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Services for Private School Students  
Under the Individuals with  
Disabilities Education Improvement  
Act: Issues of Statutory Entitlement,  
Religious Liberty, and Procedural  
Regularity

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Services for Private School Students  
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Education Improvement Act:  
Issues of Statutory Entitlement, Religious Liberty,  
and Procedural Regularity

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Abstract

Government support for private schooling has been a topic of public discussion from the beginning of the administration of President George Bush. The Individuals with Disabilities Education Improvement Act of 2004 (“Improvement Act”) amends the Individuals with Disabilities Education Act (“IDEA”) with regard to (among other things) publicly funded services for children with disabilities who attend private schools. This Article describes the private school student provisions of the new law, demonstrating that the Improvement Act represents continuity in the field of special education services for children in private education. The Article then takes up three issues regarding services for private school children: (1) The existence of any individual entitlement that private school children and their parents may have to any particular level of publicly funded special education services; (2) Whether denial of equal, or even of any, services to some private school children unconstitutionally burdens free exercise of religion or parents’ rights to control their children’s upbringing; and (3) The risk of arbitrary decision making in allocating services among private school children. With regard to the first issue, this Article demonstrates that Congress has not created any enforceable individual entitlement to special education services for any given private school child. Some states, however, have established an individual entitlement. Regarding the second problem, this Article concludes that it is constitutionally permissible for public schools to refuse to fully subsidize private school children’s special education services; any contrary view would expand constitutional rights to public services of private school children and their parents beyond acceptable bounds. Regarding the third problem, this Article advances the position that the Improvement Act creates risks of arbitrary and unfair allocations of services that are unacceptably high, and that under due process principles, transparency of the allocation process needs to be guaranteed.

Services for Private School Students  
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Some suspect a hidden agenda.<sup>1</sup> For others, the agenda is anything but hidden: The Bush administration favors private schooling.<sup>2</sup> The federal budget proposal released in March, 2006 offered \$100 million in funding for \$4,000 private school scholarships and \$3,000 tutoring grants for students in underperforming public schools.<sup>3</sup> Last fall, the administration proposed that \$500 million be spent on private school tuition for students displaced by the Hurricane Katrina disaster.<sup>4</sup> The President himself has consistently supported voucher programs to pay the tuition of students at private elementary and secondary schools.<sup>5</sup> The No Child Left Behind initiative, which is the centerpiece of the administration's effort on education, requires remedial activity for schools whose students, including defined subgroups of students, do not make adequate yearly progress towards standards of proficiency.<sup>6</sup> The actions include permissive transfers, supplemental private services, and ultimately, school reorganization that may entail

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<sup>1</sup> See, e.g., Robert Rubinstein, *Bush's Plan to Destroy Our Public Schools*, Z Magazine Online, at <http://zmagsite.zmag.org/Oct2004/rubinsteinpr1004.html> (Oct. 2004) (last visited Mar. 22, 2006) (calling No Child Left Behind law "based on lies and deceit").

<sup>2</sup> See, e.g., Mark Noonan, *The Argument for School Choice*, Blogs for Bush, at <http://www.blogsforbush.com/mt/archives/006615.html> (Mar. 2, 2006) (stating that public schools prove deficient in instilling character and teaching basics and advocating Bush administration educational choice initiatives).

<sup>3</sup> Robert Holland, *Bush Budget Calls for Private School Scholarships*, Sch. Reform News, at <http://www.heartland.org/Article.cfm?artId=18626> (last visited on Mar. 1, 2006).

<sup>4</sup> Nick Anderson, *Bush Proposes Private School Relief Plan*, WASH. POST, Sep. 17, 2005 at A12, available at [http://www.washingtonpost.com/wp-dyn/content/article/2005/09/16/AR2005091601723\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/09/16/AR2005091601723_pf.html).

<sup>5</sup> *Bush Repeats Support for School Vouchers*, CNN.com, at <http://www.cnn.com/2004/ALLPOLITICS/02/13/bush.vouchers.ap/> (Feb. 13, 2004).

<sup>6</sup> 20 U.S.C.A. § 6311(b)(2)(C)(v)(II)(cc) (West 2006).

ceding operations to an outside provider of services.<sup>7</sup> The private-education nature of these steps has led to sharp accusations that the real goal of No Child Left Behind is to undermine public education and promote private schools.<sup>8</sup>

The Individuals with Disabilities Education Improvement Act (“Improvement Act”),<sup>9</sup> passed in December of 2004, reauthorizes and amends the Individuals with Disabilities Education Act (“IDEA”).<sup>10</sup> IDEA is the basic federal legislation that furnishes assistance to states and school districts for providing special education to students with disabilities. It requires states and school districts to guarantee free,

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<sup>7</sup> 20 U.S.C.A. § 6316(b) (West 2006). Invoking the No Child Left Behind law, Maryland has announced it will take over operations of seven Baltimore middle schools and will reopen them either as charter schools or schools run by private entities under state supervision. Diana Jean Schemo, *Maryland Acts to Take Over Failing Baltimore Schools*, N.Y. TIMES, Mar. 30, 2006, at A14, available at [http://www.nytimes.com/2006/03/30/education/30child.html?\\_r=1&oref=slogin](http://www.nytimes.com/2006/03/30/education/30child.html?_r=1&oref=slogin).

<sup>8</sup> See Bess Keller, *Weaver Calls on Delegates to Make Covenant with Nation*, EDUCATION WEEK, July 13, 2005, at 16 (“Mr. Weaver called on the delegates in his July 3 keynote speech to unite to ‘defend public education and public school educators against the negative, mean-spirited, contrived attacks aimed at undermining and derailing the great institution of public education, while advancing the agenda of privatizing, charterizing, and voucherizing for personal gain.’”); see also Sam Dillon, *Some School Districts Challenge Bush’s Signature Education Law*, N.Y. TIMES, Jan. 2, 2004, at A1 (“[I]n the presidential campaign, criticism of the new law by Howard Dean, the former governor of Vermont, and other candidates has been drawing an enthusiastic response. School boards, Dr. Dean told a New Hampshire town meeting recently, call the law ‘no school boards left standing.’”); Council of Chief State School Officers, *Vouchers and Choice*, at [http://www.ccsso.org/federal\\_programs/vouchers\\_and\\_choice/1650.cfm](http://www.ccsso.org/federal_programs/vouchers_and_choice/1650.cfm) (visited Aug. 8, 2005) (expressing opposition to unsuccessful voucher proposals previously attached to No Child Left Behind bill and questioning measures contained in law as passed); National Education Association, *“No Child Left Behind” Act/ESEA*, at <http://www.nea.org/esea/index.html> (visited Aug. 8, 2005) (“The No Child Left Behind (NCLB) Act of 2001 (the latest revision of ESEA) presents real obstacles to helping students and strengthening public schools because it focuses on: punishments rather than assistance[;] rigid, unfunded mandates rather than support for proven practices[;] bureaucracy and standardized testing rather than teacher-led, classroom focused solutions.”).

<sup>9</sup> Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified in scattered sections of 20 U.S.C.A. §§ 1400-1487). In this Article, citations are to the relevant sections of 20 U.S.C.A. as amended by the Improvement Act. For a general discussion of this statute see Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7 (2006). Most provisions took effect on July 1, 2005. Pub. L. No. 108-446 § 302(a) (2004) (making statute effective immediately with regard to definition of highly qualified special education teachers and effective July 1, 2005 with regard to other provisions). The Department of Education issued final regulations under the law on August 14, 2006, effective 60 days after that publication date. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities (hereinafter “Final Rules”), 71 Fed. Reg. 46540 (Aug. 14, 2006). Despite the possibility of well-founded doubt over the truthfulness of the new statute’s title, this Article will use the term “Improvement Act” to refer to the new law.

<sup>10</sup> 20 U.S.C.A. §§ 1400-1487 (West 2006).

appropriate public education to all school-aged children who have disabilities.<sup>11</sup> One of the stated goals of the Improvement Act is to coordinate special education with the No Child Left Behind effort,<sup>12</sup> so it is hardly surprising that the Act addresses the availability of services for children with disabilities whose parents have voluntarily placed them in private schools. Remarkably, however, the amended provisions relating to private schools do not increase funding of services for children attending school in those settings. They do not create a federal voucher program for students with special education needs.<sup>13</sup> Instead, the Improvement Act preserves the essence of the most recent (1997) revision of IDEA as it relates to children placed by their parents in private schools for religious or other personal reasons.<sup>14</sup> In some places, the Improvement Act codifies rules previously established by regulation, modifying them only slightly.<sup>15</sup> Most significantly, the Improvement Act does not explicitly establish any individual entitlement to special education services for any private school child, nor does it require that services provided to private school children be delivered on the site of the private schools or by means of private school personnel.<sup>16</sup> It affords few procedural rights to parents of private school children to challenge decisions about services.<sup>17</sup> The private schools provisions of the

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<sup>11</sup> See 20 U.S.C.A. § 1412(a)(1) (West 2006) (requiring participating states to ensure that free, appropriate public education is made available to all age-eligible children with disabilities).

<sup>12</sup> See 20 U.S.C.A. § 1400(c)(5)(C) (West 2006) (claiming benefits from coordinating IDEA with No Child Left Behind provisions).

<sup>13</sup> Regarding such a proposal at the state level, see Maria Glod & Rosalind S. Helderman, *Tuition Grants Considered for Disabled Va. Students*, WASH. POST, Mar. 2, 2006, at B04, available at [http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01/AR2006030102122\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01/AR2006030102122_pf.html).

<sup>14</sup> See *infra* text accompanying notes 47-93. For a comprehensive discussion of the pre-2004 private school provisions and litigation regarding them, see MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 6.3 (2d ed. 2002 & supp. III 2005).

<sup>15</sup> See *infra* text accompanying notes 70-92.

<sup>16</sup> See *infra* text accompanying notes 94-99, 152-164.

<sup>17</sup> See *infra* text accompanying notes 150-151.

new law thus do not represent a major victory for those with a pro-private school agenda.<sup>18</sup>

A primary purpose of this Article is to make and support the point just advanced, the descriptive claim that the Improvement Act represents continuity in the field of special education services for children in private education. Emerging from the description, however, are three additional problems: (1) The existence (or non-existence) of any individual entitlement that private school children and their parents may have to any level of publicly funded special education services; (2) The question whether denial of equal, or even of any, services to some private school children unconstitutionally burdens free exercise of religion or parents' autonomy to control their children's upbringing; and (3) The risk of arbitrary decision making in allocating services among private school children. The first problem is resolved by statutory construction and regulatory interpretation; this Article will demonstrate that under current law, as under prior law, Congress has not created any enforceable individual entitlement to special education services for any given private school child. Interestingly, however, some states have established an individual entitlement, and this Article will catalogue the authorities setting out such a right. The second problem is resolved by asking whether the burden on free exercise and parental control worked by denial of equal support for private school children in need of special education is a penalty for exercise of rights to educate children in private and religious institutions, or merely a refusal to subsidize that choice. This

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<sup>18</sup> Related to the debate over support of private schools is the creation of charter schools. *See generally* Elissa Gootman, *Public vs. Private Schools: A New Debate*, N.Y. TIMES, Apr. 5, 2006, at <http://www.nytimes.com/2006/04/05/education/05charter.html> (reporting controversy over placement of new charter schools in public school buildings). The Individuals with Disabilities Act regulations generally treat charter schools as public schools, and so charter schools fall outside the scope of this Article's discussion. *See generally* 34 C.F.R. § 300.241 (2005) (establishing school district duties with respect to public charter schools).

Article will conclude that it is a constitutionally permissible refusal to provide a subsidy and will suggest that the contrary view would expand constitutional rights of private school children to public services beyond acceptable bounds. The third problem remains a problem. The absence of an individual entitlement and procedural rights means that there is little in the way of a check on public school decisions to allocate or withhold services. The law presents risks of discrimination among identically situated private school children, and of arbitrary decision making in general. IDEA affords group consultation rights,<sup>19</sup> but these are a poor substitute for a guarantee of regularity in the provision of needed government services. This Article does not advocate increased special education services for children in private schools, but it advances the position that procedural regularity of the system needs to be guaranteed.

Many writers have commented on the general topic of subsidies for private schooling, particularly religious schooling.<sup>20</sup> Others have discussed the First Amendment establishment clause issue with specific regard to on-site special education services.<sup>21</sup> A few have discussed issues of statutory interpretation entailed in providing special

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<sup>19</sup> See *infra* text accompanying notes 70-83.

<sup>20</sup> E.g., Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 *FORDHAM L. REV.* 791 (2005); Sean T. McLaughlin, *Some Strings Attached? Federal Private School Vouchers and the Regulation Carousel*, 24 *WHITTIER L. REV.* 857 (2003); Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 *TENN. L. REV.* 359 (1997). A large number of sources discuss the topic in connection with the First Amendment religion clauses. E.g., Richard Albert, *Popular Will and the Establishment Clause: Rethinking Public Funding to Religious Schools*, 35 *U. MEM. L. REV.* 199 (2005); Mark J. Chadsey, *State Aid to Religious Schools: From Everson to Zelman: A Critical Review*, 44 *SANTA CLARA L. REV.* 699 (2004). Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 *HARV. L. REV.* 163 (2002); Frank S. Ravitch, *Locke v. Davey and the Lose-Lose Scenario: What Davey Could Have Said But Didn't*, 40 *TULSA L. REV.* 255 (2004); Hannah M. Rogers, *School Vouchers: A Solution to an Educational Crisis or Impermissible Government Involvement in Religion?*, 52 *DRAKE L. REV.* 821 (2004); Steven D. Smith, *The Iceberg of Religious Freedom: Sub-Surface Levels of Nonestablishment Discourse*, 38 *CREIGHTON L. REV.* 799 (2005); Sarah Waszmer, Note, *Taking It Out of Neutral: Application of Locke's Substantial Interest Test to the School Voucher Debate*, 62 *WASH. & LEE L. REV.* 1271 (2005). For an interesting discussion that challenges conventional wisdom on the private school-public school issue, see James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 *GEO. L.J.* 1287 (2005).

