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Coerced Choice: School Vouchers and Students with Disabilities

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COERCED CHOICE: SCHOOL VOUCHERS AND STUDENTS WITH DISABILITIES

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ABSTRACT

The landscape of public education, once thought to be a core function of the state, is shifting towards privatization. The appointment of Betsy DeVos as U.S. Secretary of Education further cements this shift. In particular, DeVos intends to vastly expand the availability of vouchers and tax credits that use public dollars to fund private school tuition. The debate over this expansion and its impact on traditional public schools has been polarizing and combative. Thus far, commentators have framed vouchers as purely matters of choice and increased educational opportunities. Drowned out in the debate are the voices of students with disabilities. This Article reframes this conversation and reveals that many students with disabilities may not have a choice at all.

This Article is the first to argue that voucher legislation, as applied to students with disabilities, violates two principles of constitutional law: the unconstitutional conditions doctrine and equal protection. First, some states force students with disabilities to give up crucial federal and state educational rights in exchange for vouchers. The unconstitutional conditions doctrine, however, limits government's authority to require individuals to forgo their rights in exchange for a gratuitous benefit. Vouchers cross those limits, coercing students into accepting a restriction of significant rights to escape failing public schools. Second, equal protection requires that states sufficiently justify legislation that targets particular groups for disadvantage. While states claim that vouchers for students with disabilities are justified by better educational outcomes, many states are, in fact, motivated by their desire to eliminate the costs and burdens associated with educating students with disabilities in public schools. Moreover, far from providing a benefit, vouchers have the potential to resegregate students with disabilities—an ironic outcome given that federal disability rights law was founded on the principle of inclusion for all children.

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INTRODUCTION

The landscape of public education, once thought to be a core function of the state, has been shifting towards privatization over the past decade. The 2016 election of Donald Trump and subsequent appointment of Betsy DeVos as U.S. Secretary of Education further cemented this shift. In her first official policy address, Secretary DeVos called for an expansion of school choice programs, stating that "we must shift the paradigm to think about education funding as investments made in individual children, not in institutions or buildings."[1] In particular, DeVos wants to vastly expand the availability of vouchers and tax credits that use public dollars to fund private school tuition.[2] Though vouchers have existed for decades, they have always operated at the periphery of education reform efforts.[3] Over the past five years, however, states have significantly expanded voucher or voucher-type programs.[4] DeVos's mission has been to supercharge these programs, taking them from the sidelines directly to center field.

This shift is understandably generating contentious debates. Voucher proponents believe market forces and increased parental choice will improve educational options and outcomes.[5] Voucher opponents fear that such programs will drain public schools of vital federal and state dollars and only further exacerbate the education gap between the "haves" and "have-nots."[6] Drowned

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[1] Erica L. Green, *Betsy DeVos Calls for More School Choice, Saying Money Isn't the Answer*, N.Y. TIMES (Mar. 29, 2017), https://www.nytimes.com/2017/03/29/us/politics/betsy-devos-education-school-choice-voucher.html.

[2] *Id.* Voucher programs essentially provide parents with state-funded coupons that they apply to reduce tuition at private schools. NAT'L COUNCIL ON DISABILITY, SCHOOL CHOICE SERIES: CHOICE & VOUCHERS – IMPLICATIONS FOR STUDENTS WITH DISABILITIES 1, 27 (2018). Tax credit programs provide tax incentives for approved educational expense, including private school tuition. *Id.*

[3] Jim Ryan, *School Choice and the Suburbs*, 14 J.L. & POL. 459, 459–60 (1998) (describing the theoretical and social history of school voucher programs). The school choice movement is usually attributed to a 1955 essay by Milton Friedman, *The Role of Government in Education*, in which he advocates the government provide parents with vouchers that they can apply to certain eligible private schools. *Who We Are: Our Legacy*, EDCHOICE, https://www.edchoice.org/who-we-are/our-legacy/ (last visited Mar. 26, 2019).

[4] Forty states considered private school choice legislation in the 2014–2015 legislative year. THE COUNCIL OF PARENT ATT'YS & ADVOCATES (COPAA), SCHOOL VOUCHERS AND STUDENTS WITH DISABILITIES: EXAMINING IMPACT IN THE NAME OF CHOICE 1 (2016) [hereinafter COPAA REPORT].

[5] JEFF SPALDING, THE SCHOOL VOUCHER AUDIT: DO PUBLICLY FUNDED PRIVATE SCHOOL CHOICE PROGRAMS SAVE MONEY? 1–2, 39 (2014).

[6] Memorandum from Senator Patty Murray (D-WA) and Senate Health, Educ., Labor, and Pensions Minority Staff to Senate Colleagues (Mar. 22, 2017) (entitled Real Choice vs. False Choice: The Repercussions of Privatization Programs for Students, Parents, and Public Schools) (arguing against school choice because it "ignores the needs of students in rural areas without private school options, ignores the threats posed to students with disabilities and students who may face discrimination, and ignores the parents who believe in their communities and want their children to be able to attend strong public schools in their neighborhood").

out in the factious debates are the voices of students with disabilities. Yet, vouchers have both significant and unique implications for these students.

In many instances, voucher programs attempt to roll back crucial legal protections for students with disabilities and do so without making parents fully aware of the far-reaching consequences.[7] First, several states demand that students with disabilities waive important federal and state educational rights to gain access to a voucher.[8] A recent federal report highlights the shocking levels of misinformation about the loss of these rights.[9] Eighty-three percent of voucher programs are either vague or silent about the resulting loss of educational rights triggered upon acceptance of a voucher.[10] As a result, students with disabilities can find themselves in a private school ill-equipped to meet their educational needs, but unable to engage federal disability rights laws to demand more appropriate supports or services.[11] These students can only hope that the private school will voluntarily attempt to meet their educational needs.

Second, the proliferation of vouchers has the potential to resegregate students with disabilities, a group who spent decades fighting for the right to be integrated into regular education settings.[12] Prior to enacting sweeping federal disability rights laws, students with disabilities were either cordoned off into segregated educational settings or denied an education altogether.[13] New state enacted voucher programs restrict eligibility by disability category, recreating the decades-old problem of sorting students with disabilities into different

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[7] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-94, PRIVATE SCHOOL CHOICE: FEDERAL ACTIONS NEEDED TO ENSURE PARENTS ARE NOTIFIED ABOUT CHANGES IN RIGHTS FOR STUDENTS WITH DISABILITIES 1 (2017) (discussing the lack of information provided on protections available under the Individuals with Disabilities Education Act to children in private schools).

[8] *Id.* at 7–8, 24–26; *see* COPAA REPORT, *supra* note 4, at 20–26.

[9] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-94, PRIVATE SCHOOL CHOICE: FEDERAL ACTIONS NEEDED TO ENSURE PARENTS ARE NOTIFIED ABOUT CHANGES IN RIGHTS FOR STUDENTS WITH DISABILITIES 2 (2017).

[10] *Id.*

[11] *See infra* Section II.A.

[12] *See, e.g.*, Mills v. Bd. of Educ. of the D.C., 348 F. Supp. 866, 875 (D.D.C. 1972) (holding the District of Columbia's exclusion of children with disabilities from access to public education violated the Fourteenth Amendment's Due Process Clause); Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 302–03 (E.D. Pa. 1972) (approving consent decree that enjoined Pennsylvania from denying education to students who were "mentally retarded").

[13] *See* Honig v. Doe, 484 U.S. 305, 309 (1988) ("When the law was passed in 1975, Congress had before it ample evidence that such legislative assurances were sorely needed: . . . congressional studies revealed that better than half of the Nation's 8 million disabled children were not receiving appropriate educational services. Indeed, one out of every eight of these children was excluded from the public school system altogether, many others were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out.") (citing H.R. REP. NO. 94-332, pt. 2 (1975)).

schools.[14] Even with more general voucher programs, the threat of segregation remains because private schools are free to reject those students who need something more than "minor adjustments" to access the school's program.[15] Thus, when private schools reject these students, the effect is to leave those particular students with disabilities in public schools. Were these students in well-functioning public schools, the inability to leave this setting would be a nonissue. But too often, not only are certain categories of students left behind, they are left behind in failing public schools from which their peers are rapidly fleeing.[16]

Thus far, commentators have framed vouchers as purely matters of choice and increased educational opportunities.[17] This Article reframes this debate to demonstrate that many students with disabilities may not have a choice at all. To the contrary, many students with disabilities will find their choices are limited by a lack of private schools willing to admit them. Even when they are admitted, private schools may not be able to properly serve their needs, or worse, may segregate them into separate learning environments. Thus, rather than expanding opportunities, states take advantage of students with disabilities' compromised situations and force them to give up their legal rights in exchange for vouchers to attend schools that may be just as ill-equipped to meet their needs.

This Article analyzes the serious constitutional and statutory issues that the current generation of vouchers raises for students with disabilities. It is the first to apply two constitutional doctrines—unconstitutional conditions and equal protection—to expose the illegality of such legislation.

The unconstitutional conditions doctrine stands for the proposition that the government should not indirectly entice or coerce citizens to give up constitutional rights when direct encumbrance of those rights would be

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[14] For example, Ohio's Autism Scholarship Program limits eligibility to students diagnosed with Autism who have a current Individualized Education Plan (IEP). OHIO REV. CODE ANN. § 3310.41 (West Supp. 2019); *see also* NAT'L CONF. OF STATE LEGISLATURES, SCHOOL VOUCHER LAWS: STATE-BY-STATE COMPARISON (2014), http://www.ncsl.org/documents/educ/StateByStateVoucherComparison.pdf.

[15] 34 C.F.R. § 104.39 (2018).

[16] *See infra* Section II.B.

[17] *See, e.g.*, Wendy F. Hensel, *Recent Developments in Voucher Programs for Students with Disabilities*, 59 LOY. L. REV. 323, 324 (2013) (exploring developments in school choice for students with disabilities); Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291, 293 (2010) (discussing the impact of vouchers on students with disabilities); Brad J. Davidson, Comment, *Balancing Parental Choice, State Interest, and the Establishment Clause: Constitutional Guidelines for States' School-Choice Legislation*, 33 TEX. TECH L. REV. 435, 440 (2002) (discussing school choice in the context of the Establishment Clause).

prohibited.[18] The doctrine arises when the government offers a gratuitous benefit, but conditions the benefit on the waiver of a constitutional right.[19] Voucher legislation does exactly that. It conditions access to vouchers for students with disabilities on the waiver of state constitutional and federal and state statutory rights. In doing so, states indirectly achieve ends that would otherwise be illegal.

State constitutions, with virtual uniformity, require state governments to provide each child with an equal or adequate education.[20] Federal statutes protect against disability-based discrimination, ensure the supports and services necessary for meaningful participation in school, and guarantee a substantive right to a free appropriate public education (FAPE).[21] These statutes, and their state analogs, effectively ensure equal access to the education that states are constitutionally obligated to provide. Requiring students to waive these rights thus requires them to waive crucial elements of their state constitutional right to an education.

More specifically, when students with disabilities accept vouchers, they lose protections under the Individuals with Disabilities Education Act (IDEA),[22] the Americans with Disabilities Act (ADA)[23] and Section 504 of the Rehabilitation Act of 1973 (Section 504).[24] Title II of the ADA and Section 504 do not apply at all in private schools.[25] The IDEA, a legal juggernaut in public schools, has extraordinarily limited application in private schools.[26] This loss of rights, moreover, is not accidental. Many voucher programs explicitly require parents to waive access to all federal statutory disability rights and state constitutional rights.[27] Other states surely recognize the limitation of rights in private settings,

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[18] Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE WESTERN RESERVE L. REV. 97, 97-98 (1989).

[19] *Id.*; *see infra* Section III.A.

[20] EMILY PARKER, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION (2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf.

[21] 20 U.S.C. § 1412 (2012); 34 C.F.R. § 104.33 (2018).

[22] 20 U.S.C. § 1400.

[23] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 328 (codified at 42 U.S.C. § 12101 (2012)).

[24] Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355 (codified at 29 U.S.C. § 794 (2012)).

[25] *See* 34 C.F.R. § 104.39; *infra* Section I.B.2.

[26] *See infra* Section I.B.1.

[27] *See* COPAA REPORT, *supra* note 4, at 3, 62–63 (Oklahoma, Florida's McKay Scholarship, and Georgia ask parents to revoke all IDEA); *see also* NAT'L COUNCIL ON DISABILITY, *supra* note 2, at 59 ("In the majority of school voucher programs, when students use vouchers to attend a private school, they relinquish their rights under IDEA, including the right to an IEP, FAPE, and procedural protections."); *infra* Section II.A.

but do not bother to inform parents.[28] Either way, when students enroll in a private school that fails to meet their needs, they are left with few, if any, options. They cannot sue the private school or the state for better services.[29] Rather, they must simply suffer poor education or attempt to find a new school.

The unconstitutional conditions doctrine tests the fairness of this waiver of rights in exchange for government benefits. The doctrine provides that government cannot engage in such a trade unless the state demonstrates that its interests in conditioning students' rights outweigh the coercive nature of the bargain.[30] State interests animating voucher legislation fail to justify this encroachment on rights. The fiscal savings and improved educational outcomes promised by states have not materialized in any substantial way and, in any event, pale in comparison to the serious infringement of educational rights.

The Equal Protection Clause of the Fourteenth Amendment exposes a second flaw with respect to vouchers and students with disabilities. It provides that the government cannot deny its citizens equal protection of its laws.[31] Thus, when the government seeks to enact laws that draw distinctions among people, the government must justify its classifications with a sufficient purpose.[32] In the context of vouchers, legislators have not advanced a sufficient purpose to treat students with disabilities different from all others. To the contrary, some appear to have acted with prohibited purposes.

While disability classifications only trigger rational basis review—a decidedly low bar—voucher legislation fails to clear it. The Supreme Court has held that even under rational basis the state cannot unfairly target a group of individuals for disfavored treatment.[33] Vouchers do just that. They strip students with disabilities of their federal and state guarantees of equal educational opportunity. They do so to rid the public education system of students whom the state perceives as costly and administratively burdensome.[34] They send these

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[28] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-94, PRIVATE SCHOOL CHOICE: FEDERAL ACTIONS NEEDED TO ENSURE PARENTS ARE NOTIFIED ABOUT CHANGES IN RIGHTS FOR STUDENTS WITH DISABILITIES 17–20 (2017).

[29] *See infra* Section II.A.

[30] Fuhr, *supra* note 18, at 106–07.

[31] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[32] *See* City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

[33] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 633 (1996); *City of Cleburne*, 473 U.S. at 450; Plyler v. Doe, 457 U.S. 202, 230 (1982); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 537–38 (1973).

[34] JOSH CUNNINGHAM, PRIVATE SCHOOL CHOICE FOR STUDENTS WITH DISABILITIES (2013),

students to the private sector where federal antidiscrimination laws fail to protect them and where the state has no further responsibility for their educational outcomes.[35] While states are generally free to draw distinctions based on disability, they are not free to do so when their animating purpose is to target a group for disfavored treatment.

To fully explore vouchers' impacts on students with disabilities, this Article proceeds in four parts. Part I discusses the explosion of school choice legislation in recent years and lays the groundwork for what the movement from public to private schools means for students with disabilities. It also introduces the federal statutes that protect rights of students with disabilities and examines the reach of those statutes in private schools. Part II discusses negative policy implications of voucher programs for students with disabilities, including a serious curtailment of important statutory disability rights and the potential for resegregation. Part III applies two constitutional doctrines—unconstitutional conditions and equal protection—to theorize why voucher legislation, when applied to students with disabilities, is unconstitutional. Part IV offers a simple solution to the many problems raised by conditioning vouchers for students with disabilities: prohibit such conditions. States should enact voucher programs that give students with disabilities full access to state and federal laws enacted to guard against disability discrimination.

I. THE EXPLOSION OF SCHOOL CHOICE AND ITS IMPLICATIONS FOR STUDENTS WITH DISABILITIES

A. School Choice Gains New Momentum

"School choice," a term broadly describing educational options outside of traditional public schools, has been in existence for over sixty years.[36] But a movement to expand school choice has recently exploded in popularity across the country, with forty states considering private school choice legislation in the 2014–2015 legislative year alone.[37] States have enacted, or attempted to enact, a variety of programs ranging from school vouchers that essentially provide parents with coupons they can apply to reduce private school tuition, to

http://www.ncsl.org/documents/educ/lb-2111.pdf ("By shifting students with disabilities out of the public school system, the administrative burden of tracking and reporting student progress is reduced at both the local and state levels.").

[35] *See infra* Section III.B.3.

[36] *See generally* Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814 (2011) (tracing the origins of the school choice movement).

[37] COPAA REPORT, *supra* note 4, at 6–7; *Who We Are: Our Legacy*, *supra* note 3.

educational savings accounts that provide parents with public funds they can deposit into a government-authorized savings account for use on tuition or other education-related expenses.[38]

Most programs restrict eligibility to low-income families or families whose children are zoned for failing public schools.[39] A recent trend has emerged, however, which significantly broadens eligibility in some voucher programs by disposing of income eligibility caps.[40] Still, other school choice programs restrict eligibility to only students with documented disabilities.[41] Regardless of the target population, in large part the desire for more "school choice" is a reflection of the long-term failings of certain poor-performing public schools.[42] Proponents of school choice see these programs as a way to give more families access to higher quality private schools, but also as a way to minimize government involvement and oversight in education.[43] Detractors see choice programs as a way to redirect public money to private schools, the majority of which are religious.[44] They view choice programs as siphoning off funding from an already under-resourced public school system.[45]

The incentives behind the recent school choice expansion are varied, and while the school choice movement is generally associated with conservative political leanings, its supporters can cross party lines. Generally, choice advocates align with a conservative political ideology of limited government and a reliance on free markets.[46] As voucher programs are typically accompanied by few, if any, regulations and limited government oversight, they advance a

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[38] COPAA REPORT, *supra* note 4, at 6–7.

[39] *Id.*

[40] Indiana's Choice Scholarship Program is one of the most expansive in the country in terms of eligibility. KATHERINE CIERNIAK ET AL., THE INDIANA CHOICE SCHOLARSHIP PROGRAM: LEGAL CHALLENGES, PROGRAM EXPANSION, AND PARTICIPATION 2 (2015); *see also* Ryan Ellis, *Ted Cruz's 529 Education Savings Amendment to Tax Reform Is a Big Win for Families*, FORBES (Dec. 4, 2017, 5:43 PM), https://www.forbes.com/sites/ryanellis/2017/12/04/ted-cruz-529-education-savings-amendment-to-tax-reform-is-a-big-win-for-families/#209ec7316c45 ("The Cruz amendment expands the use of 529 dollars for two additional purposes—tuition for students in K-12 private and parochial schools, and costs related to homeschooling a child. Up to $10,000 per year per child can be distributed for these purposes.").

