

RECENT DEVELOPMENTS IN VOUCHER PROGRAMS FOR STUDENTS WITH DISABILITIES

*Wendy F. Hensel**

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* Associate Dean for Research and Faculty Development and Professor of Law, Georgia State University College of Law. The author would like to thank Professor Robert Garda and the Loyola Law Review for an invitation to present this paper at its 2013 Symposium: "Special Education in a Time of Reform."

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I. INTRODUCTION

The state of education in America is rapidly changing. Declining budgets, increased federal expectations, and diminished standing globally have triggered numerous calls for reform and innovation. One of the most popular responses by state legislatures to date has come in the form of vouchers for students to attend private schools. This movement has increased in momentum to the point that the *Wall Street Journal* claimed 2011 to be the “Year of School Choice.”¹ While many parents and supporters of school choice in education enthusiastically embrace these programs, teachers’ unions and advocates for public schools often stand in vehement opposition to their adoption, arguing that they violate a variety of state constitutional provisions and will result in the decline of public education.²

While much has been written about vouchers generally, few scholars have researched the impact that vouchers have on children who receive special education services. Some states have adopted special vouchers reserved exclusively for students with disabilities who have an Individualized Education Plan (IEP) in accordance with the Individuals with Disabilities Education Act (IDEA).³ Others have more wide-ranging voucher statutes that extend eligibility to a broad range of students, including many children with disabilities.⁴ Whether such programs specifically target students with disabilities or not, there is no question that they have a unique impact on this vulnerable population that is not adequately understood. Several years ago, I wrote about the

1. *The Year of School Choice*, WALL ST. J., July 5, 2011, available at <http://online.wsj.com/article/SB10001424052702304450604576420330972531442.html>.

2. See, e.g., Texas Am. Fed’n of Teachers, *Voucher Bill Encounters Strong Opposition in Texas Senate Committee Testimony*, TEXAS AFT LEGISLATIVE HOTLINE (Mar. 5, 2013), <http://texasaftblog.com/hotline/?p=2602>; Kevin Mooney, *Louisiana Teachers Unions Demand Schools Drop Voucher Program*, THE AMERICAN SPECTATOR (July 27, 2012, 3:26 PM), <http://spectator.org/blog/2012/07/27/louisiana-teachers-unions-dema>.

3. 20 U.S.C. §§ 1400-1450 (2008). For a discussion of states with voucher programs aimed at students with disabilities, see *infra* Section II.

4. See *infra* Section III.

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numerous concerns such programs may pose, both for the students with disabilities who matriculate into private schools, and for those who are left behind in the public schools.⁵ Since the publication of that article, a number of states have joined the voucher bandwagon, and new legal challenges have been posed.⁶ This Article will briefly explore these new developments.

Section II details recent legislation creating voucher programs specifically aimed at students with disabilities and evaluates the legal challenges filed in some states to stop their implementation. Section III explores recent developments in two states, Wisconsin and Louisiana, with general population voucher programs that may have significant implications for students with disabilities. Section IV evaluates recent evidence shedding light on the effectiveness of voucher programs for students with disabilities, and Section V concludes with a call for further research assessing the true impact of vouchers on this population.

II. THE EXPANSION OF SPECIAL NEEDS VOUCHER PROGRAMS

Since the publication of my earlier article, six states have adopted voucher programs that specifically target students with disabilities. The following section identifies the parameters of and legal challenges to these programs.

A. LOUISIANA: SCHOOL CHOICE PROGRAM FOR CERTAIN STUDENTS WITH EXCEPTIONALITIES⁷

In 2010, Louisiana adopted a two-year pilot program that provides vouchers to certain students with disabilities in parishes with populations of more than 190,000 people.⁸ In late 2012, the legislature removed the “pilot” designation and reauthorized the program through the 2014–2015 school year.⁹

5. See Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291 (2010).

6. See *infra* Section II.

7. LA. REV. STAT. ANN. § 17:4031 (2010).

8. School Choice Program for Certain Students with Exceptionalities, LA. REV. STAT. ANN. § 17:4031 (2010). This includes the six largest parishes in the state (Orleans, Jefferson, St. Tammany, East Baton Rouge, Lafayette, and Caddo). See *School Choice for Students with Disabilities*, LOUISIANA DEP'T OF EDUC., <http://www.louisianabelieves.com/schools/school-choice-for-students-with-disabilities> (last visited May 21, 2013).

9. H.B. 911, 2012 La. Sess. Law Serv. Act 424 (WEST).

The statute's eligibility requirements are somewhat different than those for other programs around the country. Students may apply for vouchers if they are entering into kindergarten through the eighth grade and are eligible to attend a Louisiana public school.¹⁰ The program is limited to children with Individualized Education Plans in place that identify exceptionalities relating to "autism, a mental disability, emotional disturbance, developmental delay, other health impairment, specific learning disability, or traumatic brain injury."¹¹ There is no indication why legislators in Louisiana—unlike those in any other state—chose to exclude those children with other impairments covered by the IDEA, including speech language impairments, hearing impairments, visual impairments, or orthopedic impairments.¹² Even children with one of the inclusive disabilities will be deemed ineligible if they are simultaneously identified as gifted or talented.¹³

Once students establish eligibility, they may receive vouchers equal to fifty percent of the state funds allocated to the parish per pupil, or the value of tuition at the private school, whichever is less.¹⁴ The Louisiana Department of Education indicated that this amounts to approximately \$2,000 each year as of 2012, although the amount reported by some school choice advocacy groups is inexplicably higher.¹⁵ Students may elect to

10. LA. ADMIN. CODE tit. 28, pt. XLIII, § 133(E)(3)(a)(i)(d) (2013).

11. § 17:4031(B)(2)(a).

12. See 34 C.F.R. § 300.8(c) (2007); LA. REV. STAT. ANN. § 17:1942(B) (2008). It would seem questionable whether Louisiana legitimately can exclude students with particular disabilities given that the Supreme Court has indicated that disability discrimination is actionable when one group of people with disabilities (e.g., those with mental disabilities) is intentionally treated worse than others with disabilities (e.g., physical disabilities). *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999) (finding case actionable despite the fact that the plaintiffs identified no non-disabled comparison class that was afforded preferential treatment); see also *Salcido ex rel. Gilliland v. Woodbury Cnty.*, 119 F. Supp. 2d 900, 937 (N.D. Iowa 2000) ("[E]xclusion of all persons with a specified disability, whatever the degree, from benefits provided to other disabled persons [does not] excuse discrimination by reason of that particular disability.").

13. LA. REV. STAT. ANN. § 17:4031(B)(2)(c) (2010). This seeming refusal to recognize that even gifted children may have disabilities stands in contrast to the position taken in the ADA Amendments Act. See generally Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 677 (2009) (providing a discussion of the relationship between academic achievement and disability under the ADAAA).

14. § 17:4031(c)(1).

15. *Compare School Choice for Students with Disabilities*, LOUISIANA DEP'T OF

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use their vouchers at any school approved by the State Board of Elementary and Secondary Education which has provided educational services to students with disabilities for at least two years.¹⁶ In addition, teachers must hold special education certification identical to that required by teachers who educate students with disabilities in public schools.¹⁷ Schools must provide services in accordance with each student's IEP or service plan,¹⁸ but are free to establish whatever admissions requirements they desire and need not accept every eligible student.¹⁹ Unlike other voucher programs in Louisiana, the School Choice Program for Students with Exceptionalities does not require schools to administer standardized testing or report results of student progress to the public.²⁰

In the two years that the program has been in existence, it has seen relatively light participation from students with disabilities. In 2012–2013, only twenty-two students participated in the program at six different schools.²¹ There is some evidence that this number may be low because of the adoption of “Louisiana’s Student Scholarships for Educational Excellence Program,”²² which is available to many of the same students and provides greater monetary benefits than the School Choice Program for Certain Students with Exceptionalities.²³ However, as discussed in Section III(B), *infra*, the Louisiana Supreme Court recently declared the former program to violate the Louisiana Constitution. The court’s reasoning does not implicate the legality of the School Choice Program for Certain Students with Exceptionalities, but the diminishing voucher options potentially now available to students in the state may lead to

EDUC., <http://www.louisianabelieves.com/schools/school-choice-for-students-with-disabilities> (last visited May 21, 2013), with Robbie Rhinesmith, *Louisiana – School Choice Pilot Program for Certain Students with Exceptionalities*, THE FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE, <http://www.edchoice.org/School-Choice/Programs/School-Choice-Pilot-Program-for-Certain-Students-with-Exceptionalities.aspx> (last visited May 21, 2013) (reporting an average value of \$6,799).

16. See § 17:4031(D)(1)(a), (c).

17. LA. ADMIN. CODE tit. 28, pt. XLIII, § 156 (2013).

18. *Id.* § 133(E)(3)(b)(i)(d).

19. LA. REV. STAT. ANN. § 17:4031(D)(2) (2010).

20. See *id.* § 17:4031.

21. See Rhinesmith, *supra* note 15 (reporting only 22 participants in the 2012–2013 school year).

22. §§ 17:4011–4025.

