

# 12 Myths and Realities about Private Educational Choice Programs

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## Introduction

Educational choice programs—defined broadly as programs that provide parents financial aid to opt their children out of the traditional public school system—have been a topic of significant public discussion and debate in recent months. Despite the increasing news coverage, however, polls show that most Americans are unfamiliar with educational choice programs.<sup>2</sup> Opponents of educational choice continually seek to take advantage of this knowledge gap by promoting various myths in an effort to deter legislators and policymakers from enacting educational choice programs.

In this white paper, the Institute for Justice (IJ), the nation’s leading law firm dedicated to protecting educational choice programs in courts all across the country, seeks to dispel and disprove 12 of these myths so that legislators and the public can make well-informed decisions about the merits of giving parents more control over their children’s education.

The reality is that our present system of delivering publicly funded education is in need of real and dramatic reform. Educational choice programs shift power from

the bureaucrats at state departments of education, as well as school districts and unions, and return that power to parents, who know better than government officials what kind of educational environment will best suit their children’s needs.

IJ recognizes that choice-driven competition is an essential ingredient to any education reform effort that hopes to spur innovation, personalize education, and offer students the opportunity to graduate from high school, attend college or a technical school, find a good job, and pursue their own American Dream. This white paper, therefore, is a robust defense of educational choice programs. It is designed to arm policymakers and legislators with easy access to the abundant sources of information and data that confirm that educational choice programs are not only constitutional, but that they can accomplish their intended purpose of improving the lives of and learning opportunities for America’s youth.



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# A Word about Terminology

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

This paper uses the phrase “educational choice program” rather than “school choice program” because of the growing popularity of programs that provide families with more than private school tuition aid. Programs in Arizona, Florida, Mississippi, Nevada, New Hampshire, North Carolina, and Tennessee, for example, provide families with financial assistance to offset costs including curricula for home education, tutors, and educational therapies—such as speech and occupational therapy—as well as for private school tuition.

The phrase “educational choice program” thus denotes programs that provide parents with the means to choose a variety of private educational options for their children instead of sending them full-time to traditional or chartered public schools.

Within the traditional public school system there is a slowly increasing tendency to provide greater parental choice through inter- and intra-district transfer options, chartered schools, online schools, and magnet schools. Although IJ does not oppose those measures, they are frequently insufficient because they present no real competitive challenge to the traditional public school system’s monopoly over students whose parents cannot afford to either move to a better school district or send their children to private schools.

There are four basic ways of delivering educational choice.

First, publicly funded scholarships, often referred to as vouchers, may be given directly by the government to parents. Parents may then select the private (and sometimes public) school of their choice, using the scholarship as partial or total payment, depending on the terms of the particular program.

Second, scholarships may be awarded by private scholarship-granting organizations, rather than directly from the government, and funded by private donations from individuals or corporations that make the taxpayer eligible to claim a tax credit, most often against their income taxes. These private scholarship-granting organizations are usually required to be 501(c)(3) nonprofit organizations. In other words, individuals or companies can reduce their annual tax liability to the state by making a donation to a qualified scholarship-granting organization that will use that money to provide scholarships to eligible families.

Third, personal tax deductions or credits can be given directly to parents for the cost of tuition paid to either a private school or an out-of-boundary public school—or for other education-related expenses paid out of parents’ pockets. Since the cost of tuition often far exceeds parents’ tax-liabilities, parental tax credits and deductions typically do not spur the sort of participation necessary to generate genuine competitive pressure on the public school system and thus have not been a particularly successful or compelling form of educational choice. If the tax credits were made refundable, however, essentially transforming the program into a hybrid type of publicly funded scholarship program, it could spur more participation than a typical personal deduction or tax credit program.

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

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

Although the vast majority of children are educated in traditional public schools that are operated by local school districts, a growing number of children are educated in schools that are operated by private individuals or companies (both for-profit and non-profit) pursuant to a charter with an appropriate chartering entity. These chartered schools (or charter schools as they are known colloquially) are public schools and are therefore subject to more regulation than private schools. One of the primary strengths of chartered public schools is that they are often not unionized, allowing the chartered schools to put the interests of students ahead of those of teachers and their unions. Although chartered public schools typically have some flexibility in their curriculum offerings and pedagogical approach, thus differentiating their offerings from public district schools, they are not private schools and are subject to significant state regulations and oversight. The distinction between traditional and chartered public schools, however, is real and this paper acknowledges those differences rather than merely lumping all public schools into the same category.

## **Myth #1: Educational choice programs take money from an already underfunded public school system.**

Reality #1: No empirical study has ever found an educational choice program to cause a negative fiscal impact on either taxpayers or public schools. Moreover, inflation-adjusted funding for traditional public schools has skyrocketed in the past 40 years, with no appreciable learning gains, and there is no evidence to suggest that spending even more would produce better educational outcomes.

Educational choice programs do not divert or take a single dollar from public schools—they simply allow funds to follow students, just as funds do whenever a child moves between school districts or enrolls in a chartered public school.<sup>4</sup> Indeed, any time a family moves out of state, decides to educate their child at home, or transfers their student from a public school to a private school, the state eventually stops sending public dollars to the student's prior public school.<sup>5</sup> Thus, with or without educational choice programs, public schools only receive funding for pupils actually enrolled in those schools. Moreover, there have been 28 empirical studies of the fiscal impact of educational choice programs on taxpayers and public schools.<sup>6</sup> Twenty-five of those studies found the programs saved the state money and three found the programs were revenue-neutral.<sup>7</sup> No empirical study has ever found a negative fiscal impact.<sup>8</sup>

Additionally, there is no empirical evidence to suggest that our nation's public school systems would improve if more money were spent on those systems.<sup>9</sup> On the surface, the myth that public school systems are underfunded seems plausible because so many schools do not perform well.<sup>10</sup> But the proper question to ask is whether additional spending would improve student academic performance. As a starting point, spending on public education has been increasing steadily for over 50 years. Inflation adjusted per-pupil funding for traditional public schools has nearly octupled since the end of World War II.<sup>11</sup> And between 1970 and 2001, inflation adjusted spending more than doubled from \$4,479 to \$8,745.<sup>12</sup> If significant

increases in spending produced better results, we should have seen significant improvement over this period of time.<sup>13</sup> And yet, academic performance has remained stagnant in the forty year period between 1970 and 2010.<sup>14</sup>

The most recent example of pouring more money into our nation's failing public school system with no appreciable effect on academic achievement is the Obama Administration's School Improvement Grant Program. A U.S. Department of Education study released by the Obama Administration itself found that the program, which poured \$7 billion into the nation's worst performing public schools, failed to produce any meaningful results.<sup>15</sup> Schools receiving program funds showed no significant improvement in test scores, graduation rates, or college enrollment compared with similar schools not receiving the funds.<sup>16</sup>

## **Myth #2: Not only is there no evidence that educational choice programs improve academic outcomes for students who participate in the programs, but recent studies show that such programs actually harm academic performance.**

Reality #2: The overwhelming preponderance of existing empirical evidence demonstrates that educational choice programs improve academic outcomes for those who participate in the programs.

