents to enroll their children in religious schools, educational choice programs violate the principle of separation of church and state and are thus unconstitutional.

## Reality #7:

The U.S. Supreme Court and numerous state courts have held that religiously neutral educational choice programs, which give parents a genuine choice of where to send their children to school, are constitutional.

## Explanation:

In 2002, the U.S. Supreme Court declared that school choice programs are constitutional in an IJ case called *Zelman v. Simmons-Harris*. This case built on a number of prior decisions that held that the Establishment Clause permits neutral government programs of true private choice where individuals direct public aid to religious institutions.<sup>58</sup> In *Zelman*, the Court held that a school voucher program that allowed parents to choose to send their children to private and religious schools was no different. The Court explained:

[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.<sup>59</sup>

In practice, this means that educational choice programs must have two characteristics to be constitutional under the First Amendment. First, the program must be neutral regarding religion—neither favoring nor discriminating against religious options. Second, parents must be free to decide whether to participate in the program and to select among the education providers. Therefore, if an educational choice program has these two features—and every current educational choice program

does—then it is constitutional under the First Amendment.

Simply because such school choice programs are constitutional under the federal Constitution, however, does not mean that they automatically pass muster under the religious clauses of certain state constitutions. Many of these provisions speak in terms of prohibiting appropriations of public funds “in aid of” or “for the benefit of” religious institutions.<sup>60</sup> The good news for educational choice advocates is that the overwhelming majority of state courts have rejected legal challenges to educational choice programs because they are religiously neutral and because the programs “aid” or “benefit” students—not religious institutions.<sup>61</sup>

In addition, the U.S. Supreme Court is poised to provide even more clarity as to whether such state constitutional provisions can be reconciled with the protections of the federal Constitution in the context of educational choice programs. The Court will be considering an IJ case in the 2019-20 term to determine whether the federal Constitution permits such constitutional provisions to bar religious options from school choice programs.<sup>62</sup> Finally, although the interpretation of state religious clauses varies, IJ has undertaken a state-by-state review of each state’s constitution and has determined that in nearly every state there is some form of educational choice that will pass muster under these and other types of state constitutional provisions.<sup>63</sup>

### Myth #8:

Educational choice programs that offer tax credits to those donating to private charities that award student scholarships are funded with public dollars.

### Reality #8:

Nearly every court in the nation to consider this question, including the U.S. Supreme Court, has concluded that funds donated to private charities are private funds, regardless of whether the donation makes the taxpayer eligible for a tax deduction or a tax credit.

### Explanation:

Courts across the country have been virtually<sup>64</sup> unanimous in holding that tax-credit-eligible donations to private charities are not public funds.<sup>65</sup> These courts include the U.S. Supreme Court and numerous state appellate courts.<sup>66</sup> As these courts have concluded, tax credits are merely a reduction of tax liability, allowing taxpayers to keep more of their own money. At no point does the state own the donated money legally or even possess it physically. As the Arizona Supreme Court concluded in its highly influential *Kotterman v. Killian* decision, to find otherwise would mean that the state essentially has a claim over every cent of taxpayers' money.<sup>67</sup>

Indeed, the government gives tax benefits for private donations all the time, including both tax deductions and tax credits for charitable

donations. No one claims that public funds are involved when individuals get a tax deduction after donating money to their favorite charity. Neither do they make this claim when taxpayers receive credits for donations to other types of nonprofit organizations, including churches and other religious organizations.<sup>68</sup> Donations to fund student scholarships are no different.

Tax-credit-funded scholarship programs allow private individuals and corporations to donate private funds to private charitable organizations that award private school scholarships to parents who decide for themselves where to enroll their students. At no time does the government own, control, or possess the monies that fund the private school scholarships.

### Myth #9:

Because educational choice programs fund religious schools that may teach doctrines at odds with modern scientific theories, choice students attending those schools receive less and worse science education than their public school counterparts.

### Reality #9:

Educational choice programs fund parents, not schools. Additionally, students who attend religious schools perform well in science on national tests, and private school students tend to take more science classes than students in public schools.

### Explanation:

Of first importance is the fact that educational choice programs do not fund schools: they fund parents. A private school receives payment for educational services provided to parents and students only after parents make an independent decision to enroll their children at that school. As such, no school is entitled to any funding under an educational choice program.

