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### SPECIAL EDUCATION FOR A SPECIAL POPULATION: WHY FEDERAL SPECIAL EDUCATION LAW MUST BE REFORMED FOR AUTISTIC CHILDREN

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#### Introduction

With a growth rate of 1,148%, Autism is presently the world's fastest growing developmental disability.<sup>1</sup> According to the Centers for Disease Control and Prevention ("CDC"), approximately 1 in 100 children in the United States are affected by an autism spectrum disorder ("ASD").<sup>2</sup> Of the approximately 4 million children born each year, an estimated 36,500 will be diagnosed with autism.<sup>3</sup> The prevalence is greater among boys, with 1 in 70 affected by some form of a disorder on the spectrum.<sup>4</sup>

As the number of individuals with autism continues to grow, major questions arise as to how their needs are to be addressed. Of specific note is the well-being of children with autism and ensuring that their presence and involvement in our society is known. Should society play a role in helping care for and protecting these children? If so, what are the legal implications for providing these protections? And further, what responsibility does our legal system carry in ensuring that children with autism are provided with the means to aid in their future development towards adulthood? Indeed, as more children with autism are diagnosed, more challenges arise in acquiring an education that meets their needs. Although federal special education law currently exists for the provision of services for children with autism under the Individuals with Disabilities Education Act ("IDEA")<sup>5</sup>, it is only a starting place for examining how autistic children can receive special education services. As acknowledged by the U.S. Government Accountability Office ("GAO"), "As

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<sup>1</sup> Autism Society -What is Autism, <http://www.autism-society.org/about-autism/facts-and-statistics.html>.

<sup>2</sup> Centers for Disease Control and Prevention, Autism Spectrum Disorders, *available at* <http://www.cdc.gov/ncbddd/autism/data.html>.

<sup>3</sup> *Id.* "Assuming the prevalence rate has been constant over the past two decades, we can estimate that about 730,000 individuals between the ages of 0 to 21 have an ASD."

<sup>4</sup> Autism Speaks – How Common is Autism, <http://www.autismspeaks.org/>.

<sup>5</sup> P.L. 94-142.

the number of children diagnosed with autism has increased, interest in understanding how children diagnosed with autism are being served under IDEA has grown.”<sup>6</sup> Complicating this issue is the fact that, as with many other children suffering from disabilities, the services provided to children with autism “depend on the needs of the child.”<sup>7</sup>

This article attempts to examine the complicated question of how to provide special education services for children with autism in the wake of astronomically high rates of diagnosis. In Part I, this article will introduce the federal Special Education Laws affecting children with disabilities through IDEA and how this system of education presently operates. Part II analyzes a 2005 report prepared by the federal government through the GAO examining how effective IDEA has been in providing special education services to autistic children. Part III considers a popular alternative that has been created to provide children with disabilities, especially those with autism, special education outside the public system through state school voucher programs. Part IV examines the creation of a tabled federal voucher program that was previously proposed in the reauthorization of IDEA. I will argue that despite the challenges a federal special education voucher program may create, it is a worthy and necessary policy consideration. On the one hand, it would be a practical effort to bring autistic children out of a failed federal special education system that has been far from beneficial. Additionally, the program would provide greater uniformity for voucher programs that currently exist at the state level but vary significantly in their substance.

## I. An Introduction to Special Education in Public Education

While the right to public education for children is not enumerated in the text of the Constitution, the states have traditionally provided for this right through legislation or provisions in their own constitutions.<sup>8</sup> The right to a public education in the U.S. has not been without controversy, however, and is perhaps best demonstrated by recent legislative efforts to craft a constitutional amendment establishing it as a constitutional right.<sup>9</sup> On March 2, 2005, H.J. Res. 29 was introduced in the U.S. House of Representatives by U.S. Rep. Jesse L. Jackson, Jr., (D-Illinois) as “Proposing an amendment to the Constitution of the United States regarding the right of all citizens of the United States to a public education of equal high quality.”<sup>10</sup> This proposed amendment was criticized as being drafted too similarly to language found in the UN Convention on the Rights of the Child,<sup>11</sup> which provided a much more expansive definition of “public education” than has been historically advanced in the U.S.<sup>12</sup> However, this attempt at redefining the breadth of public education through a constitutional amendment has found little success as it has been reintroduced on numerous occasions since its initial introduction in 2005 with the latest effort put forward during the 111th Congress in 2009.<sup>13</sup>

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<sup>6</sup> U.S. Government Accountability Office, Report to the Chairman and Ranking Minority Member, Subcommittee on Human Rights and Wellness, Committee on Government Reform, House of Representatives, *Special Education: Children with Autism*, Jan. 2005, available at <http://www.gao.gov/new.items/d05220.pdf>.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW, 18 (Aspen Publishers Inc., 2002).

<sup>9</sup> H.J. Res. 29, 109th Congress, 1st Session, March 2, 2005, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=f:hj29ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:hj29ih.txt.pdf).

<sup>10</sup> *Id.*

<sup>11</sup> UN Document on the Rights of the Child, <http://www2.ohchr.org/english/law/crc.htm>.