The existing research on the impact of educational choice programs on participating students' academic performance can be summarized as follows:

Eighteen empirical studies have examined academic outcomes for school choice participants using random assignment, the gold standard of social science. Of those, 14 find choice improves student outcomes: six find all students benefit and eight find some benefit and some are not visibly affected. Two studies find no visible effect, and two studies find Louisiana's voucher program—where most of the eligible private schools were scared away from the program by an expectation of hostile future action from regulators—had a negative effect.<sup>17</sup>

In addition to the Louisiana studies mentioned in the summary, a later study in Indiana also showed negative effects on participating students' achievement in the first few years of the program.<sup>18</sup> Encouragingly, however, trends both in Louisiana and Indiana are on an upward trajectory.<sup>19</sup> The studies released in 2017 of students in Louisiana and Indiana, whose test scores had dropped after their first few years participating in educational choice programs, now show that those students are making real and steady learning gains and are performing on par with their public

school peers.<sup>20</sup> The most recent studies also show that the students participating in the programs are often transferring from the lowest performing public schools.<sup>21</sup> It is not surprising that, in the early years, there may be a transition effect as students adjust to their new schools. Nor is it surprising that test scores rise in later years, as students adapt to their new learning environments.

Moreover, academic performance is just one measure of student achievement. There are other important measures that educational choice programs also impact positively, such as high school graduation rates, college enrollment, civic engagement, parental and student satisfaction rates, and even cost savings to states and municipalities.<sup>22</sup> There is simply no research that should cause policymakers alarm regarding decreased academic performance for students participating in well-designed educational choice programs. To the contrary, the bulk of the evidence demonstrates that these programs improve academic performance.

### **Myth #3: There is no evidence that market-driven competition from educational choice programs encourages traditional public schools to improve.**

Reality #3: There is abundant evidence that competition works and encourages traditional public schools to improve.

There have been 34 empirical studies of the effects of educational choice programs on traditional public schools.<sup>23</sup> The overwhelming majority—32—found that educational choice programs have a positive effect on such schools, while one found no effect and one found a negative effect.<sup>24</sup>

Numerous evaluations of Florida’s A+ Scholarship Program, in which students at chronically failing public schools could obtain scholarships to transfer to better performing public or private schools, found that the program raised achievement in Florida’s worst performing public schools and that the schools facing the greatest competition made the greatest academic gains.<sup>25</sup> The increased choices provided to students who were previously unable to afford to switch schools prompted changes in the institutional practices of traditional public schools, which were followed by improvements in test scores.<sup>26</sup>

The competition injected by Milwaukee’s Parental Choice Program yielded similar benefits for that city’s traditional public schools. “The scores of the students in . . . the schools facing the most potential competition from vouchers . . . improved by more in every subject area tested than did the scores of the students facing less or no competition from vouchers.”<sup>27</sup> Studies of educational choice programs in Indiana, Louisiana, Maine, and Vermont have likewise documented the positive effects that competition from choice can have on traditional public schools.<sup>28</sup>

Tellingly, the one study that found no effect on traditional public schools was a study of the very small Washington, D.C., Opportunity Scholarship Program—the country’s only educational choice program that allocates additional money to traditional public schools, thus insulating them from competition.<sup>29</sup> And in the lone study that found a negative effect on traditional public schools, the authors acknowledged that they “are not currently able to explain” their finding.<sup>30</sup>

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

## **Myth #4: Only the best and brightest students from affluent families benefit from educational choice programs, thus leaving the most disadvantaged and difficult to educate students in the public school system.**

Reality #4: Educational choice programs primarily aid disadvantaged students, especially those with special needs or from low-income backgrounds.

Affluent parents already exercise two forms of educational choice, by choosing to live in neighborhoods with good public schools or by choosing to pay to send their children to private schools. Thus, educational choice programs are frequently designed specifically with special-needs and low-income students in mind. As of 2017, 24 of the 50 choice programs across the country limit eligibility to low-and moderate-income families.<sup>31</sup> Another 18 programs limit eligibility to children with special needs and several more give additional consideration to such students.<sup>32</sup> Even programs that do not means-test participants may still prioritize low-income families.<sup>33</sup> And many programs are designed so that a significant portion of the eligible students must be transferring from a public school. This is the case for 20 of the 50 programs in 2017.<sup>34</sup>

In Florida, for example, tens of thousands of families participate in the state's John M. McKay Scholarship for Students with Disabilities Program. Under the McKay Program, parents are provided with a scholarship (worth about the same amount the state would have spent to educate the participating child in a public school) which they may use at a private or public school of their choice.<sup>35</sup> Since its inception in 2000, the program has enjoyed tremendous popularity amongst parents,<sup>36</sup> growing from two participants in its first year to over 30,000 today.<sup>37</sup> Several states have developed similar educational choice opportunities for students with disabilities to replicate the successes of Florida's McKay Program.<sup>38</sup> And still others have created programs for students with specific disabilities, like Ohio and Mississippi, which have enacted programs to benefit students with autism and dyslexia, respectively.<sup>39</sup>

In addition to serving students with disabilities, educational choice programs provide opportunities for students from all income classes and backgrounds. Contrary to what many educational choice opponents argue, educational choice programs do not discriminate against low-income or under-served students. Just the opposite, educational choice programs primarily benefit low-income students—those who would otherwise be consigned to whatever education their school district provides. For example, in Indiana alone, over 34,000 students in 2017 used publicly funded scholarships, the eligibility for which was limited to students with disabilities and students from low- and middle-income families.<sup>40</sup> In Arizona, it is estimated that over 16,000 low-income students were awarded tax-credit-funded scholarships that allowed them to enroll in a private school of their choice.<sup>41</sup> And in Kansas, low-income families and students who would otherwise be assigned to a failing public school are now eligible to receive tax-credit-funded scholarships.<sup>42</sup>

In sum, existing educational choice programs primarily aid disadvantaged students.

## Myth #5: Educational choice programs exacerbate racial segregation.

Reality #5: Educational choice programs promote racial integration.