Furthermore, as discussed briefly in the response to Myth #6, states can and do regulate education in private schools to some degree, including imposing requirements that private schools follow state curriculum guidelines.<sup>69</sup>

Additionally, the assertion that students at religious schools are not getting as good an education in science as they would in public schools is unsupported by data about actual educational outcomes. For example, according to the most recently available data, fourth and eighth graders attending Catholic schools scored 14 points higher in science on the National Assessment of Educational

Progress (NAEP) than public school students.<sup>70</sup> And in twelfth grade, the Catholic school students scored 18 points higher on the NAEP.<sup>71</sup> When broken down by ethnicity, black fourth and eighth grade Catholic school students scored nine and 15 points higher in science; similarly, Hispanic fourth and eighth grade students scored 18 and 13 points higher.<sup>72</sup> Also, 55 percent of 2015 graduates of private schools—most of which are religiously affiliated—who took the ACT, met or exceeded the test's college readiness benchmark score for math and science, compared to 36 percent of graduates from public schools.<sup>73</sup> Furthermore, private school students—most of whom attend religiously affiliated schools<sup>74</sup>—also tend to take more science courses. According to a 2016 report by the U.S. Department of Education, “a higher percentage of private high school graduates (44 percent) had taken at least one credit in biology, chemistry, and physics than had graduates from traditional public schools (29 percent).”<sup>75</sup>

### Myth #10:

Students with special needs are forced to give up their rights under federal law, specifically the Individuals with Disabilities Education Act (IDEA), when they participate in educational choice programs.

### Reality #10:

No student is ever forced to give up his or her rights under IDEA because participation in educational choice programs is strictly voluntary.

### Explanation:

The IDEA treats students with disabilities whose parents choose to participate in an educational choice program precisely the same way it treats students with disabilities whose parents choose to send their children to private schools using their own money. In both instances, students with disabilities are no longer public school students. Because the IDEA accustoms parents of students with special needs to certain substantive and procedural rights, however, it is important that parents understand that participating in an educational choice program has real and important implications under the IDEA.<sup>76</sup>

Parents whose children qualify for special education and related services, and who are enrolled in traditional or charter schools, are conferred specific substantive and procedural rights not accorded to parents whose children do not qualify for special education.<sup>77</sup> These rights include a “free and appropriate public education” (FAPE)<sup>78</sup> and an “Individualized Education Program” (IEP), a written document that outlines the various services that will be provided to educate the student—as well as where the student will be educated.<sup>79</sup> Public school parents have the right to challenge the proposed IEP as inadequate to provide FAPE both administratively and in federal court.<sup>80</sup>

The sad reality is that parents are often dissatisfied with the implementation of their child’s IEP. But parents, especially low-income parents, are at a significant disadvantage in negotiating with, and litigating against, school districts regarding the quality of their child’s education.<sup>81</sup> Unfortunately, while students on paper

possess the “right” to FAPE and an IEP, in practice far too many are unable to exercise these rights in their assigned public school, often with dire consequences.<sup>82</sup>

Ironically, if a school district (or charter school) lacks an appropriate placement for a child, his or her IEP may call for placement in a private school.<sup>83</sup> In that circumstance, the district is responsible for the entire cost of the placement, including the costs of tuition and any necessary supplementary services. This is considered a *public* placement in a private school under the IDEA, and the district remains responsible for the student. Parents who are dissatisfied by the public placement thus retain their rights to administrative and judicial recourse against the district, although not directly against the school, which remains private.

Students who participate in educational choice programs are considered *private* placements under the IDEA.<sup>84</sup> When a parent decides to place his or her child in a private school, the IDEA no longer provides the same substantive and procedural protections that apply when a student is enrolled in a public school. Under a private placement, the private school is directly accountable to the parent. The ultimate recourse of a parent who privately places his or her child in a private school and is dissatisfied with the result is to remove his or her child from that school and send him or her to a different school, public or private. Of course, parents are always free to re-enroll their student in a public school and avail themselves of the IDEA.

### Myth #11:

Unlike private schools, public schools must enroll all students.

### Reality #11:

Although public school districts must enroll all students residing in the district's boundaries who want to attend a school in the district, individual public schools are not required to—and do not—enroll all students.

### Explanation:

There are no school systems that truly enroll all students. In most of America, a student's ability to attend a particular school is restricted by geography and financial resources. While children from families that can afford to live in districts with high-performing schools may have access to the public schools they desire, children from poor and middle-income families are often trapped in failing public schools with no means of escaping to better-performing schools because they cannot afford to live in the communities where these schools operate.

Though public school districts are frequently credited as being willing to enroll all students, even where open enrollment laws allow students to attend out-of-boundary public schools without paying tuition, schools and districts can refuse to enroll out-of-boundary students based on factors such as seat capacity.<sup>85</sup> This means, as discussed in more detail in response to Myths #4, 5, and

6, the biggest basis for discrimination in traditional public schools is zip code.

Moreover, in high-performing charter schools, administrators often must resort to lotteries to determine student admissions and maintain wait lists. There are also more than 3,200 public magnet schools throughout the nation,<sup>86</sup> and such schools commonly make admissions decisions based on test scores and other selective criteria.

Finally, traditional public schools are not required to—and, in many cases, do not—serve children with special needs in the same public school those children would attend if they did not have special needs. Rather, school districts can assign such children to other public schools in the district and even contract with private schools or facilities to educate such students.<sup>87</sup>



### Myth #12:

Educational choice programs fund private schools that discriminate against students on the basis of religion, disability, sex, and sexual orientation.