[41] NAT'L CONF. OF STATE LEGISLATURES, *supra* note 14.

[42] *See* Kevin Carey, *How School Choice Became an Explosive Issue*, ATLANTIC (Jan. 24, 2012), https://www.theatlantic.com/national/archive/2012/01/how-school-choice-became-an-explosive-issue/251897/.

[43] *See id.*

[44] *See id.*

[45] *See id.*

[46] Alia Wong, *Public Opinion Shifts in Favor of School Choice*, THE ATLANTIC (Aug 21, 2018) https://www.theatlantic.com/education/archive/2018/08/school-choice-gaining-popularity/568063/ (describing overall increase in support for school choice programs and highlighting Republicans' recent embrace of school choice as a "key component of the party's platform").

conservative agenda of limited government.[47] Vouchers support parents' decisions to determine the best educational fit for their children and place much faith in parents' ability to find an appropriate school for their children. As such, they advance the idea that free markets and competition will improve the overall quality of schools as schools compete for voucher dollars. Choice programs are also supported by parents who are fed up with poor-performing public schools and are purely interested in better educational opportunities for their children. These parents may not buy into the conservative ideals of limited government and free markets, but want better schools and are willing to engage with voucher programs to secure that possibility.[48]

The choice movement has also cleaved certain previously cohesive interest groups into separate factions. One such group is parents of students with disabilities. Vouchers present a unique conundrum for this group. On the one hand, students with disabilities have some of the poorest educational outcomes of any tracked cohort.[49] They consistently demonstrate weaker scores on standardized tests and have lower graduation rates than their nondisabled peers.[50] However, students with disabilities also have access to additional federal rights through several laws that guarantee a substantive level of education and prohibit disability discrimination.[51] Many school voucher programs require that students with disabilities waive these rights as a condition of accepting vouchers. Even when waivers are not explicitly required, the act of accepting a voucher and enrolling in private school greatly limits one's protections under those laws.

The following section will lay out the basic framework of these federal statutes and examine their implications on students with disabilities who use vouchers to attend private school.

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[47] *See generally* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 14 (listing major provisions of voucher programs state by state).

[48] *See, e.g.*, Mandy McLaren, *For Indiana Special-Education Students, Choice Comes at a Cost*, WASH. POST (Dec. 26, 2016), https://www.washingtonpost.com/local/education/for-indiana-special-education-students-choice-comes-at-a-cost/2016/12/26/3b875480-c3bc-11e6-9a51-cd56ea1c2bb7_story.html?utm_term=.ce3c533aa00f.

[49] *See* STEPHEN LIPSCOMB ET AL., PREPARING FOR LIFE AFTER HIGH SCHOOL: THE CHARACTERISTICS AND EXPERIENCES OF YOUTH IN SPECIAL EDUCATION: VOLUME 1: COMPARISONS WITH OTHER YOUTH xii (2017).

[50] *Id.*

[51] *See infra* Section I.B.

B. Federal Disability Rights Statutes in Private Schools

The IDEA, the ADA, and Section 504 govern schools' interactions with and obligations to students with disabilities.[52] These federal laws, in most cases, provide more substantive rights than students with disabilities would otherwise have if limited to state law.[53] Moreover, the federal laws exist to ensure that students' state constitutional rights to education are not hollow. Federal disability rights statutes help ensure that students are provided with the special education, related services and accommodations they need to access the general education curriculum.

1. The Individuals with Disabilities Education Act

In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA) to "assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of handicapped children . . . are protected."[54] The EAHCA, now known as the IDEA,[55] is essentially a grant-making statute that originated under the Spending Clause.[56] When states agree to its terms, they receive federal dollars to support the cost of special education services.[57]

At the heart of the IDEA is the promise to provide all children with disabilities a "free appropriate public education" in the least restrictive environment, meaning in the regular education classroom with nondisabled peers.[58] Schools provide FAPE through designing and implementing individualized education programs (IEPs), a blueprint of special education supports and related services.[59] If parents disagree about the content of the IEP or any provision of FAPE, they have the right to present a complaint and ask

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[52] Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (to be codified as amended at 20 U.S.C. § 1400 (2018)); Rehabilitation Act of 1973, § 504, 29 U.S.C. § 729 (2012); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 328 (codified at 42 U.S.C. § 12101 (2012)).

[53] *See* PARKER, *supra* note 20.

[54] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(c), 89 Stat. 775 (codified at 20 U.S.C. § 1401(c) (2012)). The EAHCA is technically an amendment to the 1970 Education of the Handicapped Act (EHA), which had provided grants for states to provide special education services. Pub. L. No. 91-230 (1970).

[55] 20 U.S.C. § 1400.

[56] The Tax and Spend Clause authorizes the federal government to spend money to support the "general Welfare." U.S. CONST. art. I, § 8, cl. 1.

[57] 20 U.S.C. § 1412(a).

[58] *Id.* § 1400(d)(1)(A).

[59] *Id.* § 1414(d).

that an independent hearing officer review their allegations to determine whether or not the school has complied with the IDEA's requirements.[60] In addition, parents must be invited to participate in designing an IEP to address their child's special education needs.[61]

The Supreme Court recently confirmed that the IDEA confers a substantive right to an "appropriate" education, and held that to meet its substantive obligation under the IDEA, a school must offer an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[62] Parents can file a complaint whenever they feel that the school has failed to live up to that obligation.[63]

In contrast to the IDEA, students without disabilities only have those educational rights granted to them through state constitutions.[64] While states vary with respect to the robustness of their educational clauses, they typically do not offer students, or their parents, the same level of due process rights found in the IDEA.[65] Rather, regular education students have rights to notice and hearing prior to suspension or revocation of their educational rights.[66]

Importantly, the IDEA's force is significantly restricted in private schools.[67] Thus, students with disabilities accepting vouchers for private schools lose access to many of the law's core protections. The IDEA's reach in private school is limited in two key ways. First, the law itself limits applicability in private

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[60] *Id.* § 1415(b)(6).

[61] *Id.* § 1414(d)(1)(B).

[62] Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017).

[63] 20 U.S.C. § 1415(b)(6) (2012).

[64] PARKER, *supra* note 20. Students also have certain federal statutory rights to privacy, but they do not have a federal guarantee to a substantive level of education. 20 U.S.C. § 1232g.

[65] For example, South Carolina's education clause reads as follows: "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable." S.C. CONST. art. XI, § 3. The South Carolina Supreme Court has interpreted the clause to require the state to confer a "minimally adequate education." Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999).

[66] Goss v. Lopez, 419 U.S. 565, 584 (1975) (holding that a public school must conduct a hearing before subjecting a student to suspension).

[67] The IDEA distinguishes between unilateral parental placement in private school and public placement in private schools. *See* 20 U.S.C. § 1412(a)(10)(A)–(B). The latter keeps states responsible for the provision of FAPE, even when the child is in the private school setting. *Id.* § 1412(a)(10)(B); *see also* Mark C. Weber, *Services for Private School Students Under the Individuals with Disabilities Education Improvement Act: Issues of Statutory Entitlement, Religious Liberty, and Procedural Regularity*, 36 J.L. & EDUC. 163, 180 (2007).

schools.[68] Second, private schools limit enrollment of students with disabilities,[69] and nothing in the IDEA curtails this action.

A number of the IDEA's protections either apply with less force or do not apply at all in private schools. The state maintains its obligation, known as "child find," and must allocate a portion of federal IDEA funds to identify, locate, and evaluate private school children who may be eligible for special education services.[70] It has a second duty of consultation with the private school to plan for the delivery of special education services to children with disabilities in private schools.[71] However, students with disabilities who attend private schools have no individual entitlement to special education services.[72]

Parents who elect to enroll their children in private school forfeit their children's individual entitlements to special education services for the right to "equitable" services.[73] The state remains responsible for child find, individual evaluations, and IEP development for students with disabilities in private schools, but are not responsible for the substantive provision of FAPE.[74] Consequently, parents who use vouchers to enroll their children in private schools give up many rights under the IDEA, including the right to demand the least restrictive educational environment for their children,[75] the right to collaborate with school officials on their children's IEPs, and the right to file a complaint if they are unsatisfied with the amount or type of educational services their children receive.[76] Further, parentally placed children in private schools are not entitled to the same services they would have received had they remained in

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[68] 20 U.S.C. § 1412(a)(10).

[69] NAT'L COUNCIL ON DISABILITY, *supra* note 2, at 34 ("The National Coalition for Public Education (NCPE) states that private schools accepting voucher funds do not adequately serve students with disabilities, often denying them admission and subjecting them to inappropriate or excessive suspensions or expulsions.").

[70] States' child find obligation exists for students in both public and private schools. 20 U.S.C. § 1412(a)(10)(A)(ii); 34 C.F.R. § 300.131(a)–(b) (2018).

[71] 34 C.F.R. § 300.130–.144.

[72] "No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in public school." *Id.* § 300.137(a).

[73] Equitable services are determined through a consult with "private school representatives and representatives of parents of parentally-placed private school children with disabilities during the design and development of special education and related services." *Id.* § 300.134.

[74] Weber, *supra* note 67, at 182.

[75] In *St. Johnsbury Academy v. D.H.*, the U.S. Court of Appeals for the Second Circuit refused to invalidate a private academy's minimum mainstreaming performance requirement, ruling that private schools do not have responsibility for the IDEA's least restrictive environment (LRE) mandate. 240 F.3d 163, 170 (2d Cir. 2001).

[76] *See, e.g.*, JOSE MARTIN, CURRENT LEGAL ISSUES INVOLVING ASSISTIVE TECHNOLOGY 38 (2017) (parents filed due process complaint because they were unsatisfied with speech and language services offered by the school).

public schools.[77] In short, while the IDEA obligates states to identify and evaluate students with disabilities in private schools, it limits this obligation to equitable services and stops short of mandating an entitlement to special education services.[78]

Second, the IDEA does not mandate that private schools serve eligible students with disabilities. Rather, private schools are free to reject those students who they do not have the capacity to serve.[79] Public school districts, on the other hand, operate under a "zero-reject" rule, as set forth in the IDEA and subsequent case law, whereby they must accept all eligible children with disabilities regardless of whether they currently have the capacity to serve them.[80] It is the school district's responsibility to find an appropriate placement or hire the necessary staff to ensure a school can meet the needs of that individual child.[81] Private schools, facing no such obligation, often reject students with disabilities when they feel that their current curricula and staff will not be able to meet the child's needs.[82] Nothing in the IDEA, or in other federal antidiscrimination laws to be discussed in the following section, prevents private schools from engaging in such exclusion.

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[77] "Parentally-placed private school children with disabilities may receive a different amount of services than children with disabilities in public schools." 34 C.F.R. § 300.138(a)(2); *see also* Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1437 (10th Cir. 1997).

[78] QUESTIONS AND ANSWERS ON SERVING CHILDREN WITH DISABILITIES PLACED BY THEIR PARENTS IN PRIVATE SCHOOLS 6 (2011). Students with disabilities parentally placed in private schools have the right to invoke due process only with respect to issues of identification. 34 C.F.R. § 300.131(a), (c); OFFICE OF SPECIAL EDUC. & REHAB. SERVS., QUESTIONS AND ANSWERS ON SERVING CHILDREN WITH DISABILITIES PLACED BY THEIR PARENTS IN PRIVATE SCHOOLS (2011) (stating that school districts have an obligation to provide parentally placed private school students with disabilities the opportunity for equitable participation in the services that the district has determined to make available to this population of children with disabilities in private schools).

[79] The IDEA only governs the provision of special education and related services a child would receive if eligible under the statute. It does not, however, have any bearing on a private school's admission policies. The ADA and Section 504 prevent private schools from discriminating against students in their admissions; however, both laws allow private schools to limit enrollment to students who can meet their "essential eligibility requirements." *See* 42 U.S.C. § 12131(2) (2012); 34 C.F.R. § 104.39(a)–(c).

[80] Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 78–79 (1999) (holding that student who was a quadriplegic, ventilator-dependent, and needed extensive nursing services was entitled to those services under the IDEA); Timothy W. v. Rochester, N.H., Sch. Dist., 875 F.2d 954, 972–73 (1st Cir. 1989) (holding that a severely handicapped child was entitled to special education and related services under the EAHCA regardless of his ability to benefit from those services).

[81] 34 C.F.R. § 300.115(a)–(b).

[82] ACLU Complaint at 23, ACLU v. State of Wisconsin, https://www.aclu.org/sites/default/files/field_document/complaint_to_doj_re_milwaukee_voucher_program_final.pdf (last visited Mar. 26, 2019) (claiming "[j]ust 1.6 percent of voucher students have a disability, compared to nearly 20% of [Milwaukee Public School] students").

2. Section 504 of the Rehabilitation Act of 1973

Section 504 is a federal statute which prohibits discrimination against persons with disabilities in any program receiving federal dollars, including public and some private schools.[83] The statute is, however, more than just an antidiscrimination law. It also confers a substantive right to an "appropriate education"[84] and demands schools educate students with disabilities in the least restrictive environment.[85] Like the IDEA, Section 504 requires schools to enact procedural safeguards, including notice, the right to review records, and the right to demand an impartial hearing.[86] Section 504 only applies to private schools if they receive federal funding.[87] Private schools receive federal financial assistance through a variety of programs, including the Every Student Succeeds Act, which requires equitable participation of private school students and teachers in certain programs specific to academic achievement and teacher training.[88]

Like the IDEA, Section 504 has vastly different applications when it comes to public versus private schools. Private schools have more limited obligations under Section 504 because they only need to accept students who meet the "essential eligibility requirements" established by the schools.[89] Because private schools generally establish more selective criteria than public schools, they can lawfully restrict admission of students with disabilities who fail to meet their criteria, so long as the criteria are based on legitimate academic policies.[90]

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[83] Section 504 states, "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (2012).

[84] 34 C.F.R. § 104.33(a)–(b). Section 504 defines appropriate education as those educational services that are designed to meet the needs of students with disabilities "as adequately as the needs of [nondisabled students]." *Id.*

[85] *Id.* § 104.34.

[86] *Id.* § 104.36.

[87] "*Federal financial assistance* means any grant, loan, contract . . . or any other arrangement by which the Department provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of Federal personnel; or (3) Real and personal property or any interest in or use of such property . . . ." *Id.* § 104.3(h).

[88] 20 U.S.C. § 6320 (2012); CLARE MCCANN, NEW AM. EDUC. POLICY BRIEF, FEDERAL FUNDING FOR STUDENTS WITH DISABILITIES: THE EVOLUTION OF FEDERAL SPECIAL EDUCATION FINANCE IN THE UNITED STATES 16 (2014); *National School Lunch Program (NSLP)*, U.S. DEP'T AGRIC., https://www.fns.usda.gov/nslp/national-school-lunch-program-nslp (last updated Dec. 19, 2018); *see also ONPE General Issues Frequently Asked Questions Related to Nonpublic Schools*, U.S. DEP'T EDUC., https://www2.ed.gov/about/offices/list/oii/nonpublic/faqgeneral.html?src=preview#3 (last visited Mar. 26, 2019).

[89] 34 C.F.R. § 104.3(*l*)(4). Private schools are also free to reject those students who need something more than "minor adjustments" to access the school's program. *Id.* § 104.39(a).

[90] St. Johnsbury Acad. v. D.H., 240 F.3d 163, 165–66 (2d Cir. 2001) (upholding private school's refusal to admit student with disabilities where student did not perform at or above grade level); Wendy F. Hensel, *The*

Further, private schools have no obligation to provide students with disabilities an appropriate education when the schools do not already offer programs designed to meet those students' needs.[91] While students with disabilities may have access to private schools, those schools are not required to provide students anything outside of "minor adjustments" to help them merely access, though not necessarily benefit from, the curricula.[92]

3. The Americans with Disabilities Act

The ADA extends the antidiscrimination protections of Section 504 to any privately owned business or facility open to the public.[93] The law is broken into four titles, with Title III being relevant to private schools.[94] Title III of the ADA requires private schools to make reasonable accommodations to ensure that students with disabilities are not excluded, denied services, segregated, or treated differently than their nondisabled peers.[95] It extends to private schools regardless of whether they receive federal funding; however, it specifically exempts religious schools from coverage.[96]

While Title III of the ADA applies to private, nonreligious schools, its protections for students with disabilities are limited. Title III does not confer an individual right to an appropriate education, thus it does not require schools to develop IEPs for students with disabilities.[97] Rather, it only asks that covered schools comply with more general antidiscrimination mandates imposed on all public accommodations to ensure accessibility.[98] Further, the law allows schools to claim exemptions when they can demonstrate that providing the accommodation "would result in an undue burden."[99] Thus, similar to Section 504, private schools are able to limit their obligations under the ADA by limiting

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Limits of Federal Disability Law: State Educational Voucher Programs, 44 J.L. & EDUC. 199, 209–10 (2015).

91 34 C.F.R. § 104.39(a)–(c); Hensel, *supra* note 90, at 210.

92 34 C.F.R. § 104.39(a)–(c).

93 42 U.S.C. § 12101 (2012).

94 *Id.* § 12181. The other titles or subchapters of the ADA are as follows: Title I—Employment, Title II—Public Services, Title IV—Miscellaneous Provisions. *Id.* §§ 12101–213.

95 *Id.* § 12182(b)(2).

96 The religious exemption only applies to religious schools that are controlled by religious organizations, including places of worship. *Id.* § 12187; Marshall v. Sisters of Holy Family of Nazareth, 399 F. Supp. 2d 597, 605 (E.D. Pa. 2005).

97 42 U.S.C. §§ 12181–89; MAURICE WATSON ET AL., NAT'L ASS'N OF INDEP. SCH., AMERICANS WITH DISABILITIES ACT AND INDEPENDENT SCHOOLS 1, 13 (2011).