<sup>21</sup> Ronald D. Wenkart, *The Individuals with Disabilities Education Act and the Establishment Clause of the United States Constitution*, 23 *WHITTIER L. REV.* 411 (2001).



education services for students in private schools under local voucher programs<sup>22</sup> and under the 1997 IDEA private school provisions.<sup>23</sup> This Article brings the discussion about the meaning of the private school provisions up to date and clarifies the background against which the larger debates over support for students in private school will continue to take place. It treats in detail the question of individual entitlement to services under federal and state law. It then raises, and tries to dispose of, the debate about religious free exercise and parental autonomy issues,. It also presents the issue of arbitrariness in decisions about allocation of private school services and argues that greater protection needs to be afforded parents.

Part I of this Article will explain the Individuals with Disabilities Education Act and note some of the changes made by the Improvement Act. In Part II, this Article will give an overview of the current statutory and regulatory regime governing services for children with disabilities in private schools. Part III will take up the specific issue of individual entitlement of private school children to special education services, discussing sources both in federal and state law; it will further discuss rights to on-site services and the eligibility of home-schooled students for publicly funded special education. Part IV

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<sup>22</sup> Shannon S. Taylor, *Special Education, Private Schools, and Vouchers: Do All Students Get a Choice?*, 34 J.L. & EDUC. 1 (2005); William N. Myhill, Note, *No FAPE for Children with Disabilities in the Milwaukee Parental Choice Program: Time to Redefine a Free Appropriate Public Education*, 89 IOWA L. REV. 1051 (2004).

<sup>23</sup> William L. Dowling, Comment, *Special Education and the Private School Student: The Mistake of the IDEA Amendments Act*, 81 MARQ. L. REV. 79 (1997); Jennifer A. Knox, Comment, *The IDEA Amendments of 1997 and the Private Schools Provision: Seeking Improved Special Education, but Serving Only a Select Few*, 49 CATH. U.L. REV. 201 (1999). Several writers have discussed home schooling in connection with the 1997 IDEA private school provisions. Samuel Ashby Lambert, Note, *Finding the Way Back Home: Funding for Home School Children Under the Individuals with Disabilities Education Act*, 101 COLUM. L. REV. 1709 (2001); Lisa R. Knickerbocker, Note, *The Education of All Children with Disabilities: Integrating Home-Schooled Children into the Individuals with Disabilities Education Act*, 62 OHIO ST. L.J. 1515 (2001); Sheila Youngberg, Note, *Hooks v. Clark County School District: IDEA and the New Inequality—The Denial of Subsidized Services to Privately Schooled Children with Disabilities*, 24 WHITTIER L. REV. 597 (2002). For a discussion of home schooling issues, see *infra* text accompanying notes 170-182.

will discuss the case law concerning First Amendment and constitutional rights of parental control of children's upbringing in connection with the denial of special education services to students of religious and other private schools. In Part V, the Article will describe the aspects of the law that create risks of arbitrary decision making, and argue that in order to be consistent with basic principles of due process, public school districts need to take steps beyond the minimal ones set out in the statute to guarantee fair treatment of private school students and their families.

### **I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT**

The Individuals with Disabilities Education Act provides significant federal funding for the special education efforts of states that agree to provide all children with disabilities a free, appropriate public education.<sup>24</sup> States and local school districts that receive the money assume not only the general obligation of providing an appropriate education to all children with disabilities, but also the duty to provide services related to education, such as transportation, physical and occupational therapy, sign language interpretation, and others.<sup>25</sup> Children with disabilities are to be educated, to the maximum extent appropriate, with children who do not have disabilities, and supplementary aids and services must be furnished to avoid the need for removal from regular classes.<sup>26</sup>

Parents of children with disabilities have extensive rights of participation in the creation of the individualized education program that sets out the services to be delivered

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<sup>24</sup> See 20 U.S.C.A. § 1411(i) (West 2006) (authorizing appropriations).

<sup>25</sup> See 20 U.S.C.A. § 1401(26) (West 2006) (defining "related services").

<sup>26</sup> 20 U.S.C.A. § 1412(a)(5) (West 2006).

to the child.<sup>27</sup> They may exercise rights to challenge the program or other aspects of the provision or denial of educational services by demanding an adversarial “due process hearing” and either they or the school district may appeal the result of the hearing to court.<sup>28</sup> These mechanisms to insure that the law is enforced in each individual case and that decision making by schools is transparent were key features of the 1975 law, and demonstrated a “congressional emphasis” on participation rights and procedural regularity.<sup>29</sup> Two federal cases that strongly influenced Congress in its drafting of the law had upheld equal protection claims against denial of services to children with disabilities in public schools and procedural due process claims against exclusion from public school without notice and the opportunity to be heard.<sup>30</sup>

The Individuals with Disabilities Education Act is the name Congress gave the Education for All Handicapped Children Act of 1975 when it enacted the amendments of 1990.<sup>31</sup> The 1975 law<sup>32</sup> culminated years of efforts to establish federal assistance for education of children with disabilities, and introduced an individual, legally enforceable entitlement to education and related services for all children who met a disability

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<sup>27</sup> See 20 U.S.C.A. § 1414(d) (West 2006) (requiring opportunity for parental participation in devising individualized education program).

<sup>28</sup> 20 U.S.C.A. § 1415(f)-(i) (West 2006). The child remains in the existing placement during the pendency of proceedings. § 1415(j). Attorneys’ fees are available to parents if they are successful. § 1415(i)(3)(B)-(F) The law also provides rights to challenge long-term suspensions, expulsions, or other removals from school imposed on children with disabilities. § 1415(k).

<sup>29</sup> See *Bd. of Educ. v. Rowley*, 476 U.S. 176, 206 (1982); see also *id.* at 205 (“Congress placed . . . emphasis on compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . .”).

<sup>30</sup> *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. Ass’n for Retarded Children (P.A.R.C.) v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972). The Supreme Court commented on the importance of these cases to the formation of the Education for All Handicapped Children Act in *Rowley*, 458 U.S. at 192-93.

<sup>31</sup> Pub. L. No. 101-476, 104 Stat. 1103 (1990). The term “handicapped” had become disfavored, and many in the disabilities rights movement favored placing the noun “person” or “individual” first and the “with disabilities” modifier later, in order to emphasize that a person with a disability is a human being rather than a manifestation of an impairment. See Illinois Attorney General, Disability Rights: Manual of Style for Depicting People with Disabilities, at <http://www.ag.state.il.us/rights/manualstyle.html> (visited Mar. 31, 2006).

<sup>32</sup> Pub. L. No. 94-142, 89 Stat. 773 (1975).

standard and were in need of special education. Although some states and localities were educating children with disabilities and receiving limited federal special education funding to do so, as of 1975 approximately 1.75 million children with disabilities were excluded from public school and 2.5 million were in programs that did not meet their needs.<sup>33</sup>

The special education law came into place against a background of broader federal efforts to end discrimination against persons with disabilities. In 1973, Congress passed section 504 of the Rehabilitation Act, which forbids discrimination against persons with disabilities by recipients of federal funding.<sup>34</sup> Since state educational agencies and local school districts receive federal money, section 504 confers rights to nondiscrimination in education on children who have disabilities.<sup>35</sup> In 1990, Congress passed title II of the Americans with Disabilities Act, which bars discrimination against persons with disabilities by units of state and local government (again including state educational agencies and local school districts), creating yet another remedy for disability discrimination in education.<sup>36</sup>

The Education for All Handicapped Children Act originally required states to make provision for participation in special education by students enrolled in private schools by their parents, to the extent consistent with the number and location of the

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<sup>33</sup> H.R. REP. NO. 94-332, at 11-12 (1975).

<sup>34</sup> 29 U.S.C.A. § 794 (West 2006).

<sup>35</sup> Generally speaking, the coverage of section 504 and title II of the ADA is broader than that of IDEA, and accordingly those nondiscrimination laws protect some children who do not meet the narrower definition of eligible children found in IDEA in addition to protecting those who do. See MARK C. WEBER, RALPH MAWDSLEY & SARAH REDFIELD, SPECIAL EDUCATION LAW: CASES AND MATERIALS 58 (2005) (explaining eligibility distinctions). For a discussion of several difficult eligibility issues under IDEA, see Robert A. Garda, *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441 (2004).

<sup>36</sup> See generally Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089 (1995) (comparing section 504 and title II).

children.<sup>37</sup> In 1997, however, Congress tightened and supplemented the statutory language to require that amounts expended by school districts for the provision of services to private school students equal the amount of federal funds that would be proportionate to the number of private school children residing in the district.<sup>38</sup> The 1997 law further stated that services could be provided “on the premises of private, including parochial, schools, to the extent consistent with the law.”<sup>39</sup> The 1997 Amendments also codified case law that allowed hearing officers to require school districts to reimburse parents for tuition at private schools when the parents placed their children there because the public schools failed to offer the children a free, appropriate public education.<sup>40</sup> The statute distinguished this right to tuition funding that arises because of the parents’ victory in a dispute over the content of public school special education programming from the provision of services to children whose parents placed their children in private school for other reasons, such as family preference or religion.<sup>41</sup> The tuition

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<sup>37</sup> 20 U.S.C. § 1412 (1976).

<sup>38</sup> Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified at 20 U.S.C. §§ 1400-1487). The private school student provisions were codified at 20 U.S.C.A. § 1412(a)(10)(A) (West 1998).

<sup>39</sup> 20 U.S.C.A. § 1412(a)(10)(A)(i)(II) (West 1998).

<sup>40</sup> 20 U.S.C.A. § 1412(a)(10)(C)(ii)-(iv) (West 1998). This provision codified cases approving tuition reimbursement relief such as *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), but it made the entitlement to relief dependent on various conditions. A court has recently ruled that the statutory right to reimbursement is not an exclusive remedy, and that reimbursement may be ordered in other circumstances. *M.M. v. Sch. Bd.*, 437 F.3d 1085, 1099 (11th Cir. 2006). But see *Greenland Sch. Dist. v. Amy M.*, 358 F.3d 150 (1st Cir. 2004) (denying reimbursement when parents failed to follow all conditions specified in statute, but holding open possibility of reimbursement in extreme cases).

<sup>41</sup> The provision most frequently comes into play when the parents believe that a school district’s program of services for their child lack sufficient intensity and place their child in a private therapeutic school or similar specialized educational institution. See cases cited *supra* note 40. Nevertheless, in some instances, courts have approved reimbursement even though the private school chosen by the parents did not provide special education services. *E.g.*, *Gagliardo v. Arlington Cent. Sch. Dist.*, 418 F. Supp. 2d 559 (S.D.N.Y. 2006) (requiring reimbursement of private school tuition when private school lacked special education services but provided environment free from disability harassment). Even these latter instances are ones in which an underlying dispute exists over the appropriateness of special education services offered by the public schools. Of course, it is possible in some situations that the parents may also desire the private

reimbursement provision warned that subject to the specific subparagraph of the statute covering the obligation to provide for participation of private school students and allot proportionate funding,

[T]his part does not require a local educational agency [the statute's term for a school district or its equivalent] to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.<sup>42</sup>

Thus the participation and proportionate funding provisions were the only clear basis in federal law to obtain support from the public schools for special education of children placed by their parents in private schools for family reasons.

The President signed the latest statute amending the Individuals with Disabilities Education Act, the Individuals with Disabilities Education Improvement Act, on December 3, 2004.<sup>43</sup> The Improvement Act left the basic provisions of IDEA intact, but added requirements regarding highly qualified teachers, student assessment, and the other trappings of the No Child Left Behind effort.<sup>44</sup> It also permitted some federal special education funding to be used for intervention services for children not yet determined to have a qualifying disability.<sup>45</sup> It changed eligibility determination rules for children with

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schooling for reasons of religion or other considerations not related to the appropriateness of the special education services offered in the public schools.

<sup>42</sup> 20 U.S.C.A. § 1412(a)(10)(C)(i) (West 1998).

<sup>43</sup> Acts Approved by the President, 40 WEEKLY COMP. PRES. DOC. 2936 (Dec. 13, 2004).

<sup>44</sup> *See, e.g.*, 20 U.S.C.A. §§ 1401(10)(B) (defining highly qualified teachers), 1412(a)(16) (governing participation in assessments by children with disabilities) (West 2006).

<sup>45</sup> § 1413(f).

learning disabilities.<sup>46</sup> It altered dispute resolution procedures and judicial review rights and limited the ability to contest disciplinary decisions. And, of course, it changed the provisions relating to services for children placed voluntarily by their parents in private schools.

## **II. THE STATUTORY AND REGULATORY FRAMEWORK FOR PRIVATE SCHOOL STUDENT SERVICES UNDER THE IMPROVEMENT ACT**

Regarding private school student services, the statutory and regulatory framework of the new law encompasses two principal areas: first, school districts' responsibilities to allocate federal funding and identify, locate, and evaluate private school children who may be eligible for services; and second, the obligations of the districts to consult with private school representatives and to plan for service delivery.

### **A. Allocation of Funds and Responsibilities for Student Evaluation**

Under the Improvement Act, every school district must allocate funding to the education of private school children with disabilities in the amount of federal IDEA Part B dollars proportionate to the number of children enrolled in private schools within the district.<sup>47</sup> A child-find process must be used, in consultation with private school representatives, to determine the number of children with disabilities in private schools, in order to determine the proportionate amount to be allocated.<sup>48</sup> The allocations are to be proportionate to the number of private school children being educated in the district, rather than the number of private school students residing there.<sup>49</sup> State and local funds

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<sup>46</sup> § 1414(b)(6)(A).