### Reality #12:

Educational choice programs fund parents and students—not schools. Moreover, educational choice programs do not exempt choice schools from existing antidiscrimination laws.

### Explanation:

The impulse of choice opponents to require private schools that enroll students participating in educational choice programs to change their admissions policies is based on their fundamentally mistaken belief that educational choice programs fund schools. As detailed in response to Myths #7, #9, and #10, however, educational choice programs fund parents and students—not schools.

Parents have a fundamental constitutional right “to direct the . . . education of children under their control.”<sup>88</sup> Their choice to use the benefits provided by an educational choice program at a private school that considers factors such as religion, sex, sexual orientation, or disability in admissions, to the extent the use of such selective criteria is permissible under state and federal civil rights laws, is their choice to make—a choice that is reasonably attributable to the parents, not to the government.

Moreover, educational choice programs do not exempt private schools from having to comply with existing state and federal antidiscrimination statutes.<sup>89</sup> Federal antidiscrimination laws do not

prevent religious schools from taking religion into consideration in their admissions decisions. Private schools that are considered recipients of federal financial aid, such as schools that participate in the Department of Agriculture’s Free and Reduced Price Lunch Program, are forbidden from discriminating against disabled students<sup>90</sup> and may not discriminate on the basis of sex,<sup>91</sup> although the regulations make it clear that same-sex schooling at the elementary and secondary level is perfectly permissible.<sup>92</sup> To date, no court has construed “sex” in the context of student admissions to include sexual orientation or gender identity, though the law on that may change.<sup>93</sup>

Properly constructed, educational choice programs leverage a tolerant pluralism to empower parents to exercise their fundamental constitutional right to direct the education and upbringing of the children under their care, including the ability to choose the educational environment that best suits those children’s learning needs.