<sup>12</sup> *Bill in Congress to Make Public Education a Constitutional Right*, HLSDA, Sept. 25, 2006, available at <http://www.hslsda.org/docs/news/200609251.asp>.

<sup>13</sup> H.J.Res.29, 111th Cong. (2009).

Perhaps the continuing debate over the right to public education may someday lead to a shift in defining the educational rights of children in the U.S. However, to date there have been no significant deviations from the status quo. Instead, the focus of public education remains vested primarily within the control of states and provides the starting point for any inquiry into the government's role in providing education to children with disabilities.

The range of public education protections varies significantly from state to state.<sup>14</sup> Localized control over public education has greatly contributed to the disparities in equal access to educational opportunities, due mostly to variations in financial resources that may make or break a school, depending on its location.<sup>15</sup> The historic association between public education and funding is best captured by the following:

The problem of unequal access to educational opportunities has vexed America since the times of Horace Mann and is a deeply embedded trait of the United States' school system. The resilient logic of local control over education makes it so that school funding remains tied in significant part to local property taxes. Thus, expenditures per-pupil vary dramatically across districts and across states. Special education only slightly differs from this picture.<sup>16</sup>

The issue of financing and the education of children with disabilities, specifically those with autism, will be more thoroughly examined later in this piece. However, it is important to note that the availability of financial resources significantly contributes to the educational disparities throughout different areas of the country.

Even with public education protections in place at the state level, children with disabilities have not always received equal benefits. In fact, these children have experienced a history of discrimination in acquiring the right to a public education. Prior to 1970, the majority of children with disabilities were excluded outright from receiving a public education.<sup>17</sup> By 1970, only one in five children with disabilities in the U.S. was able to receive public a education.<sup>18</sup> These children have continued to be excluded from the classroom based on each child's specific type of disability, and further, many states have prohibited children who were deaf, blind, emotionally disturbed, and mentally retarded from receiving an education.<sup>19</sup> Most of the efforts to bring public education to children with disabilities involved the creation of specialized schools for specific disabilities, which eventually included children with differing mental capabilities:

Paralleling the newly established day classes for deaf and for blind students, by 1900 the first special classes had been formed for children who were then referred to as "backward" or "feeble-minded." They were characterized by smaller class size, emphasis on practical life skills, and an individualized approach recognizing differences in readiness, motivation,

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<sup>14</sup> HARRIS & TEITELBAUM, *supra* note 8.

<sup>15</sup> Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J. L. AND MED. 483, 516 (2010).

<sup>16</sup> *Id.*

<sup>17</sup> U.S. Department of Education, *Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, <http://www.ed.gov/policy/speced/leg/idea/history.html>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

and pacing. Contributing to this trend was the increasing adoption, especially in large, urban school districts, of psychoeducational clinics, modeled after the clinic Lightner Witner had established in 1896 at the University of Pennsylvania. While school-based clinics played a major role in assessing pupils' eligibility for special class placement (or for school exclusion), Witner's individualized, diagnostic approach would later be influential in education of students with orthopedic or health impairment, social-emotional problems, and specific learning disabilities.<sup>20</sup>

Despite these advances in education, children with autism continued to be shunned:

The starting point was bleak. Throughout the 1960s, very few school programs would accept children with autism. Since their condition was neither a physical disability nor, in many cases, mental retardation, they "slipped right through the educational loophole."<sup>21</sup>

These conditions set the stage for what would be dramatic change:

Before the enactment of Public Law 94-142, the fate of many individuals with disabilities was likely to be dim. Too many individuals lived in state institutions for persons with mental retardation or mental illness. In 1967, for example, state institutions were homes for almost 200,000 persons with significant disabilities. Many of these restrictive settings provided only minimal food, clothing, and shelter.<sup>22</sup>

In 1975, Congress passed landmark legislation requiring states to open their classroom doors to children with disabilities, putting an end to a long history of discrimination and forever changing the lives of millions of children.

The Individuals with Disabilities Education Act ("IDEA") (then called P.L. 94-142) is a federal law designed to ensure that every child identified with a disability is provided with a "free, appropriate public education" ("FAPE").<sup>23</sup> IDEA was originally the Education of the Handicapped Act ("EHA") 84 Stat. 175, as amended, 20 U.S.C. § 1401 et seq. While this federal law would be instrumental in providing education to children with disabilities, the protections were initially not as readily accessible to children with autism:

When the Education for Handicapped Children Act of 1975 (later renamed IDEA) came into force, the educational know-how in matters of autism was still virtually null. The machine of due process, however, was set in motion, and parents began to use it to create from scratch what is now a rich culture of autism education.<sup>24</sup>

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<sup>20</sup> Encyclopedia of Children and Childhood in History and Society-Special Education, <http://www.faqs.org/childhood/So-Th/Special-Education.html>.

<sup>21</sup> Caruso, *supra* note 15, at 516.

<sup>22</sup> U.S. Department of Education, *supra* note 17.

<sup>23</sup> P.L. 94-142 (Nov. 12, 1975).

<sup>24</sup> Caruso, *supra* note 15, at 516.