Ten empirical studies have examined educational choice programs and their impact on racial segregation in schools. “Nine of those studies find school choice moves students into less racially segregated classrooms. The remaining study finds school choice has no visible effect on racial segregation. None finds choice increases racial segregation.”<sup>43</sup>

In the traditional public school system, students are assigned to schools based on their zip code. Often, these geographical boundaries are racially homogenous. As a result, students in predominantly minority neighborhoods will go to school with predominantly minority classmates. Less integrated neighborhoods lead to less integrated public schools. As a consequence, although it has been more than 60 years since the U.S. Supreme Court struck down “separate but equal” in *Brown v. Board of Education*, America’s public schools remain staggeringly segregated by race and class.<sup>44</sup> In fact, in the last few decades alone, America’s public schools have seen a dramatic increase of “hyper-segregated” schools, or schools where at least 90% of students are minorities.<sup>45</sup>

Ironically, opponents of educational choice sometimes claim that the modern choice movement has its roots in racially discriminatory policies that were designed to avoid the ruling in *Brown v. Board of Education*.<sup>46</sup> However, there is no evidence that those old policies have any connection to modern day educational choice programs. Opponents, of course, tend to turn a blind eye to the fact that *Brown* outlawed racial segregation in our nation’s public schools. They also turn a blind eye to the fact that it is zip-code-based school assignments that continue to permit racial gerrymandering.<sup>47</sup> “That is why most people probably do not think of private schooling when they think of ‘white flight,’ but of families moving out of districts with growing African-American populations into suburban districts that tended to be largely white.”<sup>48</sup>

This claim also ignores today’s important realities, such as the fact that the U.S. Supreme Court held in 1976 that private schools may not discriminate on the basis of race, color, or national origin in their admissions policies.<sup>49</sup> The segregationist policies that opponents point to were predicated on the ability of private academies to discriminate on the basis of race. Faced with forced integration of their public schools, some communities closed all of their public schools and provided funding for all students to attend private institutions—institutions set up to preserve the perverse doctrine of separate but equal.<sup>50</sup> But such segregation academies are now clearly illegal.

Finally, this claim ignores the empirical evidence. As mentioned above, educational choice programs have never been found to increase segregation. Rather, they most often result in more integrated classrooms.

To be sure, concerns about the lack of racial integration in America’s schools are legitimate. But, by rejecting the notion that where a student lives should dictate the type or quality of education that he or she receives, educational choice programs help improve integration.



**Myth #6: Public schools are held accountable by state tests and curriculum mandates, while unregulated private schools are completely unaccountable.**

Reality #6: Public schools lack sufficient accountability to parents because their children must attend their assigned public school regardless of test scores. Private schools are directly accountable to parents and must deliver a satisfactory educational experience or lose students.

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

Educational choice programs empower parents to leave any school that is not meeting their child’s needs. This market-based approach is the most direct and effective accountability mechanism there is. Indeed, as discussed in detail in response to Myth #3, the threat of competition introduced by educational choice programs has been linked to statistically significant improvements in educational outcomes in traditional public schools.<sup>51</sup>

And, of course, private schools are not the “unregulated” educational environments that educational choice opponents portray. All 50 states regulate private schools for basic health and safety.<sup>52</sup> And many states require private schools to obtain the state’s approval to operate, file regular reports, and follow state curriculum guidelines.<sup>53</sup> (Of course, expanding private educational choices, as a general policy, does not require the government to reduce or expand existing regulations of private schools in any way.)

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

**Myth #7: Because they allow parents to enroll their children in religious schools, educational choice programs violate the principle of separation of church and state and are thus unconstitutional.**

Reality #7: The U.S. Supreme Court and numerous state courts have held that religiously neutral educational choice programs that give parents a genuine choice as to where to send their children to school pass constitutional muster.

In 2002, IJ won a landmark U.S. Supreme Court victory in *Zelman v. Simmons-Harris*, which upheld an Ohio voucher program that allowed Cleveland parents to send their children to private and religious schools. The Court stressed that:

[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.<sup>54</sup>

As such, under the First Amendment to the U.S. Constitution, the defining characteristics of a constitutional educational choice program are religious neutrality and private choice.

Religious neutrality means that religious and non-religious providers of educational services may participate in the program. And private choice means that parents are free to decide whether to participate in the program and, if so, to select among those providers. As long as educational choice programs have these two features—and every current educational choice program does—they pass muster under the First Amendment.

State constitutions also contain religion clauses, many of which are worded differently than the First Amendment’s Establishment Clause. Many of these provisions speak in terms of prohibiting appropriations of public funds “in aid of” or “for the benefit of” religious institutions.<sup>55</sup> The good news for educational choice advocates is that the overwhelming majority of state courts that have recently considered legal challenges to educational choice programs have concluded that such programs—because they are religiously neutral and provide private choice—“aid” or “benefit” students, not religious institutions.<sup>56</sup> While the interpretation of state religion clauses varies, IJ has undertaken a state-by-state review of every state’s constitution and has determined that in nearly every state there is some form of educational choice that will pass muster under these and other types of state constitutional provisions.<sup>57</sup>

## **Myth #8: Educational choice programs that offer tax credits to those donating to private charities that award student scholarships are funded with public dollars.**

Reality #8: Every court in the nation to consider this question, including the U.S. Supreme Court, has concluded that funds donated to private charities are private funds, regardless of whether the donation makes the taxpayer eligible for a tax deduction or a tax credit.

Several state courts have interpreted their state religion clauses to bar the use of public funds in educational choice programs. In these situations, IJ recommends that legislators and policymakers pursue educational choice programs funded by tax-credit-eligible donations to non-profit organizations that award students with tuition scholarships or administer education savings accounts. Tax-credit-funded educational choice programs are constitutionally viable in these situations because such programs do not rely on any public funding.

Courts across the country have been unanimous in holding that tax-credit-eligible donations to private charities are not public funds. These courts include the U.S. Supreme Court and numerous state appellate courts.<sup>58</sup> As these courts have concluded, tax credits are merely a reduction of tax liability for a taxpayer and simply allow taxpayers to keep more of their own money. At no point does the state own the donated money legally or even ever possess it physically. As the Arizona Supreme Court concluded in its highly influential *Kotterman v. Killian* decision, to find otherwise would mean that the state essentially has a claim over every cent of taxpayers' money.<sup>59</sup>

Indeed, the government gives tax benefits for private donations all the time, including both tax deductions and tax credits for charitable donations. No one claims that public funds are involved when someone gets a tax deduction after donating money to their favorite charity, including scholarship-granting organizations. Neither do they make this claim when taxpayers receive credits for donations to other types of non-profit organizations, including churches and other religious organizations.<sup>60</sup> Donations to fund student scholarships are no different.