## Endnotes

- 1 The editors offer their sincere thanks to IJ Senior Attorneys Richard D. Komer (ret.), Michael E. Bindas, and Bert Gall; IJ Attorneys Erica Smith, Ari Bargil, and Keith Diggs; and IJ Vice Presidents Melanie Hildreth and John Kramer for their significant contributions to this paper.
- 2 Maria Danilova & Emily Swanson, *Most Americans unfamiliar with school choice, poll finds*, PBS.org, May 12, 2017, <https://www.pbs.org/newshour/education/americans-unfamiliar-school-choice-poll-finds>.
- 3 To date, every ESA program that has been enacted is a publicly funded program. However, there is growing interest in using a tax credit mechanism to fund an ESA program. See Jason Bedrick, Jonathan Butcher, & Clint Bolick, *Taking Credit for Education: How to Fund Education Savings Accounts through Tax Credits*, Cato Institute (2016).
- 4 Jonathan Chait, *Why Do Teachers Unions Hate Eva Moskowitz?*, New York (Sept. 5, 2014), available at <http://nymag.com/intelligencer/2014/09/why-do-teacher-unions-hate-eva-moskowitz.html>.
- 5 Of course, some states provide temporary funding to school districts or schools that see precipitous drops in enrollment in very short periods of time. Funding these types of “ghost students,” however, is typically only a temporary measure to allow district officials to adjust their budgets and staff sizes to reflect the actual needs and desires of the community.
- 6 There may be some lag time between losing a student and losing the funding for that student, depending on each state’s funding scheme, which allows the districts an opportunity to adjust. However, despite the ever-present reality that schools regularly adjust to fluctuating student enrollment figures, public school advocates often claim that if even one student leaves, schools must still pay for teachers, electricity, and janitors, essentially suggesting that all costs are fixed. However, the argument that all public school costs are fixed and that schools cannot adjust to changes in student enrollment numbers is a canard. See Benjamin Scafidi, *The Fiscal Effects of School Choice Programs on Public School Districts*, Friedman Foundation for Educational Choice (March 2012).
- 7 Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice 1*, Friedman Foundation for Educational Choice (4th ed., May 2016).
- 8 *Id.*
- 9 *Breaking Down School Choice Research to Date* 41, EdChoice (July 12, 2019), available at <https://www.edchoice.org/school-choice/empirical-research-literature-on-the-effects-of-school-choice/>.
- 10 Martin F. Lueken, *Fiscal Effects of School Vouchers: Examining the Savings and Costs of America’s Private School Voucher Programs* 83, EdChoice (Sept. 2018).
- 11 Erik A. Hanushek, Paul E. Peterson, Laura M. Talpey, & Ludger Woessmann, *The Achievement Gap Fails to Close*, 19 *Educ. Next* 8, 17 (Summer 2019), available at <https://www.educationnext.org/achievement-gap-fails-close-half-century-testing-shows-persistent-divide/>. And these numbers do not take into account the millions of dollars of private philanthropy that sometimes flow to both traditional public and charter schools. See Natasha Singer, *The Silicon Valley Billionaires Remaking America’s Schools*, N.Y. Times (June 6, 2017) (detailing millions of dollars of private investments and philanthropic support of traditional public and charter schools).
- 12 Moreover, public school systems have been poor stewards of this steadily increased funding. A recent study reveals that between 1992 and 2015, growth in non-teaching administrative staff far outstripped growth in student enrollment. Benjamin Scafidi, *Back to the Staffing Surge: The Great Teacher Salary Stagnation and the Decades-Long Employment Growth in American Public Schools 1-2*, EdChoice (May 2017) (“This staffing surge was documented using publicly available data that state departments of education annually report to the US Department of Education, where each public school employee was placed into one of two categories—teachers and all other staff. ‘All other staff’ includes district and school administrators, teacher aides, counselors, social workers, reading and math coaches, janitors, bus drivers, cafeteria workers, curriculum specialists, etc.”). If this growth had simply matched enrollment increases, public schools could have saved \$35 billion annually for a total of \$805 billion over this 23-year period. *Id.