98 DEP'T OF JUSTICE, WODATCH (PRIVATE SCHOOL) (1996).

99 42 U.S.C. § 12182(b)(2)(A)(iii).

admission of students with disabilities, and invoking the undue burden exception.[100]

Title II of the ADA, which protects individuals with disabilities from discrimination by public entities, is generally thought to reach only public, but not private, schools.[101] However, there is some disagreement about the reach of both Title II of the ADA and Section 504—with some scholars arguing that they do apply to the administration of voucher programs and thus, to private schools.[102] In 2011, in *ACLU v. Wisconsin*, the ACLU alleged discrimination by Wisconsin's Milwaukee Parental Choice Program in violation of Section 504 and Title II of the ADA, claiming that the voucher program illegally excluded students with disabilities.[103] The U.S. Department of Justice agreed, finding the state ultimately responsible for ensuring that discrimination is not present in the administration of the program, "regardless of whether services are delivered directly by a public entity or provided through a third party."[104]

However, as Professor Wendy Hensel astutely illustrates, the ACLU's complaint and subsequent Department of Justice finding marked a turning point in the way courts and the Department of Education previously viewed the ADA and Section 504's reach in private schools.[105] The Department of Education had previously found "federal civil rights laws, including Section 504, do not directly apply to the private schools participating in the [voucher] program."[106]

At the heart of the matter is whether the federal government has authority to compel private entities to comply with federal laws when federal dollars are not

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[100] *But see* Hensel, *supra* note 90, at 211 (stating that the ADA prohibits private schools from imposing eligibility criteria that screens out students with disabilities from participation unless the criteria are necessary to the provision of the schools' services) (citing DEP'T OF JUSTICE, *supra* note 98, at 1–2).

[101] 42 U.S.C. § 12182(b)(2)(A)(iii).

[102] Title II of the ADA applies to public schools and sets forth more robust rights, such as FAPE and the LRE, similar to Section 504, but Title II does not apply to private entities. *Id.* § 12187. However, at least one scholar has opined that since Congress has stated that Title II of the ADA should be interpreted consistently with Section 504, the regulations developed under Section 504 that are applicable to private schools apply equally to Title II of the ADA. *Id.* § 12134(b); Hensel, *supra* note 90, at 208.

[103] The ACLU alleged (1) the Milwaukee school district tried to deter students with disabilities from applying for vouchers, (2) private schools denied admission to students with disabilities who had obtained vouchers, and (3) private schools expelled or otherwise forced students with disabilities to leave those schools. ACLU Complaint, *supra* note 82, at 29–31.

[104] Letter from Jonathan Fischbach, U.S. Dep't of Justice, Civil Rights Div., Educ. Opportunities Section, to Tony Evers, State Superintendent, Wis. Dep't of Pub. Instruction 2 (Apr. 9, 2013) ("[Wisconsin's] obligation to eliminate discrimination against students with disabilities in its administration of the school choice program is not obviated by the fact that the schools participating in the program are private secular and religious schools.").

[105] Hensel, *supra* note 90, at 221–22.

[106] *Id.* at 214.

involved. Professor Hensel compellingly argues that neither Section 504 nor Title II of the ADA apply to private schools through state-funded voucher programs.[107] In her estimation, private schools are not turned into public institutions simply by accepting vouchers from parents.[108] As such, the states' obligations under the ADA and Section 504 are to ensure nondiscrimination in the administration of vouchers. However, once parents apply those vouchers to the private school of their choice, states are not obligated to ensure that private schools comply with federal statutes.[109] Ultimately, as long as states ensure there is "meaningful access" to voucher programs, the states have met their obligation under federal laws.[110]

The question of which federal laws can reach into private schools may become a crucial one should the federal government seek to expand its role in voucher programs. School choice has gained more momentum through the Trump Administration's appointment of Betsy DeVos as Education Secretary, herself a long-time choice advocate.[111] President Trump's proposed budget for fiscal year 2018 included a $250 million allocation to the U.S. Department of Education to study the impact of private school vouchers.[112] While the Department of Education has denied any plans to fund a federal voucher program, it has suggested that states applying for federal dollars to develop school choice programs must adhere to federal law.[113] Thus, by accepting federal funding, states may expose themselves to federal obligations tied to that funding.[114] The following Part will explore federal laws' current implications for state-enacted voucher programs.

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107 *Id.* at 213–16, 225.

108 *Id.* at 215.

109 *Id.*; *see also* Liberty Res., Inc. v. Phila. Hous. Auth., 528 F. Supp. 2d 553, 569–70 (E.D. Pa. 2007) (holding that the State met its obligation under the ADA by providing meaningful access to a housing voucher program and was not obligated to ensure that the private landlords complied with Title II of the ADA).

110 *Alexander v. Choate* set forth the meaningful access rule. The Court reasoned that the "Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance . . . [but it] does not . . . guarantee the handicapped equal results . . . ." Alexander v. Choate, 469 U.S. 287, 304 (1985).

111 *Betsy DeVos, Secretary of Education—Biography*, U.S. DEP'T EDUC., https://www2.ed.gov/news/staff/bios/devos.html?src=hp (last modified May 23, 2018).

112 Andrew Ujifusa, *Ed. Dept. Has No Plans for a 'Federal Voucher Program.' Let's Break that Down.*, EDUC. WK. BLOG (May 31, 2017, 6:20 AM), http://blogs.edweek.org/edweek/campaign-k-12/2017/05/federal_voucher_program_no_plans_education_department.html.

113 *Id.*

114 The D.C. Choice Act is the only federally funded voucher program. COPAA REPORT, *supra* note 4, at 6.

II. VOUCHERS' PRACTICAL EFFECTS FOR STUDENTS WITH DISABILITIES

Many parents of a child with a disability perceive vouchers as a welcome escape from a public school system that is failing to adequately meet the child's needs.[115] The willingness to accept a voucher is at times driven by both the public school's failings and a hope that a private school will be able to achieve success.[116] Some parents may be unaware of the legal rights they shed when accepting a voucher, but others are fully aware and knowingly accept the risks to escape a failing public school system for the possibility of something better.[117] This exchange of federal educational rights for the gamble that private school will prove better has the potential for enormous and far-reaching impacts.

First, students with disabilities who accept vouchers will lose access to important federal protections designed to ensure their equal access to education. Most significantly, many states further limit the IDEA's already constricted reach in private schools by forcing parents to waive their rights under the law as a condition of accepting a voucher.[118] These mandated waivers serve to indemnify states against any failure to provide educational services despite what may be contained in federal and state laws.[119] Second, the proliferation of vouchers has the potential to resegregate students with disabilities—the exact outcome federal law sought to eliminate forty years ago. Despite voluminous research demonstrating the effectiveness of inclusive educational settings,[120] voucher legislation fails to prioritize inclusion as a goal. Rather, many voucher programs intentionally facilitate the resegregation of students with disabilities.

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115 NAT'L COUNCIL ON DISABILITY, *supra* note 2, at 40 ("Focus group participants indicated that higher expectations of school for students with disabilities were in fact one reason they decided to use a choice program.").

116 *Id.* at 41 (Parents in one study cited a variety of reasons for accepting vouchers to leave public schools including, safer schools, respecting parental input, higher expectations for students with disabilities, and more or better special education services).

117 *Id*. at 61 ("NCD research showed that state programs and private schools often fail to notify parents of students with disabilities about their rights and about how those rights may be forfeited in voucher programs; other parents received information but still felt unprepared to make a fully informed decision. Other parents felt the voucher programs were worth any risks and knowingly gave up special education rights without concerns about it.").

118 Wisconsin, Tennessee, Colorado, Ohio, and the District of Columbia allow for partial IDEA rights, while Oklahoma, Florida's McKay Scholarship, and Georgia require parents to revoke all IDEA rights. *Id.* at 3. Nevada, Utah, Arkansas, and Indiana are silent about rights. *Id.*

119 For example, an Iowa state statute reads as follows: "School districts and area education agency boards shall make public school services, which shall include special education programs and services . . . available to children attending nonpublic schools in the same manner and to the same extent that they are provided to public school students." IOWA CODE ANN. § 256.12(2)(a) (West 2012).

120 Larry G. Daniel & Debra A. King, *Impact of Inclusion Education on Academic Achievement, Student Behavior, and Self-esteem, and Parental Attitudes*, 91 J. EDUC. RES. 67 (1997); Dianne L. Ferguson et al., *Improving Education: The Promise of Inclusive Schooling*, NAT'L INST. FOR URB. SCH. DEV. 1 (2000).

The following section will first analyze how acceptance of a voucher triggers the loss of critical legal protections for students with disabilities. It will then explore the potential of broad-reaching voucher policies to resegregate students with disabilities into separate schools and classrooms.

A. The Loss of Critical Legal Protections

Students with disabilities who enroll in private schools must reconcile this decision with a significant curtailment of federal statutory rights. Students with disabilities who accept vouchers to facilitate this enrollment often face even more restrictions on those rights. The most aggressive voucher programs eliminate all rights under the IDEA, Section 504 and the ADA, as well as state constitutional rights to education.[121] For example, Arkansas's Succeed Scholarship Program for Students with Disabilities requires parents to "sign an acknowledgement that, by enrolling a child in a private school, the parent . . . waives the procedural safeguards granted by the IDEA."[122] Students who participate in Florida's McKay Scholarship, which is limited to students with disabilities who currently have IEPs in public schools, must agree to opt out of all the IDEA's due process rights.[123]

But, even when parents are not asked to waive all their rights as a condition of the voucher, none of the federal laws carry the same level of protections in private schools as they do in public schools. Equally troubling, students often waive federal protections without a complete understanding of what they are giving up.[124] And no state makes any attempt to meaningfully inform parents of the changes they tacitly accept when enrolling their child in a voucher program.

The various rights parents have across Section 504, the ADA, and the IDEA are complex. Consequently, parents give up significant rights when electing a voucher for a private school. The following section has distilled the loss of rights into four categories: (1) a substantive guarantee of an "appropriate" education,

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[121] *See, e.g.*, ARK. DEP'T OF EDUC., SUCCEED SCHOLARSHIP PROGRAM (2017) (explanatory PowerPoint), https://arksped.k12.ar.us/documents/policyAndRegulations/SucceedScholarship/SucceedScholarshipProgramExplanatoryPowerPoint.pdf (last visited Mar. 26, 2019).

[122] *Id.*

[123] FLA. STAT. ANN. §§ 1002.39, 1002.421 (West Supp. 2019). Although Florida requires a waiver of IDEA rights, this condition is not clear on the McKay Scholarship website. *See McKay Scholarship*, FLA. DEP'T EDUC., http://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/mckay/ (last visited Mar. 26, 2019). Other states explicitly include language stating that students who enroll under voucher programs will be treated as unilateral parental placements in private schools. *See, e.g.*, COPAA REPORT, *supra* note 4.

[124] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-94, PRIVATE SCHOOL CHOICE: FEDERAL ACTIONS NEEDED TO ENSURE PARENTS ARE NOTIFIED ABOUT CHANGES IN RIGHTS FOR STUDENTS WITH DISABILITIES 24–29 (2017).

(2) parental participation, (3) discipline protections, and (4) school accountability. While all three statutes contain significant protections, the IDEA provides the most robust framework of educational rights.[125] Consequently, the following section will focus on the loss of IDEA rights, and will note any significant differences as it relates to the rights contained in Section 504 and the ADA.

1. Substantive Guarantee of an "Appropriate" Education

First, when students with disabilities accept vouchers, they put faith in private schools' promise to educate them and sign away the right to a substantive guarantee of FAPE.[126] The Supreme Court has recently interpreted FAPE to confer a substantive right to an education that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[127] Public schools are tasked with crafting IEPs, highly structured blueprints of special education, and related supports and services designed to accord FAPE.[128] IEPs take stock of where a child is both academically and functionally, and describe the special education and supportive services to be provided so that the child can reach annual goals.[129] When parents feel their school has failed to confer FAPE, they can invoke the IDEA's procedural protections and file a complaint with an independent hearing officer.[130] The hearing officer is tasked with reviewing parents' complaints and deciding whether the school has met its obligations under the IDEA.[131] Thus, students not only have a guarantee of education designed to help them make progress, but parents also have a way to enforce that guarantee.

IEPs are not required in private schools. Rather, private schools must craft a "services plan" for parentally placed private school children with disabilities.[132] Services plans are far less structured than IEPs and only require a description of

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[125] *See* Perry A. Zirkel, *An Updated Comprehensive Comparison of the Idea and Section 504/ADA*, 342 WEST'S EDUC. L. REP. 886, 887–95 (2017) (outlining the framework of educational rights under the IDEA, Section 504, and the ADA).

[126] The IDEA mandates that public schools provide students with FAPE. 20 U.S.C. § 1412(a)(1)(A) (2012). While the FAPE standard under the IDEA differs from that under Section 504 and Title II of the ADA, all three grant students with disabilities a right to appropriate education and the ability to invoke due process procedures should schools fail to deliver on that right. *See* 42 U.S.C. § 12182 (2012); 34 C.F.R. § 104.33(a), (c)(4) (2018).

[127] Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).

[128] *See* 20 U.S.C. § 1414(d) (outlining the substantive requirements of an IEP).

[129] *See id.* § 1414(d)(1)(A)(i)(I).

[130] *See id.* § 1415(b)(6).

[131] *See id.* § 1415(f)(1)(A); *Endrew F.*, 137 S. Ct. at 994.

[132] 34 C.F.R. § 300.132(b) (2018).

the special education and related services that will be provided to the child.[133] Most importantly, parents who accept vouchers to enroll in private schools waive their child's individual right to special education under the IDEA.[134] They do not have the right to invoke due process procedures and complain about the type, amount, or quality of special education services.[135]

2. Parental Participation

Second, parents who accept vouchers give up their statutory right to be included in educational decisions made with respect to their child.[136] The IDEA requires that schools ensure parental participation in IEP development.[137] Parents' concerns are central to discussions about educational supports and services for their children.[138] The law obligates schools to seek out parental consent for evaluations and the provision of special education services as well as provide notice any time the school wishes to make a change to the IEP or refuses to make a change requested by the parent.[139] In short, parents have a statutory right to a seat at the table whenever important decisions are being made with respect to their children's education.[140]

In contrast, parents lose these statutory guarantees of participation when they move their children to private schools. Of course, private schools may welcome parents' input and invite them to participate in decisions surrounding their children's education. But, there is no statutory guarantee of such invitations. Should schools and parents disagree, and should the disagreement reach an impasse, private schools are under no obligation to continue to engage with parents. They can simply make unilateral decisions and if parents are unsatisfied, their only recourse is to withdraw and enroll their child elsewhere.

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133 *See id.* § 300.138.

134 *Id.* § 300.137(a) ("No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.").

135 Arguably, Section 504's due process protections remain, but as discussed previously, Section 504's reach is limited to those private schools that accept federal funding, and, even where applicable, schools can restrict enrollment to only those students who meet "essential eligibility requirements." *See* 34 C.F.R. §§ 104.39, 300.137, 300.140.

136 *Id.* § 300.322.

137 20 U.S.C. §1415(b)(1) (2012) (providing "an opportunity for the parents of a child with a disability to . . . participate in meetings with respect to the identification, evaluation, and placement of the child").

138 *See generally* 20 U.S.C. §§ 1414(a)(1)(D)(i)(I)–(II), 1415(b)(3) (requiring parental consent in various circumstances).

139 *Id.*

140 *Id.*; Blackmon *ex rel.* Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 658 (8th Cir. 1999) ("Although the IDEA mandates individualized 'appropriate' education for disabled children, it does not require a school district to provide a child with the specific educational placement that her parents prefer.").

The threat of withdrawal, in some cases, may be enough to incentivize schools to work with parents towards mutually agreeable solutions, but not in every case—and perhaps not in a case where the child exhibits challenging behaviors that prove difficult to manage. In such scenarios, parents may struggle to find a private school willing to provide the essential support, training, or resources necessary to help manage challenging student behaviors. This dilemma leads directly into another significant loss of rights: disciplinary protections.

3. Disciplinary Protections

When children with disabilities accept a voucher and leave the public school system, they forgo important protections around discipline. The IDEA requires schools to take an extra step before enacting long-term suspension or expulsion for a child with disabilities.[141] Schools must first determine whether the alleged misconduct was rooted in disability before enacting long-term discipline.[142] If behavior is found to be sufficiently tied to the disability, it is found to be a "manifestation" of the disability and the school is prevented from enacting the long-term discipline.[143] The goal instead is to modify the support and services offered to the student in an effort to teach her how to change the unwanted behavior.[144]

No such protections exist for students with disabilities in private schools. Rather, students with disabilities who are expelled from private school for behaviors related to their disability have no recourse. Parents of children with emotional disabilities or other disabilities that impact behavior must trust that private schools will continue to work with their children to help them overcome these challenges, rather than penalize them. Unfortunately, for some parents, this has not been their experience.[145] Instead, private schools will admit students with behavioral needs, but when behavior does not conform to school rules, rather than address those needs, the child is expelled.[146]

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[141] *See* 20 U.S.C. § 1415(k)(1)(E)(i)(I)–(II).

[142] *See id.* Section 504 and Title II of the ADA require schools to engage in manifestation determinations prior to enacting long-term suspensions or expulsions of qualifying students with disabilities. *See* S-1 *ex rel.* P-1 v. Turlington, 635 F.2d 342, 350 (5th Cir. 1981).

[143] 20 U.S.C. § 1415(k)(1)(E)–(F).

[144] *Id.* § 1415(k)(1)(F).

[145] Shayna A. Pitre, *'School Choice' — as Long as Your Child Doesn't Have a Disability*, HUFFINGTON POST (July 13, 2014, 5:09 PM), https://www.huffingtonpost.com/shayna-a-pitre/school-choicetrue-choice-_b_5318677.html (describing three stories of children with disabilities who were excluded from private schools through voucher programs due to their disabilities).

[146] MEG BENNER & REBECCA ULLRICH, CTR. FOR AM. PROGRESS, BETSY DEVOS' THREAT TO CHILDREN

4. School Accountability

Finally, vouchers severely limit accountability for special education services on two fronts. First, individual parents are unable to invoke due process procedures to hold private schools accountable for specific failures that relate to their children. Second, most voucher legislation requires little to no oversight of the private schools that receive public funding. The result: a systemic lack of accountability.[147] The combined effect of the lack of systemic oversight and inability of individual parents to hold private schools accountable is the proliferation of rampant fraud and abuse of government funding in voucher programs.

Once parents accept a voucher to enroll students in a private schools, they lose the ability to invoke due process protections that would otherwise allow them to lodge a complaint about the provision of special education services, including type and adequacy of services.[148] Further, parents in public schools can invoke the right to an expedited appeal of any decision to impose long-term suspension or expulsion of their child.[149] Parents who enroll their children in private schools have no such leverage.