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

**Myth #9: Because educational choice programs fund religious schools that may teach doctrines at odds with modern scientific theories, choice students attending those schools receive less and worse science education than their public school counterparts.**

Reality #9: Educational choice programs fund parents, not schools. Additionally, students who attend religious schools perform well in science on national tests and private school students tend to take more science classes than students in public schools.

Of first importance is the fact that educational choice programs do not fund schools: they fund parents. A private school receives payment for educational services provided to parents and students only after parents make an independent decision to enroll their children at that school. As such, no school is entitled to any funding under an educational choice program. Rather, any money that flows to private schools does so entirely as an incident of private choice. No school receives a single dollar of program monies unless and until a parent decides to spend their scholarship funds at that school. Furthermore, as discussed briefly in the response to Myth #6, states can and do regulate education in private schools to some degree, including imposing requirements that private schools follow state curriculum guidelines.<sup>61</sup> (Of course, affording families private educational choices, as a general policy, neither requires the government to reduce nor expand its existing regulations of private schools in any way.)

Additionally, the assertion that students at religious schools are not getting as good an education in science as they would in public schools is unsupported by data about actual educational outcomes. For example, according to the Council on American Private Education, in 2015, fourth and eighth graders attending Catholic schools scored 14 points higher in science on the National Assessment of Educational Progress (NAEP).<sup>62</sup> And in twelfth grade, the Catholic school advantage on the NAEP was 18 points.<sup>63</sup> Also, 55 percent of 2015 graduates of religious and independent schools who took the ACT met or exceeded the test's college readiness benchmark score, compared to 36 percent of graduates from public

schools.<sup>64</sup> Furthermore, private school students—most of whom attend religiously affiliated schools<sup>65</sup>—also tend to take more science courses. According to a 2016 report by the U.S. Department of Education, “a higher percentage of private high school graduates (44 percent) had taken at least one credit in biology, chemistry, and physics than had graduates from traditional public schools (29 percent).”<sup>66</sup>



## **Myth #10: Students with special needs are forced to give up their rights under federal law, specifically the Individuals with Disabilities Education Act (IDEA), when they participate in educational choice programs.**

Reality #10: No student is ever forced to give up his or her rights under IDEA because participation in educational choice programs is strictly voluntarily.

The IDEA treats students with disabilities whose parents choose to participate in an educational choice program precisely the same way it treats students with disabilities whose parents choose to send their children to private schools using entirely their own money. In both instances, students with disabilities are no longer public school students. Federal law thus treats both educational choice participants and traditional private school students in precisely the same manner; as students who have voluntarily given up their entitlement to a free public education. However, because the IDEA accustoms parents of students with special needs to certain substantive and procedural rights, it is important that parents understand that participating in an educational choice program has real and important implications under the IDEA.<sup>67</sup>

Parents whose children qualify for special education and related services, and who are enrolled in traditional or chartered public schools, are conferred specific substantive and procedural rights not accorded parents whose children do not qualify for special education.<sup>68</sup> These rights, however, are a function of the public school systems' voluntary receipt of federal IDEA funds to assist the districts in providing special education. These include a right to a "free and appropriate public education" (FAPE)<sup>69</sup> and an "Individualized Education Program" (IEP), a written document that outlines the various services that will be provided to educate the student—as well as where the student will be educated.<sup>70</sup> Public school parents have the right to challenge the proposed IEP as inadequate to provide FAPE both administratively and in federal court.<sup>71</sup> The sad reality, however, is that parents are often dissatisfied with the implementation of their child's IEP. But parents, especially low-income parents, are at a significant disadvantage in negotiating with, and litigating against, school districts regarding the quality of their child's education.<sup>72</sup>

If a school district (or chartered public school) lacks an appropriate placement for a child, his or her IEP may call for placement in a private school.<sup>73</sup> In that circumstance the district is responsible for the entire cost of the placement, including the costs of tuition and any necessary supplementary services. This is considered a public placement in a private school, and the district remains responsible for the student. Parents who are dissatisfied by the public placement thus retain their rights to administrative and judicial recourse against the district, although not directly against the school, which remains private.

Students who participate in educational choice programs are considered private placements under the IDEA.<sup>74</sup> When a parent unilaterally decides to place his or her child in a private school, the IDEA no longer provides the same substantive and procedural protections that apply when a student is enrolled in a public school. Under a private placement the private school is directly accountable to the parent. The ultimate recourse of a parent who privately places his or her child in a private school and is dissatisfied with the result is to remove his or her child from that school and send him or her to a different school, public or private. Of course, parents are always free to re-enroll their student in a public school and avail themselves of the IDEA's substantive and procedural rights.

## **Myth #11: Unlike private schools, public schools must enroll all students.**

Reality #11: Although public school districts must enroll all students residing in the district's boundaries who want to attend a school in the district, individual public schools are not required to—and do not—enroll all students.

Public school districts must serve the students who live within the district's boundaries. And, in most instances, traditional public schools must serve the students who live within the school's boundaries. However, even where open enrollment laws allow students to attend out-of-boundary schools without paying tuition, whether inter- or intra-district, schools and districts can refuse to enroll out-of-boundary students based on factors such as seat capacity.<sup>75</sup> As such, and as discussed in more detail in response to Myth #5, the biggest basis for discrimination in traditional public schools is zip code. And high-performing chartered public schools often have to resort to lotteries to determine student admissions and maintain wait lists. While children from families that can afford to live in districts with high-performing schools may have access to the public schools they desire, children from poor and middle-income families are often trapped in failing public schools with no means of escaping to better-performing schools.

Moreover, there are more than 3,200 public magnet schools throughout the nation,<sup>76</sup> and such schools commonly make admissions decisions based on test scores and other selective criteria. Likewise, as discussed briefly in response to Myth #10, traditional public schools are not required to—and, in many cases, do not—serve children with special needs in the public school they would attend if the children did not have special needs. Rather, school districts can assign such students to other public schools in the district and even contract with private schools or facilities to educate such students.<sup>77</sup>

## **Myth #12: Educational choice programs fund private schools that discriminate against students on the basis of religion, disability, sex, and sexual orientation.**

Reality #12: Educational choice programs fund parents and students, not schools. Moreover, while educational choice programs do not alter private schools' existing rights to enroll students using selective admissions criteria, they also do not exempt those schools from existing anti-discrimination laws.