* at 2. To put that dollar figure into perspective, those funds could have paid for a permanent \$11,100 salary increase for every public school teacher in America. *Id.* Of course, contrary to popular mythology and despite recently stagnant salaries, public school teachers still earn roughly the same amount as architects, accountants, engineers, nurses, and other professionals of similar stature: about \$30 per hour. Jay P. Greene, *Education Myths: What Special Interest Groups Want You to Believe About Our Schools and Why It Isn’t So*, 74 (Rowman & Littlefield 2005).
- 13 Greene, *supra* note 12, at 10-11; Andrew J. Coulson, *State Education Trends: Academic Performance and Spending over the Past 40 Years 2*, Cato Institute (Mar. 18, 2014) (Figure 1).
- 14 Hanushek et al., *supra* note 11, at 17.
- 15 Greene, *supra* note 12, at 19
- 16 U.S. Dep’t. of Educ., *School Improvement Grants: Implementation and Effectiveness ES-3* (Jan. 2017).
- 17 *Id.*
- 18 Naomi Schaefer Riley, *The Renewal Schools Disaster*, Commentary (March 2019), available at <https://www.commentarymagazine.com/articles/the-renewal-schools-disaster/>.
- 19 Forster, *supra* note 7, at 1.
- 20 *Id.*
- 21 Patrick J. Wolf, 18 *Educ. Next* 46, 49 (Spring 2018), available at <https://www.educationnext.org/programs-benefit-disadvantaged-students-forum-private-school-choice/>.
- 22 *Id.*
- 23 Matthew M. Chingos et al., *The Effects of Means-Tested Private School Choice Programs on College Enrollment and Graduation*, Urban Institute (July 19, 2019), available at <https://www.urban.org/research/publication/effects-means-tested-private-school-choice-programs-college-enrollment-and-graduation> (Milwaukee, home of the nation’s oldest choice program, showed similar positive results, while the District of Columbia showed no results one way or the other).
- 24 Corey A. DeAngelis, & Angela K. Dills, *The Effects of School Choice on Mental Health*, Aug. 24, 2018, <https://ssrn.com/abstract=3272550>.
- 25 Corey A. DeAngelis & Patrick J. Wolf, *Private School Choice and Character: More Evidence from Milwaukee*, February 26, 2019 (University of Arkansas EDRE Working Paper), <https://ssrn.com/abstract=3335162>.
- 26 Forster, *supra* note 7, at 1. (discussing the first 33 studies); David Figlio & Krzysztof Karbownik, *Evaluation of Ohio’s EdChoice Scholarship Program: Selection, Competition, and Performance Effects* (July 2016) (which constitutes the 34th study).
- 27 Forster, *supra* note 7, at 16-19; Figlio & Karbownik, *supra* note 26.
- 28 See, e.g., David Figlio & Cassandra M.D. Hart, *Competitive Effects of Means-Tested School Vouchers*, 6 *Am. Econ. J.: Applied Econ.* 133, 150-51 (2014); Rajashri Chakrabarti, *Vouchers, Public School Response, and the Role of Incentives: Evidence from Florida*, 51 *Econ. Inquiry* 500, 501, 508-09 (2013); Rajashri Chakrabarti, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs 24-25* (Fed. Reserve Bank of N.Y., Staff Rep. No. 315, Jan. 2008); Martin R. West & Paul E. Peterson, *The Efficacy of Choice Threats Within School Accountability Systems: Results from Legislatively Induced Experiments*, 116 *Econ. J.* C46, C54 (Mar. 2006); Marcus A. Winters & Jay P. Greene, *Competition Passes the Test*, 4 *Educ. Next*, 66, 68-71 (Summer 2004).
- 29 Cecilia E. Rouse et al., *Feeling the Florida Heat? How Low Performing Schools Respond to Voucher and Accountability Pressure*, 5 *Am. Econ. J.: Econ. Pol’y* 251, 269-77 (May 2013).
- 30 Caroline Minter Hoxby, *Rising Tide*, 1 *Educ. Next* 69, 72 (Winter 2001); see also Jay P. Greene & Greg Forster, *Rising to the Challenge: The Effect of School Choice on Public Schools in Milwaukee and San Antonio* 6-8, Manhattan Inst. (Oct. 2002).
- 31 See Forster, *supra* note 7, at 19 (Table 3) (collecting studies).
- 32 Jay P. Greene & Marcus A. Winters, *An Evaluation of the Effect of DC’s Voucher Program on Public School Achievement and Racial*

