

**McKay Vouchers vs. the IDEA:
School Choice and the Future of Special Education**

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I. Introduction

School choice options, also known as voucher systems, are increasing in popularity among the fifty states. As school choice gains popularity, resources and choice available to special education students may decrease. The implementation of school choice and school vouchers takes the Individuals with Disabilities Education Act (IDEA) benefits that special education proponents worked so hard to gain away from those individuals with disabilities.

II. Individuals with Disabilities Education Act

The IDEA was enacted in 1975 in response to the exclusion of and inadequate education of children with disabilities.ⁱ The IDEA strives to assure special education students receive an adequate publicly funded education.ⁱⁱ The goals of IDEA are as follows: 1) tailoring education services to the individual needs of the child; 2) requiring that parents have a role in planning the child's educational program; 3) offering a range of different placements and ways to deliver educational services; 4) educating the child

in the most integrated environment appropriate for that child's learning; 5) treating the delivery of an appropriate education as an enforceable right; and 6) offering clear and known routes for parents to resolve disputes with school districts.ⁱⁱⁱ

A student begins to use IDEA resources when he receives a referral for an evaluation to determine his needs.^{iv} The evaluation determines whether the child has a disability as defined under IDEA, whether the child needs special education or related services in order to progress in the general curriculum, and what services are needed.^v

School officials or a parent may request an evaluation, but if the school or teacher makes the request, the parent of the child must consent.^{vi} Once the evaluation is completed a team must develop an IEP, which cannot be changed once implemented without parental consent.^{vii} The team must include the child's parent and the classroom teacher if the child is to be educated in the regular classroom.^{viii} The IEP must describe the disability of the child, the educational goals for the child (short and long term), the services and strategies that will be used with the child, and the location and amount of services to be provided.^{ix} The team must review the IEP once a

year and the child's disabilities are to be evaluated every three years to determine if the need for special education is still present and if any changes have occurred.^x

The IEP team should keep in mind that according to the IDEA, the standard of educational measurement to be used is that of "striving for adequate progress," not what is ideal or perfect.^{xi} However if the IEP team determines that something is an essential and necessary part of the child's development and is required by the IEP, the cost of the service or resource cannot be a barrier to its use, the school district must pay the extra cost.^{xii} A child may leave her public school district and take her IDEA funding to a private school only if the public school is unable to meet the child's needs.^{xiii} IDEA calls this the choice of the "least restrictive environment in which the appropriate education can be provided."^{xiv}

The IDEA legislation provides an important route of due process for parents. If a parent feels that his child was not properly diagnosed or is not receiving the proper services or placement, he may ask for an impartial hearing before a state administrative officer.^{xv} The parent may appeal

decisions through administrative appeals.^{xvi} After exhausting administrative appeals, parents may bring a civil action in a state or federal court.^{xvii}

IV. Vouchers and School Choice

The philosophy behind school vouchers or school choice is simple.

Proponents believe that tax dollars should stay with the student and that parents should be able to shop competitively for an appropriate school for their child.^{xviii} Proponents believe that in turn market forces and competition will have a positive effect on public schools.^{xix} In 1993, Former Michigan Governor John Engler stated, "Public education is a monopoly, and monopolies don't work."^{xx} Governor Engler believed that public schools were not improving because there was no incentive for change, their funding was guaranteed. Today school choice is more than private vs. public, it refers to initiatives such as publicly funded vouchers and charter schools as well.

A. History of General Education Vouchers and School Choice

Alternatives to traditional public school have co-existed with public education in our country since it's founding in the form of private schools and home schooling. Vouchers and school choice present a new issue

entirely; the use of public tax money to fund private and sometimes religious schools.