<sup>47</sup> § 1412(a)(10)(A)(i)(I). Part B of the Act, 20 U.S.C.A. §§ 1411-1419 (West 2006), covers services for school-aged and preschool-aged children with disabilities. Part A, §§ 1400-1409, contains general provisions, and Part C, §§ 1431-1444, covers infant and toddler programs.

<sup>48</sup> § 1412(a)(10)(A)(i)-(ii).

<sup>49</sup> § 1412(a)(10)(A)(i).

may supplement the school district's allocation of federal money.<sup>50</sup> The district is obliged to maintain records of the number of private school children evaluated, those determined to be children with disabilities, and those served; the district must submit those records to the state educational agency.<sup>51</sup> The child-find process must be designed to insure that children in private schools are accurately identified; the activities are to be similar to those used for public school children.<sup>52</sup> Child-find may be costly, but the costs cannot be considered as part of the proportionate amount calculation.<sup>53</sup> Promptness matters. The process must be completed in a time period comparable to that for students attending public schools in the district.<sup>54</sup>

The part of this that is new is the requirement that schools identify, evaluate, and spend a proportionate amount of their federal dollars on students attending private school within their geographic boundaries as opposed to students residing there. This revision may appear to promote efficiency,<sup>55</sup> and obviously facilitates the delivery of services on the site of the private school.<sup>56</sup> But it may also have unintended consequences because the overall amount of federal special education money any district receives is based primarily on the total count of private and public school students being educated in the

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<sup>50</sup> § 1412(a)(10)(A)(i)(IV).

<sup>51</sup> § 1412(a)(10)(A)(i)(V). A state educational agency is the state department of education, state board of education, or equivalent state-level entity that receives federal special education money and then passes it on to local school districts after keeping back a fraction to defray state administrative expenditures.

<sup>52</sup> § 1412(a)(10)(A)(ii)(II)-(III).

<sup>53</sup> § 1412(a)(10)(A)(ii)(IV).

<sup>54</sup> § 1412(a)(10)(A)(ii)(V).

<sup>55</sup> There would appear to be efficiency advantages in having the entity closest to the private school serve the children who spend the bulk of their school day there.

<sup>56</sup> A single public school district that is responsible for all of the students needing special education at a given private school would seem more likely to furnish those services on site than would many school districts that are each obligated to serve only a few students at any given private school. *See generally infra* text accompanying notes 152-169 (discussing on-site services).



district, not the count of students with disabilities.<sup>57</sup> To explain: Consider the situation of a school district with a disproportionate number of private schools that accept and educate students with disabilities.<sup>58</sup> That district will be forced to share the federal special education funds it receives with the large number of students who have disabilities who are drawn to the private schools located there. In contrast, the neighboring district that is home to many private schools that ruthlessly exclude students with disabilities will see its federal special education allotment rise with the total student count but will have to share the resources with few or no private school students who need special education services. The first district starves while the second feasts. Moreover, according to non-regulatory guidance from the Department of Education, children from out of state must be treated in the same fashion as private school children from neighboring school districts in state.<sup>59</sup> This requirement appears to further exacerbate inequalities of burdens among school districts that are home to private schools that accept high special-needs as opposed to low special-needs students.

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<sup>57</sup> The allocation of funds depends on a variety of factors in addition to student count, but the total of children enrolled in public and private elementary and secondary schools in the district's jurisdiction is paramount. See 20 U.S.C.A. § 1411(f)(2)(A)-(B) (West 2006).

<sup>58</sup> Unless they receive federal funds, elementary and secondary schools run by religious entities are free from federal law obligations not to discriminate against students with disabilities. See 42 U.S.C. § 12187 (2000) (exempting religious organizations or entities controlled by religious organizations). Non-religious private schools are bound by the public accommodations provisions of the Americans with Disabilities Act ("ADA"), and all schools that receive federal funds are bound by section 504 of the Rehabilitation Act of 1973, but under both those laws, the school need not serve students who need modifications that would fundamentally alter the nature of the educational services or result in an undue burden. See 42 U.S.C. § 12182(b)(2)(A)(ii)-(iii) (2000) (defining discrimination under title III public accommodations provisions of ADA); *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979) (interpreting section 504); *St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 174 (2d Cir. 2001) (finding student with disabilities not qualified for mainstream academic classes at private school); see also Taylor, *supra* note 22, at 11 (finding "minimal court involvement in directing private schools to comply with ADA," but noting voluntary activities on the part of some private schools and possibility of stronger ADA enforcement). A prominent author has urged that stronger duties of non-discrimination be imposed on private schools. Lynn M. Daggett, *The Case for State Protection of Private School Students from Discrimination*, CHILD. LEGAL RTS J. (forthcoming).

<sup>59</sup> U.S. Dep't of Educ., Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Private Schools, at E-2 (2006), at <http://www.ed.gov/policy/speced/guid/faq-parent-placed.doc> (visited Mar. 21, 2006).

The reallocation of responsibilities for private school children from the district of residence to that of attendance relates not just to funding, but also to the duty to identify, locate, and evaluate the children for eligibility for IDEA services. IDEA provides extensive rights to children to be evaluated to determine eligibility and the need for particular special education services.<sup>60</sup> Among the rights is that to an independent educational evaluation by a qualified individual not attached to the public school system when the parent disagrees with the school district's evaluation and the school district does not challenge the disagreement in a due process hearing.<sup>61</sup> This independent evaluation must be provided at public expense.<sup>62</sup>

IDEA entitles private school children to evaluation by the public school district, and the activities undertaken to comply with that requirement must be comparable to activities undertaken for public school children.<sup>63</sup> This provision would suggest that the full set of evaluation rights, including that to independent evaluation at public expense, applies to all private school children being educated in the district. Interpreting Michigan law, a court found that a private school child was entitled to an independent educational evaluation at public expense (or that the school district had to invoke due process hearing rights to avoid providing the evaluation), reasoning that the state law applied to "every handicapped person."<sup>64</sup> Although there are no decisions construing IDEA on the private school student-independent educational evaluation issue, the federal law obligations

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<sup>60</sup> See 20 U.S.C.A. § 1414(a)-(c) (West 2006) (listing many requirements for evaluations). A court has recently affirmed that parents may avoid evaluation of their child if they so choose by withholding consent and withdrawing the child from the public school system. *Fitzgerald v. Camdenton R-III Sch. Dist.*, 439 F.3d 773 (8th Cir. 2006).

<sup>61</sup> 34 C.F.R. § 300.502 (2005).

<sup>62</sup> 34 C.F.R. § 300.502(b) (2005).

<sup>63</sup> 34 C.F.R. § 300.451 (2005).

<sup>64</sup> *Mich. Dep't of Educ. v. Grosse Pointe Pub. Schs.*, 701 N.W.2d 195 (Mich. Ct. App. 2005), *vacated as moot*, Nos. 129249, 129250, 2006 WL 1097490 (Mich. Apr 26, 2006).

appear to be the same. A guidance circular issued by the United States Department of Education discusses independent educational evaluations as a right of private school children and notes that “parents should file the request for an IEE [independent educational evaluation] with the LEA [local educational agency, typically the school district] that conducted the evaluation with which the parents disagree.”<sup>65</sup>

Additional issues related to evaluation may arise not because of any change in the private school students provision of the Improvement Act, but because of the revisions in the evaluation procedures themselves. The Improvement Act bars states from forcing school districts to use discrepancies between ability and performance to determine IDEA eligibility on the basis of learning disabilities.<sup>66</sup> The leading non-discrepancy-based methodology is Response to Intervention (RTI), a model that contemplates providing high quality, research-based instruction in general education, and determining that the child has a learning disability only if the intervention proves ineffective over time or otherwise reveals some pattern indicative of learning disability.<sup>67</sup> Since the public school district does not control the bulk of the private school child’s instructional day, how it can employ this model, much less use it to obtain meaningful results under time constraints identical to those that would apply if the student were in the public school, is a mystery.

To its credit, the Department of Education attempted to address this problem in the preamble to the final version of the Improvement Act regulations. Its response, however, was simply to note that states must develop their own criteria to determine whether a child has a learning disability, and that in doing so, “States may wish to

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<sup>65</sup> U.S. Dep’t of Educ., Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Private Schools, at F-3 (2006), *at* <http://www.ed.gov/policy/speced/guid/faq-parent-placed.doc> (visited Mar. 21, 2006).

<sup>66</sup> See 20 U.S.C.A. § 1414(b)(6)(A) (West 2006).

<sup>67</sup> Notice of Proposed Rulemaking, 70 Fed. Reg. 35782, 35802 (June 21, 2005).

consider how the criteria will be implemented with a child for whom systematic data on the child's response to appropriate instruction is not available."<sup>68</sup> The Department asserted that many private schools would collect the needed data, but allowed that the district making the eligibility determination may need to use other, unspecified, information.<sup>69</sup>

## **B. Consultation Requirements and Service Delivery**

School districts must consult with representatives of private schools regarding the child-find process and the determination of proportionate amount.<sup>70</sup> The consultation has to include how the district will consult with the private school representatives and parent representatives about provision of services;<sup>71</sup> it must include how, where, and by whom services will be provided, including types of services and apportionment if funds are scarce.<sup>72</sup> The consultation must also include how the district will provide reasons for not providing direct or contract services, if the private school representatives disagree with the agency about the provision of services or type of services.<sup>73</sup> The district is to obtain a written affirmation from the private school representatives that the consultation has occurred; if the representatives do not oblige, the district must provide documentation of its consultation efforts to the state educational agency.<sup>74</sup>

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<sup>68</sup> Final Rules, 71 Fed. Reg. 46540, 46648 (Aug. 14, 2006).

<sup>69</sup> *Id.*

<sup>70</sup> § 1412(a)(10)(A)(iii).

<sup>71</sup> § 1412(a)(10)(A)(iii)(III). The requirement of consultation about consultation may strike some as consultation gone haywire, like the "pre-meeting meeting" so common in academic and business settings.

<sup>72</sup> § 1412(a)(10)(A)(iii) (IV).

<sup>73</sup> § 1412(a)(10)(A)(iii)(V).

<sup>74</sup> § 1412(a)(10)(A)(iv).

These consultation provisions mirror those for other federally funded education programs.<sup>75</sup> They suggest confidence that the process of discussing mutual goals and concerns will lead to consensus about means. Reports about the success of the existing consultation processes are sparse, so it is difficult to assess the virtue of what the new law has codified. In any instance, the congressional incorporation of the special education provision into the statute, copying what had previously existed only in the regulations, indicates some distrust of what the Department of Education might do if the control of the executive branch shifts at some time in the future.<sup>76</sup>

Private school officials may complain to the state about failure to consult, and may take their complaint to the United States Secretary of Education if dissatisfied with the results.<sup>77</sup> The United States Department of Education has no direct control over the local school district, but possibly could cut off federal funding if a school district persisted in noncompliance. In addition, there is a mechanism by which the Department of Education may bypass a state or local education agency and deliver that entity's portion of federal funding for private schoolers directly to other providers of services to those students.<sup>78</sup> This "By-Pass" provision applies if a state law enacted before the 1983 amendments to the federal special education statute prohibits the state from providing

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<sup>75</sup> See Elementary and Secondary Education Act, 20 U.S.C.A. § 7881(c) (West 2006) (requiring public school districts to consult with private school representatives with respect to administration of federal educational programs); *see also* Office of Non-Public Education, Office of Innovation and Improvement, U.S. Dep't of Educ., Equitable Services to Eligible Private School Students, Teachers, and Other Educational Personnel 5-9 (2005) (giving non-regulatory guidance on consultation requirements for various federal educational programs).

<sup>76</sup> See Weber, *supra* note 9, at 13-14 (describing apparent congressional distrust of Department of Education's future regulatory activity, evidenced by placing matters previously covered by regulation in statutory language).

<sup>77</sup> 20 U.S.C.A. § 1412(a)(10)(A)(v) (West 2006).

<sup>78</sup> See § 1412(f).

equitable participation in special education programs for children in private schools.<sup>79</sup> It also applies if the Secretary of Education determines that a state education agency or local school district “has substantially failed or is unwilling to provide for such equitable participation.”<sup>80</sup> Under the bypass, the federal government withholds funds from the state or local education agency to compensate for the cost of services delivered directly by the contractor of the federal government.<sup>81</sup> Various procedural safeguards exist to prevent the action from being taken in error.<sup>82</sup> The bypass option appears designed to induce reluctant school districts to comply with IDEA’s private school student provisions rather than lose control over the relevant federal funding, but it may be a paper tiger. Conceivably, the United States Department of Education has threatened to use the provision to force states or school districts to give special education services to private school children, but if a special education bypass has actually been implemented, it is a well kept secret.<sup>83</sup>

Under the Improvement Act, as under previous law, services may be provided directly by school district or other public personnel, or by contract with other workers; the services are to be secular, neutral, and nonideological.<sup>84</sup> Funds and property are to remain in control of the local or state educational agency.<sup>85</sup> The regulations promulgated to implement the Improvement Act state that districts must conduct the child count on

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<sup>79</sup> § 1412(f)(1).

<sup>80</sup> *Id.*

<sup>81</sup> § 1412(f)(2)(B).

<sup>82</sup> § 1412(f)(3).