Since IDEA's enactment, all of the states and territories have agreed to comply with IDEA's mission to ensure that children with disabilities have the educational opportunities they were once denied.<sup>25</sup> The structure of IDEA and its protections have changed since its inception in 1975, including an amended version passed in 1997 (IDEA 97), as well as the law's re-authorization in 2004 with changes becoming effective on July 1, 2005.<sup>26</sup>

### What is IDEA & Its Protections for Children with Disabilities?

The articulated Congressional purpose for enacting IDEA was "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs."<sup>27</sup> In order to fulfill this stated purpose, IDEA authorizes the disbursement of funds to state and local agencies to provide educational services to children with disabilities contingent upon the satisfaction of conditions established in the statutory text.<sup>28</sup> IDEA also grants authority to the Secretary of Education to withhold funds from States that fail to comply with the relevant statutory requirements.<sup>29</sup>

Under IDEA, in order to receive funding the state is primarily responsible for ensuring that "a free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21."<sup>30</sup> FAPE is defined under IDEA as "special education and related services" that are "provided under public expense, under public supervision and direction."<sup>31</sup> IDEA also includes a requirement called "Child Find" that requires school districts receiving its funding to ensure that "children with disabilities residing in the State" are "identified, located, and evaluated."<sup>32</sup> The disabilities covered by IDEA are set out in thirteen categories found in the Act's regulations,<sup>33</sup> with Autism added in 1991.<sup>34</sup> In terms of defining autism in order to secure the legal protections available under the Act, the IDEA regulations provide the following:

(1)(i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(ii) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.

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<sup>25</sup> U.S. Department of Education, *Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, available at <http://www.ed.gov/policy/speced/leg/idea/history.html>.

<sup>26</sup> U.S. Department of Education, *Special Education & Rehabilitative Services Legislation*, available at <http://www.ed.gov/policy/speced/leg/edpicks.jhtml?src=ln>.

<sup>27</sup> 20 U.S.C. § 1400(d)(1)(A).

<sup>28</sup> *Id.* § 1412(a)(1)-(22).

<sup>29</sup> *Id.* § 1412.

<sup>30</sup> *Id.* § 1412(a)(1)(A).

<sup>31</sup> *Id.* § 1401(9).

<sup>32</sup> *Id.* §§ 1413(a)(3)(A); 1412(a)(10)(A).

<sup>33</sup> *Id.* § 1401(3)(A)(i); see 34 C.F.R. § 300.8.

<sup>34</sup> *Id.* § 1401(3)(A)(i) (2006); Caruso, *supra* note 15, at 516.

(iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.<sup>35</sup>

Under IDEA, in determining a child's eligibility for special education services, the school district "shall conduct a full and individual evaluation before the initial provision of special education and related services to a child with a disability. . ."<sup>36</sup> A parent may also make a request to a school to have a child evaluated by the school for disability.<sup>37</sup> When a school determines that a child should be evaluated for a disability, it must obtain the informed consent of the parent of the child prior to conducting the evaluation.<sup>38</sup> Moreover, "parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services."<sup>39</sup> If appropriate procedures are followed, a school may still proceed to perform an initial evaluation of a child suspected of having a disability even in the absence of parental consent by either refusal or a lack of response from the parent.<sup>40</sup> An evaluation of a child must be conducted by the school within 60 days of receiving a parental consent form unless the State where the child is located has developed its own timeframe for conducting evaluations that must be followed.<sup>41</sup> An evaluation of a child is to examine both 1) whether the child has a disability, and 2) whether the child has educational needs.<sup>42</sup> Moreover, an evaluation of a child to determine eligibility for disability may not include a consideration of a screening conducted of the child by a teacher or specialist for determining how to instruct the child to fulfill the required curriculum.<sup>43</sup> A parent's informed consent also must be obtained from a school before a school provides a child with a disability with special education and/or related services.<sup>44</sup> The absence of parental consent for special education and/or related services for a child with a disability however, cannot be overridden by a school.<sup>45</sup> Yet, a school will not be held in violation of federal law for not providing special education and/or related services when the parent of a child with a disability has refused to consent to special education and/or related services.<sup>46</sup> IDEA also provides protections for reevaluations of a child.<sup>47</sup> This may occur if the school determines reevaluation is necessary based on the child's educational needs.<sup>48</sup> A reevaluation may also be requested by a parent or teacher of the child.<sup>49</sup>

IDEA places further limits on the frequency of reevaluation allowing for no more than one per year unless otherwise agreed upon by the parent and teacher.<sup>50</sup> A reevaluation of a child with a

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<sup>35</sup> 34 CFR § 300.8(c)(1)(i)-(iii).

<sup>36</sup> 20 U.S.C. § 1414(a)(1)(A).

<sup>37</sup> *Id.* § 1414(a)(1)(B).

<sup>38</sup> *Id.* § 1414(a)(1)(D)(i)(I).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* § 1414(a)(1)(D)(ii)(I).

<sup>41</sup> *Id.* § 1414(a)(1)(C)(i)(I).

<sup>42</sup> *Id.* § 1414(a)(1)(C)(i)(I)-(II).