Although opponents of educational choice programs want private schools that enroll participating students to change their admissions policies, this impulse is based on their fundamentally mistaken belief that educational choice programs fund schools. As explained more fully in response to Myths #7 and #9, however, educational choice programs fund parents and students, not schools. Parents, of course, have a fundamental constitutional right “to direct the . . . education of children under their control.”<sup>78</sup> Their choice to use the benefits provided by an educational choice program at a private school that considers factors such as religion, sex, sexual orientation, or disability in admissions, to the extent the use of such selective criteria is permissible under the law, is their choice to make—a choice that is reasonably attributable to the parents, not to the government.

Moreover, educational choice programs do not (indeed, could not) exempt private schools from having to comply with existing federal anti-discrimination statutes.<sup>79</sup> Federal anti-discrimination laws do not prevent religious schools from taking religion into consideration in their admissions decisions. Private schools that are considered recipients of federal financial aid, such as those schools that participate in the Department of Agriculture’s Free and Reduced Price Lunch Program, are forbidden from discriminating against disabled students<sup>80</sup> and may not discriminate on the basis of sex,<sup>81</sup> although the regulations make it clear that at the elementary and secondary level

same-sex schooling is perfectly permissible.<sup>82</sup> To date, no court has ever construed “sex” in the context of student admissions to include sexual orientation.<sup>83</sup>

Expanding the scope of existing anti-discrimination laws by requiring that private schools that enroll students who participate in educational choice programs behave like public schools, while allowing other private schools to behave like private schools, would result in limiting parental choice, rather than expanding it as educational choice programs are intended to do. For example, if religious schools could not employ religious tests in admissions and require students to comply with codes of conduct, then many, if not most, religious schools would decline to enroll students participating in educational choice programs so as to protect their religious identity and beliefs.

The bottom line is that there is no one-size-fits-all approach to educating students. Properly constructed educational choice programs leverage a tolerant pluralism to empower parents to exercise their fundamental constitutional right to direct the education and upbringing of the children under their care, including the ability to choose the educational environment that best suits those children’s learning needs.

# Endnotes

- 1 The editor offers his sincere thanks to IJ Senior Attorneys Richard D. Komer, Michael E. Bindas, and Bert Gall, as well as IJ Attorneys Erica Smith, Ari Bargil, and Keith Diggs, for their significant contributions to this paper.
- 2 Maria Danilova and Emily Swanson, *Most Americans unfamiliar with school choice, poll finds*, PBS.org (May 12, 2017).
- 3 To date, every ESA program that has been enacted is a publicly funded program. However, there is growing interest in using a tax credit mechanism to fund an ESA program. See Jason Bedrick, Jonathan Butcher, & Clint Bolick, *Taking Credit for Education: How to Fund Education Savings Accounts through Tax Credits*, Cato Institute (2016).
- 4 Of course, some states provide temporary funding to school districts or schools that see precipitous drops in enrollment in very short periods of time. However, funding these types of “ghost students” is typically only a temporary measure to allow district officials to adjust their budgets and staff sizes to reflect the actual needs and desires of the community.
- 5 There may be some lag time between losing a student and losing the funding for that student, depending on each state’s funding scheme, which allows the districts an opportunity to adjust. However, despite the ever-present reality that schools regularly adjust to fluctuating student enrollment figures, public school advocates often claim that if even one student leaves, schools must still pay for teachers, electricity, and janitors, essentially suggesting that all costs are fixed. However, the argument that all public school costs are fixed and that schools cannot adjust to changes in student enrollment numbers is also a canard. See Benjamin Scafidi, Ph.D., *The Fiscal Effects of School Choice Programs on Public School Districts*, Friedman Foundation for Educational Choice (March 2012).
- 6 Greg Forster, Ph.D., *A Win-Win Solution: The Empirical Evidence on School Choice* 1, Friedman Foundation for Educational Choice (4th ed., May 2016).
- 7 *Id.*
- 8 *Id.*
- 9 Jay P. Greene, *Education Myths: What Special Interest Groups Want You to Believe About Our Schools and Why It Isn’t So* 19 (Rowman & Littlefield 2005).
- 10 *Id.* at 9.
- 11 *Id.*
- 12 *Id.* And these numbers do not take into account the millions of dollars of private philanthropy that sometimes flow to both traditional and chartered public schools. See Natasha Singer, *The Silicon Valley Billionaires Remaking America’s Schools*, N.Y. Times (June 6, 2017) (detailing millions of dollars of private investments and philanthropic support of traditional and chartered public schools).
- 13 Moreover, public school systems have been poor stewards of this radically increased funding. A recent study reveals that between 1992 and 2015, growth in non-teaching staff far outstripped growth in student enrollment. Benjamin Scafidi, Ph.D., *Back to the Staffing Surge: The Great Teacher Salary Stagnation and the Decades-Long Employment Growth in American Public Schools* 1-2, EdChoice (May 2017) (“This staffing surge was documented using publicly available data that state departments of education annually report to the US Department of Education, where each public school employee was placed into one of two categories—teachers and all other staff. ‘All other staff’ includes district and school administrators, teacher aides, counselors, social workers, reading and math coaches, janitors, bus drivers, cafeteria workers, curriculum specialists, etc.”). If this growth had simply matched enrollment increases, public schools could have saved \$35 billion annually for a total of \$805 billion over this 23-year period. *Id.* To put that dollar figure into perspective, those funds could have paid for a permanent \$11,100 salary increase for every public school teacher in America. *Id.* at 2. Of course, contrary to popular mythology and despite recently stagnant salaries, public school teachers still earn roughly the same amount as architects, accountants, engineers, nurses, and other professionals of similar stature: about \$30 per hour. Greene, *supra* note 9, at 74.
- 14 Greene, *supra* note 9, at 10-11; Andrew J. Coulson, *State Education Trends: Academic Performance and Spending over the Past 40 Years* 2, Cato Institute (Mar. 18, 2014) (Figure 1).
- 15 U.S. Dep’t. of Educ., *School Improvement Grants: Implementation and Effectiveness* (Jan. 2017).
- 16 *Id.*
- 17 Forster, *supra* note 6, at 1.
- 18 Mark Berends & R. Joseph Waddington, *School choice in Indianapolis: Effects of charter, magnet, private, and traditional public schools*, Education Finance and Policy (In Press 2016).
- 19 Recent test scores from first-year participants in Ohio and Washington D.C.’s educational choice programs show drops similar to those seen in the early years of the Louisiana and Indiana programs. See Cory Turner, Eric Weddle, & Peter Balonon-Rosen, *The Promise and Peril of School Vouchers*, NPR (May 12, 2017). However, there is no reason to believe that, as students persevere in their new schools, their test scores won’t continue to rise, just like scores in Louisiana and Indiana.
- 20 Jonathan N. Mills & Patrick J. Wolf, *How Has the Louisiana Scholarship Program Affected Students? A Comprehensive Summary of Effects after Three Years* (June 26, 2017); Jonathan N. Mills & Patrick J. Wolf, *Technical Report: The Effects of the Louisiana Scholarship Program on Student Achievement after Three Years* (June 26, 2017); Cory Turner & Anya Kamenetz, *School Vouchers Get 2 New Report Cards*, NPR (June 26, 2017) (citing preliminary findings from researchers from the University of Notre Dame and the University of Kentucky showing that, in the fourth year of Indiana’s school choice program, participants had caught up to, and sometimes surpassed, their public school peers).
- 21 Mills & Wolf, *How Has the Louisiana Scholarship Program Affected Students?*, *supra* note 20; Mills & Wolf, *Technical Report*, *supra* note 20; Turner & Kamenetz, *supra* note 20; see also Marty Lueken, *School Voucher Programs in Indiana and Louisiana*, Education Next (June 28, 2017).
- 22 Forster, *supra* note 6, at 1-2 (summarizing studies on the fiscal effects of school choice, including 25 that find school choice programs save money; studies that have examined school choice and racial segregation, including nine that find school choice moves students from more segregated schools into less segregated schools; and eight studies that find school choice improves civic values and practices); Jack-