This inability to hold private schools accountable has led to numerous accounts of fraudulent private schools formed purely to take advantage of easy access of public funding.[150] For example, Ohio's Dragonfly Academy, a private school ostensibly serving students with autism, closed abruptly when allegations surfaced that staff were not certified and enrolled students were not receiving

WITH DISABILITIES (2017) (describing the story of a six-year-old kindergartener who was expelled from a private school program she attended using a voucher due to behavioral problems stemming from gastrointestinal issues and anxiety); *see also* COPAA REPORT, *supra* note 4, at 16 ("[M]embers indicate that some schools accept children, get their voucher money, and then kick the child out for behavior or other reasons.").

147 NAT'L COUNCIL ON DISABILITY, *supra* note 2, at 55 ("Compared to public school, there is little to no oversight, aside from the minimum regarding health and safety. The GAO reports that of the 27 taxpayer-funded private school voucher and education savings accounts programs studied by GAO in school year 2016-17, only 8 of these programs required private schools to comply with annual financial audits, meaning that the states funding these schools often have no clear picture of where their investment is actually going."); NAT'L EDUC. ASS'N, POLICY BRIEF: SUBSIDIZING PRIVATE EDUCATION AT TAXPAYER EXPENSE 2 (2017) (finding that no state voucher programs for students with disabilities has included accountability measures as robust as those contained in the IDEA and the Every Student Succeeds Act (ESSA), formerly the Elementary and Secondary Education Act (ESEA)); *see* McLaren, *supra* note 48 (describing the lack of oversight for the more than $1.3 million in special education funding provided to private schools through Indiana's school voucher program).

148 20 U.S.C. § 1415(a).

149 *Id.* § 1415(k)(4)(B).

150 *Church/State FAQ: Dispelling the Myth of "School Choice"*, FREEDOM FROM RELIGION FOUND., https://ffrf.org/outreach/item/22744-voucherfaq (last visited Mar. 26, 2019).

any special education services.[151] Another private school in Florida was accused of fraudulent Medicaid claims for one-to-one therapy that the children rarely or never received.[152]

Moreover, public laws mandating annual assessments and other accountability and transparency structures in public schools do not necessarily apply in private schools.[153] A recent audit by the GAO found that while many private school choice programs have implemented some forms of academic accountability measures, few have financial accountability structures in place.[154] The same audit found "[f]ew of the [fifteen] choice programs that are designed specifically for students with disabilities have accountability mechanisms related to special education and related services."[155] Many programs failed to disclose whether certain accreditation requirements were met or whether teachers possessed sufficient specialized skills and training in providing special education instruction.[156] Such information is critical for parents of students with disabilities who want to ensure their children are taught by trained and competent professionals.

State legislatures' decisions to facilitate the transfer of public funds to private schools with minimal oversight is particularly troubling when Congress itself signaled its skepticism of the private sector's ability to properly educate

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[151] Lisa Reicosky, *Local School for Autistic Kids Abruptly Closes*, CANTON REPOSITORY, https://www.cantonrep.com/x1018081808/Local-school-for-autistic-kids-abruptly-closes (last updated May 4, 2012, 4:10 AM).

[152] Scott Maxwell, Opinion, *Shuttered 'Choice' School: Where's the Accountability?*, ORLANDO SENTINEL (Feb. 28, 2017, 5:00 PM), http://www.orlandosentinel.com/opinion/os-florida-schools-voucher-accountability-20170228-story.html.

[153] Several federal laws mandate accountability and transparency in public schools including the ESEA, which was reauthorized in 2015 through the ESSA. NAT'L COUNCIL ON DISABILITY, *supra* note 2, at 53 ("Almost half of the voucher programs do not have any testing requirement or only have to provide parents with a progress report about their children."); *see, e.g.*, 20 U.S.C. § 6841 (2012). The ESSA asks states to administer annual assessments in reading and math in grades three through eight and once in high school. *Id.* States are also obligated to report details about student outcomes. *See id.* § 6841(d). Some states require standardized testing in private schools, but others do not. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-94, PRIVATE SCHOOL CHOICE: FEDERAL ACTIONS NEEDED TO ENSURE PARENTS ARE NOTIFIED ABOUT CHANGES IN RIGHTS FOR STUDENTS WITH DISABILITIES 11, 14–15 (2017).

[154] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-94, PRIVATE SCHOOL CHOICE: FEDERAL ACTIONS NEEDED TO ENSURE PARENTS ARE NOTIFIED ABOUT CHANGES IN RIGHTS FOR STUDENTS WITH DISABILITIES 11, 14–15 (2017) (finding that two-thirds (eighteen of twenty-seven) of private choice programs include some academic testing and reporting requirements, though only nine require administration of state's standardized test).

[155] *Id.* at 12.

[156] *Id.* at 23 (describing a family who was "surprised to learn that teachers providing special education services to their child were not trained to provide those services" and a parent who reported "changing schools because they learned aspects of their child's disability could not be accommodated only after enrolling their child in school").

students with disabilities without oversight.[157] The IDEA demands some level of accountability with the local school districts who distribute federal funds to private schools for the provision of special education services.[158] The required oversight signals a legislative recognition that the private sector is not per se better than the public system and cannot simply be left to its own devices.

Most state voucher programs, however, do not reflect this skepticism or even a minimal effort to ward off potential problems.[159] Most forgo any form of accountability when it comes to the provision of special education services. Even the Milwaukee Parental Choice Program, the oldest and most well-established school choice program in the country[160] is riddled with claims of fraud.[161] As Wisconsin State Representative Mandela Barnes said, "[t]here's government money available for people who want to open up a building and call it a school. All you have to do is get the children and all you have to do is come up with a catchy slogan."[162] By failing to call for any reasonable oversight of voucher programs, state legislatures help create programs ripe for abuse and, at the same time, strip parents of the ability to hold these flawed programs accountable.

B. A Tool of Resegregation

The second practical effect of vouchers as an education policy is the potential that broad use of vouchers will lead to the resegregation of students with disabilities.[163] This potential outcome is enormously troubling, particularly when viewed against the history of the disability rights movement which fought

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[157] For example, Congress, through the IDEA, called for oversight of private schools by requiring private schools to consult with the local school district about the child find process, the determination of proportionate funds available to private school children, and provision of special education services. 20 U.S.C. § 1412(a)(10)(A)(iii).

[158] 34 C.F.R. § 300.132 (2018). It also requires that local school districts consult with private schools about identification of students with disabilities at private schools as well the provision of special education and related services to these children. *Id.* § 300.134.

[159] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-94, PRIVATE SCHOOL CHOICE: FEDERAL ACTIONS NEEDED TO ENSURE PARENTS ARE NOTIFIED ABOUT CHANGES IN RIGHTS FOR STUDENTS WITH DISABILITIES 34 (2017); COPAA REPORT, *supra* note 4, at 27–35.

[160] SCHOOL CHOICE: WISCONSIN—MILWAUKEE PARENTAL CHOICE PROGRAM, EDCHOICE, https://www.edchoice.org/school-choice/programs/wisconsin-milwaukee-parental-choice-program/# (last visited Mar. 26, 2019).

[161] Meghan Dwyer & Stephen Davis, *Voucher School Leader Indicted for Stealing Taxpayer Money Spotted at New Choice School*, FOX6NOW, http://fox6now.com/2016/02/11/voucher-school-leader-indicted-for-stealing-taxpayer-money-spotted-at-new-milwaukee-choice-school/ (last updated Feb. 12, 2016, 11:10 AM) (describing the indictment of Bishop Gregory L. Goner for using $100,000 per year of voucher funding to allegedly lease Cadillacs for himself and his family).

[162] *Id.*

[163] *See* COPAA REPORT, *supra* note 4, at 17.

tirelessly to end the exclusion of students with disabilities from public schools.[164] Vouchers precipitate segregation in three distinct ways. First, students with disabilities who enroll in private schools are at higher risk for segregation. They lose the IDEA's strong presumption favoring education in the least restrictive environment (LRE) and thus are at risk for placement in segregated settings within the private school without any recourse to challenge such settings.[165] Second, many voucher programs target students by category of disability. These programs facilitate the transfer of students with disabilities from inclusive educational settings to segregated schools without access to federal due process protections. Finally, to the extent broader voucher policies prevent access to private schools for students with severe physical or mental disabilities, such policies may aid the exodus of regular education students from public schools, while leaving behind those students with disabilities who require more costly supports and services to facilitate inclusion.

1. Waiving the Presumption of Least Restrictive Environment

Students with disabilities who enroll in private schools lose the IDEA's strong presumption favoring inclusive educational environments.[166] Without the ability to enforce a right to LRE, students with disabilities can be segregated into different classrooms or settings, without regard to whether such settings actually improve educational outcomes.[167] Excluding students with disabilities from the

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[164] *Id.*

[165] 20 U.S.C. § 1412(a)(5) (2012). If Section 504 applies, through federal funding, then an LRE requirement attaches; however, because private schools are permitted to restrict eligibility to only those students who meet the "essential eligibility requirements," they will necessarily screen out those students for whom additional supports and services would be needed to ensure education in the regular classroom. 34 C.F.R. § 104.34(a) (2018); *see also* Molly L. *ex rel.* B.L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422, 436–37 (E.D. Pa. 2002) (holding that Section 504 requires placement in the LRE that will provide a meaningful educational benefit). While Title III of the ADA would apply to prohibit segregation, it, too, is undercut by its exception permitting schools to claim that implementing the supports necessary for inclusion would present an undue burden. COPAA REPORT, *supra* note 4, at 23–24. In short, both Section 504 and the ADA enable schools to admit only those students for whom the general education classroom would be an appropriate setting with minimal supports.

[166] *Cf.* 20 U.S.C. § 1412(a)(5) (defining the LRE requirement). Inclusive education means educating students with and without disabilities in the same classroom. *See id.*

[167] To the extent that Section 504 and Title II of the ADA operate in private schools, both laws also contain LRE mandates. 34 C.F.R. § 104.34(a) (2018). But as discussed previously, Title II does not apply to private schools, and Section 504 only applies if the school has taken federal funding. Thus, LRE protections through these laws are limited by the fact that these laws do not always operate in private schools. *Cf.* COPAA REPORT, *supra* note 4, at 20–21, 25 (explaining that only "federally funded schools" must always adhere to these federal protections).

general education classroom ignores more than thirty years of research demonstrating the advantages of inclusion.[168]

Historically, students with disabilities who were segregated into alternative learning environments experienced unequal educational opportunities.[169] Parents of these students fought tirelessly to gain the right to inclusive educational environments.[170] Research demonstrates when students with disabilities are included in regular education environments, they experience improved academic, behavioral, and social outcomes.[171] Rather than assuming students with disabilities are unable to achieve at the level of their peers, the IDEA presumes just the opposite. It presumes that students with disabilities should be achieving on grade level in all but the most severe cases of cognitive impairment.[172] Consequently, the law strongly prefers inclusion to support the goal of high expectations for students with disabilities.[173]

But when students enter private schools, they lose the IDEA's strong presumption favoring inclusive education.[174] When in private schools, students with disabilities can be removed to a segregated setting to receive all special education services regardless of whether the segregated setting is warranted. Crucially, segregated settings spurn the core promise of the IDEA, the very

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[168] 20 U.S.C. § 1400(c)(5)(A)(i)–(ii); Wayne Sailor & Blair Roger, *Rethinking Inclusion: Schoolwide Applications*, 86 PHI DELTA KAPPAN 503, 504 (2005) ("[T]he sum of available evidence overwhelmingly supports integrated instructional approaches over those that are categorically segregated, regardless of the categorical label or severity of the disability.").

[169] H. Rutherford Turnbull III, *Legal Implications*, *in* MAINSTREAMING EMOTIONALLY DISTURBED CHILDREN 43, 45–46 (A.J. Pappanikou & James L. Paul eds., 1977) (stating that the mainstreaming preference arises from unequal educational opportunities because of the frequent placement of children with special needs in the worst facilities with the least capable teachers and poor funding, drawing a comparison to racial segregation).

[170] *See generally* Mark C. Weber, *The Least Restrictive Environment Obligation as an Entitlement to Educational Services: A Commentary*, 5 U.C. DAVIS J. JUV. L. & POL'Y 147 (2001) (detailing an overview of seminal cases involving the IDEA's LRE requirement).

[171] Jose Blackorby et al., *Relationships Between the School Programs of Students with Disabilities and Their Longitudinal Outcomes*, *in* SEELS, SRI PROJECT P10656, WHAT MAKES A DIFFERENCE? INFLUENCES ON OUTCOMES FOR STUDENTS WITH DISABILITIES 7-1–7-2, 7-7 (2007) ("Bivariate analyses show that, across measures, students with disabilities who took more academic classes in general education settings had greater academic success than peers who took fewer classes there."); XUAN BUI ET AL., MD. COAL. FOR INCLUSIVE EDUC., INCLUSIVE EDUCATION RESEARCH & PRACTICE 1, 3 (2010).

[172] Mark C. Weber, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. PENNUMBRA 174, 186 (2007).

[173] 20 U.S.C. § 1400(c)(5)(A).

[174] Section 504 and Title II of the ADA both contain inclusion mandates similar to the IDEA's LRE requirement. 28 C.F.R. § 35.103 (2018); 34 C.F.R. § 104.34 (2018); *see also* Letter to Michele Williams, Advocates for Children's Educ. (Mar. 14, 1994) (advising that Section 504's educational setting regulation set forth in § 104.34 is equivalent to the IDEA's LRE provision and has the same effect of creating a presumption in favor of inclusion).

reason the statute was enacted—to put an end to the exclusion of students with disabilities.[175]

2. Targeting Specific Categories of Disability

Several voucher programs target a certain category of disability and provide vouchers to attend schools specializing in the education of children with those particular disabilities.[176] These programs facilitate resegregation on the basis of disability category and ignore the IDEA's core promise of inclusive education. Such settings similarly reject Congress's intent when enacting both the ADA and Section 504—laws designed to prevent the exclusion of persons with disabilities.[177]

Some would argue that resegregation, if pursued by parents, is not only appropriate, but may be preferred. For example, Ohio's Autism Scholarship Program allows parents of children with autism spectrum disorder to choose to send their child to a private school specializing in education of autistic children.[178] Schools or service providers eligible to participate in this program must meet certain state requirements including maintaining a staff credentialed to provide special education services.[179] Because the level of supports and services needed by some children with autism are so great, specialized schools staffed with people who are trained in the provision of these services seems like an obvious answer.[180]

There is, however, a crucial difference in the parents making individual decisions to leave inclusive settings for more restrictive ones and school districts sponsoring and potentially encouraging such movements *en masse*. While highly segregated environments may be required for children with the highest

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175 20 U.S.C. § 1400(c)(2); *see also* Honig v. Doe, 484 U.S. 305, 309 (1988).

176 NAT'L CONF. OF STATE LEGISLATURES, *supra* note 14 (listing Arizona's Empowerment Scholarship Account, Florida's John M. McKay Scholarships for Students with Disabilities Program, Georgia's Special Needs Scholarship Program, Louisiana's School Choice Pilot Program for Certain Students with Exceptionalities, Mississippi's Dyslexia Therapy Scholarships for Students with Dyslexia Program and Speech-Language Therapy Scholarship for Students with Speech-Language Impairments programs, and Ohio's Autism Scholarship Program as several states that operate choice programs which limit eligibility to certain categories of disability).

177 29 U.S.C. § 794 (2012); 42 U.S.C. § 12101 (2012).

178 OHIO REV. CODE ANN. § 3310.41 (West Supp. 2019); OHIO DEP'T OF EDUC., AUTISM SCHOLARSHIP PROGRAM, https://education.ohio.gov/Topics/Other-Resources/Scholarships/Autism-Scholarship-Program (last modified Mar. 23, 2019).

179 OHIO DEP'T OF EDUC., *supra* note 178.

180 John McLaughlin, Opinion, *Why Model Autism Programs Are Rare in Public Schools*, SPECTRUM NEWS (July 11, 2017), https://spectrumnews.org/opinion/viewpoint/model-autism-programs-rare-public-schools/.

levels of need, such decisions should still be taken with great care and should be highly individualized. When states base voucher programs on categories of disability, implicit in those programs is the assumption that all children with a certain category of disability need separate learning environments. This assumption is not only flawed but dangerous, as it has the potential to move larger numbers of children into segregated settings.

3. Facilitating Exclusion

Where vouchers are being used as a broad education policy, legislatures essentially decide that rather than fix failing public school systems, the state will provide parents with the ability to leave that system. But for students with disabilities, this is not always a viable option. Private schools are not obligated to accept students with disabilities if they are unable to provide them an appropriate education with only minor adjustments to their academic program.[181] For those students for whom the impact of their disability is such that they will need specialized educational instruction and related supports, a private school is not an option. Consequently, these students are left languishing in a failing public school, while those who can leave for more promising options. As one scholar stated, "[t]he voucher program, which allows the most ambitious families to exit the common schools, threatens the vision of a system in which everyone is in the same boat and can only hope to improve his own situation by working to improve the situation of all."[182]

Indiana illustrates the phenomenon of expanding voucher eligibility and potential for exclusion of students with disabilities. The state prides itself on having the largest educational voucher program in the nation, the Choice Scholarship Program.[183] In the 2016–2017 school year, 34,299 students participated, the highest enrollment since its inception in 2011.[184] Not surprisingly, Indiana's voucher program also has broad eligibility parameters.[185] While it was originally enacted for low-income students, today there are seven "pathways" to eligibility and the income guidelines have gone up

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[181] 34 C.F.R. § 104.39 (2018).

[182] Charles Fried, Comment, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 168 (2002).

[183] Michelle Ye Hee Lee, *Mike Pence's Claim that Indiana has the Largest School Voucher Program*, WASH. POST (Aug. 12, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/08/12/mike-pences-claim-that-indiana-has-the-largest-school-voucher-program/?utm_term=.719bb854860d.

[184] IND. DEP'T OF EDUC., OFFICE OF SCH. FIN., CHOICE SCHOLARSHIP PROGRAM ANNUAL REPORT: PARTICIPATION AND PAYMENT DATA 7 (2017).