<sup>83</sup> Title I of the Elementary and Secondary Education Act, which funds remedial education services for low-income children, also has a by-pass provision, and by-passes were granted for title I services in the 1970s in Missouri and Virginia. *Washington’s Catholic Schools Seek Title I By-Pass*, Thompson Title I Online, at [http://www.thompson.com/libraries/titleionline/news\\_desk/tio050626.html](http://www.thompson.com/libraries/titleionline/news_desk/tio050626.html) (last visited Mar. 22, 2006).

<sup>84</sup> 20 U.S.C.A. § 1412(a)(10)(A)(vi) (West 2006).

<sup>85</sup> § 1412(a)(10)(A)(vii).

any date between October 1 and December 1 of each year.<sup>86</sup> Like the old regulations, the new call for transportation from the child's school or home to a site other than the private school and from the service site to the home or private school, but not from home to private school.<sup>87</sup> Like the old regulations, the new forbid organizing classes separately by private school or religion if the classes are at the same site and the classes include students enrolled in private school and public school.<sup>88</sup> Provisions governing use of public and private personnel are retained,<sup>89</sup> as are those forbidding benefit to the private school,<sup>90</sup> and requiring the public school system to retain ownership of property, equipment and supplies.<sup>91</sup>

Like old regulations, the new regulations establish that the services provided to private school children "must be provided by personnel meeting the same standards as personnel providing services in the public schools."<sup>92</sup> The regulation makes clear, however, that private elementary and secondary school teachers contracted to provide services do not have to meet the "highly qualified" standards otherwise required of teachers under IDEA and No Child Left Behind.<sup>93</sup>

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<sup>86</sup> 34 C.F.R. § 300.133(c)(ii) (2006).

<sup>87</sup> 34 C.F.R. § 300.139(b) (2006); *see* 34 C.F.R. § 456(b)(1) (2004).

<sup>88</sup> 34 C.F.R. § 300.143 (2006); *see* 34 C.F.R. § 458 (2004).

<sup>89</sup> 34 C.F.R. § 300.142 (2006); *see* 34 C.F.R. §§ 460-461 (2004).

<sup>90</sup> 34 C.F.R. § 300.141 (2006); *see* 34 C.F.R. § 459 (2004).

<sup>91</sup> 34 C.F.R. § 300.144 (2006); *see* 34 C.F.R. § 462 (2004).

<sup>92</sup> 34 C.F.R. § 300.138(a)(i) (2006); *see* 34 C.F.R. § 455(a)(1) (2004). Teachers from the private school may be hired, but only in their off hours. U.S. Dep't of Educ., Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Private Schools, at C-7 (2006), *at* <http://www.ed.gov/policy/speced/guid/faq-parent-placed.doc> (visited Mar. 21, 2006). The school district is forbidden from paying the private school for the services of the private school teachers. *Id.* at C-12.

<sup>93</sup> *Id.*; *see also* Notice of Proposed Rulemaking, 70 Fed. Reg. 35782, 35784 (June 21, 2005) (discussing proposed regulation). The greater controversy has been whether teachers in private schools must meet the qualification requirements when the special education students are placed in the private schools by school districts because no public school placement meets the students' needs. *See* Final Rules, 71 Fed. Reg. 46540, 46598 (Aug. 14, 2006) (defending regulation not requiring private school teachers to meet qualifications).

### **III. Individual Entitlements to Services and Related Issues**

The very existence of statutory provisions concerning allocation of special education resources among private school children and consultation about the allocation suggests that no given private school child is assured of a full measure of the services. Nobody talks of rationing when everyone is assured access to whatever amount of a good or service is needed. Under the Improvement Act, as under previous law, there is no federal statutory assurance or guarantee to private school children of needed, or even of any, special education services. State law provides an entitlement in some jurisdictions, but the relevant states amount to just a handful. Some individual treatment is established under federal law for children who receive services, but federal law does not even guarantee individually enforceable rights to administrative review. Moreover, though parents may expect school districts to allocate services so that they are provided in the private schools their children attend, there is no federal entitlement to services delivered on site. State law may be more liberal, but such liberality is rare. Finally, under federal law home-schooled children are not even guaranteed consideration for allocation of special education resources.

#### **A. Individual Entitlements to Services**

Before the 1997 revisions IDEA might have been read to confer an individual right to free, appropriate public education for children with disabilities enrolled in private schools,<sup>94</sup> but the changes made that year appeared to eliminate any such possibility, and

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<sup>94</sup> As noted, the statutory language requiring equitable participation was vague. *See supra* text accompanying notes 37-42. Nevertheless, the words in the original statutory title “All Handicapped Children” suggested plenary and individual rights to services. *See Tribble v. Montgomery County Bd. of Educ.*, 798 F. Supp. 668, 670-71 (M.D. Ala. 1992) (finding entitlement to special education for child in private school), *op. vacated and appeal dismissed*, No. Civ. A. 91-H-1536-N (July 14, 1993).



the interpretation adopted by the federal regulations flatly ruled out any individual right.<sup>95</sup>

Interpreting the 1997 federal law, the Seventh Circuit declared:

[T]he [1997] Amendments unambiguously show that participating states and localities have no obligation to spend their money to ensure that disabled children who have chosen to enroll in private schools will receive publicly-funded education generally “comparable” to those provided to public-school children.<sup>96</sup>

The Seventh Circuit’s position is unassailable. The passage from the 1997 IDEA amendments quoted in Section I of this Article establishes that parents have no right under the law to tuition payments for private school if they placed their children there for any reasons other than that the school district was failing to offer appropriate education.<sup>97</sup>

This language survives in the Improvement Act.<sup>98</sup> Considered in light of the statutory provision that demands proportionate allocation of funding but fails to call for a free, appropriate public education for private school children, the language permits no other conclusion but that there is no individual federal law right to services that any specific child can assert. Both the new federal regulations under the Improvement Act and the regulations they replace state the proposition directly: “No parentally placed private school child with a disability has an individual right to receive some or all of the

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<sup>95</sup> 34 C.F.R. § 300.454(a)(1) (2004) (“No 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.”); *see also* § 300.455(a)(2) (“Private school children with disabilities may receive a different amount of services than children in public schools.”), § 300.455(a)(3) (“No private school child with a disability is entitled to any service or to any amount of a service the child would receive if enrolled in a public school.”).

<sup>96</sup> *K.R. v. Anderson Cmty. Sch. Corp.*, 125 F.3d 1017, 1019 (7th Cir. 1997).

<sup>97</sup> *See supra* text accompanying note 42 (quoting 20 U.S.C.A. § 1412(a)(10)(C)(i) (West 1998) (“[T]his part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.”)).

<sup>98</sup> 20 U.S.C.A. § 1412(a)(10)(C)(i) (West 2006).

special education and related services that the child would receive if enrolled in a public school.”<sup>99</sup>

State law, however, may create an entitlement to services that the federal law does not provide.<sup>100</sup> For example, in *John T. v. Marion Independent School District*,<sup>101</sup> a federal appeals court concluded that Iowa law conferred on a private school student an individual right to services, even though the court decided that the 1997 version of IDEA did not.<sup>102</sup> The opinion relied on an Iowa statute requiring that school districts “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.”<sup>103</sup> The child in the case had cerebral palsy, which severely restricted his physical mobility and communication abilities, and so he needed a full-time aide while in school. He attended a private, religious school.<sup>104</sup> The school district announced that it would provide the aide services only if he were enrolled in public school, relying on a provision of the state statute that said that assistance with physical and communication needs “may” be provided on

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<sup>99</sup> 34 C.F.R. § 300.137(a) (2006); *see* 34 C.F.R. § 300.454(a)(1) (2004). The new version adds the language “privately placed” and thus reinforces the point that the provision applies to children placed in private educational institutions as a result of parental, rather than school district, decisions.

<sup>100</sup> Under the IDEA framework, states are always free to create rights to special education services that go beyond what the federal law provides. *See* *Town of Burlington v. Dep’t of Educ.*, 736 F.2d 773, 789 (1st Cir. 1984) (finding elevated state law standard for appropriate education enforceable under federal law provision defining appropriate services as those meeting standards of state educational agency), *aff’d sub nom.* *Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359 (1985). Even if the state law provisions relevant here were not to be considered enforceable under IDEA itself, federal courts would have pendent jurisdiction to enforce state law if a colorable federal law claim were to exist against the school district based on the same common nucleus of operative fact. *See* 28 U.S.C. § 1367(a) (2000). Local school districts are, in general, not considered arms of the state government protected by Eleventh Amendment immunity. *See* *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977); *cf.* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (finding state immune from suit in federal court for violation of state law under Eleventh Amendment principles). Alternatively, the state courts could enforce the state laws against the school districts.

<sup>101</sup> 173 F.3d 684 (8th Cir. 1999).

<sup>102</sup> *Id.* at 691.

<sup>103</sup> *Id.* at 689 (citing IOWA CODE § 256.12(2)).

<sup>104</sup> *Id.* at 687.

nonpublic school premises. The court held that reading the “may” language of the statute to undermine the basic obligation to provide services was nonsensical and found a violation of the state law.<sup>105</sup> The Iowa legislature subsequently amended the law in a manner consistent with the court of appeals’ reading of the original provision.<sup>106</sup> The state law thus confers an individual entitlement to services, and in fact even confers an effective entitlement to services on the site of the private school when the child’s disabilities necessitate the presence of an aide during the school day.

The law in Kansas establishes a similar individual entitlement to services. In *Fowler v. Unified School District No. 259*,<sup>107</sup> the Tenth Circuit Court of Appeals considered the case of a profoundly deaf child with superior intellectual capacities whose parents voluntarily placed him in a private, nonreligious school where they felt his intellectual development would be stimulated. The school district had previously provided him sign language interpretation services in a public school class that clustered students with hearing impairments.<sup>108</sup> The parents requested the school district to provide a sign-language interpreter on the site of the private school, but the district refused.<sup>109</sup> After administrative proceedings and a district court ruling, the court of appeals decided that then-applicable (pre-1997) federal and state law required the district to fund the child’s interpretation services in an amount up to the average cost to the school district to provide the same services in a public school.<sup>110</sup> The Supreme Court

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<sup>105</sup> *Id.* at 688-89.

<sup>106</sup> 2006 Iowa Legis. Serv. S.F. 2272 (West).

<sup>107</sup> 128 F.3d 1431 (10th Cir. 1997).

<sup>108</sup> *Id.* at 1433.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

vacated that decision and remanded for reconsideration in light of the 1997 changes to IDEA.<sup>111</sup>

On remand, the Tenth Circuit held open the question whether there is any individual entitlement to the services under federal law for the period after the effective date of the 1997 amendment to IDEA.<sup>112</sup> It ruled, however, that Kansas law, enforceable in federal court under IDEA, does provide an individual entitlement to services, at a cost no greater than the average cost of providing the services in the public schools.<sup>113</sup> The court relied on this statutory language:

Any school which provides auxiliary school services to pupils attending its schools shall provide on an equal basis the same auxiliary school services to every pupil, whose parent or guardian makes a request therefor, residing in the school district and attending a private, nonprofit elementary or secondary school whether such school is located within or outside the school district.<sup>114</sup>

The statute further provided for delivering the services on the site of the private school if it was located in the district and services could practically be delivered there, and thus the court found that under the facts of the case the child had a state law entitlement to on-site services.<sup>115</sup> The “equal basis” language of law led the court to limit the cost of the

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<sup>111</sup> *Fowler v. Unified Sch. Dist. No. 259*, 521 U.S. 1115 (1997).

<sup>112</sup> *Fowler*, 128 F.3d at 1438 n.6 (“We express no opinion whether a child whose proportionate share of the Federal funds in fact turns out to be zero, or a sum substantially lower than other students, could argue that his or her rights under IDEA or, perhaps, the constitution, are violated.”).

<sup>113</sup> *Id.* at 1439.

<sup>114</sup> *Id.* at 1438 (citing KAN. STAT. ANN. § 72-5393).

<sup>115</sup> *Id.*

interpreter services to “no greater than the average cost of providing hearing-impaired students with interpretive services at public schools.”<sup>116</sup>

In 1999, Kansas amended its statute. The language now reads:

Every school district shall provide special education services for exceptional children who reside in the school district and attend a private, nonprofit elementary or secondary school, whether such school is located within or outside the school district, upon the request of the parent or guardian of any such child for the provision of such services.<sup>117</sup>

Like the pre-2004 IDEA provisions on private school students, the enactment keys the provision of services to the district of residency, rather than that in which the child attends private school, creating the prospect of districts having to expend non-federal funds for resident children who attend private school outside of school boundaries while expending federal funds for both resident and non-resident children who attend school within the boundaries. Perhaps the obligations of the various districts towards the relevant children will even out in the end. The requirement for on-site services found in the earlier law has been diluted. Now the school district is to determine the site for provision of the services, “in consultation with the parent or guardian.”<sup>118</sup> The statutory terms incorporate the average-cost holding of *Fowler* for services delivered on site:

If services are provided for in the private . . . school, amounts expended for the provision of such services shall not be required to exceed the average cost to the school district for the provision of the same services in

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<sup>116</sup> *Id.* at 1439.

<sup>117</sup> KAN. STAT. ANN. § 72-5393 (West 2006).