<sup>43</sup> *Id.* § 1414(a)(1)(E).

<sup>44</sup> *Id.* § 1414(a)(1)(D)(i)(II).

<sup>45</sup> *Id.* § 1414(a)(1)(D)(ii)(II).

<sup>46</sup> *Id.* § 1414(a)(1)(D)(ii)(III)(aa)-(bb).

<sup>47</sup> *Id.* § 1414(a)(2)(A)(i)-(ii).

<sup>48</sup> *Id.* § 1414(a)(2)(A)(i).

<sup>49</sup> *Id.* § 1414(a)(2)(A)(ii).

<sup>50</sup> *Id.* § 1414(a)(2)(B)(i).

disability must be conducted a minimum of once every three years unless an agreement is reached such that an evaluation is unnecessary by a parent and the teacher.<sup>51</sup>

IDEA also establishes the procedures for conducting evaluations.<sup>52</sup> A school must provide the parent of a child with a disability with notice of the evaluation procedures.<sup>53</sup> IDEA specifies what must be included in the evaluation of the child,<sup>54</sup> including the “use [of] a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent.”<sup>55</sup> These items will be considered when the child is evaluated for the determination of the presence of a disability and, if the child has a disability, for structuring the child’s Instructional Education Program (“IEP”).<sup>56</sup>

An evaluation of a child may also not be based on “a single measure or assessment” in making determinations of either a disability or the educational program for a child with a disability.<sup>57</sup> IDEA requires the “use [of] technically sound instruments” for the purpose of assessing the child for cognitive and behavioral issues that may contribute to his or her disability or educational needs.<sup>58</sup> Additional requirements are spelled out in IDEA for assessments, namely: that the assessments do not discriminate on the basis of race or culture;<sup>59</sup> that they are in a “language and form” designed to provide the most accurate picture of a child’s capabilities;<sup>60</sup> that the assessments used are “valid and reliable;”<sup>61</sup> that individuals conducting the assessments have the proper and training to administer the assessments,<sup>62</sup> and that instructions for the administration of the assessments are complied with by administrators.<sup>63</sup>

The evaluation must also include all areas in which it is suspected that the child could have a disability.<sup>64</sup> As such, “relevant information” must be provided by the assessment tools and strategies utilized that form the basis of a child’s educational plan.<sup>65</sup> If a child transfers from one school to another in the same school district within the same academic year, the schools must work together to coordinate the completion of the evaluation process in an efficient and timely manner.<sup>66</sup>

Upon the completion of an evaluation, “a team of qualified professionals” and the parent of the child shall determine: 1) whether or not the child has a disability, and 2) “the educational needs of the child.”<sup>67</sup> A parent will be provided with a copy of the evaluation report as well as the documentation assessing the child’s eligibility for disability and educational needs.<sup>68</sup> When a child is

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<sup>51</sup> *Id.* § 1414(a)(2)(B)(ii).

<sup>52</sup> *Id.* § 1414(b).

<sup>53</sup> *Id.* § 1414(b)(1).

<sup>54</sup> *Id.* § 1414(b)(2).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* § 1414(b)(2)(A)(i)-(ii).

<sup>57</sup> *Id.* § 1414(b)(2)(B).

<sup>58</sup> *Id.* § 1414(b)(2)(C).

<sup>59</sup> *Id.* § 1414(b)(3)(A)(i).

<sup>60</sup> *Id.* § 1414(b)(3)(A)(ii).

<sup>61</sup> *Id.* § 1414(b)(3)(A)(iii).

<sup>62</sup> *Id.* § 1414(b)(3)(A)(iv).

<sup>63</sup> *Id.* § 1414(b)(3)(A)(v).

<sup>64</sup> *Id.* § 1414(b)(3)(B).

<sup>65</sup> *Id.* § 1414(b)(3)(C).

<sup>66</sup> *Id.* § 1414(b)(3)(D).

<sup>67</sup> *Id.* § 1414(b)(4)(A).

<sup>68</sup> *Id.* § 1414(b)(4)(B).

identified as meeting the eligibility for special education services, the primary vehicle used to document the child's special education services is the IEP.<sup>69</sup> The creation of the IEP is performed by a group of individuals known as the IEP team<sup>70</sup> and includes the child's parents and/or guardian.<sup>71</sup> The role of parents in the development of the child's IEP has significantly impacted the shaping of the process:

According to the IDEA, the parents or guardians of each student are both allowed and expected to work closely with the team of educators and therapists in the design of an appropriate range of services that meets that student's specific needs. The parents' role as advocates in the process is now a central feature of the law of special education. The tone of the battle for children with disabilities has changed accordingly: the class actions of the 1970s have given way to strictly individual disputes, fought by parents with only their own means, one IEP at a time.<sup>72</sup>