- Integration After One Year*, 11 Cath. Educ.: A J. of Inquiry & Prac. 83, 87-88, 92, 94 (2007).
- 33 Daniel H. Bowen & Julie R. Trivitt, *Stigma without Sanctions: The (Lack of) Impact of Private School Vouchers on Student Achievement*, 22 Educ. Pol’y Analysis Archives 11 (Aug. 2014).
- 34 EdChoice, *The ABCs of School Choice: The comprehensive guide to every private school choice program in America* 136-40 (2019 ed.) (This count excludes the Maine and Vermont Town Tuitioning Programs because those two programs are designed to provide education to students where no public school is furnished, in contrast to other choice programs which provide students with private options in addition to public schools.)
- 35 *See id.*
- 36 *Id.* at 57 (noting that Cleveland’s Scholarship Program gives priority to families with incomes less than 200 percent of the federal poverty level).
- 37 *Id.* at 136-40.
- 38 *Id.* at 33-34.
- 39 Virginia R. Weidner & Carolyn D. Herrington, *Are Parents Informed Consumers: Evidence from the Florida McKay Scholarship Program*, 81 *Peabody J. Educ.*, No. 1, 27-56 (2006) (“almost 90 percent of McKay respondents . . . were satisfied or very satisfied with the school their child attends”).
- 40 EdChoice, *supra* note 34, at 34.
- 41 *Id.* at 81-82.
- 42 *Id.* at 59-60; *id.* at 47-48.
- 43 *Id.* at 37-38.
- 44 *Id.* at 89-90.
- 45 *Id.* at 107-08.
- 46 Forster, *supra* note 7, at 26.
- 47 Christopher Lubienksi, *NEPC Review: 12 Myths and Realities about Private Educational Choice Programs*, Nat’l. Educ. Pol’y. Ctr. 12, Mar. 2019, <https://nepc.colorado.edu/thinktank/voucher-myths> (purporting to “prove” that segregation data was being cherry picked while actually ignoring the full data set).
- 48 Compare Ind. Dep’t. of Educ. Off. of Sch. Fin., *Choice Scholarship Program Annual Report: Participation and Payment Data* 10, Apr. 2016, <https://www.doe.in.gov/sites/default/files/choice/2015-2016-choice-scholarship-program-report-final-july-update.pdf> (showing the increase in African-American students from 943 in 2011-12 to 4,317 in 2015-16) with Ind. Dep’t of Educ. Off. of Sch. Fin., *Choice Scholarship Program Annual Report: Participation and Payment Data* 11, Feb. 2019, <https://www.doe.in.gov/sites/default/files/choice/2018-2019-choice-scholarship-program-report-final-040219.pdf> (showing the percentage of participation by black and white students decrease compared to the increase in participation by Asian and Hispanic students, alongside the increase in population participation by all four groups). For example, as the income-based Indiana School Choice Scholarship Program expanded eligibility and capacity, the share of African-American students decreased even as the absolute number of such students more than quadrupled (eventually approximating the demographics of the state). Similarly, as the absolute numbers of African-American and white students increased over the last three years, the relative and absolute numbers of Hispanic students grew as well.
- 49 Ind. Dep’t of Educ. Off. of Sch. Fin. (Feb. 2019), *supra* note 48, at 11.
- 50 Wolf, *supra* note 21, at 48.
- 51 Greg Toppo, *GAO study: Segregation worsening in U.S. Schools*, USA Today, May 17, 2016 (quoting Gary Orfield et al., *Brown at 62: School Segregation by Race, Poverty and State*, Civil Rights Project/ Proyecto Derechos Civiles (May 16, 2016)).
- 52 U.S. Gov’t Accountability Office, *GAO-16-345, K-12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination* 10 (April 2016).
- 53 Toppo, *supra* note 51.
- 54 See James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 *Geo. L.J.* 1287 (2005) (explaining that because school choice has had a huge variety of intellectual forebears including, but not limited to, freed slaves, libertarian economists, segregationists, progressive education reformers, and black nationalists, reducing the origins of school choice to a single cause obscures more than it illuminates).
- 55 *See, e.g.*, Anna J. Egalite, *The Competitive Effects of the Louisiana Scholarship Program on Public School Performance* (2016), available at <https://educationresearchalliancencola.org/files/publications/Report-4-LSP-Competitive-Effects.pdf>.
- 56 Christopher Hammons, *Fifty Educational Markets: A Playbook of State Laws and Regulations Governing Private Schools*, 14-15 (April 2008).
- 57 *Id.*
- 58 *See Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (“Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.”).
- 59 *Id.* at 652.
- 60 For more information about state religion clauses, see Richard D. Komer, *School Choice and State Constitutions’ Religion Clauses*, 3 *J. Sch. Choice* 331 (2009).
- 61 *Magee v. Boyd*, 175 So. 3d 79, 135 (Ala. 2015) (finding that the “tax-credit provision was designed for the benefit of parents and students, and not for the benefit of religious schools”); *Kotterman v. Killian*, 972 P.2d 606, 620 (Ariz. 1999) (“The way in which [a scholarship organization] is limited, the range of choices reserved to taxpayers, parents, and children, the neutrality built into the system—all lead us to conclude that benefits to religious schools are sufficiently attenuated to foreclose a constitutional breach.”); *Niehaus v. Huppenthal*, 310 P.3d 983, 987 (Ariz. Ct. App. 2013) (“The specified object of the ESA is the beneficiary families, not private or sectarian schools.”); *Cain v. Horne* (“*Cain I*”), 183 P.3d 1269, 1274 (Ariz. Ct. App. 2008) (upholding a voucher program under one of Arizona’s religion clauses because “parents and children make an independent, personal choice to direct the funds to a particular school, which may be either religious or secular”, *overruled on other grounds by Cain v. Horne* (“*Cain II*”), 202 P.3d 1178 (Ariz. 2009); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. Ct. 2001) (“[T]he Act allows Illinois parents to keep more of their own money to spend on the education of their children as they see fit and thereby seeks to assist those parents in meeting the rising costs of educating their children.”); *Toney v. Bower*, 744 N.E.2d 351, 360-63 (Ill. App. Ct. 2001) (finding persuasive the reasoning in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12 (1993), that “[t]he direct beneficiaries of the aid were disabled children; to the extent that sectarian schools benefitted at all from the aid, they were only incidental beneficiaries”); *Meredith v. Pence*, 984 N.E.2d 1213, 1228-29 (Ind. 2013) (“The direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend.”); *Schwartz v. Lopez*, 382 P.3d 886, 899 (Nev. 2016) (“It is undisputed that the ESA program has a secular purpose—that of education—and that the public funds which the State Treasurer deposits into the education savings accounts are intended to be used for educational, or nonsectarian, purposes.”); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999) (“The primary beneficiaries of the School Voucher Program are children, not sectarian schools.”); *Oliver v. Hofmeister*, 368 P.3d 1270, 1276 (Okla. 2016) (“The scholarship program does not directly fund religious activities because no funds are dispersed to any private sectarian school until there is a private independent selection by the parents or legal guardian of an eligible student.”); *Jackson v. Benson*, 578 N.W.2d 602, 626-27 (Wis. 1998) (describing vouchers as “life preservers” that have “been thrown” to students participating in the program).
- 62 *See infra*, note 64. A recent decision of the U.S. Supreme Court, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), suggests that IJ will prevail in that upcoming case. In *Trinity Lutheran*, the Court held that the state of Missouri violated the U.S. Constitution when it relied on its state constitution to bar a church-run preschool from participating in the state’s playground resurfacing program. The decision suggests that, just as the U.S. Constitution does not tolerate the use of a state constitution to exclude a religious preschool from an otherwise neutral grant program, the U.S.