<sup>118</sup> *Id.*

the public schools of the school district for children within the same category of exceptionality.<sup>119</sup>

Pennsylvania is an additional jurisdiction in which courts have interpreted state law to create an individual entitlement to special education services for private school children. A federal district court ruled in 2000 that a child with mental retardation who attended a private, religious school had a personal entitlement under state law to services such as a speech therapy, occupational therapy, itinerant teaching services for non-religious courses, and teacher's aide services.<sup>120</sup> The court relied on a statute providing that the relevant public educational agency had the duty "to maintain, administer, supervise and operate such additional classes or schools as are necessary or to otherwise provide for the proper education and training for all exceptional children who are not enrolled in classes or schools maintained and operated by school districts or who are not otherwise provided for."<sup>121</sup> The court limited the reach of the holding, however, by stressing that it was impossible in this particular case for the child "to receive a proper education" in the public school.<sup>122</sup> The court found as fact that the child reacted negatively to separation from his two brothers, who attended the private school, and would cry and resist getting on the bus to attend the public school.<sup>123</sup> At the private school, the child's brothers and friends would help and support him, but he lacked peer support and acceptance at the public school.<sup>124</sup> The court did not intimate what the result might be if the reason for the private school placement were purely the religious or other

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<sup>119</sup> *Id.*

<sup>120</sup> *John T. v. Delaware County Intermediate Unit*, No. 98-5781, 2000 U.S. Dist. LEXIS 6169 (May 8, 2000) (granting preliminary injunction).

<sup>121</sup> *Id.* at 19 (citing 24 PA. CONS. STAT. § 13-1372(4)). This statute remains in effect. 24 PA. CONS. STAT. ANN. § 13-1372(4) (West 2006).

<sup>122</sup> *Id.* at 20.

<sup>123</sup> *Id.* at 5.

<sup>124</sup> *Id.*

preferences of the parents, and the child could receive a proper education in the public schools if the parents preferred that option.

*Veschi v. Northwestern Lehigh School District*<sup>125</sup> addressed that open issue. In *Veschi*, the Commonwealth court ruled that a school district had to make speech and language therapy available to Vincent Veschi, a child with disabilities who attended a parochial school.<sup>126</sup> The court characterized the district's decision to refuse to deliver the services to a private school child as conditioning provision of the services on enrollment in the district's public schools.<sup>127</sup> It said that the "crux of the Veschis' argument, and one with which we agree, is that they have a constitutionally protected right to decide where Vincent goes to school under *Pierce v. Society of Sisters* and *Wisconsin v. Yoder*."<sup>128</sup> The court did not develop that argument, however.<sup>129</sup> Instead it gave most of its attention to Pennsylvania law.<sup>130</sup> The court noted one provision that states: "No pupil shall be refused admission to the courses in [special] schools or departments, by reason of the fact that his elementary or academic education is being or has been received in a school other than a public school."<sup>131</sup> The court thought this language applicable because special departments within school districts provide speech and language therapy services.<sup>132</sup> The court also cited other provisions, declaring that nothing in law either barred dual enrollment of a child in public and private school, or gave the school district direct

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<sup>125</sup> 772 A.2d 469 (Pa. Commw. 2001).

<sup>126</sup> *Id.* at 471.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 473 (citations omitted).

<sup>129</sup> The persuasiveness of this position will be discussed at greater length *infra* text accompanying notes 185-207.

<sup>130</sup> The court did not rely on (or even cite) the provision the *John T.* court found decisive, perhaps because the record did support the conclusion that the child was unable to be satisfactorily educated in public school.

<sup>131</sup> *Veschi*, 772 A.2d at 473.

<sup>132</sup> *Id.* (ascribing argument to plaintiffs).

authority to force a child to enroll in public school in order to take advantage of public school special education classes.<sup>133</sup> To the contrary, a regulatory provision required that students who attend nonpublic schools be afforded equal opportunity to participate in special education services and programs.<sup>134</sup>

A Pennsylvania court recently extended *Veschi* to require a public school to provide occupational therapy services to a private school child deemed eligible under section 504 of the Rehabilitation Act, but not IDEA. In *Lower Merion School District v. Doe*,<sup>135</sup> a panel of the Commonwealth Court considered the case of a six-year-old child who had been found not to meet the definition of a child with disabilities under IDEA, but had been found eligible for occupational therapy services under section 504 of the Rehabilitation Act of 1973. As noted above, section 504 entitles some children to adaptations or supplemental services under the school district's obligation not to discriminate, even though the children do not need special education to learn or otherwise are ineligible for services under IDEA.<sup>136</sup> The parent enrolled the child in a private kindergarten program, dually enrolled him in the public school district, and requested that occupational therapy be provided at a public school.<sup>137</sup> In affirming an administrative decision requiring the district to provide the services, the court relied on a federal regulation promulgated under section 504 that obligates recipients of federal money who

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<sup>133</sup> *Id.* at 474 (noting sources supporting dual enrollment).

<sup>134</sup> *Id.* at 473-74 & n. 7 (citing 22 PA. CODE § 14.41(e)).

<sup>135</sup> 878 A.2d 925 (Pa. Commw. Ct. 2005), *appeal granted*, 899 A.2d 1125 (Pa. May 31, 2006) (TABLE, NO. 790 MAL 2005).

<sup>136</sup> *See supra* note 35 and accompanying text (noting different eligibility provisions under IDEA and section 504). An example of a child covered by section 504 and the ADA but not IDEA may be a student with an orthopedic impairment who needs only to have facilities and policies modified to gain full accessibility in school, but who has no need for any special education services. In addition, some children who have mild impairments are found eligible for services under section 504 but not IDEA, as appears to have been the case with the child in *Lower Merion*.

<sup>137</sup> *Lower Merion Sch. Dist.*, 878 A.2d at 926.



operate public elementary or secondary education programs to furnish a free, appropriate public education to all children who meet the eligibility standards of section 504.<sup>138</sup> The court also rested its decision on provisions of Pennsylvania law implementing that obligation.<sup>139</sup> It placed weight on the general interpretation of state law in *Veschi*, which, as noted, required that speech and language therapy be provided to a child enrolled in a private school when the child was disabled so as to be eligible under IDEA.<sup>140</sup> The dissenting judge complained that *Veschi* relied on a Pennsylvania regulatory provision that had since been repealed,<sup>141</sup> and further argued that section 504's basic obligation to provide accommodations to children receiving services from public schools did not constitute a right to services when the child is not attending courses or classes in the public schools.<sup>142</sup>

*Lower Merion's* discovery of an individual entitlement to services for a private school child eligible solely under section 504 may well arouse criticism. Simply looking at the federal law issues in the case, it seems strange that private school children who are covered by section 504 but not IDEA would have an individual right to services from the public school system, when children covered by IDEA do not. Section 504 is at bottom a nondiscrimination statute,<sup>143</sup> and unlike IDEA does not create a funding stream or set out specific obligations beyond the general duty not to discriminate on the basis of disability. For children in public schools, section 504 extends to all children with disabilities who

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<sup>138</sup> *Id.* at 927-31 (citing 34 C.F.R. § 104.33(a)).

<sup>139</sup> *Id.* at 931.

<sup>140</sup> *Lower Merion Sch. Dist.*, 878 A.2d at 932-33.

<sup>141</sup> *Id.* at 933-34 (Smith-Ribner, J., dissenting) (citing 22 PA. CODE § 14.41(e) (repealed 2001)).

<sup>142</sup> *Id.* at 934-35. The dissent also stressed that under the state education department's interpretation of state law, the district had no obligation to provide services to children in private schools. *Id.* at 936.

<sup>143</sup> See *supra* text accompanying notes 34-36 (describing section 504); see also Christopher J. Walker, Note, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School*, 58 STAN. L. REV. 1563, 1588-98 (2006) (contrasting duties imposed under section 504 with those under IDEA).

meet its coverage definition<sup>144</sup> the entitlement to reasonable accommodations: modifications of rules, additional services, and the like so that children with disabilities may be educated on an equal plane with others whether the children with disabilities are IDEA-eligible or not. But if children in private schools who are IDEA-eligible have no entitlement to special education services under that law, it is hard to find a basis in section 504 for conferring an entitlement to children who have disabling conditions that do not trigger IDEA eligibility. Of course, it could be that section 504 confers the individual entitlement to publicly funded special education services on all children with disabling conditions, irrespective of the children's eligibility under IDEA. But the general provisions of section 504 contain no language conferring such a right, and the federal regulatory provision relied on by the *Lower Merion* court may easily be interpreted as applying only to children actually attending the district's schools. Nevertheless, *Lower Merion* stands as the most recent example of finding individual entitlements to services in state law. Although the dissent took the majority to task for relying on a case that followed a state regulatory provision that had since been repealed, the majority cited ample support for its position from other sources.

Statutes and regulatory provisions in other states remain undeveloped as potential sources of individual rights to services. In addition, there is always the prospect of state legislative change. Advocates of greater public support for special education services for private school children might be well advised to look to their state legislatures rather than Congress, in light of the congressional decision to stay with the outlines of the 1997

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<sup>144</sup> The definition is set out at 29 U.S.C.A. § 706(8)(B) (West 2006) (“[I]ndividual with a disability’ means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”).

legislation when revising the federal statute in 2004. The successful implementation of entitlements for private school students where the state law entitlements exist may furnish evidence to respond to the criticism that providing a federal entitlement is unworkable or unduly expensive.

Even in the absence of an individual, enforceable right to services, the federal special education law makes one nod to individual treatment in delivery of services to children with disabilities in private schools. Regulations promulgated under the 1997 version of IDEA established that districts had to create service plans for all the private school children they serve; the plans had to describe the specific special education and related services that the school district will furnish to the individual student.<sup>145</sup> The Improvement Act regulations retain this provision: Each private school child served must have a services plan.<sup>146</sup> The regulations further state that a services plan “means a written statement that describes the special education and related services” that the school district “will provide to a parentally-placed child with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary . . . .”<sup>147</sup> The process for development of the services plan must include the involvement of a representative of the private school.<sup>148</sup> Otherwise, the process for development and the content of the final product resemble to some degree the process and content of individualized education programs.<sup>149</sup>

Whatever procedural regularity the services plan requirement entails nevertheless stops short of the right to appeal school district decisions to refuse services to an

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<sup>145</sup> 34 C.F.R. § 300.454(c) (2004).

<sup>146</sup> 34 C.F.R. § 300.132(b) (2006).

<sup>147</sup> 34 C.F.R. § 300.37 (2006).

<sup>148</sup> See 34 C.F.R. § 300.137(c)(2) (2006).

<sup>149</sup> See 20 U.S.C.A. § 1414(d) (West 2006) (describing individualized education program).

individual child. The Improvement Act regulations retain the previous provision forbidding disgruntled parents from using the IDEA due process hearing procedure for any complaints except those having to do with failure by the school district to properly identify, locate, or evaluate the private school student.<sup>150</sup> For all other complaints, the parents are expected to make use of the state investigation and resolution process, which lacks the rights of notice, hearing, and judicial review furnished by the ordinary special education administrative procedure.<sup>151</sup>

## **B. On-Site Services**

The House Committee Report on the bill that became the Improvement Act states a preference for services provided on the site of the private school:

The Committee wishes to make clear that local educational agencies should provide direct services for parentally placed private school students with disabilities (as for most students) on site at their school, unless there is a compelling rationale for such off-site services. Such intent indicates the preference that providing services on site at the private school is more appropriate for the student and less costly in terms of transportation and liability.<sup>152</sup>

This strong preference is repeated in the Notice of Proposed Rulemaking for the Improvement Act regulations,<sup>153</sup> but does not appear in the proposed or final regulations themselves, just as it missed being included in the language of the statute. Given the current questioning by many courts of the use of legislative history in the interpretation of

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<sup>150</sup> 34 C.F.R. § 300.140(a)-(b) (2006); *see* 34 C.F.R. § 300.457(a)-(b) (2004).

<sup>151</sup> 34 C.F.R. § 300.140(c)(1) (2006). *See generally* 34 C.F.R. §§ 300.151-.153 (2006) (requiring state to have complaint resolution process and describing process required).

<sup>152</sup> H.R. Rep. No. 108-77, at 95 (2003).

<sup>153</sup> 70 Fed. Reg. 35782, 35789 (June 21, 2005).

statutes,<sup>154</sup> the preference could easily become a dead letter. The preamble to the final regulations repeats that preference for on-site services is the Department of Education's position, but goes on to state that the congressional language subjecting the term "may be provided to the children on the premises of private, including religious, schools" to the condition "to the extent consistent with law" permits state constitutions or other law to override any preference for on-site services.<sup>155</sup> What the Department of Education appears to have in mind is a state whose constitution imposes greater restrictions on religious establishment than the Supreme Court currently finds to have been imposed by the United States Constitution.<sup>156</sup> But the Department of Education's statement would seem to apply as well when a state has any statute or rule, enacted for whatever reason, that forbids on-site services or permits local school districts to refuse to provide them.

The omission of any guarantee of on-site services provides yet another example of how what might have been a more radical change in the law ended up reinforcing continuity with the status quo. Even before the passage of the 1997 IDEA amendments, the leading case *Goodall v. Stafford County School Board*<sup>157</sup> established that a school district may choose to offer services only at public school locations, and may refuse to offer services in private school buildings. Part of *Goodall*'s reasoning was that on-site

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<sup>154</sup> See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in judgment) (declaring legislative history to be illegitimate as basis for statutory interpretation). See generally Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique* 36 HARV. J. ON LEGIS. 361 (1999) (finding sharp decline in Supreme Court reliance on legislative history). The debate on the propriety of reliance on legislative history is beyond the scope of this Article.

<sup>155</sup> Final Rules, 71 Fed. Reg. 46540, 46596 (Aug. 14, 2006).

<sup>156</sup> For example, a state may interpret its own constitutional provision forbidding establishment of religion more in line with the view of the First Amendment taken by the Supreme Court before the 1990s. See generally *infra* text accompanying notes 158-159 (noting change in Supreme Court interpretation to permit publicly supported remedial education services on sites of religious schools).