- ie Kerstetter, *Two National Surveys find Charter-School Parents More Satisfied than Those with Children in District-Operated Schools: Private school parents most satisfied of all*, Education Next (Dec. 13, 2016).
- 23 Forster, *supra* note 6, at 16-19 (discussing the first 33 studies); David Figlio & Krzysztof Karbownik, *Evaluation of Ohio's EdChoice Scholarship Program: Selection, Competition, and Performance Effects* (July 2016) (which constitutes the 34th study).
- 24 Forster, *supra* note 6, at 16-19; Figlio & Karbownik, *supra* note 23.
- 25 See, e.g., David Figlio & Cassandra M.D. Hart, *Competitive Effects of Means-Tested School Vouchers*, 6 Am. Econ. J.: Applied Econ. 133, 150-51 (2014); Rajashri Chakrabarti, *Vouchers, Public School Response, and the Role of Incentives: Evidence from Florida*, 51 Econ. Inquiry 500, 501, 508-09 (2013); Rajashri Chakrabarti, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs* 24-25 (Fed. Reserve Bank of N.Y., Staff Rep. No. 315, Jan. 2008); Martin R. West & Paul E. Peterson, *The Efficacy of Choice Threats Within School Accountability Systems: Results from Legislatively Induced Experiments*, 116 Econ. J. C46, C54 (Mar. 2006); Marcus A. Winters & Jay P. Greene, *Competition Passes the Test*, 4 Educ. Next, 66, 68-71 (Summer 2004).
- 26 Cecilia E. Rouse, et al., *Feeling the Florida Heat? How Low Performing Schools Respond to Voucher and Accountability Pressure*, 5 Am. Econ. J.: Econ. Pol'y 251, 269-77 (2013).
- 27 Caroline Minter Hoxby, *Rising Tide*, 1 Educ. Next 69, 72 (Winter 2001); see also Jay P. Greene & Greg Forster, *Rising to the Challenge: The Effect of School Choice on Public Schools in Milwaukee and San Antonio* 6-8, Manhattan Inst. (Oct. 2002).
- 28 See Forster, *supra* note 6, at 19 (collecting studies).
- 29 Jay P. Greene & Marcus A. Winters, *An Evaluation of the Effect of DC's Voucher Program on Public School Achievement and Racial Integration After One Year*, 11 Cath. Educ.: A J. of Inquiry & Prac. 83, 87-88, 92, 94 (2007).
- 30 Daniel Bowen & Julie R. Trivitt, *Stigma without Sanctions: The (Lack of) Impact of Private School Vouchers on Student Achievement*, 22 Educ. Pol'y Analysis Archives 11 (Aug. 2014).
- 31 EdChoice, *The ABCs of School Choice: The Comprehensive guide to every private school choice program in America* 143-46 (2017 ed.) (This count excludes the Maine and Vermont Town Tuitioning Programs because those two programs are designed to provide education to students where no public school is furnished, in contrast to other choice programs which provide students with private options in addition to public schools).
- 32 See *id.*
- 33 *Id.* at 55 (noting that Cleveland's Scholarship Program gives priority to families with incomes less than 200 percent of the federal poverty level).
- 34 *Id.* at 143-46.
- 35 *Id.* at 33-34.
- 36 Virginia R. Weidner & Carolyn D. Herrington, *Are Parents Informed Consumers: Evidence from the Florida McKay Scholarship Program*, 81 Peabody J. Educ., No. 1, 27-56 (2006) ("almost 90 percent of McKay respondents . . . were satisfied or very satisfied with the school their child attends").
- 37 EdChoice, *supra* note 31, at 34.
- 38 *Id.* at 77-78.
- 39 *Id.* at 57-58; *id.* at 47-48.
- 40 *Id.* at 37-38.
- 41 *Id.* at 85-86.
- 42 *Id.* at 99-100.
- 43 Forster, *supra* note 6, at 26.
- 44 U.S. Gov't Accountability Office, *Report to Congressional Requesters, K-12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination*, GAO-16-345 10 (April 2016).
- 45 Greg Toppo, *GAO study: Segregation worsening in U.S. Schools*, USA Today, May 17, 2016 (quoting Gary Orfield, et al., *Brown at 62: School Segregation by Race, Poverty and State*, Civil Rights Project/Proyecto Derechos Civiles (May 16, 2016)).
- 46 See Chris Ford, Stephenie Johnson, & Lisette Partelow, *The Racist Origins of Private School Vouchers*, Center for American Progress (July 12, 2017).
- 47 See Sherrel Stewart, *This Mostly White City Wants To Leave Its Mostly Black School District*, NPR (Dec. 19, 2016).
- 48 Neal McCluskey, *It's the Slingshot, Not the Nuke, That's the Bigger Danger?*, Cato at Liberty (July 14, 2017).
- 49 *Runyon v. McCrary*, 427 US 160 (1976) (holding that 42 U.S.C. § 1981 prohibits private schools from discriminating on the basis of race, color, and national origin in admissions).
- 50 Ford, Johnson, & Partelow, *supra* note 45 at 1-4.
- 51 See, e.g., Anna J. Egalite, *Technical Report: The Competitive Effects of the Louisiana Scholarship Program on Public School Performance* (2016).
- 52 Christopher Hammons, *Fifty Educational Markets: A Playbook of State Laws and Regulations Governing Private Schools* 10, 14-15 (April 2008).
- 53 *Id.* at 14-15.
- 54 *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).
- 55 For more information about state religion clauses, see Richard D. Komer, *School Choice and State Constitutions' Religion Clauses*, 3 J. Sch. Choice 331 (2009).
- 56 *Magee v. Boyd*, 175 So. 3d 79, 135 (Ala. 2015) (finding that the "tax-credit provision was designed for the benefit of parents and students, and not for the benefit of religious schools."); *Kotterman v. Killian*, 972 P.2d 606, 620 (Ariz. 1999) ("The way in which [a scholarship organization] is limited, the range of choices reserved to taxpayers, parents, and children, the neutrality built into the system—all lead us to conclude that benefits to religious schools are sufficiently attenuated to foreclose