Most cases in protest of voucher use in private schools have cited the establishment clause of the First Amendment for support. Those cases argue that public money cannot be used to send a child to a religious private school because this can be interpreted as government endorsing specific religions or groups and thus violates the establishment clause of the First Amendment of the Constitution. Eileen Wagner, a proponent of vouchers for special education students stated:

“In effect, the Act [referring to the IDEA] says a child may be entitled to special education, but he will only get it on the government’s terms. The result may be to eliminate any choice in educational setting for handicapped children and their parents unless their families are wealthy enough to withstand not only regular tuition but the high cost of special education as well.”^{xxi}

Vouchers and school choice often have an air of discrimination about them. Early debates surrounding vouchers involved religion and race.^{xxii}

In 1875 Representative James Blaine from Pennsylvania introduced a proposed amendment to the constitution that would prevent taxpayer money from going to Catholic private schools.^{xxiii} The amendment, dubbed the Blaine Amendment, passed in the House but failed in the Senate by a narrow

four votes.^{xxiv} Although it failed on a national level, the Blaine Amendment took root in many state constitutions.^{xxv} In 2005, thirty-seven states had provisions in their constitutions that deny state funding to sectarian programs.^{xxvi}

In the late 1990's the state of Ohio established a pilot voucher program designed to provide educational choices to students who reside in the Cleveland City School District.^{xxvii} The Cleveland City School district was rated among the worst performing public school districts in the Nation.^{xxviii} Several Ohio taxpayers filed suit to enjoin the established voucher program on the ground that it violated the Establishment Clause.^{xxix} The court decided that the Cleveland pilot project was not a violation of the establishment clause.^{xxx} The court noted that the program provided assistance directly to the student's family, and from there the family was free to choose where to send their child. This allowed a broad class of citizens to use government aid to enroll their student at a school regardless of its religious affiliation.^{xxxi} The government's role ended with the disbursement of the benefits.^{xxxii} The court ruled, in this landmark case that

school choice and school vouchers are not to be interpreted as government endorsed establishment of religion.^{xxxiii}

B. Special Education and the Voucher System

Requests for special education services has seen a dramatic increase over the past decade.^{xxxiv} Over six million children receive some sort of special education service today, thirteen percent of public school students in the United States have been diagnosed with a disability and receive some type of special education service.^{xxxv} School choice and vouchers take on an entirely different meaning when applied to students with special education needs. Special education students are excluded from most public voucher programs and in the few that include them there is strong evidence that those schools are not providing the special education services that the students need and are guaranteed under the IDEA.^{xxxvi}

i. McKay Voucher Program

The McKay Scholarships for Students with Disabilities Program currently in place in Florida is the leading example of a voucher system developed specifically for special education students. Sara Mead, of the Education

Sector Think Tank in Washington D.C., wrote in her report entitled

Information Underload: Florida's Flawed Special-Ed Voucher Program,

"The program's namesake, John McKay, argued that the IDEA process for obtaining private placements primarily benefited children whose affluent parents knew how to work the bureaucracy, leaving those with less-savvy parents behind . . . In early 2000, McKay, with little difficulty, persuaded fellow lawmakers to take the program statewide beginning that fall."^{xxxvii}

In order to qualify for a McKay voucher a student must first have been enrolled in a Florida public school for at least a year and must have utilized the system of diagnosis and development of an IEP which was put in place at the federal level through the IDEA.^{xxxviii} After the diagnosis and eligibility of the child is determined, the parents of the special needs child only need to file a non-binding declaration of intent with the Florida Department of Education and enroll their child in a private school which has agreed to participate in the program.^{xxxix}

In Florida, the amount of government funding that is attached to a special education student varies depending on the severity of the disability.^{xi} A child is assigned one of five funding levels, the most money being granted to those children with the most severe disabilities.^{xii} This tiered system of

funding also applies to McKay Scholarship participants.^{xlii} The funding a student receives under McKay is either the same amount they would receive, under the Florida funding level system, at a public school or the cost of private school tuition, whichever is less.^{xliii} Once the funding amount has been determined and the parents have chosen a school, the benefits of IDEA come to an abrupt halt.^{xliiv} Once the parents accept McKay funding they leave behind the due process rights the IDEA granted them and they must rely solely on good faith that the new private school supported by McKay Scholarships will properly educate the special education child.^{xliiv}