<sup>157</sup> 930 F.2d 363 (4th Cir. 1991). *Goodall* drew criticism almost immediately. See Eileen N. Wagner, *Public Responsibility for Special Education and Related Services in Private Schools*, 20 J.L. & EDUC. 43 (1991) (contending services in religious schools do not cause excessive entanglement).

services at religious school excessively entangle church and state, a position that does not survive *Zobrest v. Catalina Foothills School District*<sup>158</sup> and *Agostini v. Felton*,<sup>159</sup> Supreme Court cases that upheld, respectively, the placement of a public-school funded sign language interpreter at a religious school and the provision of remedial services under title I of the Elementary and Secondary Education Act at a religious school. The Supreme Court decisions did not affect the other bases for the *Goodall* court's reasoning, however, which included the basic point that nothing in the statute commands services on the location of a private school if the district prefers to provide them elsewhere.<sup>160</sup> After the 1997 law clarified that no individual entitlement to services existed at all, numerous courts rejected demands for on-site services, relying on the new statute and the Department of Education regulation interpreting it.<sup>161</sup>

Some cases uphold the principle that the services need not be provided on site even when the denial of on-site services appears scarcely rational. *Bristol Warren Regional School Committee v. Rhode Island Department of Education*<sup>162</sup> refused a demand for services on the site of a parochial school, upholding a policy under which the school district provided on-site services only when the private school was within walking distance of a public school.<sup>163</sup> From the students' perspective, that would be when on-site services would be needed least. Perhaps the rationale for the policy was the convenience of the teachers or other personnel based at the public facility, who might

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<sup>158</sup> 501 U.S. 1 (1993).

<sup>159</sup> 521 U.S. 203 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985) and *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985)).

<sup>160</sup> *Goodall*, 930 F.2d at 369.

<sup>161</sup> *E.g.*, *Jasa v. Millard*, 206 F.3d 813 (8th Cir. 2000); *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999); *Russman v. Bd. of Educ.*, 150 F.3d 219 (2d Cir. 1998); *K.R. v. Anderson Cmty. Sch. Corp.*, 125 F.3d 1017 (7th Cir. 1997); *Cefalu v. East Baton Rouge Parish Sch. Bd.*, 117 F.3d 231 (5th Cir. 1997); *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168 (4th Cir. 1995).

<sup>162</sup> 253 F. Supp. 2d 236 (D.R.I. 2003).

<sup>163</sup> *Id.* at 241-42.

otherwise need to be transported to the private school location.<sup>164</sup> Alternatively, the conduct of the district may have been purely capricious.

Nevertheless, state law may create an entitlement to services provided on site. In *Bay Shore Union Free School District v. T.*,<sup>165</sup> Judge Jack Weinstein concluded “dubitante” that New York law confers upon a child who is eligible for special education an individual entitlement to services at the child’s private school.<sup>166</sup> Ruling that a child with attention-deficit hyperactivity disorder was entitled to the services of a one-on-one aide for three hours a day at his private school, the court noted that denial of the services would burden a religious choice of the parents to send the child to a sectarian school; a construction of New York statutes that provided for the services would avoid a potential conflict with the right of free exercise of religion.<sup>167</sup> The court also emphasized that under the facts of the particular case, a hearing officer had found that a one-on-one aide could be provided only in the private school, and that for this child, the aide was necessary if the child were to receive free, appropriate public education.<sup>168</sup> Though the court pointed out that the law in some other states differs from that of New York,<sup>169</sup> one may expect advocates of private school services to undertake litigation to have courts enforce state laws that look like New York’s in a manner similar to the construction in

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<sup>164</sup> There may have been a collective bargaining agreement provision in force limiting where the personnel could be made to work. Thanks for Maureen MacFarlane for pointing out this possibility.

<sup>165</sup> 405 F. Supp. 2d 230 (E.D.N.Y. 2005).

<sup>166</sup> *Id.* at 233. The adverb “dubitante” was justified, said the court, because of unclear statutory language and an absence of definitive interpretations. The court suggested an appeal to the Second Circuit Court of Appeals and certification from that court to the New York Court of Appeals. *Id.* at 234.

<sup>167</sup> *Id.* at 247.

<sup>168</sup> *Id.* at 248-49.

<sup>169</sup> The court distinguished California, Pennsylvania, Texas, Arizona, and Kansas, acknowledging that after *Fowler Unified School District No. 259*, 128 F.3d 1431 (10th Cir. 1997) found a right to on-site services, the Kansas legislature changed the statute. The court also disagreed with an interpretation of New York law in another federal decision, *Russman v. Bd. of Educ.*, 92 F.Supp.2d 95, 97-98 (N.D.N.Y. 2000), *vacated as moot*, 260 F.3d 114 (2nd Cir. 2001), and distinguished a New York Court of Appeals decision applying the state law in another context, *Bd. of Educ. v. Wieder*, 531 N.Y.S.2d 889 (N.Y. 1988).

*Bay Shore*, and one may expect advocates in other states to work for changes in their state legislation to imitate New York's.

### **C. Home Schooling**

Some home-schoolers have an even more basic complaint than that of the families whose children are inadequately served or served away from their private schools because of allocation decisions made by local school districts. In some states, home schooling is not considered private school, and so home-schooled children are not even eligible for being considered for IDEA funded services. The Improvement Act is silent regarding whether home-schooled children qualify as children in private schools and thus may participate in the fight for the pool of services that a school district provides private school children with disabilities. The leading decision on the topic holds that eligibility under IDEA of home-schooled children for publicly funded services for private school children depends on state law. In *Hooks v. Clark County School District*,<sup>170</sup> the Ninth Circuit Court of Appeals ruled that a state has the choice whether home schooling will qualify as private schooling under IDEA, and it held that for the relevant time period, Nevada had decided not to include home instruction in with private schools.<sup>171</sup> The court relied on a United States Department of Education interpretation of the IDEA,<sup>172</sup> and further stated that Congress endorsed that interpretation by enacting definitions of “elementary school” and “secondary school” that delegate to the states the determination

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<sup>170</sup> 228 F.3d 1036 (9th Cir. 2000).

<sup>171</sup> *Id.* at 1038. As the court noted, Nevada changed its law during the pendency of the dispute, and as of the time of the decision allowed the services at issue. The case remained alive because of a claim for reimbursement of services the parents funded. *Id.* at 1039.

<sup>172</sup> *Id.* at 1040 (citing Letter to Williams, 18 Individuals with Disabilities L. Rep. 742, 744 (U.S. Dep’t of Educ. Office of Special Educ. Programs 1992) (allowing states to define whether home schooling constitutes private school placement)).



of which educational institutions qualify and which do not.<sup>173</sup> The court thus affirmed the denial of reimbursement for speech therapy services obtained by parents of a child with a disability who was being educated at home.<sup>174</sup>

*Hooks* received a chilly reaction from commentators. They pointed out that the Department of Education's interpretation is by no means the only way to read the statute,<sup>175</sup> and that the approach of the Department and the court will cause disuniformity among the states.<sup>176</sup> Plainly, the result will cause some children with disabilities not to receive publicly funded school services, contrary to the general goal of providing a free, appropriate public education to all children with disabilities.<sup>177</sup> These criticisms of the decision have some power, but cannot overcome a longstanding interpretation by the agency Congress chose to enforce the statute,<sup>178</sup> particularly when Congress comprehensively amended provisions relating to private schools in 1997, and then after *Hooks* in 2004, without making any change in the definition of what is a private school or otherwise doing anything to explicitly cover home schoolers.

Questions about access to facilities may yield a different answer than those about the right to services. One district court case initially held that equal protection, federal

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<sup>173</sup> *Id.* (citing 20 U.S.C. 1401(5), (23)). The court also rejected claims based on equal protection and due process. *Id.* at 1041-43.

<sup>174</sup> *Id.* at 1038.

<sup>175</sup> See Knickerbocker, *supra* note 23, at 1538-43; Lambert, *supra* note 23, at 1719-23.

<sup>176</sup> See Lambert, *supra* note 23, at 1723-29 (noting disparity and uncertainty of results among states).

<sup>177</sup> See Knickerbocker, *supra* note 23, at 1553; Lambert, *supra* note 23, at 1720-21; Youngberg, *supra* note 23, at 615.

<sup>178</sup> Interpretations such as the one in *Williams* are given substantial deference, but are not binding. *Yankton Sch. Dist. v. Schramm*, 900 F. Supp. 1182, 1190 n.3 (D.S.D. 1995). In general, an interpretation of a federal special education law by the Department of Education carries great weight. See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . ."). But see 20 U.S.C.A. § 1406(d) (West 2006) ("The Secretary may not issue policy letters or other statements . . . that . . . (2) establish a rule that is required for compliance with, and eligibility under, this title without following the requirements of section 553 of title 5, United States Code."). Given that the interpretation at issue grants permission to states rather than imposing compliance or funding eligibility requirements on them, section 1406 does not apply by its own terms.

statutory disability discrimination, and state law claims may lie against a school district for excluding a home-schooled child with a disability from a playground during the hours public school children used it.<sup>179</sup> Ultimately, however, the court dismissed the federal claims for failure to exhaust IDEA administrative remedies and remanded the remaining claims to state court.<sup>180</sup> The child's parents pursued to the Maine Supreme Judicial Court the question whether the school could continue to suspend the child from use of the playground in the absence of a functional behavioral assessment of the child, when he had reportedly manifested aggression towards students and adult supervisors.<sup>181</sup> The court ruled that state law permitted the child's exclusion.<sup>182</sup>

#### **IV. Religious Free Exercise and Parental Autonomy Issues**

As noted above, in *Zobrest v. Catalina Foothills School District*<sup>183</sup> the Supreme Court ruled that a school district's funding of a public-school funded sign language interpreter at a religious school did not violate the First Amendment's establishment clause.<sup>184</sup> The controversy since that case has been whether, if a public school system opts not to provide services to children who attend religious or other private schools, it violates the free exercise clause, due process clause, or some other constitutional provision. Depending on what policies the district adopts, its conduct might be challenged as imposition of an unconstitutional condition or as constitutionally impermissible viewpoint discrimination.

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<sup>179</sup> Fitzpatrick v. Town of Falmouth, 321 F. Supp. 2d 119 (D. Me. 2004).

<sup>180</sup> Fitzpatrick v. Town of Falmouth, 324 F. Supp. 2d 95 (D. Me. 2004).

<sup>181</sup> Fitzpatrick v. Town of Falmouth, 879 A.2d 21 (Me. 2005).

<sup>182</sup> *Id.* at 29.

<sup>183</sup> 501 U.S. 1 (1993) (discussed *supra* text accompanying note 158).

<sup>184</sup> That case's relaxed view of the establishment clause is reaffirmed by the Court's more recent decision upholding the constitutionality of the voucher system in Cleveland, despite the fact that parents directed the funding overwhelmingly to religious schools. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

## A. Unconstitutional Conditions

Under IDEA, school districts can give lesser amounts of services to children in private schools, including religious schools, than they give to the same children if the children were attending public school. For some of the children, lesser services likely means no services at all. Not surprisingly, parents will view this as the school district's conditioning the provision of needed services on the parents' decision to withdraw their children from private school and enroll them in public school. The decision to obtain public schooling will run against the parents' preferences regarding their children's education and may cause the parents to violate what they perceive as their religious duties. Is this the imposition of an unconstitutional condition?

In *Pierce v. Society of Sisters*, the Supreme Court ruled that a statute forcing parents to send their children to public schools or face criminal penalties “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>185</sup> The Supreme Court's decision drew support from *Meyer v. Nebraska*,<sup>186</sup> which overturned a the conviction of a teacher for instructing children below the eighth grade in a language other than English. That ban violated the Fourteenth Amendment rights of parents to provide for instruction of their children and the right of the teacher to practice his calling.<sup>187</sup> Both holdings survived the 1930s revolution in Fourteenth Amendment substantive due process doctrine exemplified by *Nebbia v. New York*<sup>188</sup> and *West Coast Hotel v. Parrish*,<sup>189</sup> cases establishing the principle that general economic and social laws are to be evaluated under a rational basis

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<sup>185</sup> 268 U.S. 510, 534-35 (1925).

<sup>186</sup> 262 U.S. 390 (1923).

<sup>187</sup> *Id.* at 400-03.

<sup>188</sup> 291 U.S. 502 (1934).

<sup>189</sup> 300 U.S. 379 (1937).

test, and thus that the Court will find no due process violation if the enactment bears a minimal relation to any legitimate governmental end.<sup>190</sup>

Although neither *Pierce* nor *Meyer* relied on the guarantee of free exercise of religion, in *Wisconsin v. Yoder*, the Court cited both (and relied significantly on *Pierce*) when it upheld the free exercise claim of Amish parents against a state law requiring all children to attend school until age sixteen when compliance conflicted with Amish religious tenets.<sup>191</sup> In *Yoder*, the Court reasoned that just as *Pierce* had subordinated the state's interest in establishing and controlling basic education to "the interest of parents in directing the rearing of their off-spring, including their education in church-operated schools," so too the governmental interest in one or two additional years of education had to yield to the religious free exercise interest of the Amish.<sup>192</sup> The Court stressed that enforcing the law against the religionists would gravely endanger if not destroy their religion, and that the interests of the state were satisfied in part by the informal training the children received in their communities and the longstanding self-sufficiency of Amish people in the communities.<sup>193</sup> Subsequent to *Yoder*, the Supreme Court in a series of cases culminating in the 1990 decision *Employment Division v. Smith* limited the reach of the free exercise guarantee, and affirmed that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his

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<sup>190</sup> See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955) (applying rational basis test for due process challenge to economic regulation by state). *Meyer* and *Pierce* feature prominently in Supreme Court decisions striking down laws infringing on personal autonomy under substantive due process principles, such as the abortion cases. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

<sup>191</sup> 406 U.S. 205, 213-14 (1972).