- a constitutional breach.”); *Niehaus v. Huppenthal*, 310 P.3d 983, 987 (Ariz. Ct. App. 2013) (“The specified object of the ESA is the beneficiary families, not private or sectarian schools”); *Cain v. Horne* (“*Cain I*”), 183 P.3d 1269, 1274 (Ariz. Ct. App. 2008) (upholding a voucher program under one of Arizona’s religion clauses because “parents and children make an independent, personal choice to direct the funds to a particular school, which may be either religious or secular”), *overruled on other grounds by Cain v. Horne* (“*Cain II*”), 202 P.3d 1178 (Ariz. 2009); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. Ct. 2001) (“[T]he Act allows Illinois parents to keep more of their own money to spend on the education of their children as they see fit and thereby seeks to assist those parents in meeting the rising costs of educating their children”); *Toney v. Bower*, 744 N.E.2d 351, 360-63 (Ill. App. Ct. 2001) (finding persuasive the reasoning in *Zobrest v. Catalina Foot-hills School District*, 509 U.S. 1, 12 (1993), that “[t]he direct beneficiaries of the aid were disabled children; to the extent that sectarian schools benefitted at all from the aid, they were only incidental beneficiaries”); *Meredith v. Pence*, 984 N.E.2d 1213, 1228-29 (Ind. 2013) (“The direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend”); *Schwartz v. Lopez*, 382 P.3d 886, 899 (Nev. 2016) (“It is undisputed that the ESA program has a secular purpose—that of education—and that the public funds which the State Treasurer deposits into the education savings accounts are intended to be used for educational, or non-sectarian, purposes.”); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999) (“The primary benefi-ciaries of the School Voucher Program are children, not sectarian schools.”); *Oliver v. Hofmeister*, 368 P.3d 1270, 1276 (Okla. 2016) (“The scholarship program does not directly fund religious activities because no funds are dispersed to any private sectarian school until there is a private independent selection by the parents or legal guardian of an eligible student.”); *Jackson v. Benson*, 578 N.W.2d 602, 626-27 (Wis. 1998) (describing vouchers as “life preservers” that have “been thrown” to students participating in the program).
- 57 Richard D. Komer & Olivia Grady, *School Choice and State Constitutions: A Guide to Designing School Choice Programs*, Institute for Justice and American Legislative Exchange Council (2d ed. Updated March 2017). Additionally, a recent decision of the U.S. Supreme Court may also impact how state religion clauses apply to educational choice programs. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. \_\_\_ (2017), the Court held that the state of Missouri violated the U.S. Constitution when it relied on its state constitution to bar a church-run preschool from participating in the state’s playground resurfacing program. The decision suggests that, just as the U.S. Constitution does not tolerate the use of a state constitution to exclude a religious preschool from an otherwise neutral grant program, the U.S. Constitution will not tolerate the use of state constitutional provisions to exclude religious options from educational choice programs.
- 58 See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) (“Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations.”); *Kotterman*, 972 P.2d at 618 (“For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before.”); *Magee*, 175 So. 3d at 136 (finding that a refundable school choice tax-credit program was constitutional in part because “a tax credit cannot be equated to a government expenditure”); *McCall v. Scott*, 199 So. 3d 359, 370-71 (Fla. Dist. Ct. App. 2016) (concluding that tax-credit-eligible donations to private scholarship organizations are not public appropriations); *Gaddy v. Ga. Dept. of Rev.*, 802 S.E.2d 225, 230 (Ga. 2017) (“The statutes that govern the Program demonstrate that only private funds, and not public revenue, are used”); *Toney*, 744 N.E.2d at 357 (finding that the terms “public fund” and “appropriation” were not broad enough to encompass a tax credit and concluding that to find otherwise would “endanger the legislative scheme of taxation”), *appeal denied*, 754 N.E.2d 1293 (Ill. 2001); *Griffith*, 747 N.E.2d at 426 (same), *appeal denied*, 755 N.E.2d 477 (Ill. 2001). See also *State Bldg. & Constr. Trades Council v. Duncan*, 162 Cal. App. 4th 289, 294, 299 (2008) (finding that “[t]ax credits are, at best, intangible inducements offered from government, but they are not actual or de facto expenditures by government” and thus “tax credits do not constitute payment out of public funds” under a state statute); *Olson v. State*, 742 N.W.2d 681, 683 (Minn. Ct. App. 2007) (concluding that tax credits and tax exemptions are not public expenditures); *Manzara v. State*, 343 S.W.3d 656, 661 (Mo. 2011) (“The tax exemptions in [another case] and the tax credits here are similar in that they both result in a reduction of tax liability. The government collects no money when the taxpayer has a reduction of liability, and no direct expenditure of funds generated through taxation can be found.”).
- 59 *Kotterman*, 972 P.2d at 618 (rejecting the argument that simply “because taxpayer money could enter the treasury if it were not excluded by way of the tax credit, the state effectively controls and exerts quasi-ownership over it” and concluding that “under such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature”).
- 60 Cf. Dick M. Carpenter II, Ph.D. & Angela C. Erickson, *On Common Constitutional Ground: How Georgia’s Scholarship Tax Credits Mirror Other State Programs and Expand Educational Opportunity*, Institute for Justice (March 2016); Dick M. Carpenter II, Ph.D. & Angela C. Erickson, *Opening the Schoolhouse Doors: Tax Credits and Educational Access in Alabama*, Institute for Justice (February 2014).
- 61 Hammons, *supra* note 52, at 14-15. For example, states may legitimately require, as part of their general regulatory authority and not because of any special authority derived from operating an educational choice program, that private schools teach modern scientific theories as part of curriculum requirements. However, the state has no business limiting what parents or their private school surrogates may say about those theories or any business preventing private schools from teaching alternate theories. Indeed, as the U.S. Supreme Court has declared, “[f]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
- 62 Council for American Private Education, *Science Performance Improves in Grades 4 and 8*, Outlook, Nov. 2016, at 2 (“Missing from the 2015 science results were breakouts for private schools in general. Although enough Catholic schools (a subgroup of private schools) participated in NAEP to yield results for that sector, the response rate among other private schools unfortunately fell well below the 70 percent threshold required to produce separate private school findings that accurately reflect the private school population. National school participation rates for the science assessment at grade 4 were 61 percent for private schools and 83 percent for Catholic schools. At grade 8 they were 56 percent for private schools and 80 percent for Catholic schools. And at grade 12 they were 57 percent for private schools and 76 percent for Catholic schools.”).
- 63 *Id.*
- 64 *Id.* (Private schools also beat public schools on the following ACT benchmarks: English – 81 percent vs. 61 percent; reading – 66 vs. 44; math – 60 vs. 40).
- 65 According to the Council for American Private Education, private school students attended private schools in the 2013-2014 school-year along the following breakdown: Catholic (41.3%); Nonsectarian (21.3%); Conservative Christian (13.4%); Baptist (13.4%); Lutheran (3.5%); Jewish (5.1%); Episcopal (2.1%); Seventh-day Adventist (1.1%); Calvinist (0.5%); Friends (0.4%). *Private School Facts*, Council