[185] CIERNIAK ET AL., *supra* note 40.

dramatically.[186] Further, Indiana's education dollars follow the student, meaning that when a student accepts a voucher and applies that money to a private school, the student's zoned public school loses those dollars.[187]

Ultimately, a state like Indiana will eventually spend less money in public schools as it diverts funding to private schools. Such a structure promises massive budget shortfalls for public school systems. Because there are so many fixed costs associated with public schools, including building maintenance, teacher salaries, and transportation, public schools cannot simply cut costs to account for shrinking budgets.[188] In fact, this shift of public dollars to private schools is already keenly felt in some rural school districts.[189]

Glimpsing at this coming trend, the effects of vouchers as a blanket education policy has some scholars predicting a dire future for public education. One scholar suggested:

> Once a substantial number of students attend private schools, the electorate will not want to support public education. Indeed, school privatization decisions currently being made could greatly alter the nature and structure of education in our nation, perhaps as significantly as the common school movement did more than a century ago.[190]

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[186] IND. DEP'T OF EDUC., *supra* note 184. The current income caps allow families at 200% of the federal free and reduced lunch guidelines to participate (this equates to about $89,900 a year for a family of four), and receive a scholarship for up to half of private school tuition. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. FEDERAL POVERTY GUIDELINES USED TO DETERMINE FINANCIAL ELIGIBILITY FOR CERTAIN FEDERAL PROGRAMS, https://aspe.hhs.gov/poverty-guidelines (last visited Mar. 26, 2019).

[187] IND. CODE ANN. § 20-51-4-4(a)(2) (West Supp. 2018).

[188] *See* Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 438–39 (2016) (discussing the growth of voucher funding in the face of cuts to funding for traditional public schools). Several studies that assess the financial impact of charter schools on public school districts provide important analogous insights and can help predict the dangers of siphoning money away from traditional public schools. *See, e.g.*, Robert Bifulco & Randall Reback, *Fiscal Impacts of Charter Schools: Lessons from New York*, 9 EDUC. FIN. & POL'Y 103 (2014) (finding "that charter schools can create fiscal impacts on school districts, particularly in districts with rapid growth in charter schools and declining or stagnant enrollment bases); Helen F. Ladd & John D. Singleton, *The Fiscal Externalities of Charter Schools: Evidence from North Carolina* 19 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 182, 2018) (finding large and negative fiscal effects of charter schools on urban school districts in North Carolina).

[189] Press Release, Senator Patty Murray, Statement by Senator Patty Murray on the Supreme Court Voucher Decision (June 27, 2002), https://www.murray.senate.gov/public/index.cfm/2002/6/statement-by-sen-patty-murray-on-the-supreme-court-voucher-decision; *Vouchers Don't Work in Rural Areas*, NAT. COALITION FOR PUB. EDUC., https://www.ncpecoalition.org/ruralvouchers (last visited Mar. 26, 2019).

[190] Martha McCarthy, *The Legal Status of School Vouchers: The Saga Continues*, 297 WEST'S EDUC. L. REP. 655, 671 (2013).

Similarly, several disability rights advocacy groups fear that an expansion of disability-targeted voucher programs will lead to discrimination, segregation, and exclusion of students with disabilities.[191]

Critically, voucher expansion presents more than just flawed education policy; rather, such legislation represents government's unconstitutional burdening of individual rights. Voucher legislation burdens a particular group, students with disabilities, under the guise of providing them a benefit. The following Part will analyze vouchers under two legal theories—the unconstitutional conditions doctrine and the Equal Protection Clause of the Fourteenth Amendment. Both demonstrate the serious constitutional concerns with school choice.

III. CONSTITUTIONAL LIMITS

Setting aside the questionable effectiveness of vouchers as an educational policy with respect to students with disabilities, there remains the more central concern of their legality. Voucher programs have been challenged under the First Amendment's Establishment Clause, which prohibits government sponsorship of religion.[192] In that context, the Supreme Court held voucher programs that provide funds directly to parents present a "true private choice" and thus, do not violate the Establishment Clause.[193] While this constitutional question appears settled, others remain. This section will analyze two additional constitutional principles implicated by voucher legislation: (1) the unconstitutional conditions doctrine, and (2) the Equal Protection Clause of the Fourteenth Amendment.

A. The Unconstitutional Conditions Doctrine

The unconstitutional conditions doctrine arises whenever the government offers a gratuitous benefit, but conditions the benefit on the waiver of a

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[191] The National Education Association (NEA) issued a policy brief stating, "[v]ouchers would sacrifice accountability and civil rights protections for children with special needs without improving the quality of services, student achievement, or parental options. Policymakers should instead provide full funding for IDEA." NAT'L EDUC. ASS'N, POLICY BRIEF: VOUCHER SCHEMES: A BAD IDEA FOR STUDENTS WITH DISABILITIES 2 (2008).

[192] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) (holding that the voucher program did "not offend the Establishment Clause"). The First Amendment's Establishment Clause prohibits the government from making any law "respecting an establishment of religion." U.S. CONST. amend. I. While some government action implicating religion is permissible, there remains some controversy around how much the Establishment Clause tolerates. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (5th ed. 2015).

[193] *Zelman*, 536 U.S. at 662–63 (holding that a voucher program facilitated "true private choice" because it gave funds directly to parents who could then choose where to commit those funds).

constitutional right.[194] For example, the government might condition a tax exemption on refraining from speech.[195] The tax exemption is a gratuitous benefit that the government is not obliged to offer, but to take advantage of the benefit, one must give up a right to speech. In some instances, such conditions are permitted, but in other cases—such as when such a condition is considered coercive—courts strike down the condition as unconstitutional.[196] As distilled by the Supreme Court, the doctrine stands for the principle that the government may not act indirectly to produce a result which it could not command directly.[197] The Court has used the doctrine in the context of tax benefits, healthcare, public employment, and business licenses.[198] It has been applied to invalidate both federal and state laws that infringed upon federal and state constitutional rights.[199]

Voucher legislation conditions benefits on the waiver of federal and state statutory rights and, in some instances, state constitutional rights.[200] Because vouchers do not implicate federal constitutional rights, the federal unconstitutional conditions doctrine is not controlling. Yet, the logic behind the federal doctrine applies with equal force to the ways in which states condition access to vouchers for students with disabilities. States ask these students to give up both federal statutory rights and state constitutional rights to get access to a voucher.

The following section will first outline key principles of the unconstitutional conditions doctrine. Next, it will explain why the doctrine provides the right framework for voucher legislation despite the absence of infringement on a federal constitutional right. Finally, it will demonstrate that when the doctrine is applied to analyze vouchers' effects on students with disabilities, it becomes

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194 CHEMERINSKY, *supra* note 192, at 1028.

195 Speiser v. Randall, 357 U.S. 513, 528–29 (1958) (holding that a statute denying tax exemption to those who could not prove that they did not advocate violent overthrow of government was unconstitutional).

196 *Compare* Rust v. Sullivan, 500 U.S. 173, 200 (1991), *with* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841–42 (1995); *see also* CHEMERINSKY, *supra* note 192, at 1032.

197 *See Speiser*, 357 U.S. at 526. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

198 Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545 (1983) (tax benefits); Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250, 257–58 (1974) (healthcare); Perry v. Sindermann, 408 U.S. 593, 597 (1972) (public employment); Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583, 595 (1926) (business license).

199 *See* State v. Bennett, 867 N.W.2d 539, 543 (Minn. Ct. App. 2015) (holding Minnesota's test-refusal statute does not violate the unconstitutional conditions doctrine by imposing a criminal penalty on a person who has been arrested for driving while impaired and has refused to submit to a breath test), *cert. denied*, 136 S. Ct. 2542 (2016); *supra* notes 197–98.

200 Nine of the fifty state constitutions require public education for students with disabilities. PARKER, *supra* note 20, at 1.

clear that states cannot lawfully condition access to vouchers on the waiver of affirmative federal statutory rights and state constitutional rights to education.

1. Principles of Unconstitutional Conditions

While the Supreme Court has not always been clear and consistent in its application of the unconstitutional conditions doctrine, three basic principles run through the Court's precedent.[201] First, the doctrine is only implicated when the government attempts an action that would otherwise infringe on constitutional rights.[202] More specifically, the government indirectly infringes on a constitutional right by asking an individual to voluntarily give up that right.[203] Because the government cannot take the right away directly, it asks citizens to forgo the right.[204] If the government could take away or curtail the right directly, the fact that the waiver of the right is attached to a government benefit is irrelevant and there is no unconstitutional conditions problem.[205] Second, even if there is a potential infringement of a constitutional right, the state may justify the infringement by showing a relationship between the government's interest in imposing the condition and the constitutional right in question.[206] To do so, the government must demonstrate that it has a legitimate interest that outweighs

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[201] Dolan v. City of Tigard, 512 U.S. 374, 407 n.12 (1994) ("Although it has a long history . . . the 'unconstitutional conditions' doctrine has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question."); *see also* Sullivan, *supra* note 197, at 1416.

[202] Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE WESTERN RESERVE L. REV. 97, 98 (1988) ("This doctrine posits that a condition attached to the grant of a governmental benefit is unconstitutional if it requires the relinquishment of a constitutional right. The doctrine has been used to invalidate conditions affecting interests protected by the first, fourth, fifth, and fourteenth amendments.").

[203] *Id.* at 98–99; Sullivan, *supra* note 197, at 1421–22 ("Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference. The 'exchange' thus has two components: the conditioned government benefit on the one hand and the affected constitutional right on the other.").

[204] *See* Sullivan, *supra* note 197, at 1421–22.

[205] Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 70 (2006) (holding that under the Solomon Amendment the federal government could constitutionally withhold funding from universities if they refuse to give military recruiters access to school resources).

[206] In cases that apply the unconstitutional conditions doctrine to property, and specifically the concept of eminent domain, the Supreme Court has held that

> [u]nder the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

Dolan, 512 U.S. at 385 (citing Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968)).

the particular right at issue.[207] Third, the government's attempt to condition the right in exchange for the benefit cannot be coercive.[208]

In short, the doctrine forbids the government from unduly pressuring someone into forfeiting a constitutional right, regardless of whether the person ultimately agrees to give up their right in exchange for the benefit.[209] The focus is on the coercive nature of the bargain itself, rather than the end result, and does not turn on the gratuitous nature of the benefit.[210] In fact, as the Court has noted, "virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind," including tax benefits, healthcare, and public employment, yet the issue does not turn on whether or not the government is obligated to provide the benefit.[211]

Judges have, on occasion, invoked the unconstitutional conditions doctrine to analyze state legislation that infringes on state constitutional rights. For instance, the Ninth Circuit Court of Appeals has identified three factors it will analyze when a government entity seeks to condition the receipt of a public benefit on a waiver of a California state constitutional right.[212] The government must establish the following: "(1) the conditions reasonably relate to purposes sought by the legislation which confers benefit; (2) the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) there are no alternative means less subversive of constitutional right" that could achieve the same purpose.[213] As with the federal unconstitutional conditions doctrine, the purpose of this state doctrine is to analyze the relationship between the legislation and the behavior

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[207] Lorenz v. State, 928 P.2d 1274, 1283–84 (Colo. 1996) (holding that a statute prohibiting certain elected and appointed officials from holding gaming licenses did not impose an unconstitutional condition on the right to ballot access or the right to hold public office because the restriction imposed only a limited burden on ballot access, right to public office, and voters' ability to exercise preferences, which was outweighed by the State's substantial interest in avoiding corruption and appearance of corruption in the gaming industry and local government).

[208] Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 606 (2013) ("In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.").

[209] *Id.*

[210] *Id.* at 608 ("We have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up a constitutional right.").

[211] *Id.* at 608 (citing Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545 (1983) (tax benefits); Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250 (1974) (healthcare); Perry v. Sindermann, 408 U.S. 593 (1972) (public employment); United States v. Butler, 297 U.S. 1, 71 (1936) (crop payments); Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583, 592–93 (1926) (business license)).

[212] Sanchez v. Cty. of San Diego, 464 F.3d 916, 930 (9th Cir. 2006), *cert. denied*, 128 S. Ct. 649 (2007).

[213] *Id.*

the government is seeking to compel. In California, for example, the government bears the heavy burden of demonstrating the practical necessity for limitation of the state constitutional right.[214] Other state courts have applied the doctrine to help analyze state laws that affect state constitutional due process rights[215] and the right to be free from unreasonable searches and seizures.[216] While the doctrine may not be a frequent player in state courts, precedent exists demonstrating its value in testing the limits of state-imposed conditions on state constitutional rights.

2. *The Unconstitutional Conditions Doctrine as a Framework for Analyzing Vouchers*

The unconstitutional conditions doctrine provides a powerful framework for analyzing the position in which some voucher programs place students with disabilities: they compel students to waive their federal statutory and state constitutional educational rights in exchange for escaping public schools that may already be violating their rights. As with other infringements on rights, here the doctrine can be used to analyze the relationship between voucher legislation and the behavior the government is seeking to compel—the relinquishment of educational rights.

While scholars differ about the purpose of the doctrine and whether a unifying theory exists such that it can be applied consistently across all contexts, one principle offered by Professor Kathleen Sullivan is particularly salient in the voucher context.[217] Sullivan suggests the doctrine is most important in regard to "preferred liberties."[218] Essentially, preferred liberties simply cannot be sacrificed. Without the doctrine, the government is subject to nothing more than

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[214] *Id.*

[215] Gonya v. Comm'r, N.H. Ins. Dep't, 899 A.2d 278, 282 (N.H. 2006) (applying an unconstitutional conditions analysis to a state regulation seeking to restrict New Hampshire's constitutional right to redress actionable injuries).

[216] Univ. of Colo. *ex rel.* Regents of the Univ. of Colo. v. Derdeyn, 863 P.2d 929, 946 (Colo. 1993) (conditioning participation in intercollegiate sports at a state university on "voluntary consent" to random suspicionless drug testing was a violation of the unconstitutional conditions doctrine); State v. Bernard, 859 N.W.2d 762, 767 (Minn. 2015) (holding a warrantless breath test that defendant refused would not have been an unconstitutional search because it would have been a valid search incident to a lawful arrest); State v. Bennett, 867 N.W.2d 539, 543 (Minn. Ct. App. 2015), *cert. denied*, 136 S. Ct. 2542 (2016).

[217] Professor Kathleen Sullivan recommended courts use the doctrine to scrutinize the distribution of power "between government and rightholders . . . , constitutional rights *among* rightholders," and "to the extent that a condition discriminates de facto between those who do and do not depend on a government benefit, [to] create a de facto caste hierarchy in the enjoyment of constitutional rights." Sullivan, *supra* note 197, at 1490.

[218] *Id.* at 1419. Professor Sullivan opines that the doctrine is helpful in "identif[ying] a characteristic technique by which government appears not to, but in fact does burden those liberties, triggering a demand for especially strong justification by the state." *Id.*

rational basis review, even though the effect of its action is to limit citizens' access to "preferred liberties."[219] Under rational basis review, the government can successfully put forth virtually any justification to demonstrate a constitutionally permissible need for its proposed restriction of rights.[220] The unconstitutional conditions doctrine serves as an important limit. The doctrine asks whether the government's gratuitous benefit, when conditioned on the relinquishment of a particularly important right, demands stronger justification than the minimum required under rational basis review.[221] The need for the higher standard is based in part on the importance of the right at issue.

Public education is a right so central to the functioning of our democratic society that it simply cannot be sacrificed on a whim. As the following sections describe, students with disabilities have both state constitutional and federal statutory rights to education. The unconstitutional conditions doctrine provides a useful framework for weighing the competing interests at issue in legislation that seeks both to condition these educational rights and relieve the state from the obligation to provide public education.

a. State Constitutional Rights

All fifty state constitutions contain a right to education.[222] While the exact nature of the right differs by state, for purposes of this analysis, the important point is that access to public education generally implicates a state constitutional right. As such, conditions on that right should be subject to the unconstitutional conditions doctrine. While no state has applied the unconstitutional conditions doctrine to education, several state courts have applied the doctrine to infringements of other state constitutional rights.[223] Thus, a similar analysis should presumptively apply to state voucher programs that condition access to waiver of the state's responsibility to fulfill the right to an education.

Moreover, education ranks among the most important rights in our democracy.[224] Several state supreme courts have held education to be a fundamental right under their respective state constitutions.[225] Others have

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219 *See id.* at 1425.

220 *See infra* Section III.B.1.

221 Sullivan, *supra* note 197, at 1425.

222 PARKER, *supra* note 20.

223 *See supra* notes 212–216 and accompanying text.

224 *See generally* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments.").

225 *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 957–58 (Cal. 1976) (finding education to be a fundamental right and deeming California's school finance system to be unconstitutional); Horton v. Meskill, 376 A.2d 359,

simply declared students to have a constitutional right to a quality education.[226] All are premised on a similar rationale that values education as a core democratic right. As described by Kentucky's Constitution, "the education of young people is essential to the prosperity of a free people."[227] Vouchers ask students with disabilities to give up this elemental right—a state constitutional right to a system of publicly funded education.[228]

Precedent makes clear that the state cannot directly undermine the right to education. It cannot make students' access to it depend on where they live, how rich their districts are, or the special needs a student may have.[229] A few cases have gone so far as to say that this right is not even conditioned on the students' good behavior.[230] Even when students engage in serious misbehavior, the state

372–74 (Conn. 1977) (holding education to be a fundamental right based on state compulsory attendance laws and Connecticut state constitutional provisions); *see also* Robyn K. Bitner, Note, *Exiled from Education:* Plyler v. Doe*'s Impact on the Constitutionality of Long-Term Suspensions and Expulsions*, 101 VA. L. REV. 763, 768 (2015).

[226] Robinson v. Cahill, 303 A.2d 273, 294 (N.J. 1973) (finding New Jersey's system of financing public education violative of the state's constitutional mandate to provide for "equal educational opportunity"); Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997) (right to education provided in state constitution is qualitative and encompasses right to "sound basic education . . . preparing students to participate and compete in the society"); Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999) (holding South Carolina's Constitution "require[d] the General Assembly to provide the opportunity for each child to receive a minimally adequate education"); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) (holding West Virginia Constitution education clause provided a fundamental right to education); Washakie Cty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 337 (Wyo. 1980) (finding a state system of local property taxes unconstitutional under equal protection). Not all states have adopted this posture. *See, e.g.*, Lewis E. v. Spagnolo, 710 N.E.2d 798 (Ill. 1999) (holding education was not a fundamental right under Illinois state laws); State *ex rel.* Shineman v. Bd. of Educ., 42 N.W.2d 168, 170 (Neb. 1950) (holding education was not a fundamental right under the Nebraska Constitution).

[227] Rose v. Council for Better Educ., 790 S.W.2d 186, 205–06 (Ky. 1989) (holding that four justifications existed for treatment of education as a fundamental right: "1) The education of young people is essential to the prosperity of a free people. 2) The education should be universal and should embrace all children. 3) Public education should be supervised by the State, to assure that students develop patriotism and understand our government. 4) Education should be given to all—rich and poor—so that our people will be homogeneous in their feelings and desires.").