23. See Rhinesmith, *supra* note 15.

increased participation in this program in the future.²⁴

**B. OKLAHOMA: THE LINDSEY NICOLE HENRY SCHOLARSHIP
FOR STUDENTS WITH DISABILITIES PROGRAM²⁵**

During the 2012–2013 school year, 169 students participated in Oklahoma’s scholarship program for students with disabilities.²⁶ First implemented in 2010, the scholarship allows each student with an IEP who spent the previous year at public school²⁷ to elect a private school scholarship that is roughly equal to the state and local funding that the school district would receive to educate the student.²⁸ There are no re-eligibility requirements, and the student is entitled to continue to receive the award until he or she graduates from high school or turns twenty-two, whichever occurs first.²⁹ The statute makes clear that a parent’s acceptance of a voucher is the equivalent of a parental revocation of consent to services under the IDEA.³⁰

Schools are eligible to participate in the program if they comply with a number of basic requirements. They must be accredited, be fiscally sound, comply with all federal

23. As noted in Section III(B). *infra*, the Louisiana legislature is attempting to find an alternative source of funding for the general scholarship program that would not be unconstitutional. If it is successful in doing so, the low numbers participating in the School Choice Program for Certain Students with Exceptionalities may continue.

25. OKLA. STAT. ANN. tit. 70, §§ 13-101-114.5 (West 2013). Interestingly, the law is named after the daughter of Oklahoma Governor Brad Henry, who died as an infant from a rare neuromuscular disease. Kim Archer, *Supreme Court Tosses Challenge to Lindsey Nicole Henry Law*, TULSA WORLD (Nov. 21, 2012, 8:14 AM), http://www.tulsaworld.com/article.aspx/Supreme_court_tosses_challenge_to_Lindsey_Nicole_Henry/20121121_19_a1_theokl67174.

26. § 13-101.2(A); Robbie Rhinesmith, *Oklahoma-Lindsey Nicole Henry Scholarships for Students with Disabilities*, THE FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE, <http://www.edchoice.org/School-Choice/Programs/Lindsey-Nicole-Henry-Scholarships-for-Students-with-Disabilities.aspx> (last visited May 21, 2013).

27. An exception to this requirement is available for students who are children of a member of the United States Armed forces and who have transferred to the school district “pursuant to a permanent change of station orders.” § 13-101.2(B)(1).

28. *Id.* § 13-101.2(J)(2). The scholarship amount will be reduced by up to two and a half percent of the total amount, “which may be retained by the State Department of Education as a fee for administrative services rendered.” OKLA. STAT. ANN. tit. 70, § 13-101.2(J)(3).

29. *Id.* § 13-101.2(B)(2).

30. *Id.* § 13-101.2(F)(1) (West 2013) (citing 20 U.S.C. §§ 1414(a)(1)(D), 1414(C) (2004)).

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antidiscrimination statutes, meet health and safety codes, and comply with all laws regarding the general regulation of private schools.³¹ The statute mandates schools to be “academically accountable to the parent or legal guardian for meeting the educational needs of the student[,]” but does not require the achievement of any substantive requirements.³² Although the statute requires teachers who work in these private schools to hold a bachelors degree or higher, it exempts this requirement for those who have taught for at least three years or who “have special skills, knowledge, or expertise that qualifies them to provide instruction in subjects taught.”³³ Neither the statute nor the Department of Education indicates what “special skills” might qualify under this provision, opening the door to potentially wide-ranging qualifications.³⁴ These accountability requirements have been critiqued by some as insufficiently rigorous.³⁵ As one legislator noted during consideration of the bill, once a child enters private school, “we take our hands off the wheel.”³⁶

The scholarship legislation was subject to considerable controversy shortly after its enactment. Initially, the statute charged school districts with administering its various requirements for student participation. Within months, the school boards of five counties voted to refuse to execute any of the required administrative functions.³⁷ Later, when several parents in these districts filed suit in federal court challenging the refusal

31. OKLA. STAT. ANN. tit. 70, § 13-101.2(H)(1)-(4), (7) (West 2013).

32. OKLA. STAT. ANN. tit. 70, § 13-101.2(H)(5).

33. *Id.* § 13-101.2(H)(6).

34. For example, an individual who has a child with a disability but no formal training or education could conceivably have “special skills” that would suffice for purposes of the statute. For a critique of similar provisions, see Hensel, *supra* note 5, at 325-27.

35. See, e.g., Rep. Jason Nelson, *Ultimate Education Accountability: Henry Scholarships*, OFFICIAL BLOG OF OKLAHOMA STATE REP. JASON NELSON (Aug. 13, 2012), <http://www.jasonnelson.org/2012/08/ultimate-education-accountability-henry.html> (discussing comments received from constituents relating to accountability of the scholarship program).

36. Barbara Hoberock, *Senate Sends Student-Aid Bill to Governor*, TULSA WORLD (Mar. 27, 2010, 5:09 AM), http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20100527_16_A4_OLHMIY533303&PrintComments=1 (quoting Oklahoma Senator Sean Burrage).

37. See, e.g., *Students in Broken-Arrow, Jenks Denied Access to Special-Needs Scholarship*, CAPITOLBEATOK (Oct. 6, 2010), <http://capitolbeatok.com/reports/students-in-broken-arrow-jenks-denied-access-to-special-needs-scholarship>; Archer, *supra* note 24.

to issue disability scholarships, the districts responded by filing a countersuit challenging the program's constitutionality.³⁸ The state resolved the immediate legal issue by amending the statute to transfer administrative responsibility from districts to the Oklahoma Department of Education,³⁹ and the parents ultimately dismissed their litigation.⁴⁰

Not content with this result, however, two districts filed a constitutional challenge to the program in state court on behalf of all school districts in Oklahoma, again naming several parents as defendants.⁴¹ The school districts claimed that the scholarship program violated Article II, § 5 of the Oklahoma Constitution, which prohibits the use of public funds "directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion . . ."⁴² Of the forty schools approved by the Oklahoma Department of Education at the time of the litigation, thirty-eight were religious.⁴³ In addition, because the act diverts public funds away from public school systems, the school districts argued that it violated Article 1, § 5 and Article 13, § 1 of the Oklahoma Constitution, both of which require the state to establish and maintain a system of free public schools open to all children.⁴⁴ Similar arguments have been made successfully against voucher programs in other states.⁴⁵

The districts made two additional, novel arguments. They contended that the state was making an unconstitutional gift of public funds in violation of Article X, § 14 and § 15, because it neither provided the vouchers for consideration nor retained control over how the private schools spent the public funds.⁴⁶ Moreover, the districts argued the scholarships discriminated

38. See *Students in Broken-Arrow*, *supra* note 36; *Archer*, *supra* note 24.

39. H.B. 1744, 53rd Leg., 1st Sess. (Okla. 2011).

40. See *Archer*, *supra* note 24.

41. Journal Entry of Judgment, *Indep. Sch. Dist. No. 5 of Tulsa Cnty. v. Spry*, No. CV 2011-00890 (Tulsa Dist. Ct. 2012), available at <http://www.becketfund.org/wp-content/uploads/2012/04/Jenks-v.-Spry-Docket.pdf>.

42. OKLA. CONST. art. II, § 5.

43. Supplemental Brief of Plaintiffs / Appellees Addressing Arguments of Defendants / Appellants, Filed Pursuant to Order of May 31, 2012 at 6, *Indep. Sch. Dist. No. 5 of Tulsa Cnty. v. Spry*, No. CV-2011-00890, available at <http://www.becketfund.org/wp-content/uploads/2011/05/Jenks-School-Districts-OK-SC-Brief.pdf>.

44. *Id.* at 2; OKLA. CONST. art. I, § 5; art. XIII, § 1.

45. Hensel, *supra* note 5, at 310-15.

46. Supplemental Brief, *supra* note 42, at 2; OKLA. CONST. art. X, §§ 14-15.

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against similarly-situated students with disabilities in violation of Article II, § 7 of the Oklahoma Constitution, because the legislation served students with disabilities under the IDEA but excluded students with disabilities with accommodation plans developed under § 504 of the Rehabilitation Act of 1973.⁴⁷

On March 27, 2012, a Tulsa district court agreed with the school districts and struck down the Lindsey Nicole Henry Scholarships for Students with Disabilities Program as unconstitutional.⁴⁸ Because the judge did not include any discussion in her order, it is impossible to know which provision of the Oklahoma Constitution she found to violate the statute.⁴⁹ The defendants filed an appeal directly to the Oklahoma Supreme Court, and the effect of the decision on the scholarship program was stayed pending resolution of that appeal.⁵⁰

The Supreme Court of Oklahoma reversed, concluding that the plaintiff school districts lacked standing to question the constitutionality of the legislation.⁵¹ The court reasoned:

The funds at issue are not taxes from taxpayers in the districts' county revenue streams that a county assessor is improperly reducing or disposing of, but part of the Legislature's general grant to the districts, through the State Department of Education. Because the school districts are not the ones charged with the duty to provide free public education, the Legislature's withholding of certain funds, even if it is unconstitutional, does not violate a constitutionally protected interest of the school districts themselves, because they are merely the Legislature's vehicle.⁵²

Although the Supreme Court's decision predictably was

47. 29 U.S.C. § 794 (2002); OKLA. CONST. art. II, § 7; Supplemental Brief, *supra* note 42, at 2. Interestingly, if this argument had been successful, it ultimately might have resulted in an expansion of the scholarship program to include students with 504 plans, which would seem contrary to plaintiffs' desire to end the program altogether.