The IEP is defined under IDEA as “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section. . . .”<sup>73</sup> When developing a child's IEP, the IEP Team will consider 1) the child's strengths,<sup>74</sup> 2) parental concerns over the enhancement of the child's educational opportunity,<sup>75</sup> 3) evaluation results from either the initial or most recent evaluation,<sup>76</sup> and 4) “the academic, developmental, and functional needs of the child.”<sup>77</sup> Additionally, the IEP Team must consider several “special factors”<sup>78</sup> that may pertain to the child including positive behavioral intervention or other strategies when the child has a behavioral problem,<sup>79</sup> language needs when a child lacks proficiency in English,<sup>80</sup> the use of Braille for a child who is blind or visually impaired (unless the IEP Team determines Braille is unnecessary),<sup>81</sup> communication needs of the child,<sup>82</sup> and assistive technology.<sup>83</sup>

IDEA details a number of requirements regarding the content of the IEP.<sup>84</sup> The primary areas that must be addressed in the IEP include: 1) “the child's present levels of academic achievement and functional performance,”<sup>85</sup> measurable annual goals both academic and functional,<sup>86</sup> how the goals will be measured and the frequency of progress reports for measuring those goals,<sup>87</sup> “a

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<sup>69</sup> *Id.* § 1414(d)(1)(A).

<sup>70</sup> *Id.* § 1414(d)(1)(B).

<sup>71</sup> *Id.* § 1414(d)(1)(B)(1).

<sup>72</sup> Caruso, *supra* note 15, at 515-16.

<sup>73</sup> 20 U.S.C. § 1414(d)(1)(A)(i).

<sup>74</sup> *Id.* § 1414(d)(3)(A)(i).

<sup>75</sup> *Id.* § 1414(d)(3)(A)(ii).

<sup>76</sup> *Id.* § 1414(d)(3)(A)(iii).

<sup>77</sup> *Id.* § 1414(d)(3)(A)(iv).

<sup>78</sup> *Id.* § 1414(d)(3)(B).

<sup>79</sup> *Id.* § 1414(d)(3)(B)(i).

<sup>80</sup> *Id.* § 1414(d)(3)(B)(ii).

<sup>81</sup> *Id.* § 1414(d)(3)(B)(iii).

<sup>82</sup> *Id.* § 1414(d)(3)(B)(iv).

<sup>83</sup> *Id.* § 1414(d)(3)(B)(v).

<sup>84</sup> *Id.* § 1414(d)(1)(A)(i)(I)-(VIII).

<sup>85</sup> *Id.* § 1414(d)(1)(A)(i)(I).

<sup>86</sup> *Id.* § 1414(d)(1)(A)(i)(II).

<sup>87</sup> *Id.* § 1414(d)(1)(A)(i)(III).



statement of the special education and related services and supplementary aids and services,<sup>88</sup> a statement of the program modifications or supports that will be for the school personnel that will be provided for the child,<sup>89</sup> an explanation of when the child will not participate with non-disabled children in activities in the regular classroom setting,<sup>90</sup> a description of specific accommodations for the child for standardized tests that will be used to assess the child's academic and functional performance,<sup>91</sup> specifications for services and modifications including when services begin, their frequency, location, and duration.<sup>92</sup> Furthermore, upon the child reaching age 16, the first IEP must address the child's transition that must be done annually<sup>93</sup> including postsecondary goals,<sup>94</sup> transition services,<sup>95</sup> and one year prior to reaching the age of majority that the child is informed of his or her rights.<sup>96</sup> Additional information may also be included in a child's IEP beyond these requirements.<sup>97</sup> A review of a child's IEP must occur at least annually by the IEP Team during which the IEP Team makes a determination of whether or not the child is achieving the annual goals articulated in the IEP.<sup>98</sup> Upon review of the IEP, the IEP Team will revise the IEP as appropriate.<sup>99</sup> Revisions of a child's IEP may be made due to the child's lack of progress towards the annual goals articulated in the child's IEP or the general information,<sup>100</sup> new information about the child based on reevaluation,<sup>101</sup> information given to the child's parent or by the child's parent,<sup>102</sup> needs anticipated for the child,<sup>103</sup> and "other matters."<sup>104</sup>

After the IEP Team determines the special education services that will be incorporated into the IEP, a determination must be made of where the child will receive those services or the child's educational placement.<sup>105</sup> The decision of placement "is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options."<sup>106</sup> The child's educational placement must be in the "least restrictive environment" under IDEA, or LRE.<sup>107</sup> The regulations to IDEA provide the following understanding of the requirements for the LRE:

- (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

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<sup>88</sup> *Id.* § 1414(d)(1)(A)(i)(IV).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* § 1414(d)(1)(A)(i)(V).

<sup>91</sup> *Id.* § 1414(d)(1)(A)(i)(VI).

<sup>92</sup> *Id.* § 1414(d)(1)(A)(i)(VII).

<sup>93</sup> *Id.* § 1414(d)(1)(A)(i)(VIII).

<sup>94</sup> *Id.* § 1414(d)(1)(A)(i)(VIII)(aa).

<sup>95</sup> *Id.* § 1414(d)(1)(A)(i)(VIII)(bb).

<sup>96</sup> *Id.* § 1414(d)(1)(A)(i)(VIII)(cc).

<sup>97</sup> *Id.* § 1414(d)(1)(A)(ii)(I).

<sup>98</sup> *Id.* § 1414(d)(4)(A)(i).