There are potential positives to the McKay system. If a parent is frustrated or disgruntled over the services their child is receiving in the public school, they would simply have to apply for a voucher and avoid the complaint and appeals process involved in the IDEA.^{xlivi} This may save time and expedite the students movement to a better program. The government also has the potential to save money since tuition for a private school may cost less than the funding tier designated to those students with severe disabilities.^{xliiii} The average class size drops from 21.8 students in a public school to 12.7 students in a private school.^{xliiii} In some cases, smaller class

size may mean more attention is paid to development of a student based on their specific needs. Finally, a recent Manhattan Institute study finds that Florida's voucher program for special education students "improves the academic gains of those who remain in the public school."^{xlix}

V. McKay vs. IDEA

Many differences exist in the governance of a McKay voucher type system and the federally funded Individuals with Disabilities Education Act.

A. Accountability

Accountability is the main difference between McKay and IDEA. IDEA should allow state use of federal special education funds to enable students with disabilities to attend schools or to access services of their family's choosing, as long as states measure and report outcomes for all students benefiting from IDEA funds. The McKay program and special education voucher proposals in Congress do not seem to have any accountability to the tax payer.¹

Accountability is the main problem behind the McKay Scholarship voucher program. As Sara Mead stated in her report on the McKay system, "McKay has the potential to be a valuable resource for policymakers and educators

interested in the likely impacts of expanding private school vouchers or other forms of school choice.”^{li} However Mead goes on to say that it is important to be able to evaluate the success of the McKay program and in the current system that evaluation is close to impossible.^{lii} Mead writes that “many of the most important policy questions about McKay - in particular, what influence it has on student achievement – are virtually impossible to answer, because the state collects very little information from schools and students participating in the program.”^{liii}

There is no actual requirement for a school that receives a McKay voucher to provide special education services.^{liv} In order to receive McKay scholarships, practically the only thing a school has to do is sign up with the program.^{lv} Private schools participating in the McKay program do not even have to be accredited; the only thing they have to show is “financial stability,” which can be demonstrated “simply by having been open for one full year.”^{lvi}

Furthermore, private schools are not accountable to the state; they do not have to show proof of student achievement or prove quality of teaching.^{lvii} This is an important issue since public funds are being used

toward a program that the taxpayers have no way of monitoring.^{lviii} Quoting

a newspaper article written on the subject Mead writes,

“No one really knows how well the . . . McKay program is working because those who oversee it are covering their eyes. . . . Ask how these private schools are performing or whether students and families are happy, or even whether tax dollars are being used in accordance with state law, and the response tends to follow two paths: 1) We trust parents to make smart decisions for their students, or, 2) We don’t know.”^{lix}

The Manhattan Institute’s study presents some valuable insight into the McKay program, but its results may be troublesome. The Manhattan Institute’s study regarding the effect of McKay vouchers on public schools has many problems. First and foremost, the issue of accountability rears its ugly head once again; there is no way of measuring the improvement of a special education student in private schools because “private school students, including those who utilize McKay scholarships, are not required to take the state’s standardized exams.”^{lx} Therefore, the Manhattan Institute’s study has “no information on their performance after they leave public school and thus no basis for evaluating McKay’s impact on them.”^{lxi} Since there is no way to measure private school improvement in special education, the Institute’s study makes its measurement by using public schools.

Although small improvements were shown in the public school system from the competition increase under the McKay program^{lxii}, the authors do not take into account other factors that may have had a contributing effect such as improved public funding and possible increasing in government spending. The study comes to the conclusion that because there was a small improvement in special education at the public level, it must be the result of competition from private schools under the McKay voucher system.^{lxiii} Since there is no way of measuring the improvement of students who actually used the McKay voucher, there is no way of knowing whether or not the improvement in the public schools was the result of the McKay system or some other outside contributing factor.^{lxiv}

The McKay voucher system may indeed be a valuable choice for parents of special education students to consider, but some amount of accountability must be factored in. Taxpayer's money should not be spent on a system with no oversight or measurable results. Parents may make a general assumption that private school will be better for their special needs child, however this assumption is not rooted in any information. As stated previously, the private school does not have to provide any type of

educational plan or personalized attention for the special needs child, as a public school would. Parents assumption that a private school may be better for their special needs child could be correct, but the best utilization of the system would be a private school that was required to provide accountability and plans similar to those required under the IDEA.