[228] All fifty states contain an education clause in their constitution. PARKER, *supra* note 20. Nine states contain an additional clause specifically addressing students with disabilities. *Id.* Such disability-focused educational clauses vary with respect to categories of disability covered as well as substantive rights granted. *See, e.g.*, NEB. CONST. art. VII, § 11.

[229] Horton v. Marshall Pub. Sch., 769 F.2d 1323, 1324, 1334 (8th Cir. 1985) (holding the school district's application of "domicile requirement" to deny enrollment to minor children whose parent or guardian was not living in the district violated Due Process and Equal Protection Clauses); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1360 (N.H. 1997) (holding a "system of financing public education" through school taxes assessed in school districts was disproportionate and unreasonable within the meaning of a constitutional provision requiring proportional tax assessments and state-funded public schools).

[230] Cathe A. v. Doddridge Cty. Bd. of Educ., 490 S.E.2d 340, 350–51 (W. Va. 1997) (holding that only in extreme cases and through strict scrutiny review could a child taken out of a regular school for disciplinary reasons be denied all public education opportunities).

remains obligated to provide for their education.[231] In fact, complete deprivations of education are typically subject to heightened scrutiny.[232] The notion that the state might ask a student to waive this right to education and achieve indirectly what it cannot achieve directly is contrary to the right itself. Yet, this is exactly what state voucher programs seemingly attempt to do—shed state obligations to educate students with disabilities. Thus, the unconstitutional conditions doctrine and the logic behind it are necessary to ensure limits on states' behavior when the state constitutional right to education is at issue.

b. Federal Statutory Rights

In addition to state constitutional rights to education, students with disabilities have rights under federal statutes.[233] These federal statutory rights are meant to support students' ability to access their state constitutional right to education.[234] But, importantly, federal statutes also confer a substantive right to FAPE.[235] In this respect, the federal statutes play a dual role. They bestow students with disabilities a substantive right to FAPE and they ensure students with disabilities are given necessary special education and related supports they require to access their state constitutional right to education.[236]

As with the state constitutional right to education, in many cases students with disabilities are asked to give up federal statutory protections in exchange for a voucher.[237] These federal rights include not only their substantive right to

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[231] *Id.* at 350.

[232] *Id.*

[233] *See supra* Section I.B. All states must adopt their own state regulations to enforce the terms of the IDEA. Some states provide students with disabilities additional rights through state statutes. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 71B, §§ 1–16 (West 2009). This state law guarantees a "free and appropriate public education in the least restrictive environment" to all school-aged children (ages 3 to 21) regardless of disability. *Id.* §§ 1–2. Any child who qualifies for special education services will receive services specified in an IEP. *Id.* § 3. A team of interested parties, which could include educators, parents, physicians, and advocates, develops the plan. *Id.* The law also mandates support for children with disabilities who may be bullied. *Id.*

[234] 20 U.S.C. § 1400(c) (2012) (describing that prior to enactment of the EAHCA of 1975, the educational needs of millions of children with disabilities were not being met because they were effectively excluded from school, thus these children were denied their state constitutional right to education. The EAHCA was enacted to prevent such exclusion of children with disabilities from their state constitutional right to education); *see also* Mills v. Bd. of Educ. of the D.C., 348 F. Supp. 866, 875 (D.D.C. 1972); Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 302–03 (E.D. Pa. 1972) (approving consent decree that enjoined Pennsylvania from denying education to students who were "mentally retarded").

[235] 20 U.S.C. § 1412(a)(1). *See generally* Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 995–96 (2017) (affirming that the IDEA required states to confer a "substantively adequate program of education").

[236] 20 U.S.C. § 1400(d); 29 U.S.C. § 794 (2012).

[237] NAT. COUNCIL ON DISABILITY, CHOICE & VOUCHERS – IMPLICATIONS FOR STUDENTS WITH DISABILITIES 24 (2018), https://ncd.gov/sites/default/files/NCD_Choice-Vouchers_508_0.pdf.

FAPE, but also the right to be free from segregated learning environments, and the right to invoke due process to complain about the loss of such rights.[238] Some voucher programs require parents to explicitly waive their rights to invoke federal statutory protections for students with disabilities as a condition of acceptance of the voucher.[239] For example, under the Succeed Scholarship Program for Students with Disabilities in Arkansas, parents must "sign an acknowledgement that, by enrolling a child in a private school, the parent . . . waives the procedural safeguards granted by the IDEA."[240]

While the unconstitutional conditions doctrine has never been applied to federal statutory rights, the nature of these particular federal rights and the close connection to a state constitutional right provides a compelling basis for applying the same analysis. As a practical matter, it is simply impossible to disentangle the federal statutory rights from the state constitutional right to education. The federal rights facilitate the delivery of the state constitutional right, and voucher programs ask students to give up both.[241] Thus, ceding statutory rights under the IDEA, Section 504, and the ADA equates to the loss of the state constitutional right to education.

More specifically, these federal disability laws ensure equality of access to education.[242] Without such guarantees in place, students with disabilities lose the tools they may require to meaningfully engage with curricula.[243] And without protections of the federal laws, a state constitutional right to education can become meaningless. By virtue of the loss of rights under the federal statutes that were enacted to guarantee equal access to education, students with disabilities also lose their ability to access their state constitutional right to education. States should no more be able to require students to waive their state constitutional right to education than states should be able to require students to waive the predicates to receiving full access to the state constitutional right.

Just as with restrictions on states' constitutional rights to education, the condition on federal statutory rights is an attempt to compel a result which the

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238 20 U.S.C. §§ 1412(a)(5), 1415.

239 NAT. COUNCIL ON DISABILITY, *supra* note 237, at 59.

240 ARK. DEP'T OF EDUC., *supra* note 121.

241 NAT. COUNCIL ON DISABILITY, *supra* note 237, at 65 ("[F]ederal IDEA rights, as a general rule, have not been viewed as being extended to children and youth with disabilities who participate in voucher programs.").

242 *See* Fry v. Napoleon Community Schools, 137 S. Ct. 743, 748-50 (2017) (discussing how the IDEA Section 504, and the ADA protect students' interests).

243 Students lose the right to FAPE individualized supports and services, the right to be placed in inclusive environments with nondisabled peers, and the right to invoke due process protections to enforce such rights. 20 U.S.C. § 1412.

government could not otherwise achieve without violating the law.[244] In this instance, when parents accept conditions on access to federal statutes, states are no longer responsible for providing FAPE or ensuring students with disabilities are educated in inclusive environments.[245] States could not relinquish these federal obligations without requiring such "voluntary" conditions. Rather, it is only through enforcement of the condition attached to vouchers that states are freed from these obligations.

As Professor Sullivan warns, government action of this sort can "alter the balance of power between government and rightholders."[246] Without the waiver, students with disabilities have a significant number of legal protections that, in effect, give them the power to control their education and ensure its quality. But by asking students to waive those rights, states severely rebalance that power. They essentially force students with disabilities to indemnify the government for its failure to provide them with educational benefits. And interestingly, it is only with regard to this subpopulation that states pursue such a broad waiver, raising the possibility that the states' true interest is in extinguishing the rights themselves, not pursuing some other legitimate purpose.

Assuming now that the unconstitutional conditions doctrine is a proper tool with which to analyze vouchers as applied to students with disabilities, the final section will evaluate the constitutionality of vouchers using the doctrine.

3. Evaluating the Constitutionality of the Conditions on Vouchers

As a general principal, states are not free to eschew either state or federal obligations. The question presented here is whether they can do so by imposing conditions on vouchers.[247] Once a right has been conditioned, the primary questions under the unconstitutional conditions doctrine are (1) the legitimacy of the government interest and (2) the coercive nature of the bargain. While a court may be more willing to apply the unconstitutional conditions doctrine when the states' constitutional rights to education are implicated than when only federal statutory rights are in play, the analysis is the same in either scenario.

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244 States could not ordinarily refuse to comply with federal and state statutes providing for the education. *See* COPAA REPORT, *supra* note 4, at 20–25.

245 20 U.S.C. § 1400(d); 29 U.S.C. § 794.

246 Sullivan, *supra* note 197, at 1490. Sullivan recommends courts use the doctrine to scrutinize any government condition that threatens to skew the balance of power between the government and the people holding the right, or the distribution of rights among people, to create a de facto "caste hierarchy in the enjoyment of constitutional rights." *Id.*

247 "It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly." Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 59–60 (2006).

Thus, the following section will discuss the analysis under both without drawing distinctions between state constitutional rights and federal statutory rights to education.

a. Legitimacy of the Government Interest

The Supreme Court has looked to the legitimacy of the government interests at issue when the government seeks to entice a waiver of a constitutional right. For instance, in *Lorenz v. State*,[248] the Court held that a statute prohibiting certain elected and appointed officials from holding gaming licenses did not impose an unconstitutional condition on the right to hold public office because the restriction imposed was outweighed by the state's substantial interests in avoiding corruption and the appearance of corruption in the gaming industry and local government.[249] In the criminal law context, the Court has upheld the practice of impeachment on cross-examination of a defendant despite its infringement on the Fifth Amendment privilege against self-incrimination because of the interest it serves—strengthening the reliability of the criminal process.[250] In the property law context, the Court held that a California public land commission could not, without paying compensation, condition permission to rebuild a house on the property owners' transfer of a public easement across beachfront property.[251] Looking to the underlying interest at issue, the Court found "[t]he evident constitutional propriety" of prohibiting a land use "disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[252] Finally, in *Legal Services Corp. v. Velazquez*, the Court held that a federal grant restriction on funds to legal services nonprofits, prohibiting lawyers from challenging welfare laws, was an unconstitutional condition.[253] The Court warned that, "[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge."[254]

Per the Court's analysis in unconstitutional conditions cases, a condition will be considered legitimate if the competing state interest which induced the condition is substantial.[255] A condition will fail to meet this standard if it "utterly

248 928 P.2d 1274 (Colo. 1996) (en banc).
249 *Id.* at 1285–86.
250 Brown v. United States, 356 U.S. 148, 156 (1958).
251 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987).
252 *Id.* at 836–37.
253 531 U.S. 533, 548–49 (2001).
254 Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548 (2001).
255 *See supra* Section III.A.1.

fails to further the end advanced as justification."[256] With respect to vouchers and students with disabilities, state governments' self-described interests fall into three categories: (1) fiscal savings, (2) increased efficiencies, and (3) improved educational outcomes. While the stated interests may seem innocuous at first, each comes at great cost to students with disabilities and upon closer inspection, the unstated but undeniable effect is to free the state of its obligation to provide students with disabilities equal educational opportunities, an interest surely not worthy of a substantial restriction on educational rights.

Fiscal savings is often cited by lawmakers and advocacy groups as a rationale to support school voucher legislation.[257] Essentially, they claim a savings occurs because it costs less to provide a voucher for a child to attend private school than to educate that child in public schools.[258] Moreover, legislators claim this savings is recouped at higher levels with respect to students with disabilities because this cohort cost twice as much to educate.[259] Costs associated with educating students with disabilities has long strained state education budgets, in part because the IDEA places significant demands on states in return for federal funding, but Congress has yet to fully fund the program.[260] Since its enactment, the law has included a commitment to pay 40% of the average per student cost for every special education student.[261] However, currently the federal government provides local school districts with less than 20% of its promised commitment.[262]

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[256] *Nollan*, 483 U.S. at 836–37.

[257] SPALDING, *supra* note 5, at 39; Martin Lueken, *How to Accurately Calculate the Fiscal Impact of School Voucher Programs*, EDCHOICE BLOG (Sept. 27, 2016), https://www.edchoice.org/blog/how-to-accurately-calculate-the-fiscal-impact-of-school-voucher-programs/.

[258] "The most relevant relationship in calculating the fiscal impact of school choice is the difference between: (1) the amount of financial assistance (i.e., the voucher amount) provided to participants and (2) the current cost of educating those students in the public school system. If the average voucher amount is less than the average per-student educational cost, a savings is realized for those students that use a voucher to leave a public school to enroll in a private school." SPALDING, *supra* note 5, at 1.

[259] *Id.* at 12. One advocacy group even praised Arizona and Louisiana's policy of offering a voucher worth less than the amount the state would otherwise spend on educating a student with a disability in a public school precisely because of the fiscal savings. CUNNINGHAM, *supra* note 34.

[260] *See* 231 Nat'l Educ. Ass'n (NEA), *Background of Special Education and the Individuals with Disabilities Education Act (IDEA): The 2004 IDEA Reauthorization Bill*, http://www.nea.org/home/19029.htm (last visited Mar. 26, 2019).

[261] *Background of Special Education and the Individuals with Disabilities Education Act (IDEA): The 2004 IDEA Reauthorization Bill*, NAT'L EDUC. ASS'N, http://www.nea.org/home/19029.htm (last visited Mar. 26, 2019).

[262] *Id.* (noting that in 2004 the "average per student cost [was] $7,552 and the average cost per special education student [was] an additional $9,369 per student, or $16,921. Yet, in 2004, the federal government [was] providing local school districts with just under 20 percent of its commitment rather than the 40 percent specified by the law").

Setting aside for the moment the active debate over whether such cost savings is actually realized through voucher legislation,[263] the relevant question for purposes of the unconstitutional conditions analysis is whether fiscal savings justifies the infringement of educational rights. The argument falls flat for two reasons. First, state governments need not condition the rights of students with disabilities to enact voucher legislation. Thus, assuming such legislation provides a fiscal savings, they could still enact it without restricting students' rights under federal and state laws. In short, the ends are not necessary to justify the means.

Second, given the historical weight accorded to the nature of educational rights, including the fact that such rights are embedded in all fifty state constitutions,[264] it seems unlikely that fiscal concerns alone would permit governments to condition voucher legislation on a waiver of access to educational rights. This is particularly true given that such a condition is not a necessary component to enacting such legislation. If the state needs the education system to reduce or control costs, one would expect the state to pursue that through efficiency within the system, not by removing individuals from the system itself.

In some states, voucher programs have gotten so big that they are causing deficits in state education budgets.[265] The savings resulting from vouchers are not actually recouped in the public school system, but rather recouped by the state budget more broadly.[266] It is at least arguable that states enacting voucher

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[263] One of the largest pro-voucher interest groups, the Friedman Foundation for Educational Choice, authored a report claiming a cumulative total savings of $1.7 billion dollars from school voucher programs between 1991 and 2011. SPALDING, *supra* note 5, at 12. The report claimed that students with special education needs cost school districts on average twice as much as regular education students. *Id.* at 12, 39; *see also* U.S. Dep't of Educ., Educ. Res. Info. Ctr. (ERIC), Jeopardizing a Legacy: A Closer Look at IDEA and Florida's Disability Voucher Program 8–10 (2003). Yet, compare the Department of Education Report with the current calls for a halt to Indiana's voucher program, where the Indiana state superintendent stated, "[f]or too long, Indiana has diverted funding from public schools without studying the impact on our traditional school system. It is time for our state legislature to fully study the fiscal and academic impacts that the school voucher system is having on Indiana's education system." Claire McInerny, *School Voucher Program Cost State $18 Million More than Previous Year*, WFYI INDIANAPOLIS (July 19, 2016), http://www.wfyi.org/news/articles/school-voucher-program-cost-state-18-million-more-than-previous-year.

[264] *See* PARKER, *supra* note 20.

[265] *See* Valerie Strauss, *What Taxpayers Should Know About the Cost of School Choice*, WASH. POST (Jan. 26, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/26/what-taxpayers-should-know-about-the-public-cost-of-school-choice/?noredirect=on&utm_term=.6b9f9a36690c.

[266] Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703, 721 (2015). Mead argues that where state constitutions require a duty to provide uniform education, voucher programs that siphon off money from public schools may at some point violate state constitutional obligation to provide for public education. *Id.* at 704–05, 714.

programs that drain state coffers of education funding are in danger of running afoul of their commitment to provide for a system of public education.[267] In these states the justification of fiscal savings is in tension with a duty to provide a uniform system of public education.[268] Consequently, fiscal savings may not be a legitimate legislative goal if it comes at the expense of meeting the states' constitutional obligations to provide a public system of education.

A second legislative interest advanced for the creation of vouchers is efficiency. The National Conference of State Legislatures has lauded voucher programs' ability to both cut costs and ease the administrative burden of compliance with the IDEA. "By shifting students with disabilities out of the public school system, the administrative burden of tracking and reporting student progress is reduced at both the local and state levels."[269] Schools have a number of reporting requirements that they must meet in order to comply with IDEA's terms, and while efforts have been made to minimize these requirements, they nonetheless place significant demands on school districts.[270] When students accept vouchers to attend private schools, the reporting requirements are virtually extinguished.[271] States may have their own reporting mandates built into their voucher legislation, but most states require only limited reporting or none at all.[272]

Another component of efficiency is schools' ability to offer parents a direct path into the private school system while avoiding costly litigation. The IDEA empowers students and their parents to invoke due process procedures to file complaints about the adequacy of FAPE.[273] If parents can prove the public school denied their child FAPE, they may be able to seek tuition reimbursement for a private school placement.[274] In fact, the robust nature of the IDEA's due

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[267] *Id.* at 737.

[268] *Id.* at 736–37.

[269] CUNNINGHAM, *supra* note 34; *see also* SPALDING, *supra* note 5, at 2, 9–10.

[270] 20 U.S.C. § 1408 (2012).

[271] Elise Helgesen Aguilar, *A New Government Report Shows Private School Voucher Programs Fail to Provide Information, Especially to Families of Students with Disabilities*, AMS. UNITED FOR SEPARATION CHURCH & ST. (Dec. 1, 2017), https://www.au.org/blogs/wall-of-separation/a-new-government-report-shows-private-school-voucher-programs-fail-to. School districts must still track the number of students with disabilities in private schools, but their data gathering for this cohort of students is greatly reduced per federal law.

[272] Marie Rauschenberger, *Resolving the Lack of Private-School Accountability in State-Funded Special Education Voucher Programs*, 2015 MICH. ST. L. REV. 1125, 1152–53 (2015).

[273] *See supra* Part II.