<sup>99</sup> *Id.* § 1414(d)(4)(A)(i).

<sup>100</sup> *Id.* § 1414(d)(4)(A)(ii)(I).

<sup>101</sup> *Id.* § 1414(d)(4)(A)(ii)(II).

<sup>102</sup> *Id.* § 1414(d)(4)(A)(ii)(III).

<sup>103</sup> *Id.* § 1414(d)(4)(A)(ii)(IV).

<sup>104</sup> *Id.* § 1414(d)(4)(A)(ii)(V).

<sup>105</sup> 34 CFR §300.116.

<sup>106</sup> 34 CFR §300.116(a)(1).

<sup>107</sup> 20 U.S.C. § 1412(a)(5).

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>108</sup>

The determination of a child's placement must be: 1) made at least annually, 2) based on the child's IEP, and 3) as close as possible to the child's home.<sup>109</sup> Several other considerations are also provided about the placement decision in the IDEA regulations. Unless otherwise specified in the IEP, a child's disability should not be considered when determining placement.<sup>110</sup> The regulations also provide for the consideration of "any potential harmful effect on the child" or "the quality of services" to the child needs in making the LRE determination.<sup>111</sup> The fact that a child with a disability may need specific accommodations is not reason alone, under IDEA, to remove the child from an age appropriate regular classroom setting.<sup>112</sup> IDEA also requires that there be a "continuum of alternatives" for placement of children with disabilities.<sup>113</sup> This requirement involves ensuring that children with disabilities have a number of different placement options<sup>114</sup> and supplementary services which permit a child with a disability to participate in a regular classroom setting.<sup>115</sup> The LRE mandate found in IDEA is often referred to as the statute's "mainstreaming" provision meaning that the law requires children with disabilities to be included to the "extent appropriate," in a regular education setting, with non-disabled children.<sup>116</sup>

An IEP Team creating an IEP for a child with a disability is required, under IDEA, to explain the reasons why the child would be excluded from participation in activities in the regular classroom setting.<sup>117</sup> As discussed later, significant challenges often arise for children with autism in the area of educational placement and securing the LRE.

IDEA also provides parents of children with disabilities a number of procedural safeguards to ensure they are involved in the special education process, remain properly informed of any decisions regarding a child with a disability, and have the opportunity to challenge a decision regarding the child.<sup>118</sup> Any school that provides special education in accordance with IDEA must provide procedural safeguards as specified in the statute.<sup>119</sup> IDEA outlines the particular procedural safeguards that are afforded to parents with children who are being considered for special education services based on a disability.<sup>120</sup> Under IDEA, parents are provided with the ability to participate in all aspects of their child's special education planning including "meetings, with respect to the identification, evaluation, and educational placement of the child, and the provision of a free

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<sup>108</sup> 34 CFR §300.114(a)(2)(i)-(ii).

<sup>109</sup> 34 CFR §300.116(b).

<sup>110</sup> 34 CFR §300.116(c).

<sup>111</sup> 34 CFR §300.116(d).

<sup>112</sup> 34 CFR §300.116(e).

<sup>113</sup> 34 CFR §300.115(a).

<sup>114</sup> 34 CFR §300.115(b)(1).

<sup>115</sup> 34 CFR §300.115(b)(2).

<sup>116</sup> Pete Wright, Esq. and Pamela Wright, MA, MSW, *Least Restrictive Environment (LRE) & FAPE*, WRIGHTS LAW, <http://www.wrightslaw.com/advoc/articles/idea.lre.fape.htm>.

<sup>117</sup> 20 U.S.C. § 1414(d)(1)(A)(i).

<sup>118</sup> *Id.* § 1415.

<sup>119</sup> *Id.* § 1415(a).

<sup>120</sup> *Id.* § 1415(b).

appropriate public education to such child, and to obtain an independent evaluation of the child.”<sup>121</sup> Parents have the right to review all records relating to the child’s special education planning.<sup>122</sup>

Another significant aspect of procedural safeguards for parents is notice.<sup>123</sup> Parents must be provided with notice explaining the procedural safeguards available to them under IDEA and the notice must be provided to a parent once a year.<sup>124</sup> Parents must also be provided with a copy of the procedural safeguards when: 1) it is determined initially that a child should be evaluated for a disability or evaluation of the child is requested by a parent; 2) when a complaint is originally filed on behalf of the child regarding any aspect of the special education process; or 3) when a copy of the procedural safeguards are requested by the parent.<sup>125</sup> The contents of the procedural due process notice to parents are also regulated under IDEA.<sup>126</sup> Furthermore, notice must be provided to parents when a school decides to pursue or make a change regarding the child’s special education.<sup>127</sup> Additionally, notice must be provided when the school *refuses* to pursue or make a change.<sup>128</sup> The instances in which notice must be provided to parents in the case of refusal include changes regarding “the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.”<sup>129</sup> IDEA sets out the requirements for prior written notice to parents in the case of either taking or refusing to take action involving a child: 1) a “description of the action proposed or refused” by the school;<sup>130</sup> 2) an explanation of the school’s reasoning for the action and a description of each item used by the school in making the determination; 3) a statement to the parents of the procedural safeguards provided under this section of IDEA or how to obtain a listing of those procedural safeguards if the notice is not for the child’s initial evaluation for disability; 4) contacts for the parent to serve as a resource for the parent in explaining this portion of IDEA; 5) a description of other options considered by the IEP Team and why those options were rejected; and 6) an understanding of the factors that the school ultimately utilized in its decision to pursue or refuse an action involving the child.<sup>131</sup> A school must establish procedures for providing notice to parents in the parents’ native languages whenever possible.<sup>132</sup>