48. Journal Entry of Judgment, *supra* note 40, at 2-3.

49. *Id.*

50. Order Staying Judgment Pending Appeal, Indep. Sch. Dist. No. 5 of Tulsa Cnty. v. Spry, No. CV 2011-00890 (Tulsa Dist. Ct. 2012), *available at* <http://www.becketfund.org/wp-content/uploads/2012/04/Jenks-Consent-Order-Granting-Stay.pdf>.

51. Indep. Sch. Dist. No. 5 of Tulsa Cnty. v. Spry, 292 P.3d 19, 20 (Okla. 2012).

52. *Id.*

hailed by school choice advocates, the court notably did not address the key question of the program's constitutionality. As a result, the door remains open to challenges to the Lindsey Nicole Henry Scholarship program in the future.

C. OHIO: JON PETERSON SPECIAL NEEDS SCHOLARSHIP PROGRAM⁵³

Ohio first entered the special needs voucher arena when it implemented the Ohio Autism Scholarship, which provides up to \$20,000 for children with autism to receive services from private providers.⁵⁴ In 2011, the state broadened the availability of vouchers through the adoption of the Jon Peterson Special Needs Scholarship Program, which has a number of unique aspects.⁵⁵ Children with disabilities who have IEPs and are either enrolled in public school or eligible to enroll may elect a scholarship equal to a set amount from the state calculated according to the student's disability category, or the tuition and fees of the private provider, whichever is less.⁵⁶ In 2012–2013, the first academic year of the program, awards ranged from approximately \$7,000 for speech or language impairments, and up to \$20,000 for autism or multiple disabilities.⁵⁷ Although students may use the scholarships to attend public schools outside of their home districts, they may not simultaneously use the funds for private supplemental services.⁵⁸

53. OHIO REV. CODE ANN. § 3310.52 (West 2012).

54. *Id.* § 3310.41; *Autism Scholarship Program Parent FAQ's*, OHIO DEP'T OF EDUC., <http://education.ohio.gov/Topics/Other-Resources/Scholarships/Autism-Scholarship-Program/Parent-FAQs> (last modified May 7, 2013).

55. § 3310.52; see Ohio Dep't of Educ., *Jon Peterson Special Needs Scholarship Program Fact Sheet* (Feb. 7, 2012), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC8QFjAA&url=http%3A%2F%2Feducation.ohio.gov%2Fgetattachment%2FTopics%2FOther-Resources%2FScholarships%2FSpecial-Needs-Scholarship%2FJon-Peterson-Scholarship-Forms-Resources%2FJPSN-Fact-Sheet.pdf.aspx&ei=SzTSUYP2CoWs9ATrr4HYDQ&usg=AFQjCNF3pWjffE1-tlGXpbz8MMd9Ac1Kw&sig2=qPg6wmHT-qR_hQlNpT-Tkw&bvm=bv.48572450,d.eWU.

56. OHIO REV. CODE ANN. § 3310.52 (West 2012); OHIO ADMIN. CODE 3301-101-03(A) (2010); OHIO ADMIN. CODE 3301-101-10(C) (2010).

57. Ohio Dep't of Educ., *Jon Peterson Special Needs Scholarship: Maximum Scholarship Amounts by Category* (Feb. 1, 2012), available at <http://education.ohio.gov/getattachment/Topics/Other-Resources/Scholarships/Special-Needs-Scholarship/Jon-Peterson-Scholarship-How-to-Apply/JPSNCategoryAmounts.pdf.aspx>.

58. *Jon Peterson Special Needs Scholarship: FAQ for School District*, OHIO DEP'T

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The number of scholarships awarded in Ohio is capped at five percent of the total number of children identified with disabilities in the state the previous year.⁵⁹ If the number of scholarship applications exceeds this amount, a lottery will be held to determine who will receive the funding, although students currently receiving scholarships will have priority.⁶⁰ Notably, Ohio requires students who accept scholarships to participate in standardized testing unless exempted pursuant to an IEP, and the results must be reported to the state.⁶¹ Districts are required to provide transportation services to and from the registered private schools in some circumstances.⁶²

In order to participate in the program, schools must be approved by the Ohio Department of Education, comply with federal antidiscrimination statutes, and employ teaching professionals with credentials in special education.⁶³ Prior to enrolling a scholarship recipient, schools must disclose to the parents the methods of instruction that will be used and the qualifications of the teachers and personnel who will be providing the instruction.⁶⁴ The schools are then expected to implement the IEPs and provide the identified services unless the applicant agrees otherwise in writing.⁶⁵

The program specifically states that acceptance of a scholarship generally waives a district's obligation to provide a free, appropriate public education (FAPE) to the student.⁶⁶ Unlike other states, however, Ohio retains control, and

OF EDUC., <http://education.ohio.gov/Topics/Other-Resources/Scholarships/Special-Needs-Scholarship/Jon-Peterson-Scholarship-Provider-Resources/District-FAQs#FAQ546> (last modified Apr. 16, 2013).

59. OHIO REV. CODE ANN. § 3310.52(B) (West 2012). In 2012-2013, this would equate with approximately 13,000 scholarships. See Shepherd Pittman, *Ohio's Dramatic Expansion of School Choice Praised by Nation's Original Voucher Organization*, THE FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE (June 30, 2011), <http://www.edchoice.org/Newsroom/News/Ohio-s-Dramatic-Expansion-of-School-Choice-Praised-by-Nation-s-Original-Voucher-Organization.aspx>.

60. OHIO ADMIN. CODE 3301-101-06(2)-(3) (2010).

61. OHIO REV. CODE ANN. § 3310.522 (West 2012). Because of this unique feature, the effectiveness of the Jon Peterson Scholarship in enhancing the education of students with disabilities may be evaluated over time.

62. *Id.* § 3310.60; OHIO ADMIN. CODE 3301-51-08((K)(2) (2010).

63. OHIO REV. CODE ANN. § 3310.58 (West 2012); OHIO ADMIN. CODE 3301-101-09(B).

64. OHIO REV. CODE ANN. § 3310.521(B)(1)-(2).

65. *Id.* § 3310.52(A); OHIO ADMIN. CODE 3301-101-02(C)-(E).

66. OHIO REV. CODE ANN. § 3310.53(A); OHIO ADMIN. CODE 3301-101-05(A)(8).

scholarship recipients retain their rights with respect to the development of students' IEPs each year.⁶⁷ Schools accepting scholarship students must agree to provide records of their implementation of each child's IEP, including an evaluation of the child's progress in meeting IEP goals.⁶⁸ However, the student's home district is responsible for reviewing and updating the IEP on an annual basis, in cooperation with the private provider.⁶⁹ Students must then reapply for their scholarships on an annual basis, and be reevaluated for eligibility at least every three years.⁷⁰

Ohio permits students accepting scholarships to file written complaints or request due process hearings alleging that the public school district of residence violated the IDEA.⁷¹ No complaint, however, "may . . . allege a violation of any requirements involving the implementation of the IEP and whether the child has received FAPE."⁷² Once a scholarship is accepted, parents are responsible for ensuring the child receives those services to which he is entitled under an IEP.

D. NORTH CAROLINA: SPECIAL EDUCATION EXPENSES CREDIT⁷³

North Carolina's new program for children with disabilities involves a tax credit for eligible students rather than an affirmative voucher payment by the state.⁷⁴ To be eligible for the credit, taxpayers must have a dependent child in grades kindergarten through twelve who has been enrolled in a public school for the preceding two semesters.⁷⁵ The child must have an

67. OHIO REV. CODE ANN. § 3310.53(B) (West 2012).

68. *Id.* § 3310.58(G).

69. OHIO ADMIN. CODE 3301-101-5(A)(7) (2010).

70. Ohio Dep't of Educ., *For Students with Disabilities and their Parents: A Comparison of Rights Under the IDEA and Chapter 3323 to the Jon Peterson Special Needs Scholarship Program* (Nov. 2011), available at <http://education.ohio.gov/getattachment/Topics/Other-Resources/Scholarships/Special-Needs-Scholarship/Jon-Peterson-Scholarship-How-to-Apply/FAPECOMPARISON.pdf.aspx>.

71. OHIO ADMIN. CODE 3301-101-12(A).

72. *Id.*

73. N.C. GEN. STAT. ANN. § 105-151.33 (West 2013).

74. *Id.*

75. *Id.* § 105-151.33(a). Children with disabilities who are in preschool, are at least three years old, and who receive special education services through the public school are also eligible if they are not eligible to enroll in public kindergarten. N.C.