[274] 20 U.S.C. § 1412(a)(10)(C)(ii); *see also* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 258–59 (2009) (Souter, J., dissenting). Public perception of the frequency and costs of such claims on school districts may overstate the actual cost. *See* JAY P. GREENE & MARCUS A. WINTERS, DEBUNKING A SPECIAL EDUCATION MYTH: DON'T BLAME PRIVATE OPTIONS FOR RISING COSTS 67–68, 70 (2007) (comparing several articles featuring high costs of individual students' private school tuitions on public school districts, with data on actual numbers of

process system has engendered calls from school superintendents to scale back its force.[275] School districts, understandably, would prefer to limit the costs associated with defending lawsuits, and many state legislatures see vouchers as a way to limit those costs and head off litigation.[276] Voucher legislation offers parents who are unhappy with the public school system a relatively direct method of leaving it. Vouchers incentivize parents to forgo the potentially costly and lengthy litigation to improve services in public schools for the more immediate promise of better services in a private school.

While administrative efficiency in and of itself may be a legitimate goal, when the purpose of efficiency is an end run around federal disability rights legislation, that goal should face more scrutiny. The IDEA requires states to submit reports to the Department of Education to ensure that states are fulfilling their statutory obligations to students with disabilities.[277] A state's desire to get out from under these reporting requirements is essentially a desire to avoid or outsource that obligation. Thus, the goal of efficiency is to push the costly and administratively burdensome responsibility to educate students with disabilities onto private actors, who are under no such reporting obligation.

Likewise, incentivizing parents to accept vouchers and waive due process protections is inherently suspect. The condition merely operates as a way for the

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students publicly placed in private schools). In 2004, only about 1.48% of students with disabilities were enrolled in publicly funded private placements (amounting to 0.18% of the public school student population). *Id.*

[275] Sasha Pudelski, AASA, Rethinking Special Education Due Process: A Proposal for the Next Reauthorization of the Individuals with Disabilities Education Act 2 (2016). The School Superintendents Association recently authored a report detailing the costs associated with defending due process claims and recommending that a type of mandatory mediation (referred to as consultation) be implemented prior to the filing of any lawsuit. *Id.* at 4. Among its findings based on a survey of 200 school superintendents, "the current due process system continues to expend considerable school district resources and impedes the ability of school personnel to provide enhanced academic experiences for all students with disabilities because it devotes the district's precious time and resources to fighting the legal actions of a single parent." *Id.* at 2.

> The average legal fees for a district involved in a due process hearing were $10,512.50. Districts compelled to compensate parents for their attorney's fees averaged $19,241.38. The expenditures associated with the verdict of the due process hearing averaged districts $15,924.14. For districts that chose to settle with a parent prior to the adjudication of the due process hearing, the settlement costs averaged $23,827.34.

Id. at 3.

[276] Nat Malkus & Tim Keller, Federal Special Education Law and State School Choice Programs, 18 Federalist Soc'y Rev. 22, 26 (2017) ("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 nonpublic 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."); *see also* COPAA REPORT, *supra* note 4, at 13.

[277] 20 U.S.C. § 1414(d)(5)(B).

state to insulate itself from legal challenges—an action the Supreme Court has previously found violates the unconstitutional conditions doctrine.[278] When viewed in this light, states appear to be using "efficiency" as a cloak for shedding their statutory responsibilities towards students with disabilities.

Finally, state legislators and voucher proponents frequently claim that school choice empowers parents to choose a school most effective for their child.[279] They claim that giving more parents the ability to choose the best performing school will in turn improve the quality of schools for all children.[280] Thus, the justification for shifting public funds into the private sector is the promise of better schools for all children.

Recent research demonstrates otherwise. Several recent reports indicate that at best voucher students show no improvement in student achievement, and at worst such programs actually hurt student performance.[281] Here, the offered goal—privatization of education to improve outcomes—does not square with the actual result. As in prior cases where the Court imposed the unconstitutional conditions doctrine, here the "condition . . . utterly fails to further the end advanced as the justification."[282] Thus, it is at least arguable that the condition permits a restriction of civil rights in order to achieve an undesirable outcome.

In addition to weighing the state interest in enacting the condition, the unconstitutional conditions doctrine tells courts to consider whether coercion exists in the nature of the bargain between the condition and the benefit. The following section will analyze whether coercion exists with respect to vouchers.

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[278] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 549 (2001).

[279] Secretary of Education Betsy DeVos went so far as referring to opponents of school choice as "'flat Earthers' who have 'chilled creativity' and held American students back." Gregory Wallace, *Education Secretary: School Choice Opponents Have 'Chilled Creativity'*, CNN, http://www.cnn.com/2017/05/22/politics/betsy-devos-school-choice-trump-budget/ (last updated May 22, 2017, 10:24 PM) ("'They will be hurting the children and families who can least afford it. If politicians in a state block education choice, it means those politicians do not support equal opportunity for all kids,' DeVos said.").

[280] NAT. COUNCIL ON DISABILITY, *supra* note 237, at 9.

[281] Douglas N. Harris, Brown Ctr. on Educ. Policy at Brookings, Why Managed Competition Is Better than a Free Market for Schooling 2 (2017). Recent studies of voucher programs in Ohio and Louisiana show voucher students perform worse than non-voucher students. DAVID FIGLIO & KRZYSZTOF KARBOWNIK, THOMAS B. FORDHAM INST., EVALUATION OF OHIO'S EDCHOICE SCHOLARSHIP PROGRAM: SELECTION, COMPETITION, AND PERFORMANCE EFFECTS 2 (2016) (finding decline in math scores that cannot be attributed to "setbacks that typically accompany any change in schools"); Jonathan N. Mills et al., Educ. Research All. for New Orleans, How Has the Louisiana Scholarship Program Affected Students? A Comprehensive Summary of Effects after Two Years 2 (2016).

[282] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

b. Coercive Nature of the Bargain

Coercion, while central to the unconstitutional conditions doctrine,[283] remains difficult to precisely define.[284] Professor Mitchell Berman defines coercion in this context as "state action that burdens exercise of a constitutional right for the purpose of either discouraging or punishing assertion of that right."[285] States impermissibly burden a right if the purpose of the condition is either punitive or meant to discourage the exercise of the right.[286]

Critiques of such a limiting principle often point to the view that government should be able to condition any benefit that it was not obligated to provide. But, the Supreme Court has already rejected this greater-includes-the-lesser argument as being a "facile generalization" that "obscure[s] the issue."[287] Further, as Professor Berman opines, "it is entirely plausible that an individual may be better off in a world in which the benefit at issue is withheld entirely than in a world in which it is offered on a condition that she, but not others, would reject."[288] This hypothetical presents a realistic vision of the future for students with disabilities who reside in states with expansive voucher programs.[289]

The Court has used coercion as a reason to strike down conditions that affect First Amendment rights to freedom of speech, religion, and association. For example, the Court suggested that a public college would violate a professor's freedom of speech if it declined to renew his contract because he was critical of the college's administration.[290] Most recently, the Supreme Court held that a

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283 Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 597 (2013).

284 *Compare* Sullivan, *supra* note 197 (arguing that coercion is not the correct lens through which to view the Court's analysis in these cases), *with* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001) (supplying a new framework in which coercion is one piece of an unconstitutional conditions analysis, but also arguing that even noncoercive proposals may be unconstitutional).

285 Berman, *supra* note 284, at 7.

286 *Id.* at 35.

287 Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

288 Berman, *supra* note 284, at 18–19.

289 Florida has one voucher program with 31,499 participating students; Indiana has one voucher program with 34,299 participating students; Ohio has five voucher programs with a total of 46,780 participating students; and Wisconsin has four voucher programs with a total of 33,775 participating students. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-94, PRIVATE SCHOOL CHOICE: FEDERAL ACTIONS NEEDED TO ENSURE PARENTS ARE NOTIFIED ABOUT CHANGES IN RIGHTS FOR STUDENTS WITH DISABILITIES 39–42 (2017).

290 Perry v. Sindermann, 408 U.S. 593, 597 (1972) (holding that the absence of a contractual right to reemployment did not defeat a professor's claim that a public university's decision not to renew his contract was based on the professor's public criticism of the university's policies, and if true could violate the First Amendment).

federal statute placed an unconstitutional condition on the First Amendment by requiring organizations that receive federal HIV- and AIDS-related funding to adopt a policy explicitly opposing prostitution and sex trafficking.[291] In reaching this conclusion, the Court closely scrutinized the purpose of the condition and concluded that it did more than simply define the limits of government spending, but rather sought to leverage funding to regulate speech.[292] The condition "demand[ed] that funding recipients adopt—as their own—the Government's view on an issue of public concern."[293]

As applied to vouchers, conditions require students with disabilities to forfeit educational rights under federal and state laws which impact their state constitutional right to an education. Arguably, the animating purpose is to discourage, and in fact limit, these students' educational rights, which puts it squarely within the definition of coercion. States will argue that the purpose of the condition is merely to facilitate the use of vouchers for students with disabilities to enter into better educational environments, namely private schools. However, if courts pull back the curtain on voucher legislation, they will likely find states' reasoning hollow.

Voucher conditions limit rights in both direct and indirect ways, but with the same result—unjustified encroachment of educational rights. First, several states directly require students with disabilities to waive their right to special education and related supports when they accept vouchers.[294] Such demands often put parents in a position of choosing between a failing public school and the chance of a better private school, but with no guarantee that the new setting will ultimately prove any better. In such circumstances, the acceptance of a voucher and its conditions does not represent a "true choice." Rather, it often represents the only prudent choice to escape a failing public school system. Second, states indirectly limit rights by shrouding voucher conditions in secrecy, making it unlikely that parents are fully aware of the effect of such conditions on their children's statutory rights.[295] In short, coercion exists because parents are not made aware of the rights they are giving up, and even when they are aware, many feel they have no reasonable choice but to give up those rights.

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[291] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 208, 217 (2013).

[292] *Id.* at 217.

[293] *Id.* at 226. The Court has found coercion to exist in federal funding schemes when such programs are "aimed at the suppression of dangerous ideas." Speiser v. Randall, 357 U.S. 513, 519 (1958).

[294] *See supra* Section II.A.

[295] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-94, PRIVATE SCHOOL CHOICE: FEDERAL ACTIONS NEEDED TO ENSURE PARENTS ARE NOTIFIED ABOUT CHANGES IN RIGHTS FOR STUDENTS WITH DISABILITIES 25 (2017).

The majority of states fail to provide sufficient notice to fully explain vouchers' effects on educational rights.[296] A 2017 GAO report found 83% of students enrolled in a private school program designed for students with disabilities "were in a program that provided either no information about changes in IDEA rights or provided information that . . . contained inaccuracies about these changes."[297] Parents may accept a voucher and enroll their child in a private school without realizing that they have much more limited, if any, control over the provision of special education services offered to their child.

Voucher advocates would likely argue that no coercion exists because parents are not forced to accept vouchers. They can freely choose to engage with vouchers or reject them. But parents who are unhappy with their public school system are faced with the choice to either keep their child in the failing system, fight against that system by invoking due process rights under federal statutes, or accept a voucher and leave. Even where the public school is demonstrably failing their child and flouting federal statutory law, parents bear the burden of initiating costly and likely lengthy litigation to right those wrongs.[298] When faced with this costly and tenuous victory, vouchers can present an enticing path out of the morass. All parents need do is essentially indemnify the state of the responsibility to educate their child. Thus, states offer parents a way to leave a public school system that is currently failing their child, for the promise of a school that may prove better. But, if the only way to ensure your child will enter that school is to sign away protections, that bargain is the definition of coercion.

In all cases where parents of children with disabilities accept vouchers, they give up significant rights to special education tailored to their child's unique needs. Acceptance of vouchers does not simply burden the free exercise of a right, it prohibits it altogether. Further, in states where vouchers are expanding and becoming the predominate education policy, the decision to decline a voucher (and keep the IDEA protections intact) is also fraught with concerns. Parents may be unhappy with the current public education option for their child, but the choice to leave comes with an enormous risk. Like the hypothetical scenario envisioned by Professor Berman, in a very real sense many parents

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296 *Id.* at 1.

297 *Id.* at Highlights.

298 Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 53, 55, 62 (2005). *See generally* Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2011) (arguing that more attention should be placed on public enforcement, rather than private enforcement of education statutes).

would be better off if the voucher programs did not exist and instead states increased commitments to improve public schools for all children.[299]

B. The Equal Protection Clause

A second challenge to the constitutionality of vouchers may be found in the Equal Protection Clause of the Fourteenth Amendment that sets forth: no State shall "deny to any person within its jurisdiction the equal protection of the laws."[300] While states are free to enact laws that treat groups of people differently, when they do so, they must identify a sufficiently important objective to justify the discrimination.[301] Laws singling people with disabilities out for different treatment must pass rational basis review—that is, they must be rationally related to a legitimate government purpose.[302] Rational basis is the most minimal level of review and only rarely have laws been declared unconstitutional for failing to meet it.[303] Challengers bear the burden of demonstrating the law does not meet any legitimate government purpose and courts defer to government action with a strong "presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality."[304]

In a few groundbreaking cases, however, the Supreme Court has struck down laws for failure to survive rational basis review. In those cases, the Court has emphasized that while the government may pursue a limitless number of legitimate goals under rational basis review, there is one purpose that is presumptively invalid: targeting a particular group for disfavored treatment. In these cases, the Court has been less deferential in its application of rational basis review and unwilling to accept what might otherwise be legitimate goals. While voucher laws appear to provide a benefit (not a cost) to students, it is at least arguable that when applied to students with disabilities, the more invidious purpose of such laws is to remove a costly, litigious, and thus disfavored group of students from the public school system and alleviate the state's burden of educating them. This is precisely the type of illegitimate targeting that the Court has found unconstitutional in other cases.

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299 Berman, *supra* note 284, at 18–19.

300 U.S. CONST. amend. XIV, § 1.

301 City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

302 *Id.* at 446 (holding that the intellectually disabled are not a "suspect class" triggering a higher level of scrutiny).

303 *See* Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 611–12 (1999–2000).

304 Hodel v. Indiana, 452 U.S. 314, 331–32 (1981).

1. When Laws Fail Rational Basis Review

The rational basis review is a notoriously low threshold for legislatures to cross. The Supreme Court has held that where rational basis review is applicable the government "need not 'actually articulate at any time the purpose or rationale supporting its classification.'"[305] Rather, "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity."[306] Despite this low threshold, the Supreme Court has struck down a handful of laws under rational basis review for want of "legitimate public purpose."[307]

When reviewing those holdings carefully, a common theme emerges. In each case, the government purpose has been to single out the classified group for disfavored treatment. In other words, treating some identifiable group differently was not a byproduct of a government effort to reform welfare expenditures; rather, the government's purpose was actually to disfavor a particular group and it did so through the restrictions on such programs.[308] And in each case, the Court withheld the deference it typically accords the government and found the laws failed to survive rational basis review. The Court struck down these laws despite the fact that the government may have also had some other additional valid justifications, such as fiscal savings.[309] Rather, in these instances, "the Court has found that the only plausible way to characterize the challenged statute was as an effort to disadvantage a group because of prejudice toward its members."[310]

City of Cleburne v. Cleburne Living Center, Inc. marks the first time the Supreme Court engaged in an equal protection analysis based on a class of intellectually disabled individuals.[311] There, the Court struck down a zoning ordinance which excluded a group home meant for intellectually disabled individuals.[312] The Court held that the intellectually disabled were not a suspect class that required a higher level of judicial scrutiny.[313] Yet, the Court still found that no rational basis existed for believing the group home would pose any special threat to the city's legitimate interests.[314] Even though the City was

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305 Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 320 (1993) (citing Nordlinger v. Hahn, 505 U.S. 1, 15 (1992)).

306 *Id.* at 319.

307 City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985).

308 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 537–38 (1973).

309 Plyler v. Doe, 457 U.S. 202, 227 (1982).

310 Saphire, *supra* note 303, at 608.

311 *Id.* at 610.

312 *City of Cleburne*, 473 U.S. at 450.

313 *Id.* at 442–43.

314 *Id.* at 448. The Court "did not question the legitimacy of [the] interests" offered by the city, but rather

pursuing the generally legitimate interest of safety, the Court found the ordinance was also motivated by "irrational prejudice" against the intellectually disabled.[315] This particular prejudice and targeting of the group for disfavored treatment rendered the ordinance unconstitutional.[316] In short, classifications imposed on a disfavored group due to prejudice do not serve a legitimate government interest and will fail to pass rational basis review.[317]

In *U.S. Department of Agriculture v. Moreno*, the Supreme Court again struck down legislation for want of a legitimate government purpose.[318] Petitioners brought a challenge against enforcement of an amendment to the Food Stamp Act that made ineligible any household containing an individual unrelated to any other member of the household.[319] The Court held the amendment was not rationally related to the stated purposes of the Act or to any legitimate governmental interest in minimizing fraud.[320] In *Moreno*, the Court made plain that laws targeting disfavored groups violate equal protection, stating "[f]or if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[321]

Most recently, in *Romer v. Evans*, the Supreme Court struck down a state law that made it illegal for municipalities to pass laws protecting people from discrimination based on sexual orientation.[322] The Court applied rational basis review, acknowledging that it was "the most deferential of standards" but even

examined whether the banning "of the group home was . . . a rational way to further any of [those interests]." Saphire, *supra* note 303. Unlike earlier rational basis review cases which were wholly deferential to legislatures, in *Cleburne*, the Court examined whether the classification furthered the government's proffered interest in some rational way. *Id.* The Court's unwillingness to defer to the government's proffered interests led some commentators to believe that the case stood for a new proposition, referred to as "rational basis with bite." Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793 (1987). However, when the Court failed to extend this analysis to cases beyond *Cleburne* it became clear that the Court did not create a new standard for laws affecting the intellectually disabled. United States v. Harris, 197 F.3d 870, 876 (7th Cir. 1999) ("With due deference to the congressional approach to legislation affecting the disabled, this Court chooses to follow the lead of our fellow circuit courts and the direction indicated by the Supreme Court to conclude that the disabled are not a suspect or quasi-suspect class. Therefore, we apply rationality review to claims of discrimination made by persons in this class.").

315 *City of Cleburne*, 473 U.S. at 450.

316 *Id.*

317 *Id.* at 449–50.

318 413 U.S. 528, 537–38 (1973).

319 *Id.* at 530.

320 *Id.* at 534.