Parents also have the right to an opportunity for mediation.<sup>133</sup> Parents are entitled to bring forth a complaint regarding any aspect of the process involving a child and special education based on disability including “the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.”<sup>134</sup> IDEA establishes a two year statute of limitations running from the time the parent either knew or should have known of the

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<sup>121</sup> *Id.* § 1415(b)(1).

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

<sup>123</sup> *Id.* § 1415(b)(3).

<sup>124</sup> *Id.* § 1415(d)(1)(A).

<sup>125</sup> *Id.* § 1415(d)(1)(A)(iii).

<sup>126</sup> *Id.* § 1415(d)(2).

<sup>127</sup> *Id.* § 1415(b)(3)(A).

<sup>128</sup> *Id.* § 1415(b)(3)(B).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* § 1415(c)(1)(A).

<sup>131</sup> *Id.* § 1415(c)(1).

<sup>132</sup> *Id.* § 1415(b)(4).

<sup>133</sup> *Id.* § 1415(b)(5).

<sup>134</sup> *Id.* § 1415(b)(6)(A).

statutory violation, unless the State where the action occurred has established its own timeframe for bringing complaints.<sup>135</sup>

When a complaint has been brought under IDEA, the law provides the opportunity for an impartial due process hearing available to either the parents or the school.<sup>136</sup> An attempt to resolve a complaint must occur through a preliminary meeting within 15 days of a school receiving a complaint<sup>137</sup> unless there is agreement<sup>138</sup> by the parties in writing to waive the meeting or, in the alternative, to participate in the mediation process.<sup>139</sup> If the parties fail to resolve the dispute within 30 days to the parent's satisfaction, the parties will proceed to a due process hearing.<sup>140</sup> Parents who file a complaint are entitled to disclosure of any evaluations conducted on the child and the recommendations for the child based on those evaluations five days prior to the hearing.<sup>141</sup> If a party fails to disclose this documentation, the hearing officer may bar its introduction at the due process hearing unless the other party has otherwise consented to the introduction to be offered as evidence.<sup>142</sup> IDEA mandates specific requirements for an individual to serve as a due process hearing officer.<sup>143</sup> A hearing officer may not be employed in any way by the school or district that is a party to the dispute involving the child.<sup>144</sup> The hearing officer may not have "a personal or professional interest" that impedes the individual's ability to serve as an impartial decision-maker.<sup>145</sup> While there is no requirement that a hearing officer be either a judge or even a lawyer, an individual serving as a hearing officer must have the knowledge and ability to understand the relevant law and regulations, to conduct hearings, and to write decisions.<sup>146</sup> The decision by a hearing officer in the event of a due process hearing may be appealed.<sup>147</sup>

Recent Supreme Court jurisprudence interpreting IDEA has also been critical to establishing the rights of parents and their children with disabilities. In the case of *Winkelman v. Parma City School District*, the U.S. Supreme Court considered "whether a nonlawyer parent of a child with a disability may prosecute IDEA actions *pro se* in federal court. . ."<sup>148</sup> The Court relied on the statutory scheme of IDEA in the absence of any textual reference to the issue at bar to hold that "IDEA grants parents independent, enforceable rights" that includes entitlement to FAPE for their children with disabilities.<sup>149</sup> The case's resolution allowed parents of children with disabilities to exercise *pro se* representation in IDEA cases.<sup>150</sup> If the Supreme Court had resolved the case in the alternative, it would have left many special education cases blocked at the door to the court since many parents of children with disabilities cannot afford the expenses of legal representation that could potentially

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<sup>135</sup> *Id.* § 1415(b)(6)(B).

<sup>136</sup> *Id.* § 1415(f)(1)(A).

<sup>137</sup> *Id.* § 1415(f)(1)(B)(i)(I).

<sup>138</sup> *Id.* § 1415(f)(1)(B)(i)(IV).

<sup>139</sup> *Id.* § 1415(f)(1)(B)(i).

<sup>140</sup> *Id.* § 1415(f)(1)(B)(ii).

<sup>141</sup> *Id.* § 1415(f)(2)(A).

<sup>142</sup> *Id.* § 1415(f)(2)(B).

<sup>143</sup> *Id.* § 1415(f)(3)(A).

<sup>144</sup> *Id.* § 1415(f)(3)(A)(i)(I).

<sup>145</sup> *Id.* § 1415(f)(3)(A)(i)(II).

<sup>146</sup> *Id.* § 1415(f)(3)(A)(ii).

<sup>147</sup> *Id.* § 1415(g)(1).