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IEP in place and receive special education services from the public school on a daily basis.⁷⁶ If the dependent child then enrolls either in a private school or home school, the taxpayer may be eligible for a tax credit of up to \$3,000 per semester for each qualifying child or the cost of tuition for the semester, whichever is less.⁷⁷ Students must be reevaluated for eligibility every three years.⁷⁸

The credit applies to expenses incurred for private school tuition, home school special education costs, and related special education services.⁷⁹ With respect to home schools, the credit may be directed only toward those expenses incurred as a result of the student's disability.⁸⁰ There are no further limitations on the type of schools in which children must enroll to be eligible.

One interesting aspect of this legislation affects those children with disabilities who remain in public schools. For each child who leaves public school and exercises a tuition credit, \$2,000 must be placed in a Fund for Special Education and Related Services administered by the North Carolina Department of Education.⁸¹ These funds must then be used to provide special education and related services for children with disabilities in public schools, and to reimburse schools for the services they are statutorily required to provide to students that matriculate into private schools, such as re-eligibility certifications.⁸² This provision was intended to recapture some of the cost savings generated by those who elect to receive the \$6,000 tax credit, which is less than the estimated \$10,000 spent on each child with disabilities in public school, and apply it to the benefit of children remaining in the public school system.⁸³

DEPT OF REVENUE DIRECTIVE, TAX CREDIT FOR CHILDREN WITH DISABILITIES WHO REQUIRE SPECIAL EDUCATION 2 (Jan. 23, 2012), *available at* <http://www.dor.state.nc.us/practitioner/individual/directives/pd-12-1.pdf>. Beginning in 2016, dependents will need only demonstrate enrollment in public school for one semester prior to applying for the credit. *Id.*

76. N.C. GEN. STAT. ANN. § 105-151.33(a)(2)-(3) (West 2013).

77. *Id.* § 105-151.33(b). The maximum tax credit received in a calendar year cannot exceed \$6,000. *Id.*

78. *Id.* § 105-151.33(a).

79. *Id.* § 105-151.33(b).

80. N.C. GEN. STAT. ANN. § 105-151.33(b) (West 2013).

81. *Id.*

82. *Id.* § 115C-472.15.

83. See *North Carolina Legislature Passes Bipartisan Special Needs Tax Credit Plan*, PR NEWSWIRE (June 17, 2011), <http://www.prnewswire.com/news->

E. MISSISSIPPI: DYSLEXIA THERAPY SCHOLARSHIP FOR STUDENTS WITH DYSLEXIA⁸⁴

Students diagnosed with dyslexia in the state of Mississippi who are in first through sixth grade are eligible for a voucher payment from the state to attend a qualified private school that provides “comprehensive multisensory dyslexia therapy.”⁸⁵ Children must have been enrolled in a Mississippi public school or a state-approved private school located in Mississippi “that emphasizes instruction in dyslexia intervention” in the year prior to the application.⁸⁶ The scholarship is also available to students who have been accepted to attend a qualified private school at the time of application.⁸⁷ For eligible students, the award is an amount equal to the base funds in the “Mississippi Adequate Education Program,” equivalent to the state dollars provided for each student to public schools.⁸⁸ The scholarship remains in effect until students return to public school or graduate from the sixth grade.⁸⁹

Participating schools must be accredited as special purpose schools that provide “comprehensive dyslexia therapy” to students by licensed dyslexia therapists.⁹⁰ In addition, schools must agree to provide written explanations to parents of enrolled students detailing their academic progress at least once per year, maintain a physical location in the state, and subject school personnel to fingerprinting and criminal background checks.⁹¹

F. ARIZONA: EMPOWERMENT SCHOLARSHIP ACCOUNT PROGRAM⁹²

Arizona first entered the special needs voucher arena in late

releases/north-carolina-legislature-passes-bipartisan-special-needs-tax-credit-plan-124073189.html (showing the amount that North Carolina is currently spending on each student who receives special education).

84. MISS. CODE ANN. §§ 37-173-1-37-17-31. (West 2012).

85. *Id.* § 37-173-1(f); *See also id.* § 37-173-3.

86. *Id.* § 37-173-5(2)(a).

87. *Id.* § 37-173-5(2)(b). This does not include home schools, juvenile detention centers, or virtual schools, unless the student’s participation in a virtual school is limited to less than two courses. *Id.* § 37-173-7(1)(a)-(c).

88. MISS. CODE ANN. § 37-173-13(1) (West 2012).

89. *Id.* § 37-173-7(2)(a).

90. *Id.* § 37-173-1(g).

91. *Id.* §§ 37-173-17(1), 37-173-23.

92. ARIZ. REV. STAT. ANN. §§ 15-2401-2404 (2013).

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2006 when it enacted its Scholarships for Pupils with Disabilities program.⁹³ The statute awarded state funds to attend private school to children with IEPs who spent the prior year in public school.⁹⁴ Students received the amount the public schools would have received for the student pursuant to Arizona's special education laws, or the tuition and fees of the private school, whichever was less.⁹⁵ Scholarship payments were made directly to the private school in which the eligible student enrolled.⁹⁶

The program was challenged almost immediately in state court on the grounds that it violated several sections of the Arizona constitution.⁹⁷ Ultimately, the Supreme Court of Arizona struck down the program because it violated the Aid Clause of the Arizona Constitution, which prohibits any "tax...or appropriation of public money made in aid of any church or private or sectarian school, or any public service corporation."⁹⁸ The court rejected the argument that students, rather than the private schools, were the true beneficiaries of the scholarships.⁹⁹ The court found that because parents had no option but to endorse checks sent by the state to the private schools, the program constituted a direct transfer of funds from the state treasury to the private schools.¹⁰⁰

In 2011, in an attempt to overcome these constitutional problems, the Arizona legislature created a new program that provides state money directly to the parents of children with disabilities.¹⁰¹ Pursuant to the Empowerment Scholarship Account Program, children with IEPs or 504 plans under the Rehabilitation Act, as well as those who previously received

93. ARIZ. REV. STAT. ANN. §§ 15-891-891.06 (2013).

94. *Id.* § 15-891(B)(1). For a full discussion of this statute and its subsequent court treatment, *see* Hensel, *supra* note 5, at 312-15.

95. Hensel, *supra* note 5, at 313.

96. *Id.* at 314 (discussing findings of the Arizona Supreme Court on this issue).

97. *Cain v. Horne*, No. CV 2007-002986, 2007 WL 1891530 (Ariz. Super. Ct. June 14, 2007), *rev'd*, 202 P.3d 1178 (Ariz. 2009).

98. *Cain v. Horne*, 202 P.3d 1178, 1180, 1184 (Ariz. 2009) (quoting ARIZ. CONST. art. IX, § 10).

99. *Id.* at 1184.

100. *Id.* The court did not address the plaintiffs' second argument, that the program violated Article II, Section 12 ("the Religion Clause") of the Arizona Constitution because students could use the funds at private, religious schools. *Id.* at 1185 n.4.

101. ARIZ. REV. STAT. ANN. §§ 15-2401-2404 (2013).

scholarships under the predecessor program,¹⁰² are qualified to receive funding if: (1) they attended public school for at least 100 days of the prior fiscal year; (2) they transferred to private schools to participate in an Empowerment Scholarship; (3) they previously received Empowerment Scholarships; or (4) they previously received Arizona Scholarships for Pupils with Disabilities and continue to attend a qualified school.¹⁰³ Once eligibility is established, the state, upon application by the parent of a qualified student, will fund an account with an amount “equivalent to ninety percent of the base support level” provided by the state to the district.¹⁰⁴ The parent has discretion to use the funds to pay for a variety of services for the student, including private school tuition, textbooks, educational therapies or services by licensed or accredited providers, online learning programs, or even tuition for higher education.¹⁰⁵ However, the parent must agree to secure an education for the student in core subjects and to release the school district from all obligations to educate the qualified student.¹⁰⁶

Although scholarships must be renewed on an annual basis, students remain eligible through high school graduation regardless of whether there are “any changes to the student’s multidisciplinary evaluation team plan.”¹⁰⁷ Unused funds in the account after high school graduation may be used for postsecondary educational expenses.¹⁰⁸ Consistent with its treatment of private schools under its earlier disability voucher program, Arizona requires only that qualified schools receiving account funds be located in the state and “not discriminate on the

102. *Id.* § 15-2401(6)(a)(i)-(iii),(v). The program also applies to students who are not disabled, including those who attend schools or school districts that have been assigned a letter grade of D or F, those who are previous recipients of empowerment scholarships, those with guardians or parents on active duty in the armed forces, and those who are wards of the juvenile court and are either residing with prospective permanent placements or have achieved permanency through adoption or permanent guardianship. ARIZ. REV. STAT. ANN. § 15-2401(6)(a)(iv)-(ix) (2013).

103. *Id.* § 15-2401(6)(b)(i)-(iv).

104. *Id.* § 15-2402(C).

105. *Id.* § 15-2402(B)(4). The statute does not permit empowerment account funds to be used to pay for computers, technological devices, transportation, or “consumable educational supplies, including paper, pens, or markers.” *Id.* § 15-2402(B)(6).