- Constitution will not tolerate the use of state constitutional provisions to exclude religious options from educational choice programs.
- 63 Richard D. Komer & Olivia Grady, *School Choice and State Constitutions: A Guide to Designing School Choice Programs*, Institute for Justice and American Legislative Exchange Council (2d ed. Updated March 2017).
- 64 The only court to reach a contrary conclusion was the Montana Supreme Court in December 2018, though that decision has been appealed to the U.S. Supreme Court and will be argued in the 2019-20 term. *Espinoza v. Mont. Dep't. of Rev.*, 393 Mont. 446 (2018), cert. granted, 139 S. Ct. 2777 (2019). In *Espinoza*, the Montana Supreme Court found that the state's tax credit program was unconstitutional under Montana's Blaine Amendment, which prohibits the government from using public appropriations to aid religious organizations. Unlike courts in Florida and Georgia, which have substantially similar language in their constitutions, see *infra* note 66, the Montana Supreme Court ruled that the state's tax-credit scholarship program involved "indirect" appropriations and was therefore unconstitutional. *Id.* at 465-67.
- 65 Several state courts have interpreted their state religion clauses to bar the use of public funds in educational choice programs. In these situations, IJ recommends that legislators and policymakers pursue educational choice programs funded by tax-credit-eligible donations to non-profit organizations that award students with tuition scholarships or administer education savings accounts. Tax-credit-funded educational choice programs are constitutionally viable in these situations because such programs do not rely on any public funding.
- 66 See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations."); *Kotterman*, 972 P.2d at 618 ("For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before."); *Magee*, 175 So. 3d at 136 (finding that a refundable school choice tax-credit program was constitutional in part because "a tax credit cannot be equated to a government expenditure"); *McCall v. Scott*, 199 So. 3d 359, 370-71 (Fla. Dist. Ct. App. 2016) (concluding that tax-credit-eligible donations to private scholarship organizations are not public appropriations); *Gaddy v. Ga. Dept. of Rev.*, 802 S.E.2d 225, 230 (Ga. 2017) ("The statutes that govern the Program demonstrate that only private funds, and not public revenue, are used."); *Toney*, 744 N.E.2d at 357 (finding that the terms "public fund" and "appropriation" were not broad enough to encompass a tax credit and concluding that to find otherwise would "endanger the legislative scheme of taxation"), *appeal denied*, 754 N.E.2d 1293 (Ill. 2001); *Griffith*, 747 N.E.2d at 426 (same), *appeal denied*, 755 N.E.2d 477 (Ill. 2001). See also *State Bldg. & Constr. Trades Council v. Duncan*, 162 Cal. App. 4th 289, 294, 299 (2008) (holding that "[t]ax credits are, at best, intangible inducements offered from government, but they are not actual or de facto expenditures by government" and thus "tax credits do not constitute payment out of public funds" under a state statute); *Olson v. State*, 742 N.W.2d 681, 683 (Minn. Ct. App. 2007) (concluding that tax credits and tax exemptions are not public expenditures); *Manzara v. State*, 343 S.W.3d 656, 661 (Mo. 2011) ("The tax exemptions in [another case] and the tax credits here are similar in that they both result in a reduction of tax liability. The government collects no money when the taxpayer has a reduction of liability, and no direct expenditure of funds generated through taxation can be found.").
- 67 *Kotterman*, 972 P.2d at 618 (rejecting the argument that simply "because taxpayer money could enter the treasury if it were not excluded by way of the tax credit, the state effectively controls and exerts quasi-ownership over it" and concluding that "under such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature").
- 68 Cf. Dick M. Carpenter II & Angela C. Erickson, *On Common Constitutional Ground: How Georgia's Scholarship Tax Credits Mirror Other State Programs and Expand Educational Opportunity*, Institute for Justice (March 2016); Dick M. Carpenter II & Angela C. Erickson, *Opening the Schoolhouse Doors: Tax Credits and Educational Access in Alabama*, Institute for Justice (February 2014).
- 69 Hammons, *supra* note 56, at 14-15. For example, states may legitimately require, as part of their general regulatory authority and not because of any special authority derived from operating an educational choice program, that private schools teach modern scientific theories as part of curriculum requirements. However, the state has no business limiting what parents or their private school surrogates may say about those theories or any business preventing private schools from teaching alternate theories. Indeed, as the U.S. Supreme Court has declared, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
- 70 Council for American Private Education, *Science Performance Improves in Grades 4 and 8*, Outlook, Nov. 2016, at 2 ("Missing from the 2015 science results were breakouts for private schools in general. Although enough Catholic schools (a subgroup of private schools) participated in NAEP to yield results for that sector, the response rate among other private schools unfortunately fell well below the 70 percent threshold required to produce separate private school findings that accurately reflect the private school population. National school participation rates for the science assessment at grade 4 were 61 percent for private schools and 83 percent for Catholic schools. At grade 8 they were 56 percent for private schools and 80 percent for Catholic schools. And at grade 12 they were 57 percent for private schools and 76 percent for Catholic schools.").
- 71 *Id.*
- 72 See *Public, Private, and Charter School Dashboard*, Nation's Report Card, 2018, [https://www.nationsreportcard.gov/dashboards/schools\\_dashboard.aspx](https://www.nationsreportcard.gov/dashboards/schools_dashboard.aspx) (go to "overall performance results," then "science," and then select a category under "race/ethnicity.") (last visited Sept. 5, 2019).
- 73 See Council for American Private Education, *Private School Students More Likely to Be Ready for College*, Outlook, Nov. 2015, at 1 (Private schools also beat public schools on the following ACT benchmarks: English – 85 percent vs. 61 percent; reading – 66 vs. 44; math – 60 vs. 40).
- 74 According to the National Center for Education Statistics, private school students attended private schools in the 2017-2018 school-year along the following breakdown: Catholic (40.0%); Nonsectarian (22.0%); Unspecified Christian (14.2%); Jewish (5.8%); Baptist (3.5%); Lutheran (3.2%); Episcopal (1.0%); Seventh-day Adventist (1.0%); Calvinist (0.4%); Friends (0.4%). U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Private School Universe Survey*, <https://nces.ed.gov/surveys/pss/tables/TABLE02f11718.asp> (Table 2) (last visited Aug. 30, 2019).
- 75 U.S. Dep't of Educ., National Center for Education Statistics, *The Condition of Education 2016* 180 (May 2016).
- 76 IJ thus recommends that all educational choice programs explicitly acknowledge that participation in an educational choice program is the same as a parental placement under 20 U.S.C. § 1412(a)(10) of the Individuals with Disabilities Education Act.
- 77 About the only substantive right that non-special education students possess is a right to a "free" public education, meaning they cannot be charged the user fees (known as "school fees") that once were commonplace before the entire burden was shifted to the taxpayers at large. No state recognizes a cause of action for educational malpractice, even where students graduate unable to read.
- 78 What constitutes FAPE varies from child to child and has resulted in numerous federal court challenges, including the U.S. Supreme Court decisions in *Board of Education v. Rowley*, 458 U.S. 176 (1982), addressing FAPE in the context of a mainstreamed student, and *Andrew F. v. Douglas County School District*, 137 S. Ct. 988 (2017), involving a student requiring more extensive interventions. But neither *Rowley* nor *Andrew F.* require a school district to provide what every parent wants, namely the best available education.
- 79 20 U.S.C. § 1414(d)(1)(A)(i)(IV)-(V), (e). IDEA requires that FAPE be provided in the "least restrictive environment" to minimize the exclusion of students with disabilities from schools' general education