321 *Id.*

322 517 U.S. 620, 635–36 (1996).

so, insisted on "knowing the relation between the classification adopted and the object to be attained."[323] Thus, rather than deferring to the legislature's proffered justifications for the law, the Court sought to examine those justifications—a step beyond what is typically required in rational basis review.[324] Because the Court found no legitimate purpose in singling out a certain class of persons for "disfavored legal status," it struck down the law as violating the Equal Protection Clause.[325] The Court went on to state, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[326]

Finally, it is worth noting one additional case which sits at the intersection of education and rational basis review—*Plyler v. Doe*.[327] In *Plyler*, the Supreme Court held that a Texas law excluding a class of undocumented Mexican children from access to public schools violated the Equal Protection Clause.[328] Because the undocumented immigrant children were not a suspect class and education is not considered a "fundamental right," the Court applied rational basis review to analyze the law.[329] While the Court did not hold that laws impacting education should be treated differently under an equal protection analysis, it nonetheless could not disregard the fact that the law sought the wholesale exclusion of a class of children from public schools. In discussing the law's impact on education, the Court said:

> By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the Texas statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the Texas statute] can hardly be considered rational unless it furthers some substantial goal of the State.[330]

Here, as with the previous cases, the Court was not willing to defer to government interests when the goal of the legislation was to target a group for

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323 *Id.* at 632.
324 Saphire, *supra* note 303, at 611 n.90.
325 *Evans*, 517 U.S. at 635–36.
326 *Id.* at 633.
327 457 U.S. 202, 230 (1982).
328 *Id.*
329 *Id.* at 223–24.
330 *Id.*

disfavored treatment. Texas proffered cost savings as a legitimate government interest, claiming the law would "preserv[e] the state's limited resources for the education of its lawful residents"[331] and argued that "undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education."[332] But the Court rejected such interests, holding instead that the classification violated the Equal Protection Clause because it failed to demonstrate how excluding a class of children from public school was "reasonably adapted" to the purpose of providing a high quality education for all children in public school.[333] In justifying its holding, the Court cited to a previous case for the proposition that the state may "not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools."[334]

Plyler echoes the underlying theme of the previous cases: laws that seek to target specific groups for disfavored treatment are inherently suspect—even under rational basis review. *Plyler* may also instruct courts to review laws circumventing rights to education more closely. While the Court did not hold that education was per se different, a narrow reading of *Plyler* suggests that cost may not always justify class-based denials of education. Arguably, what *Cleburne*, *Moreno*, *Romer*, and *Plyler* have in common is the plaintiffs' ability to convince the Court that the legislation at issue unfairly targeted and disadvantaged a certain group based on "irrational prejudice" or merely a "desire to harm a politically unpopular group."[335] Once such a showing was made, the Court was less willing to give the state the deference it would otherwise accord under a rational basis analysis. Rather, when plaintiffs were able to demonstrate

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331 *Id.* at 227.

332 *Id.* at 229.

333 *Id.* at 230. "The State may borrow the federal classification. But to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to '*the purposes for which the state desires to use it.*'" *Id.* at 226 (citing Oyama v. California, 332 U.S. 633, 664–65 (1948) (Murphy, J., concurring)).

334 *Id.* at 229 (alteration in original) (citing Shapiro v. Thompson, 394 U.S. 618, 633 (1969)). In *Thompson*, the Supreme Court held that a District of Columbia statute that denied welfare assistance to residents who had not resided within their jurisdiction for at least one year preceding their application for welfare benefits was a violation of the Equal Protection Clause. 394 U.S. at 621–22. Because the constitutional right in question implicated the right to travel across state lines, a constitutional right, the Court applied strict scrutiny and thus required the Government to show a compelling interest in order to uphold the law. *Id.* at 634. The Court held that while the Government had a valid interest in limiting expenditures in public programs, such as public education, it may not accomplish this purpose by "invidious distinctions between classes of its citizens." *Id.* at 633. The Court went on to say that a state "could not, for example, reduce expenditures for education by barring indigent children from its schools." *Id.*

335 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

that proposed laws targeted a group for "disfavored legal status," deference to previously legitimate state justifications, such as cost, fell flat.[336]

Voucher legislation, under certain circumstances, would fail to pass rational basis review for this very same reason. While voucher laws are seemingly intended to benefit students with disabilities by providing them a choice to leave the public school system, this choice comes at a significant cost—the waiver of federal and state laws guaranteeing equal access to education. Rather than receiving a benefit, students with disabilities suffer the loss of important rights. In fact, the benefit of voucher laws is recouped by the state, who is released from federal and state obligations to provide this cohort with equal educational opportunities and is shielded from liability should vouchers fail to produce better educational outcomes. Stripping students with disabilities of educational rights serves no legitimate state purpose, but only insulates states from liability should they run afoul of federal and state laws.

Most important, however, is that states may have another illicit motive—limiting their duties to a costly and litigious cohort of students. As the following section will demonstrate, voucher legislation targeting students with disabilities may be animated by the states' desires to limit their responsibility to this group, and when viewed in this context, it is at least arguable that voucher laws target students with disabilities for disfavored treatment.

2. Why Vouchers Fail Rational Basis Review

To overcome rational basis review, students with disabilities would need to demonstrate that voucher legislation unfairly targets them for disfavored treatment. They could make such a showing by demonstrating two points. First, states' proffered justifications for vouchers bear no relationship to the infringement of students with disabilities' rights under federal and state laws. Second, states' insistence on restricting the rights of students with disabilities is motivated by two illegitimate goals: avoiding burdensome obligations of federal laws, and shifting the responsibility of educating a costly and litigious group.

Voucher legislation singles out students with disabilities for disfavored treatment by requiring that they relinquish important rights to education under both state and federal laws.[337] And it does so to advance state interests that are divorced from the legislation's stated purpose. States claim the animating principles behind vouchers are improved educational outcomes, fiscal savings,

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336 Romer v. Evans, 517 U.S. 620, 633 (1996).

337 ARK. DEP'T OF EDUC., *supra* note 121.

and facilitating parents' ability to choose a school most appropriate for their children.[338] All of these goals can be readily achieved without limiting students' rights to equal educational opportunities. Yet, states ask students to waive their educational rights, inducing dire consequences.

Students with disabilities must trust that the private school will have the tools necessary to educate them even when their needs require deviations from the norm. Should private schools fail in this regard, students with disabilities give up the right to hold schools accountable. Essentially, voucher legislation encumbers the rights of students with disabilities, and similar to the ordinance in *Romer v. Evans*, makes it "more difficult for [them] than for all others to seek aid from the government."[339] Students without disabilities can be relatively sure that they will be able to access a curriculum as delivered by the private school. Because they do not require additional supports and services, they lose nothing by forfeiting access to them. But a student who needs differentiated instruction, and loses access to it, loses everything. Consequently, vouchers single out students with disabilities for special and disfavored treatment.

Moreover, none of the states' proffered reasons for enacting voucher legislation (educational outcomes, free choice, fiscal savings) are related to the restriction on rights for students with disabilities. States claim that vouchers offer students with disabilities a way out of a public school system that is failing to meet their needs.[340] They claim that vouchers offer a chance at better educational outcomes. The most recent data analyzing student performance under voucher programs is at best neutral, and at worst evidences poorer performance in private school settings.[341] But even if the data painted a rosier picture (finding students with disabilities had improved educational outcomes in private schools), such a conclusion may still not warrant the restriction of federal statutory rights enacted to prevent disability discrimination. The restriction of access to laws designed to protect against disability discrimination and provide equal educational opportunity is not necessary to the development of school choice programs. If states are truly concerned about improved educational outcomes for students with disabilities, then ensuring access to the federal statutes that would guarantee them the tools they require to facilitate learning would support that goal. Instead, the government claims that students with

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338 *See supra* Section III.A.3.a.

339 517 U.S. at 633.

340 COPAA REPORT, *supra* note 4, at 19; EDCHOICE, THE ABCS OF SCHOOL CHOICE: THE COMPREHENSIVE GUIDE TO EVERY PRIVATE SCHOOL CHOICE PROGRAM IN AMERICA 3 (2018), https://www.edchoice.org/wp-content/uploads/2018/01/ABCs-of-School-Choice-2018-Edition-1.pdf.

341 *See supra* note 281 and accompanying text.

disabilities should forgo federal protections because doing so would facilitate improved educational outcomes. Just as in *Cleburne*, the governments' proffered interests are "so attenuated as to render the distinction arbitrary or irrational."[342]

Likewise, states claim that vouchers provide parents of students with disabilities a way to choose a school that best fits the needs of their children. But facilitating parents' freedom to choose the right school for their children would not be stymied by also ensuring their children's rights were intact when enrolling in those schools.

Finally, states claim that because vouchers cost less than educating students with disabilities in public schools, their state budgets reap the savings from enacting such programs. States would continue to recover those savings without restricting rights. Further, while fiscal savings are generally viewed by courts as a legitimate government interest, in those cases where plaintiffs have demonstrated that legislation targeted their group for disfavored treatment, cost was not found to be a sufficient goal to warrant such treatment.[343] Rather, at least in the case where access to education was completely denied, the Court held that the state may "not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools."[344] While voucher legislation does not bar educational access entirely, it effectively makes it much less certain that students with disabilities will have the supports and services necessary to ensure they are able to access the curriculum as effectively as their nondisabled peers. None of the states' proffered reasons for vouchers would be impugned by ensuring students with disabilities' access to federal and state rights meant to guarantee equal educational opportunity. In essence, the ends do not justify the means.

Some could argue that private schools may be less willing to accept vouchers if it means they will be responsible for providing supports and services necessary to educate students with disabilities. But this criticism actually exposes an ulterior motive for such legislation—states' desire to divest themselves of the obligation to a costly cohort of students. While state legislators publicly adopt the mantle of free choice as the driving force behind voucher legislation, the real motivator is the relinquishment of the responsibility to educate a costly and litigious group of students. Thus, vouchers may appear to provide a benefit to students with disabilities in the form of money to attend private schools, but peeling back the curtain on such legislation reveals an entirely different set of

342 City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985).

343 *See supra* Section III.B.1.

344 Shapiro v. Thompson, 394 U.S. 618, 633 (1969); *see also supra* note 334 and accompanying text.

animating principles, which shift the story told by voucher legislation from one of free choice to one of dereliction of duties.

When students with disabilities are in public schools they have access to a robust set of rights under the IDEA, the ADA, and Section 504.[345] The statutes impose affirmative obligations on schools to convey both substantive and procedural rights.[346] Meeting these obligations can be costly for states. Further, when schools fail, students can invoke the federal laws to demand that schools meet their obligations.[347] Such actions can be costly for school districts to defend against.[348] Limiting students' access to these laws alleviates this cost.

Because of the monumental deference paid to lawmakers under rational basis review, some may believe that striking down voucher legislation under the Equal Protection Clause is, to put it bluntly, a long shot.[349] But, if courts are willing to recognize that the conversation around vouchers has been misconstrued, rational basis may still have bite. When analyzing cases that have failed to survive rational basis review, a new framework emerges. This framework suggests that when groups are targeted for disfavored treatment, courts should more carefully scrutinize the state's proffered interests to determine whether such interests are legitimate. Vouchers single out students with disabilities for disfavored status, encumbering their educational rights, but not the rights of their peers. Thus, vouchers are not simply about helping students with disabilities get out of struggling public schools. They are about shifting the burden of educating this costly group of students to the private sector. Because the justification for such a significant encumbrance on educational rights is so attenuated to the purpose of the legislation, vouchers may be the rare type of classification that would, in fact, fail rational basis review.

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345 *See supra* Section I.B.

346 *See supra* Section I.B.

347 20 U.S.C. § 1415 (2012). Procedural safeguards include: an opportunity for parents to "examine all records" concerning their child, to participate in meetings relating to "identification, evaluation, and educational placement of the child," to receive an independent educational evaluation of their child, to receive written prior notice regarding proposals "to initiate or change," or refusals "to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a [FAPE]" to the child. *Id.* § 1415(b)(1), (3). Additionally, parents have an ability to pursue mediation, and to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." *Id.* § 1415(b)(5)–(6).

348 *See supra* note 275 and accompanying text.

349 As one scholar candidly summarized, "the conception of rational basis review as a 'bulwark' against significant, and even unreasonable, discrimination seems more to reflect wishful thinking than a candid assessment of Supreme Court doctrine." Saphire, *supra* note 303, at 635.

IV. SOLUTIONS

In many instances vouchers represent the privatization or elimination of states' constitutional obligations to provide for a system of public education. State legislatures can lawfully decide to spend taxpayer money on such a system, but if the goal is to provide better educational opportunities in the private sector for all students, then states should require voucher-recipient private schools to adhere to many of the requirements of the IDEA as well as the ADA and Section 504. Voucher legislation can more effectively address the inequities currently borne by students with disabilities, but both federal and state governments must first recognize the problems created by the current system and have the will to fix it.

A. Congressional Solutions

The most impactful solution rests with the federal government. For the many reasons discussed throughout this Article, voucher legislation unjustly burdens the rights of students with disabilities. Congress could right this wrong with a straightforward amendment to the IDEA. Congress should clarify that publicly funded education programs (including vouchers) will be treated as public placements for purposes of the IDEA.[350] Such treatment would ensure that certain key responsibilities for the provision of special education services remain with the state.[351]

When the IDEA was enacted, Congress likely did not anticipate the expansion of hybrid public–private placements, where public funds facilitate placement at private schools. However, because the IDEA assigns states the task of identifying all students with disabilities and providing FAPE, such responsibility should remain with the state when public funds are used to facilitate an educational placement. For example, under the IDEA, when a child changes public school programs, through relocation or an intra-district magnet school option, the state is still responsible for the provision of FAPE to the child,

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[350] In 1990, the U.S. Department of Education's Office for Civil Rights issued a memorandum which stated the agency's interpretation that students who are placed in private schools through a voucher program are considered to be parentally placed in private schools and, are thus, not fully covered by the IDEA's protections. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, OCR STAFF MEMORANDUM 1 (1990); *see also* Letter from Susan Bowers, Acting Deputy Assistant Sec'y for Civil Rights, and Patricia J. Guard, Acting Dir., Office of Special Educ. Programs, U.S. Dep't of Educ., to John W. Bowen, Att'y for Pinellas Cty. Sch. Bd. (Mar. 30, 2001), http://www.ed.gov/policy/speced/guid/idea/letters/2001-1/bowen3302001fape.doc (confirming that federal civil rights laws "do not directly apply to the private schools participating" in Florida's voucher program).

[351] 34 C.F.R. § 300.132 (2018).

regardless of which publicly funded school she chooses.[352] So too, should the state's obligation continue when vouchers are used to place students in private schools.

Because it would be impractical to expect that private schools would be equipped to provide all the educational and supportive services necessary for all types of disabilities, the onus for such provision should remain with the state. In other words, the IDEA should be amended to clarify that when students use public funds to attend private schools, the state cannot divest itself of the responsibility to confer FAPE. Rather, the state would still be obligated to monitor compliance of private schools "through procedures such as written reports, on-site visits, and parent questionnaires."[353] Such an amendment would facilitate school choice, by allowing parents to select private schools if so desired, but at the same time would keep the core components of the IDEA intact such that students who accepted public funding to attend private schools could be assured of meaningful access to education.

B. State Legislative Solutions

States that wish to enact voucher legislation should ensure that such laws protect the rights of students with disabilities rather than obfuscate them. Legislators should require private schools that accept vouchers to fully abide by the IDEA, the ADA, and Section 504. Further, legislators should include accountability structures such as participation in statewide assessment and publicly available student performance data. State legislators should also demand that voucher recipient schools be able to meet high standards for teacher qualifications and require special education training or other certifications when schools hold themselves out as providing special education programs.

Some states are moving in this direction, requiring private schools to meet accreditation requirements and mandating nationally standardized testing.[354] But even the states that have implemented accountability measures either explicitly demand waivers of federal disability rights or remain silent on the voucher's effect on these rights.[355] Schools receiving public funds should not only be held accountable for quality of instruction and for student performance outcomes, but

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[352] 34 C.F.R. § 300.323.

[353] 34 C.F.R. § 300.147(a).

[354] ARK. DEP'T OF EDUC., *supra* note 121. Arkansas's Succeed Scholarship Program for Students with Disabilities requires private schools to meet Arkansas State Board of Education accreditation requirements for providing appropriate services for students with disabilities. *Id.*

[355] Kevin P. Brady, *The Paradox of State-Funded Private Choice Vouchers, Accountability Measures, and Legal Protections for Students with Disabilities*, 344 EDUC. L. REP. 635, 642 (2017).

should also be prohibited from violating these students' rights. Thus, states should both include meaningful accountability measures in the voucher programs as well as ensure that private schools that participate are, as a whole, accessible to children with disabilities.

C. Judicial Solutions

Even if Congress and states fail to act, courts have the power and obligation to achieve several of the foregoing goals. Courts could declare voucher programs unconstitutional when evidence indicates that the state is using the program as a solution to poorly funded and underperforming public schools, and conditioning voucher access on waiver of federal and/or state educational rights.

When the only way to escape a failing public school system is to accept a voucher that strips away constitutional and statutory rights, students are not actually exercising free choice. They are forced into making a choice between two evils. Such coercion should not stand under the unconstitutional conditions doctrine, particularly where plaintiffs can demonstrate that the government interests of saving money and improved educational outcomes are not met through the enactment of vouchers. Further, if plaintiffs can reframe the debate to demonstrate that vouchers in fact harm students with disabilities, courts should also strike down such legislation under the Equal Protection Clause. Courts should ensure that voucher programs do not divest students with disabilities of their rights, but rather offer them a meaningful choice between public or private school.

CONCLUSION

Giving parents the freedom to choose a school best suited to their child's needs is an easy concept to embrace. Parents, after all, are in the best position to make educational decisions on behalf of their children. But the lure of choice is lost when its effects on students with disabilities are exposed. For these students, choice comes at a serious cost. They must also "choose" to give up the critical state and federal rights that ensure their equal access to education. Without these rights, students with disabilities have no guarantee that a private school will be capable of meeting their unique educational needs. For those students who are in public schools that are already failing to meet their needs, accepting a voucher and relinquishing educational rights may feel like a coerced choice.

Voucher legislation ultimately violates principles of constitutional law by unduly burdening students' rights and unjustifiably targeting students with

disabilities for disfavored treatment. Moreover, vouchers impose significant costs on students with disabilities without adequate justification. If states are sincerely concerned with providing students with disabilities more or better educational options, they should enact voucher programs without conditions. This would guarantee that a student with disabilities could walk into a private school knowing that they would have the same opportunity at a meaningful education as any other student. If states refuse to take action, then courts should. If school choice legislation continues to expand, it must recognize the costs currently imposed on students with disabilities and provide these students with true, not coerced, choice.