106. ARIZ. REV. STAT. ANN. § 15-2402(B)(1)-(2) (2013). The statute retains the school district’s obligation to participate in eligibility evaluations. *Id.* § 15-2404(B)(2).

107. ARIZ. REV. STAT. ANN. § 15-2402(F) (2013).

108. *Id.* § 15-2402(B)(4)(i)-(j).

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basis of race, color, or national origin.”¹⁰⁹ The statute does not require any teacher credentialing or any reports to the state of student progress and achievement in the private schools upon acceptance of a scholarship.¹¹⁰

Within months of its enactment, the Empowerment Scholarship Account program was challenged in state court, raising the same constitutional objections as the earlier litigation in Arizona.¹¹¹ On January 25, 2012, the Superior Court of Maricopa County found the new program distinguishable because:

[t]he exercise of parental choice among education options makes the program constitutional. The monies are earmarked for a student’s educational needs as a parent may deem fit – not endorsed directly to a private institution in an all or nothing fashion.¹¹²

The court summarily rejected the argument that the program constituted an endorsement of religion by the state because “the State is not directing where monies are to go. Any benefit is indirect and not a result of State action.”¹¹³ The case is currently on appeal to the Arizona Court of Appeals.¹¹⁴

III. GENERAL VOUCHER PROGRAMS WITH IMPLICATIONS FOR STUDENTS WITH DISABILITIES

Although the focus of this paper is on those voucher programs that relate specifically to students with disabilities, some legal challenges and developments are in play that relate to general voucher programs impacting special needs students. The following section briefly details these programs.

109. *Id.* § 15-2401(5).

109. *See* ARIZ. REV. STAT. ANN. §§ 15-2401-2404 (2013).

111. *Niehaus v. Huppenthal*, CV 2011-017911 (Ariz. Super. Ct. Jan. 25, 2012), available at <http://goldwaterinstitute.org/sites/default/files/m5077507.pdf>. The suit was filed by the Arizona School Boards Association and the Arizona Education Association, among others. *See* Court of Appeals Division One, *Niehaus v. Huppenthal* 1 CA-CV 12-0242: Appellate Case Information (Apr. 9, 2012), available at <http://apps.supremecourt.az.gov/aacc/appella/1CA%5CCV%5CCV120242.pdf> [hereinafter *Niehaus Appellate Case Information*].

112. *Niehaus*, CV 2011-017911 at *2.

113. *Id.* at *3.

114. *See* *Niehaus v. Huppenthal*, No. 1-CA-CV-12-0242, 2012 WL 4839636 (Ariz. Ct. App. July 9, 2012). *See also* *Niehaus Appellate Case Information*, *supra* note 110.

A. WISCONSIN: MILWAUKEE PARENTAL CHOICE PROGRAM¹¹⁵

The Milwaukee Parental Choice Program (MPCP), which began in the 1990–1991 school year, is one of the oldest and largest voucher programs in the United States.¹¹⁶ Students who reside in the city of Milwaukee and meet income eligibility guidelines are entitled to receive vouchers to attend qualified private schools in the district.¹¹⁷ Participating schools must accept the vouchers as payment in full until the students reach high school, at which time additional fees may be charged in some circumstances.¹¹⁸ The program currently includes more than 100 schools and enrolls nearly 25,000 students in the district.¹¹⁹

Participating private schools are required to accept all applications during open enrollment periods, unless there are more applications than openings, at which point the schools must have random drawings to determine enrollees.¹²⁰ Although private schools may not discriminate against children with disabilities in the admissions' process, a school is only required "to offer . . . those services to assist students with special needs that it can provide with minor adjustments."¹²¹ The Wisconsin Department of Public Instruction urges parents to contact the private schools they are considering for their special needs children to discuss "the services the school is able to provide for their child," as well as their public school district to learn about

115. WIS. STAT. ANN. § 119.23 (West 2013).

116. Cecilia Elena Rouse & Lisa Barrow, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions* 17-18 (Princeton Univ. Educ. Research Section, Working Paper No. 28, 2008), available at <http://dataspace.princeton.edu/jspui/bitstream/88435/dsp01z316q1622/4/28ers.pdf>.

117. § 119.23(2)(a)-(b).

118. *Parental Private School Choice Program (PPSCP-Racine) Frequently Asked Questions – 2013–2014 School Year*, WIS. DEPT OF PUB. INSTRUCTION 2-3 (2013), http://sms.dpi.wi.gov/files/sms/doc/ppscp_faq_2013-14.doc [hereinafter *PPSCP: Frequently Asked Questions*] (Question 5). For example, schools can charge a higher tuition for students in grades nine through twelve if parental income exceeds 220% of the poverty rate. They can also charge for personal items, meals, and extracurricular activities. *Id.*

119. *Milwaukee Parental Choice Program Facts and Figures for 2012-2013*, WIS. DEPT. OF PUB. INSTRUCTION, http://sms.dpi.wi.gov/files/sms/doc/mpcp_13fnf_2012_11.doc (last visited July 2, 2013); *Research Brief: Choice Schools Have Much in Common with MPS, Including Student Performance*, 101 PUBLIC POLICY FORUM 1, 1 (Feb. 2013), http://publicpolicyforum.org/sites/default/files/2013VoucherBrief-Clarified_1.pdf.

120. WIS. STAT. ANN. § 119.23(3)(a) (West 2013).

121. *PPSCP: Frequently Asked Questions*, *supra* note 117, at 4 (Question 11).

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“the lesser services that the school district provides children with special needs who are enrolled in private schools.”¹²²

In 2011, the American Civil Liberties Union (ACLU) and others filed a complaint with the Department of Justice claiming that the Milwaukee Parental Choice Program discriminates against children with disabilities in violation of § 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act (ADA).¹²³ The complaint alleged that the Wisconsin Department of Public Instruction (WDPI) failed to enforce antidiscrimination laws against the private schools participating in the program, and as a result, the “voucher program serv[es] an almost exclusively non-disabled population” and unlawfully segregates students with disabilities.¹²⁴ While more than nineteen percent of the children in Milwaukee public schools have disabilities, only 1.6% of those participating in the voucher program self-reported that they have disabilities.¹²⁵ The complaint also cited anecdotal evidence that the parents of students with disabilities who seek admission to participating private schools are discouraged from applying, and that some enrolled students have been expelled because no protection is provided to these students for behavioral manifestations of their disabilities.¹²⁶

Predictably, the state denied both that it discriminated against children with disabilities and that the number of children participating in the voucher program is as small as represented by the ACLU.¹²⁷ One school official noted that the complainants’ data conflicts with a 2007 survey conducted by the School Choice Demonstration Project at the University of Arkansas, which concluded that nine percent of participating children have disabilities of some kind.¹²⁸ A recent study conducted by

122. *PPSCP: Frequently Asked Questions*, *supra* note 117, at 4 (Question 11).

123. Complaint Under § 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, Am. Civil Liberties Union Found. Racial Justice Program v. Wisconsin (June 7, 2011) [hereinafter Complaint under § 504 and Title II], *available at* http://www.aclu.org/files/assets/complaint_to_doj_re_milwaukee_voucher_program_final.pdf.

124. *Id.* at 4.

125. *Id.* at 10.

126. *Id.* at 14-16.

127. *Complaint About Voucher Program Becomes Battle of Numbers*, www.specialedconnection.com (June 15, 2011).

128. *Id.*

academics from several universities reinforces this position and “estimate[s] that between 7.5[%] and 14.6[%] . . . of MPCP students have disabilities that likely [would] qualify them for special education services were they attending Milwaukee Public Schools (MPS).”¹²⁹ The study concludes that the reported numbers are artificially low because private schools have no financial incentive to identify students with special needs, are less formalized than their public school counterparts, and resist attaching labels to students.¹³⁰

The state’s coverage under § 504 and Title II is clear, as is the requirement that the state cannot discriminate against individuals with disabilities through contractual arrangements.¹³¹ Less clear, however, is the applicability of those statutes to the private schools participating in the program. The federal Office of Civil Rights has concluded in the past that private schools accepting vouchers are neither state contractors subject to Title II, nor recipients of federal funds subject to § 504, so long as federal money is kept separate from the state’s voucher program.¹³² The ACLU complaint nevertheless argued that these schools are covered by § 504 because they receive Title I and nutrition funding, and by Title II because some of the private schools enroll nearly 100% of students receiving vouchers, which transforms those schools into de facto public schools.¹³³

Shortly before this article went to press, the Department of Justice (DOJ) issued a letter to the WDPI that appears to side with the ACLU on this issue, concluding that the WDPI “must do more to enforce the federal statutory and regulatory requirements that govern the treatment of students with disabilities who participate in the school choice program.”¹³⁴ In

129. David J. Fleming, Patrick J. Wolf, & John F. Witte, *When Rights, Incentives, and Institutions All Clash: The Case of School Vouchers and Special Education in Milwaukee 2* (Am. Political Science Assoc. 2012 Annual Meeting Paper, Aug. 2012), available at <http://ssrn.com/abstract=2107763>.