programs. 20 U.S.C. § 1412(a)(5). In other words, under IDEA, students are to be placed in general education classrooms to the maximum extent possible.

80 20 U.S.C. § 1415.

81 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).

82 *Id.*

83 20 U.S.C. § 1412(a)(10)(B)(i).

84 See Gov't Accountability Office, 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.").

85 See Matt Barnum, *In Ohio, suburban school districts close themselves off from city students, study finds*, Chalkbeat, June 6, 2017, <https://www.chalkbeat.org/posts/us/2017/06/06/in-ohio-suburban-school-districts-close-themselves-off-from-city-students-study-finds/> (noting that the "districts that declined outside enrollment were predominantly ones surrounding major cities, like Cincinnati, Cleveland, Columbus, and Dayton, all of which serve a large number of low-income students and students of color.").

86 U.S. Dep't of Educ., National Center for Education Statistics, *Selected Statistics From the Public Elementary and Secondary Education Universe: School Year 2015–16* 9, December 2017 (Table 3), <https://nces.ed.gov/pubs2018/2018052.pdf>

87 See Robert Enlow, "*Public Schooling*" is a Myth, Jay P. Greene's Blog, June 5, 2017, <https://jaypgreene.com/2017/06/05/public-schooling-is-a-myth/> (detailing instances of politicians exerting their political power to get their child placed in preferred public schools, increases in selective-admissions magnet schools, and the fact that many public school districts send students with disabilities to schools other than their neighborhood public school).

88 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

89 Of course, federal law prohibits all private schools, whether or not they participate in educational choice programs, from discriminating based on race, color, or national origin. 42 U.S.C. § 1981. There may also be state antidiscrimination laws or regulations that apply to private schools. There are no educational choice programs in the country that attempt to exempt schools that enroll participating students from such state laws.

90 Recipients of federal financial aid "that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs." 34 CFR Pt. 104, App. A.28. And private schools "may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs." *Id.* Additionally, under the Americans with Disabilities Act (ADA) all nonreligious private schools are considered "public accommodations" and are thus prohibited from discriminating based upon disability unless the school does not offer programs designed to meet the child's special needs. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, Title III, §§ 301, 307. Religious private schools, however, are exempt from the ADA's prohibition on discrimination based on disability. *Id.* Of course, notwithstanding these exemptions, religious and other private schools routinely admit and educate students with disabilities.

91 Federal law permits private schools that are "controlled by a religious organization" to discriminate on the basis of sex if necessary to comply "with the religious tenets of such organization." 34 C.F.R. § 106.12(a). Courts have also been reluctant, in the employment context, to interfere with the sincerely held religious beliefs of private religious schools. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (protecting religious groups' right to shape their own faith by applying the ministerial exception in employment discrimination law for teachers deemed ministers at religious schools).

92 34 C.F.R. § 106.15.

93 On April 22, 2019, the Supreme Court announced that it would hear a trio of consolidated cases to determine whether federal employment discrimination laws protect LGBT employees. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019). Specifically, the Court is seeking to resolve whether the phrase "because of sex" in Title VII includes discrimination based on sexual orientation and gender identity. In each of the consolidated cases, people who are either gay or transgender alleged that they were fired because of their sexuality or gender identity. Regardless of how the Supreme Court disposes of the cases, it is not at all clear that this ruling will be extended to either the admissions (or hiring) practices of religious private schools. See 34 C.F.R. § 106.12 (exempting private schools "controlled by a religious organization" from existing federal prohibition on sex discrimination if necessary to comply "with the religious tenets of such organization").