The lack of accountability also lends itself to an abuse of the system. Florida has seen an increase in mild learning disabilities since the implementation of the McKay vouchers, which may or may not be a result of parents abusing the system to get their child into a private school paid for by the public dollar.

The abuses of the system, the inability to measure improvement, and no way of knowing whether or not a school that accepts McKay vouchers has a special education problem, cause a potentially valuable system to fall short. In order for McKay to be used on a national level a system of accountability must be put into place.

B. Due Process

Many rights under the IDEA^{ixv} would not exist under a McKay voucher system. In *Zobrest*, a deaf student using IDEA funding at a private school

was denied a sign language interpreter.^{lxvi} The parents of the student fought for IDEA funding to pay for an interpreter regardless of the fact that the student attended a sectarian school.^{lxvii} The parents won the suit, and the government was required to fund an interpreter to help the student.^{lxviii}

Under a McKay system of vouchers, if a private school denies a deaf child the right to have an interpreter in class, a parent is left with only two options: 1) accept the school's decision and have no interpreter for the deaf child or 2) take his child out of the school. Again, this issue is solved if it is required that state vouchers are implemented using a plan and system much like the IDEA. If a school desires to receive state voucher money, a systematic checks and balance system should be put into place that resembles the IDEA. This way parents are able to determine what is best for their child, but they are also receiving the proper benefits and due process that should be provided to ensure a special education child is able to reach his or her potential.

VI. Conclusion

A happy medium can be reached between the IDEA and a McKay type of voucher system. In *Zelman*, the Supreme Court declared it constitutional to

spend public funded money at a private non-sectarian or sectarian school in the form of vouchers or school choice.^{lxix} Special education students should be afforded the same privileges as general education students. However, with that equal opportunity comes a certain level of accountability on the school's end.

When federal or state money is used to fund special education services through IDEA, public schools are accountable not only to parents and students, but to the government as well. This same concept of accountability should be applied to vouchers when a special education student uses that money to attend a private school. At the very least, a private school accepting a special education student through a voucher system should be required to show some proof of a special education program being implemented at the school or for the specific student. Ideally, a family could use a voucher and still receive the same attention, planning, and detail under the IDEA.

Parents want what is best for their child, which is understandable. However, sometimes parental perception of what is best for their child is based on a stereotype; in this case that a private school will undoubtedly be

better for their child. This may be true in many areas of the country, and the parent should be able to have this option, however many parents may not be realize the rights they are giving up for their special education student by not educating under the IDEA. A middle ground needs to be developed where the IDEA requirements are merged with vouchers and private school accountability. This will improve public and private school special education programs alike and ensure that our special education students are able to maximize their potential.

ⁱ Terry Jean Seligmann, *An Idea Schools Can Use: Lessons from Special Education Legislation*, 29 FORDHAM URB. L.J. 759 (2001).

ⁱⁱ *Id.* at 761.

ⁱⁱⁱ 20 U.S.C. §1401-1415 (2008).

^{iv} Seligmann, *supra* note 4, at 762

^v *Id.*

^{vi} 20 U.S.C. §1414(a)(1)(B) (2008).

^{vii} *Id.* §1414(d)(1)(B).

^{viii} Seligmann, *supra* note 4, at 763

^{ix} *Id.*

^x *Id.*

^{xi} *Id.*

^{xii} *Id.*

^{xiii} 20 U.S.C. §1412 (a)(5) (2001).

^{xiv} Seligmann, *supra* note 4, at 764.

^{xv} 20 U.S.C. §1415(f)(1) (2001).

^{xvi} *Id.* §1415(i)(2) (2001).

^{xvii} *Id.*

^{xviii} Beth A. Simonton-Kramer, *Michigan's School of Choice Act: A Comment on the Exclusion of the Special-Needs Child*, 24 T.M. Colley L. Rev. 425, 429 (2007).