130. *Id.* at 8, 10, 15.

131. See 34 C.F.R. § 104.4(b)(4) (2000).

132. OCR Staff Memorandum, 22 IDELR 669, 671 (July 27, 1990); Letter to Bowen, 35 IDELR 129 (OCR Mar. 23, 2001).

133. Complaint under § 504 and Title II, *supra* note 122, at 3, 20. Interestingly, the complaint makes no mention of the independent obligations under Title III of the ADA that attach to private schools as public accommodations.

134. Letter from the U.S. Dep’t of Justice Civil Rights Div. to Tony Evers, State Superintendent, Wis. Dep’t of Pub. Instruction 1 (Apr. 9, 2013), available at http://www.aclu.org/files/assets/04_09_13_letter_to_wisconsin_dpi_0.pdf [hereinafter

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potentially significant language, DOJ concluded that “the State cannot, by delegating the education function to private voucher schools, place MPCP students beyond the reach of the federal laws that require Wisconsin to eliminate disability discrimination in its administration of public programs.”¹³⁵ DOJ reasoned that government agencies are obligated under Title II to “take appropriate steps . . . to prohibit discrimination against individuals with disabilities, regardless of whether services are delivered directly by a public entity or provided through a third party.”¹³⁶

In addition to policing private schools for compliance with Title II, DOJ directed WDPI to (1) establish a complaint procedure relating to the treatment of children with disabilities in the school choice program; (2) collect data about the program to enable DOJ to determine “how and to what extent students with disabilities are being served by voucher schools[;]” and (3) conduct outreach to the parents of students with disabilities to educate them.¹³⁷ DOJ also mandated that WDPI ensure that schools do not discourage students with disabilities from applying, reject students who have applied, or dismiss students from their programs prior to determining whether there are any “reasonable modifications to school policies, practices or procedure that could enhance the school’s capacity to serve that student.”¹³⁸ WDPI is tasked with reporting any violations of the ADA by private schools to DOJ and providing ADA training to all new and existing schools that participate in the voucher program.¹³⁹

A detailed examination of the implications of the DOJ letter is beyond the scope of this Article. There is no question, however, that the letter’s assumption that Title II of the ADA applies to private schools accepting voucher funding is highly significant and may be far-reaching. DOJ’s language is not restricted to the Milwaukee Parental Choice Program and would seem to apply to all publicly-funded voucher programs.¹⁴⁰ Moreover, DOJ’s

Letter to Tony Evers].

134. Letter to Tony Evers, *supra* note 133, at 2.

135. *Id.*

136. *Id.* at 3-4.

137. *Id.* at 4.

138. Letter to Tony Evers, *supra* note 133.

139. The ACLU apparently has already taken this position. See *Justice Department Says State Voucher Programs May Not Discriminate Against Students with Disabilities*, AMERICAN CIVIL LIBERTIES UNION (May 2, 2013) (“[T]he DOJ

position in the letter seemingly contradicts existing state and federal precedent holding that students are “parentally-placed” when they participate in voucher programs, such that state and federal laws applicable to governmental entities do not apply.¹⁴¹ Further research is needed to explore fully the implications of this significant development.

B. LOUISIANA: STUDENT SCHOLARSHIPS FOR EDUCATIONAL EXCELLENCE PROGRAM¹⁴²

Similar litigation may be brewing in Louisiana as a result of its adoption of a general voucher program in 2012, which has become one of the largest voucher programs in the country.¹⁴³ The Student Scholarships for Educational Excellence Program began as a pilot for Orleans Parish, and became an ongoing statewide program beginning in the 2012–2013 school year.¹⁴⁴ Low-income students who are entering kindergarten, or who were enrolled in a public school the prior year that received a grade of C, D, or F under the state’s accountability system, are eligible to receive vouchers equal to the per-pupil funds allocated to school districts or the cost of tuition at the private school, whichever is less.¹⁴⁵ Participating schools are required to accept the vouchers as payment in full.¹⁴⁶

Unlike many voucher programs, Louisiana’s program requires students receiving money to take all state standardized assessments.¹⁴⁷ The state Department of Education must publish

firmly establishes that the Americans with Disabilities Act applies to voucher programs, with potentially far-reaching impact across the country.”), <http://www.aclu.org/racial-justice/justice-department-says-state-voucher-programs-may-not-discriminate-against-students>.

140. See Hensel, *supra* note 5, at 316-21; Patrick J. Wolf, *School Choice and Students with Disabilities in Milwaukee*, EDUCATIONNEXT (May 16, 2013), <http://educationnext.org/school-choice-and-students-with-disabilities-in-milwaukee/>.

142. LA. REV. STAT. ANN. §§ 17:4011-4025 (2012).

143. The *Washington Post* called the program “potentially the country’s largest,” allowing “some 450,000 students,” or more than half the students in Louisiana, to participate. Valerie Strauss, *Why a Louisiana Judge Ruled School Vouchers Unconstitutional*, WASH. POST (Nov. 30, 2012, 5:57 PM), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2012/11/30/why-a-louisiana-judge-ruled-school-vouchers-unconstitutional/>.

144. SCHOOL CHOICE PILOT PROGRAM FOR CERTAIN STUDENTS WITH EXCEPTIONALITIES, H.B. 911, 38th Sess. (La. 2012).

145. §§ 17:4013(2), 17:4016(A).

146. *Id.* § 17:4022(4).

147. *Id.* § 17:4023.

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these results annually, along with graduation, retention, and parental satisfaction rates for participating private schools.¹⁴⁸ However, the state has been critiqued for establishing insignificant consequences for participating schools with voucher students who perform poorly on these assessments, and for exempting approximately seventy-five percent of participating schools from public reporting because of size.¹⁴⁹ Many have also found it problematic that the majority of participating schools are “small Christian schools,” many of which have a track record of using evangelical curriculums in conflict with modern scientific theories.¹⁵⁰

The Louisiana scholarship program is open to all eligible students, including those with disabilities.¹⁵¹ If students with disabilities choose to participate and enroll in schools with demonstrated capacities to offer special education services, those students are entitled to additional scholarship funding in an amount equal to the cost of providing those services to participants.¹⁵² To establish a “demonstrated capacity,” schools must have existed and provided services to students with disabilities for at least two years, and deliver educational services by teachers who hold “appropriate certification in special education . . . in accordance with a student’s Individual Education Plan.”¹⁵³

148. LA. REV. STAT. ANN. § 17:4015(7) (2012).

149. See, e.g., Stephanie Simon, *Louisiana Sets Rules for Landmark School Voucher Program*, REUTERS (July 23, 2012, 8:26 PM), <http://www.reuters.com/article/2012/07/24/us-usa-education-louisiana-idUSBRE86N00J20120724> (noting

[S]chools will not be penalized for poor scores on state standardized tests if they have fewer than [forty] voucher students enrolled in the upper elementary or secondary grades. Those schools can continue to receive state funds even if their voucher students fail to demonstrate basic competency in math, reading, science and social studies.).

150. *Id.* See also Strauss, *supra* note 142 (noting that some schools in the program “use [a] curriculum that promotes Young Earth Creationism, the belief that Earth is no older than 10,000 years old – and that human beings lived alongside dinosaurs People are free to ignore science at will, but that doesn’t mean they should get public tax dollars to do it.”).

151. LA. REV. STAT. ANN. §§ 17:4012(6), 17:4016(A) (2012).

152. *Id.* § 17:4016(B)(1)-(2).

153. *Id.* § 17:4016(2). Schools in this category are permitted to charge more for recipients receiving special education services. *Id.* § 17:4016(B)(2); LA. ADMIN. CODE tit. 28, pt. CLIII, § 501(F) (2013). The total amount awarded to the student, however, cannot exceed what the state would have provided to a local school system if the student attended public school. LA. REV. STAT. ANN. § 17:4016(B)(2) (2012).

Notably, the program adopts an open admissions process for enrollment, and private schools do not have control over which students are admitted.¹⁵⁴ All schools are required to indicate the services they are able and willing to provide to students with disabilities, but need not offer special education services or implement a child's IEP upon enrollment.¹⁵⁵ Moreover, in order to enroll, the parents of all special needs students "shall acknowledge in writing, as part of the enrollment process that [they agree] to accept only such services as are available to all students enrolled in the nonpublic school."¹⁵⁶ To the extent that this provision requires students to waive any rights they have to a free, appropriate public education under the IDEA, Louisiana's statute is similar to other state programs approved by the Office of Civil Rights of the U.S. Department of Education.¹⁵⁷ However, a broad reading of the word "services" could mean that students are also required to relinquish their rights under Title III of the Americans with Disabilities Act, which imposes a positive obligation on private schools to make reasonable modifications to policies, practices, and procedures where such modifications are necessary for a student with disabilities and do not represent a fundamental alteration of the academic program.¹⁵⁸ The language of the Louisiana statute suggests that students must accept the school's status quo regardless of whether modifications can be made. The statute also provides that "a participating school is required to offer only those services that it already provides or such services as necessary to assist students with special needs that it can provide with minor adjustments."¹⁵⁹ Interestingly, this mimics the legal language of § 504, which typically does not apply to private schools accepting school vouchers from the state unless they are receiving federal funding from another program.¹⁶⁰

To date, few Louisiana schools accepting voucher students have chosen to offer special education services. Of the 125

154. LA. REV. STAT. ANN. § 17:4022(1) (2012). A random selection process is implemented if there are more students that wish to enroll in a school than there are available spaces. *Id.* § 17:4015(3)(b).