<sup>192</sup> *Id.* at 213; see also *id.* at 232-33 (quoting *Pierce*).

<sup>193</sup> *Id.* at 215-29.

religion prescribes (or proscribes).’”<sup>194</sup> But *Smith* did not overrule *Yoder*. It distinguished it as a “hybrid” case involving both free exercise and parents’ rights to direct the upbringing of their children.<sup>195</sup>

Relying on cases such as *Pierce* and *Yoder*, parents may argue that their constitutional rights to control the upbringing of their children and to freely exercise their religion are infringed when they send their children to private, religious school and the public school district refuses to provide the special education services the children would receive if the parents had enrolled them in public school. So far, such arguments have not been successful. In 2004, the First Circuit Court of Appeals turned away a suit contending that failure to provide the full range of special education services and procedural rights for a child in a private, religious school violates the constitutional guarantees of substantive due process, equal protection, and free exercise of religion, as well as federal statutory law.<sup>196</sup> The court in *Gary S. v. Manchester School District* reasoned that the parents’ unquestioned constitutional right to educate their child in a private, religious school did not entail a constitutional right to public funding for the child’s education, including special education services that would otherwise be provided if the child were in public school.<sup>197</sup> The court supported its position by citing cases such as *Harris v. McRae*,<sup>198</sup> in which the Supreme Court ruled that although women have the fundamental right to an abortion, women who cannot afford the abortion need not be provided funding under the Medicaid program to obtain one, even when Medicaid funded

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<sup>194</sup> 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

<sup>195</sup> *Id.* at 882.

<sup>196</sup> *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15 (1st Cir. 2004).

<sup>197</sup> *Id.* at 19-21.

<sup>198</sup> 448 U.S. 297 (1980).

all other medically necessary services.<sup>199</sup>

Parents of private school children may question the reasoning in *Gary S.*, insisting that the denial of services that would cost the school district the same if the child were in public school constitutes a penalty for parental compliance with religious duties or exercise of control over upbringing. The school district, meanwhile, would defend the denial as a decision simply not to subsidize the free exercise of religion or the childrearing choices of the parent. The parents of a child with disabilities are treated no differently from the parents of a child without disabilities. Both sets of families are denied the full set of public school services they would receive if the child were enrolled in public school.

There is, of course, an exceedingly fine line between a penalty and denial of a subsidy.<sup>200</sup> In this instance, however, a distinction should be drawn. The statutes in *Meyer*, *Pierce*, and *Yoder* all imposed criminal sanctions for exercise of religious liberty or parental autonomy. Thus they clearly fell on the penalty side. Failure to provide

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<sup>199</sup> *Gary S.*, 374 F.3d at 20-21.

<sup>200</sup> Many scholars have explored the penalty-subsidy issue and related ones having to do with the surrender of rights in order to obtain government benefits. Perhaps the most famous article is William Van Alstyne's *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442 (1968) (challenging view that "no one has a constitutional right to government largess"). A selection of other articles includes: Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001) (relying on coerciveness test); Richard A. Epstein, Foreword: *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 102-03 (1988) (proposing approach that forbids government from using conditions on largess to do more than cover costs of social expenditures); Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1352 (1984) (proposing distinction between "threats" and "offers"); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U.L. REV. 989, 990 (1995) (declaring unconstitutional conditions problem intractable); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1499-1500 (1989) ("An appropriate test would subject to strict review any government benefit condition whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government."); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 594 (1990) (proposing abandonment of constitutional conditions doctrine). See generally Symposium, *The Unconstitutional Conditions Doctrine*, 72 DENV. U.L. REV. 857 (1995) (discussing general problem of exchanging rights for government benefits).

funding for services is different. The *Gary S.* court's analogy to the abortion funding controversy is apt. *Roe v. Wade*<sup>201</sup> overturned criminal penalties on abortion before fetal viability and declared abortion a fundamental constitutional right, but *Harris v. McRae*<sup>202</sup> upheld denial of funding even when the state provided payment for childbirth and all other medically needed services. It identified the denial as a permissible failure to provide a subsidy rather than an unconstitutional imposition of a penalty.<sup>203</sup> *Harris v. McRae* is itself subject to criticism,<sup>204</sup> but as long as it stands, it is a far closer comparison to the denial of special education services for private school students than the criminal penalty cases are. The parents in *Meyer*, *Pierce* and *Yoder* were not demanding free instruction, even though the government provided free instruction to all in public school. They were demanding freedom from criminal penalties.

Unless private school children have a constitutional right to the wide variety of services that public school districts furnish public school students (or at least could furnish at no greater cost than when provided to public school children), they have no constitutional right to equal special education services. Bus transportation to and from school, books and materials, access to laboratory facilities, participation in sports teams are all denied to private school children unless the school district affirmatively chooses to furnish them. No credible authority has ever hinted that there is a constitutional

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<sup>201</sup> 410 U.S. 113 (1973).

<sup>202</sup> 448 U.S. 297 (1980).

<sup>203</sup> *Id.* at 316-17 & n.19.

<sup>204</sup> See, e.g., Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113, 1115-16 (1980) (objecting on ground that "[t]he Court's reasoning in *Roe v. Wade* necessarily entails the proposition that no governmental action can be predicated on the view that in the previability period abortion is per se morally objectionable") (footnotes omitted); Sullivan, *supra* note 200, at 1440 (criticizing reasoning in abortion funding denial cases). Even if *Harris v. McRae* were to be discarded and one of the alternative approaches to unconstitutional conditions doctrine adopted, it is likely the government would still prevail in a challenge to the denial of special education funding for private school students. See *infra* text accompanying note 207.

obligation to provide these goods. As *Gary S.* noted, the implication of the parents' position in that case was that public funding of all religious education is required, because the failure to provide funding equal to that given public school children similarly burdens the choice to educate in a sectarian school.<sup>205</sup> The First Circuit decision mirrors those of many other courts that have rejected free exercise arguments regarding the denial of special education services to students in religious schools.<sup>206</sup>

Some scholars have put forward approaches to the unconstitutional conditions problem that do not rely on penalty-subsidy distinctions, arguing, for example, that government denial of benefits should be found unconstitutional when improper governmental motive is present or denial of the benefit is coercive.<sup>207</sup> These approaches yield the same conclusion that denial of equal special education services is constitutionally permissible. No improper motive is evident. The government is not trying to engage in suppression of religion or the supplanting of parental authority. Government is merely allocating resources in a way that supports what it has traditionally supported and finds most convenient to support. Conditioning of full special education services on enrollment in public school is difficult to describe as coercion when so many parents continue to educate their children privately.

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<sup>205</sup> *Gary S.*, 374 F.3d at 20-21.

<sup>206</sup> See *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1050-51 (9th Cir. 1999); *K.R. v. Anderson Cmty. Sch. Corp.*, 125 F.3d 1017, 1019 (7th Cir. 1997); *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 170-73 (4th Cir. 1995); *Russman v. Bd. of Educ.*, 92 F.Supp.2d 95, 97-98 (N.D.N.Y. 2000), *vacated as moot*, 260 F.3d 114 (2nd Cir. 2001). *But see* *Bay Shore Union Free Sch. Dist v. T.*, 405 F. Supp. 2d 230, 247 (E.D.N.Y. 2005) (describing issue as “troubling” and adopting construction of state law to avoid doubts about constitutionality); *cf.* *Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844 (5th Cir. 2003) (holding that teacher alleging school district denied her promotion to administrative position because her children attended private school stated claim for violation of clearly established constitutional right).

<sup>207</sup> See sources cited *supra* note 200 (discussing various alternative approaches to constitutionality of provision of benefits conditioned on surrender of constitutional rights).



## B. Religious Viewpoint Discrimination

A variation on the constitutional issue is presented when the district or the state permits private school children at non-sectarian schools to receive publicly funded special education services on site, but forbids children at private religious schools from receiving them on the sites of their schools. *Rosenberger v. Rector and Visitors of the University of Virginia*<sup>208</sup> held in 1995 that a state university could not permissibly discriminate against a student religious organization in funding its printing costs when it funded the printing costs of various other student organizations. The disparate treatment constituted viewpoint discrimination in violation of the First Amendment's free speech guarantee.<sup>209</sup> Elsewhere, the Court has asserted that government violates religious free exercise rights when it singles out religion for negative treatment.<sup>210</sup> A policy that funds on-site services in secular schools but not sectarian ones seems to contradict these principles.

In *Peter v. Wedl*,<sup>211</sup> the Eighth Circuit Court of Appeals considered the case of a child with quadriplegia and other disabilities who needed a paraprofessional aide while in school. The child attended a Christian school until the parents' private funding for the aide ran out, then transferred to a public school.<sup>212</sup> For part of the relevant time period, Minnesota law barred public school districts from providing services at sectarian schools, although it permitted them to provide services at nonreligious private schools.<sup>213</sup> After the regulation was enjoined, the school district still maintained an apparent de facto

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<sup>208</sup> 515 U.S. 819 (1995).

<sup>209</sup> *Id.* at 845-46.

<sup>210</sup> *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 530 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of . . . religion in general").

<sup>211</sup> 155 F.3d 992 (8th Cir. 1998).

<sup>212</sup> *Id.* at 994

<sup>213</sup> *Id.*

policy of funding aide services only at nonsectarian private schools.<sup>214</sup> The court ruled that the Minnesota regulation violated the plaintiff family's rights of free exercise of religion, free speech, and equal protection.<sup>215</sup> It remanded for development of similar claims based on the de facto policy, if it were found to exist.<sup>216</sup> The court ruled that the discrimination could not be justified on the ground of avoiding an establishment clause violation, in light of decisions such as *Zobrest* and *Agostini* permitting on-site services in religious schools.<sup>217</sup>

If *Gary S.* and *Peter v. Wedl* are both credited, the conclusion is that a public school district may deny on-site services to children in private schools, but that it must do so across the board, without regard to the religious nature of the school at which the services are denied. Fear of entanglement or other establishment of religion does not justify discrimination against provision of services at the religious institution. The Constitution does not forbid refusal to fund private school services in general, but selecting whom to fund on the basis of whether the school is religious violates constitutional principles of nondiscrimination articulated in *Rosenberger*.

*Peter's* validity (and, conversely, *Rosenberger's* reach) may be subject to question, however, in light of *Locke v. Davey*,<sup>218</sup> the 2004 Supreme Court decision that rejected a free exercise challenge to the constitutionality of refusal to provide a student a post-secondary scholarship for religious study even when public scholarship aid was provided to students enrolled in other collegiate programs. The *Davey* Court

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<sup>214</sup> See *id.* at 996-98.

<sup>215</sup> *Id.* at 996-97.

<sup>216</sup> *Id.* at 998.

<sup>217</sup> *Id.* at 997 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), and *Agostini v. Felton*, 521 U.S. 203 (1997)).

<sup>218</sup> 540 U.S. 712 (2004).

acknowledged that awarding a scholarship to the student to study devotional theology was permissible under the establishment clause of the First Amendment.<sup>219</sup> At the same time, the Court stressed that the denial of the funds did not impose sanctions on religious practice,<sup>220</sup> or even force individuals to choose between their beliefs and receiving a government benefit: “The State has merely chosen not to fund a distinct category of instruction.”<sup>221</sup> The Court distinguished *Rosenberger* on the ground that the scholarship program was not a forum for speech, and it dismissed an equal protection argument on the ground that without a free exercise violation, the categories created by the law called for nothing more than rational basis review.<sup>222</sup> The Court placed special weight on the tradition of prohibiting the use of public funds to train religious ministers.<sup>223</sup> The Supreme Court’s decision has been applied to permit government to deny support for instruction in religious high schools. In a recent case concerning general, rather than special, education, the First Circuit Court of Appeals relied on *Davey* in ruling that Maine did not violate the equal protection clause by failing to provide tuition payments to private sectarian secondary schools on behalf of students when it made the payments available to private nonsectarian secondary schools.<sup>224</sup>

Some scholars’ interpretations of *Locke v. Davey* would imply that the case completely overrules *Peter*, and extends *Gary S.* so significantly as to permit school systems to selectively deny funding for special education services for children in religious schools. Professor Laycock notes that “The plaintiff’s claim . . . was a

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<sup>219</sup> 540 U.S. at 719; see *Witters v. Wash. Dep’t of Servs. for Blind*, 474 U.S. 481, 487 (1986).

<sup>220</sup> *Davey*, 540 U.S. at 720-21.

<sup>221</sup> *Id.* at 721.

<sup>222</sup> *Id.* at 720 n.3.

<sup>223</sup> *Id.* at 721-23.

<sup>224</sup> *Eulitt v. Maine Dep’t of Educ.*, 386 F.3d 344 (1st Cir. 2004).

straightforward application of recent precedents. But *Davey* involved an important competing principle: there is very little that the government is constitutionally required to fund.”<sup>225</sup> He goes on to state that “As written, [the opinion] applies only to funding the training of clergy, but it may well be extended to all funding decisions, including discriminatory refusals to fund secular services or instruction delivered by religious institutions.”<sup>226</sup> Other commentators view the case as making substantial inroads on the principle of neutrality expounded in *Rosenberger* and referred to in various free exercise cases.<sup>227</sup>

*Davey* need not be given so broad a reading. The Court emphasized that the scholarship program it upheld nevertheless permitted students to attend pervasively religious schools.<sup>228</sup> All the law barred was training for the distinctly religious profession of becoming a minister. The analogy would thus perhaps permit the school district to refuse to provide publicly funded special education services at a high school that is a seminary or convent, but not to refuse to furnish the services at an ordinary elementary or secondary school that has a religious orientation. But this reading is by no means the

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<sup>225</sup> Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 158 (2004) (continuing, “. . . In *Davey*, the gravitational pull of the no-aid tradition overrode the rule prohibiting discrimination against religion.”).