^{xix} *Id.*

^{xx} *Id.*

^{xxi} Taylor, *supra* note 2, at 5-6 quoting Eileen N. Wagner, *Public Responsibility for Special Education and Related Services in Private Schools*, 20 J.L. & Educ. 57 (1991).

^{xxii} In response to the Courts desegregation decision in *Brown v. Board of Education*, the General Assembly of Virginia amended the state constitution to authorize local governing bodies to appropriate funds to allow students to attend public or nonsectarian private schools. One particular Virginia county responded by closing all public school doors and giving vouchers to students so they could attend all-white private schools. The decision in *Griffin v. School Board*, a lawsuit brought on by the County's actions, required the public schools to be re-opened and the discriminatory behavior to end. However, the negative connotation school vouchers developed as a result of the decision in *Griffin* continues make some people hesitant in advocating for school vouchers for fear of discriminatory possibilities. *Griffin v. School Board*, 377 U.S. 218 (1964).

^{xxiii} Taylor, *supra* note 2, at 15.

^{xxiv} *Id.*

^{xxv} *Id.*

^{xxvi} *Id.* at 16.

^{xxvii} *Zelman v. Simmons-Harris*, 536 U.S. 639, 634-44 (2002).

^{xxviii} *Id.*

^{xxix} *Id.* at 648.

^{xxx} *Id.* at 644.

^{xxxi} *Id.* at 645.

^{xxxii} *Zelman*, 536 U.S. at 645.

^{xxxiii} *Id.* at 644.

^{xxxiv} Seligmann, *supra* note 4, at 759.

^{xxxv} *Id.* at 760.

^{xxxvi} Elliot M. Minberg, *Vouchers and the Future of Public Education*, 59 N.Y.U. Ann. Surv. Am. L. 469.

^{xxxvii} Sara Mead, Education Sector Reports *Information Underload: Florida's Flawed Special-Ed Voucher Program* (June 2007), pg. 2

^{xxxviii} *Id.*

^{xxxix} *Id.*

^{xl} *Id.*

^{xli} *Id.*

^{xlii} *Id.*

^{xliii} Marcus A. Winders and Jay P. Green, *Vouchers for Special-ed students*, part 2 of 3, Washington Times, April 20, 2008.

^{xliv} Mead, *supra* note 46, at 1.

^{xlv} Mead, *supra* note 46, at 2.

^{xlvi} Winders and Green, *supra* note 52.

^{xlvii} *Id.*

^{xlviii} *Id.*

^{xlix} *Id.*

¹ Mead, *supra* note 46, at 4 quoting Andrew J. Rotherman and Sara Mead, “Think Twice: Special Education Vouchers Are Not All Right”, Progressive Institute, June 2003, available online at http://www.ppionline.org/documents/Special_Education_0603.pdf

^{li} Mead, *supra* note 46, at 2.

^{lii} *Id.*

^{liii} *Id.*

^{liv} *Id.*

^{lv} *Id.*

^{lvi} *Id.*

^{lvii} *Id.*

^{lviii} Mead, *supra* note 46, at 1.

^{lix} Mead, *supra* note 46, at 2, quoting “McKay’s Voucher Results,” Editorial, *St. Petersburg Times*, Dec. 9, 2002.

^{lx} Mead, *supra* note 46, at 1.

^{lxi} Manhattan Institute Civic Report, *The Effect of Special Education Vouchers on Public School Achievement: Evidence From Florida’s McKay Scholarship Program*, Jay P. Greene & Marcus A. Winters. No. 52 April 2008.

^{lxii} Winders, *supra* note 37.

^{lxiii} Manhattan Institute Study

^{lxiv} Mead, *supra* note 46, at 7.

^{lxv} *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993).

^{lxvi} *Zoberest*, 509 U.S. at 3.

^{lxvii} *Id.*

^{lxviii} *Id.* at 13-14.

^{lxix} *Griffin v. School Board*, 377 U.S. 218 (1964).