155. *Id.* § 17:4016(3)(a)-(b).

156. *Id.* § 17:4016(B)(1).

157. See Hensel, *supra* note 5, at 316-18 (discussing OCR consideration of this issue).

158. 42 U.S.C. § 12182(B)(2)(A)(ii) (1990).

159. LA. REV. STAT. ANN. § 17:4016(B)(3)(a) (2012).

160. OCR Staff Memorandum, *supra* note 131, at 671-73.

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participating private schools in the 2012–2013 school year, only six fell into this category.¹⁶¹ This has led to significant critique from disability advocates in the state, and to a series of claims that mirror those brought in Wisconsin against the Milwaukee Parental Choice Program.¹⁶² Advocates argue that Louisiana has created a dual system of education that segregates children with disabilities and denies them the right to participate in public programs.¹⁶³ Already, anecdotal evidence indicates that students with disabilities are discouraged by private schools from applying and are given the message that the schools will be unable to meet these students' needs.¹⁶⁴

The likelihood that Louisiana will see legal challenges similar to those raised in Wisconsin has diminished, however, as the result of a recent constitutional challenge against the program. In 2012, Louisiana's two largest teacher unions and the state's school board association filed suit claiming that the Student Scholarships for Educational Excellence Program violates a number of Louisiana constitutional provisions, including Article VIII, § 13(b), because of the way the program is funded by the legislature.¹⁶⁵ Section 13(B) establishes a "Minimum Foundation Program" (MFP) to "equitably allocate . . . funds to parish and city school systems" to ensure "a minimum foundation of education in all public elementary and secondary schools."¹⁶⁶ The plaintiffs argued that the scholarship program violated this provision because it transferred funding from the MFP to private schools, which are not contemplated by

161. Pamela Fischer, *Louisiana's School Voucher Program a Challenge for Students with Disabilities*, ADVOCACY CENTER (Aug. 16, 2012, 8:30 AM), <http://www.advocacyla.org/index.php/news-reader/items/louisianas-school-voucher-program-a-challenge-for-students-with-disabilities.html>; Barbara Leader, *Some Kids Being Left Behind?*, THE NEWS STAR (Jan. 10, 2013), <http://www.thenewsstar.com/article/20120721/NEWS01/130110037/Some-kids-being-left-behind->.

162. See *supra* Section III(A).

163. See, e.g., Zoe Sullivan, *Vouchers No Quick Fix for Disabled Students in Louisiana*, NEW AMERICA MEDIA (Aug. 20, 2012) (noting that "advocates believe the new voucher program will only make matters worse" for kids with disabilities in Louisiana), <http://newamericamedia.org/2012/08/louisianas-voucher-program-fails-disabled-students.php>; Leader, *supra* note 160.

164. Leader, *supra* note 160.

165. See *La. Fed'n of Teachers v. Louisiana*, No. 612, 733, 2012 WL 6220138 (La. Dist. Ct. Nov. 30, 2012).

166. LA. CONST. art. VIII, § 13(B).

the Louisiana Constitution.¹⁶⁷

The district court agreed, declaring the program to be unconstitutional as currently construed.¹⁶⁸ Significantly, however, the court made clear that it was “not suggesting that the State is prohibited from providing funding to nonpublic schools or nonpublic educational opportunities, but rather, that . . . [t]he funding . . . must come from some other portion of the general budget” rather than from the MFP.¹⁶⁹

Just as this article was going to press, the Louisiana Supreme Court upheld the decision of the lower court and struck down the scholarship program as unconstitutional because of its use of MFP funds.¹⁷⁰ The court’s decision is a clear setback for proponents of school choice in Louisiana. Nevertheless, the legislature could correct the constitutional deficiencies by funding the program through an alternative source. Louisiana Governor Bobby Jindal has vowed to “continue [to] fight” to keep the program a viable option for Louisiana’s children,¹⁷¹ and the legislature is currently considering alternative funding mechanisms.¹⁷² Thus, the program is likely to continue to impact the education of children with disabilities in Louisiana, creating the potential for future legal challenges under the ADA and § 504.¹⁷³

167. *La. Fed’n of Teachers*, 2012 WL 6220138 at *13.

168. *Id.* at *23.

169. *Id.* at *20.

170. *La. Fed’n of Teachers v. Louisiana*, Nos. 2013-CA-0120, 2013-CA-0232, 2013-CA-0350, 2013 WL 1878913 at *3 (La. May 7, 2013). The court also found the 2012-2013 MFP invalid because the legislature did not follow the appropriate procedures mandated by law, overruling the lower court on this issue. *Id.*

171. Joe Gyan, Jr., *Judge Rules Voucher Funding Is Unconstitutional*, THE ADVOCATE (Dec. 3, 2012), available at <http://theadvocate.com/home/4557918-125/judge-to-rule-friday-in>. In fact, the Louisiana Department of Education continues to encourage participation in the program, notwithstanding the pending case. A spokesperson stated that “[a]ll children currently in the voucher program [can] continue to attend their nonpublic schools,” and noted that “parents can start signing their children up in February” to participate in the 2013-2014 school year. Danielle Dreilinger, *School Voucher Case Moves to Louisiana Supreme Court*, TIMES-PICAYUNE (Jan. 4, 2013, 6:36 PM), http://www.nola.com/education/index.ssf/2013/01/new_bese_president_advocates_v.html (quoting Barry Landry).

171. Danielle Dreilinger, *Shakeout from School Voucher Ruling by Louisiana Supreme Court Begins*, TIMES-PICAYUNE (May 15, 2013, 9:51 PM), http://www.nola.com/education/index.ssf/2013/05/shakeout_of_high_court_school.html.

173. *La. Fed’n of Teachers v. Louisiana*, Nos. 2013-CA-0120, 2013-CA-0232, 2013-

IV. NEW EVIDENCE ON EFFECTIVENESS OF PROGRAMS

My earlier article on school vouchers in 2010 included a comprehensive discussion of both the pitfalls and potential promise of voucher programs for students with disabilities.¹⁷⁴ Since publication of that article, the evidence continues to grow urging a cautious approach towards vouchers for this population. The following section briefly touches on two of these new developments.

A. STUDENT ACHIEVEMENT

One of the key critiques of all school voucher programs, particularly those directed at students with disabilities, is the absence of accountability measures for student achievement in many states. To date, Ohio has the only voucher program directed at students with disabilities that requires standardized testing.¹⁷⁵ Although students with disabilities may be tested when they participate in general voucher programs like the Milwaukee Parental Choice Program,¹⁷⁶ the small number of enrollees with disabilities can call the validity of these results into question.

Georgia's Special Needs Scholarship Act, adopted in 2007, does not require standardized testing of students with disabilities who enroll in the program.¹⁷⁷ The state does, however, require private schools that educate these students to conduct pre-assessments and post-assessments of students in the areas of reading and math, the results of which they must report to the Georgia Department of Education on a yearly basis.¹⁷⁸ Schools select their own assessment measures, making it difficult, if not impossible, to draw meaningful conclusions from the data or to evaluate the performance of comparator public school students with disabilities.¹⁷⁹ Under any measure, however, the following

CA-0350, 2013 WL 1878913 (La. May 7, 2013).

174. Hensel, *supra* note 5, at 321-49.

175. *See supra* Section II(C).

176. WIS. STAT. ANN. § 119.23(7)(e) (West 2011).

177. GA. CODE ANN. §§ 20-2-2111-2118 (West 2012).

178. Georgia Dep't of Educ., *Georgia Special Needs Scholarship Program End of School Year Report 2011-2012 School Year 2* (Dec. 1, 2012), http://gosa.georgia.gov/sites/gosa.georgia.gov/files/related_files/document/GA_Special_Needs_Program_Report_11-12.pdf.

179. *Id.*

results from 2011–2012 would seem troubling.

Georgia schools must report the progress each student has made over the course of the academic year as falling into one of four categories: (1) no progress, (2) progress less than one year, (3) progress of one year, and (4) progress of more than one year.¹⁸⁰ In the 2011–2012 school year, private schools reported the following results relating to 2,537 students in math and 2,544 students in reading:¹⁸¹

Progress Achieved	None	< 1 year	1 year	> 1 year
2011–2012				
MATH	13%	26%	37%	23%
READING	12%	27%	38%	23%

Although it is encouraging that at least sixty percent of the children made progress of one year or more than one year in these core subjects while enrolled in private schools, it is problematic that forty percent did not. Of particular concern are those students reported as having made no progress at all in these subjects for an entire academic year. Because these numbers are self-reported by the private schools and reflect assessments the schools themselves chose to administer, it is plausible that standardized testing would reveal that the actual number of students with limited progress is even higher. Such results comport with the anecdotal stories of parents who have discovered, upon returning their children with disabilities to public schools after participating in voucher programs, that their children were several grade levels behind their peers, despite having received favorable progress reports from the private schools.¹⁸²

180. Georgia Dep't of Educ., *Georgia Special Needs Scholarship Program End of School Year Report 2011-2012 School Year 2* (Dec. 1, 2012), http://gosa.georgia.gov/sites/gosa.georgia.gov/files/related_files/document/GA_Special_Needs_Program_Report_11-12.pdf.