<sup>226</sup> *Id.* at 161; see also Sarah Waszmer, Note, *Taking It Out of Neutral: The Application of Locke’s Substantial Interest Test to the School Voucher Debate*, 62 WASH. & LEE L. REV. 1271, 1274 (2005) (“[This note] concludes that, after *Locke*, the Court is unlikely to invalidate a school aid program that excludes religious schools.”). The position that government may place any conditions it chooses on its aid programs is reinforced by the recent unanimous decision upholding the Solomon Amendment, which denies federal aid to universities that do not permit military recruiting on campus. See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006).

<sup>227</sup> See, e.g., Steven K. Green, *Locke v. Davey and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913, 943-45 (2004); Thomas C. Berg & Douglas Laycock, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 236-39 (2004). Although the cited sources are critical of *Locke*, other commentary has lent support to at least some of its reasoning. See, e.g., Frank S. Ravitch, *Locke v. Davey and the Lose-Lose Scenario: What Davey Could Have Said, But Didn’t*, 40 TULSA L. REV. 255 (“[A] limiting principle on the formal neutrality doctrine is desirable--any limiting principle!”).

<sup>228</sup> *Id.* at 724.

only one a court may adopt. If the public schools do not need to meet a neutrality standard and the provision of specialized services is not viewed as a forum for speech, a case such as *Peter* is without support. Whether this is considered a good or a bad thing may depend more than anything else on the perspective of the person engaging in the consideration.

## **V. Concerns About Administrative Arbitrariness**

The federal law and its interpretations create a large number of regulatory requirements for school districts in their provision of services to children in private schools. But they also vest tremendous amounts of unreviewable decision making power in the public school districts. The Constitution is not totally silent regarding these exercises of power. Although IDEA gives license for arbitrary allocations of special education resources among children in private schools, Fourteenth Amendment due process doctrine requires at least a minimal degree of transparency in how the resources are to be distributed.

### **A. Risks of Arbitrary Decision Making**

As Congress has enacted it, the Department of Education has implemented it, and the courts have interpreted it, IDEA's private school student regime features numerous openings for purely arbitrary decision making on the part of public school districts. There is no individual entitlement to services at all, much less to an individually proportional amount of the resources available to all private school children. There are no hearing rights to challenge decisions to give or withhold services. Under the federal law, services may, but need not, be delivered on site, even if the services are those that cannot sensibly be provided off site, such as sign language interpretation or a personal

aide. The law requires school districts to consult with private school representatives, but it specifies nothing about what must emerge from the consultation process, short of an affirmation that the consultation itself occurred. Indeed, the whole consultation process sounds more like an exercise in interest group politics<sup>229</sup> than in rational policy making. The law affords no protection from discrimination against children in religious schools, apart from precedent that is now of questionable soundness. The current interpretation of the law by the Department of Education grants license for withholding all services from home-schooled children.

As a general rule, guarantees of fairness in government decisions are not very robust. Under current doctrine, Fourteenth Amendment equal protection and substantive due process require that the categories employed in legislation or regulations bear at least a rational relationship to legitimate governmental ends, even if the ends are hypothetical ones.<sup>230</sup> The test, however, is elastic,<sup>231</sup> and the discriminations occasioned by the private school provisions may well survive this minimal scrutiny.<sup>232</sup> Procedural due process rights to notice and hearing before a neutral decision maker might be asserted in an effort to avoid unfair denial of services, but current doctrine establishes that those rights apply

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<sup>229</sup> Sources on interest group politics are too numerous to catalogue, but a classic work is THEODORE J. LOWI, *THE END OF LIBERALISM* (1969).

<sup>230</sup> See, e.g., *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); JOHN E. NOWAK & RONALD R. ROTUNDA, *CONSTITUTIONAL LAW* §§ 11.4, at 453-59 (substantive due process), 14.3, at 687 (equal protection) (7th ed. 2000).

<sup>231</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* § 9.2.1, at 652 (2d ed. 2002) (“Unfair laws are allowed to stand because a conceivable legitimate purpose can be identified for virtually any law.”). Criticisms of this type are longstanding. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 368 (1949) (“There are broad areas in which the Court’s use of the equal protection clause can only be described as an abandonment of it”).

<sup>232</sup> As the Court pointed out in *Davey*, in the absence of a free exercise violation, minimal scrutiny applies to the denial of scholarship aid, and the discrimination against religious training is traditional enough to create its own rational justification. *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004).

only when an individual has an entitlement to liberty or property.<sup>233</sup> If nothing else is clear, it is that Congress and the Department of Education have worked hard to avoid creating any individual entitlement to services. Government decisions to act in a more general fashion are not subject to hearing rights or other ordinary requirements of procedural due process.<sup>234</sup>

## **B. Due Process Protections**

There is, nevertheless, another thread of due process doctrine apart from ordinary procedural due process and minimal scrutiny substantive due process that requires some base level of transparency in government administration of benefits.<sup>235</sup> The doctrine demands at the very least that government largess be distributed pursuant to standards that are written down and publicly available.<sup>236</sup> In *White v. Roughton*,<sup>237</sup> the Seventh

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<sup>233</sup> Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972); CHEMERINSKY, *supra* note 231, § 7.3.2, at 536-38; NOWAK & ROTUNDA, *supra* note 230, § 13.2, at 596.

<sup>234</sup> See Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (“Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. . . . General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard”).

<sup>235</sup> The absence of a recent Supreme Court decision spelling this out notwithstanding, commentators have observed that such a thread of due process doctrine has to be recognized. See, e.g., JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 267-68 (1985) (“[In this book] I have urged that constitutional due process adjudication make rule-bound bureaucracy one of its primary heuristics for establishing a presumption of constitutional legitimacy . . . . To have an administrative state without rules is to have not due process, but *Der Prozess* [original title of FRANZ KAFKA, THE TRIAL (Willa Muir & Edwin Muir trans. 1937)].”); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 7 (1992) (assimilating idea into procedural due process) (“[P]art of the purpose of procedural due process is to act as a mechanism to assure that the substantive legal principle [supporting government action] is adequate”).

<sup>236</sup> Whether this is procedural due process, substantive due process, or something in between is a question to be taken up another day. The issue falls rather neatly between Professor Chemerinsky’s categories of whether government has an adequate reason to do something at all (substantive due process) and what notice or hearing rights it has to afford an individual before it does something (procedural due process). See CHEMERINSKY, *supra* note 231, § 7.1, at 522-23. Because of the connection to the need for government rationality in forming general rules, the topic may be thought of as more substantive than procedural, but the connection to making individual decisions on the basis of discernable rules suggests procedural due process more than substantive. Debates on such matters can be endless. Compare Wendy Collins Perdue, *Sin, Scandal and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 Wash. L. Rev. 479, 508 & n.183 (1987) (characterizing limits on state court territorial jurisdiction as matters of substantive due process) with Mark C. Weber, *Purposeful Availment*, 39 S.C. L. Rev. 815, 838 n.119, 854-55 n.210, 864 (1988) (arguing that limits on state court territorial jurisdiction flow from procedural due process guarantee).

Circuit Court of Appeals found a violation of due process when a township administrator of general assistance awarded or denied benefits without any published standards of eligibility or amounts of aid.<sup>238</sup> The court declared that “due process requires that welfare assistance be administered to ensure fairness and freedom from arbitrary decision-making as to eligibility.”<sup>239</sup> The court went on to state:

Defendant Roughton as administrator of the general assistance program has the responsibility to administer the program to ensure the fair and consistent application of eligibility requirements. Fair and consistent application of such requirements requires that Roughton establish written standards and regulations. At the hearing in the district court . . . defendant Roughton admitted that he and his staff determine eligibility based on their own unwritten personal standards. . . . Such a procedure, vesting virtually unfettered discretion in Roughton and his staff, is clearly violative of due process.<sup>240</sup>

The court did not rest its interpretation on the conclusion that the applicants for benefits had an entitlement to benefits.<sup>241</sup> Indeed, because the standards were ad hoc and unwritten, it is dubious whether there was anything anyone could term an entitlement. Although the court cited the statute establishing the assistance program, it conceded that under state law grants might be provided on a one-time-only basis, rather than as a stream

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<sup>237</sup> 530 F.2d 750 (7th Cir. 1976).

<sup>238</sup> *Id.* at 751 (listing in addition, other challenged practices).

<sup>239</sup> *Id.* at 753.

<sup>240</sup> *Id.* at 753-54.

<sup>241</sup> The court cited *Goldberg v. Kelly*, 397 U.S. 254 (1970), regarding due process when discussing notice and appeal rights, however. *White*, 530 F.2d at 752-53.



of income,<sup>242</sup> which was the indicator of a protected property interest in other due process welfare cases.<sup>243</sup>

*White v. Roughton* is hardly an isolated case. It relied on a prominent Second Circuit decision in which the court found a claim for violation of due process when the plaintiffs alleged that a public housing authority failed to adopt standards for selection of prospective tenants.<sup>244</sup> That court stated:

It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse. . . . For this reason alone due process requires that selections among applicants be made in accordance with ‘ascertainable standards’ . .

. .<sup>245</sup>

Just last year, a court applied this line of authority in finding a violation of due process when District of Columbia officials terminated or modified disability compensation benefits of employees without adopting and consistently applying written standards for the decisions.<sup>246</sup>

Applied to the topic of special education services for private school students, this doctrine dictates that public school districts must establish written, publicly available

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<sup>242</sup> *Id.* at 753 n.8 (stating that due process principles applied to grants of any length, but finding statute not limited to one-time grants)

<sup>243</sup> *See, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 262-64 (1970) (discussing constitutional protection of continued provision of benefits).

<sup>244</sup> *Holmes v. N.Y. City Housing Auth.*, 398 F.2d 262 (2d Cir. 1968).

<sup>245</sup> *Id.* at 265 (relying on and quoting *Hornsby v. Allen*, 326 F.2d 605, 609-10 (5th Cir. 1964)).

<sup>246</sup> *Lightfoot v. Dist. of Columbia*, 355 F. Supp. 2d 414 (D.D.C. 2005), *stay granted*, No. 05-7028, 2006 WL 573869 (D.C. Cir. Feb. 10, 2006). The underlying decision in that case was subsequently reversed, 448 F.3d 392 (D.C. Cir. 2006), with the court ruling that due process could be satisfied with case-by-case adjudication reminiscent of common law development rather than rule-making. *See id.* at 338. A concurring opinion would have disapproved *White* and *Holmes*. *Id.* at 401 (Silberman, J., concurring).

standards for allocating services among private school children. The services do not need to be equal to those provided the children in public schools, but they must be awarded or withheld on the basis of some sensible and discernable system. Degrees of need might be taken into account, and costs of providing services do not have to be ignored.<sup>247</sup> But purely arbitrary decision making must be avoided. This principle should apply as well to provision of services on the sites or off the sites of private schools and in religious schools and secular schools. If distinctions are made, the school district must make them pursuant to a written, public policy that can be justified on the basis of relevant educational or administrative considerations, and not on the basis of whim or prejudice against some class of students.

The approach taken here reaches a conclusion parallel to that reached by Professors Shapiro and Levy in their recent article regarding government benefits and due process,<sup>248</sup> even if the means to the results differ in some respects. Whereas the approach outlined here identifies a thread of due process doctrine separate from ordinary notice-and-hearing procedural due process and rational basis substantive due process, Shapiro and Levy contend that that due process doctrine in general took a wrong turn when in the 1970s the Supreme Court began to insist on identifying an entitlement before requiring that withholding or termination of a government benefit had to be subject to procedural due process rights of notice and hearing.<sup>249</sup> Shapiro and Levy would have courts

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<sup>247</sup> The role of cost considerations is a perennial topic in special education law. See, e.g., Terry Jean Seligmann, *Rowley Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL'Y 217, 285 (2005) (describing cost as “the Elephant in the Room”); Andrew Miller, Note, *Irrelevant Costs and Economic Realities: Funding the IDEA After Cedar Rapids*, 62 OHIO ST. L.J. 1289 (2001); Ashley Oliver, Note, *Should Special Education Have a Price Tag? A New Reasonableness Standard for Cost*, 83 DENV. U. L. REV. 763 (2006).

<sup>248</sup> Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Due Process*, 57 ADMIN. L. REV. 107 (2005).

<sup>249</sup> *Id.* at 111-33.

abandon the rigidity of contemporary procedural due process doctrine to recognize that decisions regarding distribution of benefits should be subject to legal standards, and that due process rights should attach when the government takes action adverse to an individual concerning eligibility under those legal standards.<sup>250</sup> Shapiro and Levy would correct the doctrine's path; the approach suggested here merely points out that all along, the path has been broader than may have been appreciated. But applied to the issue of publicly funded special education services for children in private schools, both approaches demand written standards that make sensible allocations and are available for public scrutiny.

### CONCLUSION

Private school children do not gain an individual entitlement to special education services under the new federal law, but the more elaborate statutory provisions calling for identification of the children and proportionate spending could possibly cause more of those children to receive a more extensive array of services. Moreover, what the federal law does not furnish, state law may provide. Constitutional claims to an individual entitlement to special education services equivalent to what public school children receive lack support, be they claims of religious free exercise rights or rights to control the upbringing of one's children. A potential due process problem does arise, however, because the federal law grants public school administrators such a degree of unchecked authority that arbitrary and unfair decisions are a serious risk. The problem demands a response in the form of written, public, and reasonable standards for the provision of the special education services to children in private schools.

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<sup>250</sup> *Id.* at 134. An exception applies when decisions are constitutionally vested in the political discretion of government officials. *See id.*