- for Am. Private Educ., <http://www.capenet.org/facts.html> (last visited July 24, 2017).
- 66 U.S. Dep't of Educ., National Center for Education Statistics, *The Condition of Education 2016* 180 (May 2016).
- 67 IJ thus recommends that all educational choice programs explicitly acknowledge that participation in an educational choice program is the same as a parental placement under 20 U.S.C. § 1412(a)(10) of the Individuals with Disabilities Education Act.
- 68 About the only substantive right that non-special education students possess is a right to a “free” public education, meaning they cannot be charged the user fees (known as “school fees”) that once were commonplace before the entire burden was shifted to the taxpayers at large. No state recognizes a cause of action for educational malpractice, even where students graduate unable to read.
- 69 What constitutes FAPE varies from child to child and has resulted in numerous federal court challenges, including the U.S. Supreme Court decisions in *Board of Education v. Rowley*, 458 U. S. 176 (1982), addressing FAPE in the context of a mainstreamed student, and *Andrew F. v. Douglas County School District*, 137 S. Ct. 988 (2017), involving a student requiring more extensive interventions. But neither *Rowley* nor *Andrew F.* require a school district to provide what every parent wants, namely the best available education.
- 70 20 U.S.C. § 1414(d)(1)(A)(i)(IV)-(V), (e). IDEA requires that FAPE be provided in the “least restrictive environment” to minimize the exclusion of students with disabilities from schools’ general education programs. 20 U.S.C. § 1412(a)(5). In other words, under IDEA, students are to be placed in general education classrooms to the maximum extent possible.
- 71 20 U.S.C. § 1415.
- 72 See generally Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat’l Ass’n Admin. L. Judiciary 423 (2012) (discussing parents’ disadvantages in the IEP process).
- 73 20 U.S.C. § 1412(a)(10)(B)(i).
- 74 See Gov’t Accountability Office, *Report to Congressional Requesters, School Choice: Private School Choice Programs Are Growing and Can Complicate Providing Certain Federally Funded Services to Eligible Students*, GAO-16-712 7 (August 2016) (“‘Parentally placed’ children with disabilities would include those students with disabilities enrolled by their parents in private schools through private school choice programs.”).
- 75 See Matt Barnum, *In Ohio, suburban school districts close themselves off from city students, study finds*, Chalkbeat, June 6, 2017 (noting that the “districts that declined outside enrollment were predominantly ones surrounding major cities, like Cincinnati, Cleveland, Columbus, and Dayton, all of which serve a large number of low-income students and students of color.”).
- 76 *Selected Statistics From the Public Elementary and Secondary Education Universe: School Year 2014–15*, National Center for Education Statistics, Table 3 (“Number of operating public elementary and secondary schools, by school type, charter, magnet, Title I, and Title I schoolwide status, and state or jurisdiction: School year 2014–15”), available at <https://nces.ed.gov/pubs2016/2016076/tables.asp>.
- 77 See Robert Enlow, “Public Schooling” is a Myth, Jay P. Greene’s Blog (June 6, 2017) (detailing instances of politicians exerting their political power to get their child placed in preferred public schools, increases in selective-admissions magnet schools, and the fact that many public school districts send students with disabilities to schools other than their neighborhood public school).
- 78 *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925).
- 79 Of course, federal law prohibits all private schools, whether or not they participate in educational choice programs, from discriminating based on race, color, or national origin. 42 U.S.C. § 1981. There may also be state anti-discrimination laws or regulations that apply to private schools. There are no educational choice programs in the country that attempt to exempt schools that enroll participating students from such state laws.
- 80 Recipients of federal financial aid “that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs.” 34 CFR Pt. 104, App. A.28. And private schools “may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.” *Id.* Additionally, under the Americans with Disabilities Act (ADA) all non-religious private schools are considered “public accommodations” and are thus prohibited from discriminating based upon disability unless the school does not offer programs designed to meet the child’s special needs. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, Title III, §§ 301, 307. Religious private schools, however, are exempt from the ADA’s prohibition on discrimination based on disability. *Id.* Of course, notwithstanding these exemptions, religious and other private schools routinely admit and educate students with disabilities.
- 81 Federal law permits private schools that are “controlled by a religious organization” to discriminate on the basis of sex if necessary to comply “with the religious tenets of such organization.” 34 C.F.R. § 106.12. Courts have also been reluctant, in the employment context, to interfere with the sincerely held religious beliefs of private religious schools. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (protecting religious groups’ right to shape their own faith by applying the ministerial exception in employment discrimination law for teachers deemed ministers at religious schools).
- 82 34 C.F.R. § 106.15.
- 83 The U.S. Court of Appeals for the Seventh Circuit recently construed Title VII of the Civil Rights Act of 1964, which makes it unlawful for employers subject to the Act to discriminate on the basis of a person’s “race, color, religion, sex, or national origin,” 42 U.S.C. § 2000e-2(a), and determined that “discrimination on the basis of sexual orientation is a form of sex discrimination.” *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017). However, it is not at all clear that this ruling will be extended to either the admissions (or hiring) practices of religious private schools. See 34 C.F.R. § 106.12 (exempting private schools “controlled by a religious organization” from existing federal prohibition on sex discrimination if necessary to comply “with the religious tenets of such organization”).



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