181. *Id.*

182. See, e.g., Gus Garcia-Roberts, *McKay Scholarship Program Sparks a Cottage Industry of Fraud and Chaos*, MIAMI NEW TIMES (June 23, 2011), <http://www.miaminewtimes.com/2011-06-23/news/mckay-scholarship-program-sparks-a-cottage-industry-of-fraud-and-chaos/>.

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Is it important to note that these results are limited to one state (Georgia) participating in vouchers and reported in a very limited format. Moreover, one study in Florida concluded that the existence of a Florida special needs voucher program has had a positive influence on the math and reading performance of students left in public schools, although admittedly only a “very modest” one.¹⁸³ Nevertheless, these results reinforce the pressing need for further investigation into the impact of these programs on the academic achievement of students with disabilities who elect to participate in voucher programs, as well as on those students left behind in public schools.

B. DISABILITY COMMUNITY’S PERCEPTION OF SPECIAL NEEDS VOUCHERS

At the time my last article was published in July 2010, there was no clear consensus among disability advocates or parents of children with disabilities about whether to embrace the special needs voucher movement. Since then, however, a number of groups have gone on record as opposing or having significant reservations about the adoption of such programs, despite the fact that parental satisfaction of participants appears to remain quite high.

In 2012, the Council on Disability issued a progress report that addressed the current state of education for children with disabilities.¹⁸⁴ The report begins with the premise that “[s]chools in which students with and without disabilities learn side by side are essential to quality educational outcomes for all students,” and cautions against the “failed segregation practices of decades past.”¹⁸⁵ The report identifies “several areas of concern” with special needs voucher programs in this regard, and urges the U.S. Department of Education and the U.S. Department of Justice “to clarify civil rights violations that may be linked to creating a publicly financed (in whole or in part) segregated educational

183. See Marcus A. Winters & Jay P. Greene, *Public School Response to Special Education Vouchers: The Impact of Florida’s McKay Scholarship Program on Disability Diagnosis and Student Achievement in Public Schools*, 33 EDUCATIONAL EVALUATION AND POLICY ANALYSIS 138, 156 (June 6, 2011), available at <http://epa.sagepub.com/content/33/2/138.abstract?rss=1>.

184. NAT’L COUNCIL ON DISABILITY, NATIONAL DISABILITY POLICY: A PROGRESS REPORT (2012), available at http://www.ncd.gov/rawmedia_repository/7f96ce1b_6ab9_45e0_8bfc_adbeaa29412b?document.pdf [hereinafter NCD 2012 Progress Report].

185. *Id.* at 53.

system for students with disabilities.”¹⁸⁶ The Council argues that the “[r]eceipt of public funds, vouchers or scholarships should not require students with disabilities to surrender their rights under the Individuals with Disabilities Education Act or the Americans with Disabilities Act” as currently required in virtually every state,¹⁸⁷ a position consistent with that taken by many other advocacy groups.¹⁸⁸

Notably, moreover, disability groups have begun to figure prominently in legislative debates over the adoption of special needs vouchers—typically on the side of those who oppose the programs. In Wisconsin, for example, an organization called Disability Rights Wisconsin has argued passionately, both in the media and at legislative hearings, against the adoption of special needs voucher legislation, contending that the proposed programs are an “effort to dismantle special education as we know it”¹⁸⁹ That organization has joined forces with the three largest disability advocacy groups in the state to wage a public campaign making clear that vouchers will not benefit children with disabilities.¹⁹⁰ Similar activity is taking place in Texas, where the legislature has unsuccessfully attempted to pass a special needs voucher bill for several years.¹⁹¹

186. NCD 2012 Progress Report, *supra* note 183, at 60-61 (recommendation 2.6).

187. *Id.* at 60 (recommendation 2.5).

188. See, e.g., Nat’l Ctr. for Learning Disabilities, *Issue Brief: Voucher Programs*, <http://www.nclld.org/images/content/files/hill-briefs/voucher-programs-brief-template.pdf> (last visited May 21, 2013) (“NCLD opposes the use of federal funds for voucher programs”); Brian Moon, *Disability Rights Groups Oppose Voucher Proposal*, WISCONSIN RADIO NETWORK (Mar. 11, 2013), <http://www.wrn.com/2013/03/disability-rights-groups-oppose-voucher-proposal/> (quoting the Wisconsin Board for People with Developmental Disabilities as stating that “there are no ‘federal protections in place’ for disabled students attending private schools, ‘[s]o [private schools] can tell families that they offer certain things—teachers, curriculum, specialists—and not deliver on any of that.”).

189. *Special Needs Scholarships: Myths and Facts about AB 110*, DISABILITY RIGHTS WISCONSIN (May 2, 2011), http://www.weac.org/Libraries/PDF/Myths_and_Facts-Special_Needs_Scholarships.sflb.ashx; Rona Statman, Comments to the Texas Senate on Behalf of the Arc of Texas Regarding SB1000, THE ARC OF TEXAS, *available at* <http://www.senate.state.tx.us/75r/senate/commit/c530/handouts07/0327-SB1000-Rona-Statman.pdf> (last visited May 21, 2013) (“The Arc of Texas and the vast majority of other statewide disability organizations do not believe a voucher program is the answer.”).

190. See, e.g., *Statewide Disability Groups Share Legislators’ Concerns About Special Needs Vouchers*, THE WHEELER REPORT (Mar. 7, 2013), http://www.thewheelerreport.com/wheeler_docs/files/0307disabilitygroups.pdf.

191. See, e.g., *Reasons to Oppose Private School Vouchers*, TEXAS PTA (2012)

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This increasing opposition by disability groups stands in contrast to the reality that many parents of children with disabilities who elect to take vouchers are pleased with these programs and believe that private schools are meeting the special needs of their children. In a very small study in Georgia, for example, ninety-eight percent of the surveyed parents concluded that they were “very satisfied” or “satisfied” with their children’s academic performance in private school, compared to twenty percent that were “very satisfied” or “satisfied” with the performance of their former public school.¹⁹² Although there are a number of reasons to question the significance of such results,¹⁹³ they are consistent with satisfaction surveys conducted in other states, and they suggest that voucher programs are successful for at least some of the children with disabilities who participate.¹⁹⁴ Notably, the number of children participating in existing programs continues to grow each year, suggesting that these programs continue to be popular with parents.¹⁹⁵ Additional evaluation, including comprehensive studies of large samples of parents, is needed to fully determine whether this perception holds true across a broader section of participating parents, and whether the parents of children who remain behind in public school are equally enthusiastic about the impact that such programs have on their children.

V. CONCLUSION

There is no question that the number of states offering private school vouchers to students with disabilities will continue to grow, and that the effectiveness and desirability of those

(noting that “[m]ajor advocacy groups for people with disabilities, Advocacy Inc. and the ARC of Texas, oppose creating a voucher program for students with autism”), <http://www.txpta.org/public/upload/files/Legislative/2012/two-pager%20-%20voucher%20programs%20and%20voucher%20program%20for%20students%20w%20autism.pdf>; Comments by Rona Statman, *supra* note 188.

192. Patrick Kaiser, *Special Needs, Exceptional Results: 2012 Survey of Families Receiving the Georgia Special Needs Scholarship*, CENTER FOR AN EDUCATION GEORGIA 2 (Aug. 2012), *available at* http://heartland.org/sites/default/files/specialneeds_surveyreport2012.pdf.

193. *See* Hensel, *supra* note 5, at 332-35 (explaining that parental satisfaction surveys do not take into account the feelings of parents remaining in public school and may be the result of the limited accountability measures in place at private schools).

194. *Id.* at 333 n.262 (discussing positive survey results in Utah and Florida).

195. In Georgia, for example, participation has increased by 400-500 students during each year that its program has been in existence. Kaiser, *supra* note 191, at 4

programs will be debated by advocates of school choice, students with disabilities, and the broader community. Notably lacking from this discussion is empirical data evaluated by disinterested parties. To assess whether such programs advance the interests of this vulnerable population, studies must be conducted to evaluate the test scores, graduation and retention rates, harassment reports, and similar measures of success, both for students accepting vouchers and for those who remain in public schools. The federal government should likewise thoughtfully consider and clarify the legal expectations that attach to private schools receiving significant funding from states with voucher programs, as well as the impact of the required waiver of students' rights under the IDEA and ADA. Children with disabilities and their parents deserve clear evidence of the positive and negative consequences of public policy decisions purportedly made for their benefit.