<sup>148</sup> 550 U.S. 516, 522 (2007).

<sup>149</sup> *Id.* at 526-27, 533.

<sup>150</sup> *Id.*

take years to prosecute under IDEA. The relief sought by the plaintiff in *Winkleman* included tuition reimbursement for private education.<sup>151</sup>

Another significant decision viewed by disability rights advocates as a major victory in federal special education law came in *Forest Grove School District, v. T.A.*<sup>152</sup> In *Forest Grove*, the U.S. Supreme Court examined whether parents who unilaterally place their child with a disability in a private school may receive tuition reimbursement under IDEA.<sup>153</sup> Interestingly, IDEA as originally drafted was silent on the issue of reimbursement; however, the law did provide judicial authority with the ability to grant relief, stating, “[T]he court shall receive records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of evidence, shall grant such relief as the court determines is appropriate.”<sup>154</sup> The U.S. Supreme Court would play a critical role in initially determining what constituted “appropriate” relief under this provision in IDEA in the cases of *School Comm. of Burlington v. Department of Ed. of Mass.*<sup>155</sup> and *Florence County School District Four v. Carter*.<sup>156</sup>

The Supreme Court’s leading opportunity to examine the issue of what constituted “relief” under the Education for All Handicapped Children Act (“EHA”) occurred in *Burlington*. The Court first examined tuition reimbursement to parents of children with disabilities for private educational placement.<sup>157</sup> In its evaluation, the Court considered the awarding of private tuition reimbursement to the parents in the context of a court determination that private placement, as opposed to placement in the proposed IEP offered by the school district, was proper for the child under EHA.<sup>158</sup> Ultimately, it determined that judicial authority to grant relief included reimbursement to parents of children with disabilities who place their children in private educational institutions for special education.<sup>159</sup>

The Court’s holding in *Burlington* answered the initial question of whether tuition reimbursement to parents of children with disabilities for placement in private educational institutions was permissible relief, but unresolved issues remained. Indeed, the Court failed to provide any guidance in what situations parents would succeed in seeking reimbursement for funding private education. Specifically, the Court did not answer whether this decision applied to situations where parents rejected the IEP initially proposed for their child by the school district and instead placed the child in private education without the child having ever received special education services in the local public agency. This is the legal dilemma that was taken up twenty-four years later by the Court in *Carter*.

In *Carter*, the child was identified as having a disability while she was in a public school within the local school district.<sup>160</sup> Dissatisfied with this plan, the child’s parents challenged its appropriateness under IDEA pursuant to 20 U.S.C. § 1415(b)(2) and the IEP was determined to be

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<sup>151</sup> *Id.* at 521.

<sup>152</sup> 129 S. Ct. 2484 (2009).

<sup>153</sup> *Id.*

<sup>154</sup> 20 U.S.C. § 1415(e)(2).

<sup>155</sup> 471 U.S. 359 (1985).

<sup>156</sup> 510 U.S. 7 (1993).

<sup>157</sup> *See Burlington*, 471 U.S. 359.

<sup>158</sup> *Id.* at 369.

<sup>159</sup> *Id.*

<sup>160</sup> *Carter*, 510 U.S. at 10.

appropriate by both local and state hearing officers.<sup>161</sup> During the pendency of those challenges, the parents removed the child to a private institution for children with special education needs.<sup>162</sup> The parents eventually brought an action to recover the cost of tuition reimbursement they had incurred in placing their child in a private institution because the school district had failed to provide their child FAPE under the IEP.<sup>163</sup> Compared to *Burlington*, the question at issue in *Carter* was a very narrow one indeed.<sup>164</sup>

In *Carter*, the Court examined whether or not the parents of children with disabilities who unilaterally place their children in private educational institutions for the purpose of receiving special education services are prohibited from being retroactively reimbursed when the private educational institution does not meet state requirements pursuant to IDEA.<sup>165</sup> The Court eventually determined that the provisions of 20 U.S.C. § 1401(a)(18) were inapplicable to parental placements of children with disabilities in private educational institutions.<sup>166</sup> In response to the argument that reimbursement should be denied because the private school did not meet state standards, the Court stated that it would be inappropriate for the local school district that has already failed to provide a “free appropriate public education” under IDEA to then find the parents’ choice for private educational placement improper.<sup>167</sup> The Court explained: “Parents’ failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement.”<sup>168</sup> This analysis in *Carter* signaled a broad view in favor of permitting reimbursement to parents of children with disabilities in private education institutions for special education services.

When Congress reauthorized and amended IDEA in 1997, the *Burlington* and *Carter* decisions were incorporated into the Act’s protections.<sup>169</sup> The 1997 amendments include a section specifically addressing cases where the school district has failed to provide the child with a disability FAPE and the parents of the child seek tuition reimbursement after placing the child in a private institution.<sup>170</sup> This new provision provides guidance for “[p]ayment for education of children enrolled in private schools without consent of or referral by the public agency.”<sup>171</sup> The first subchapter of the section outlines the cases in which parents may seek tuition reimbursement stating that:

This subchapter does not require a local educational agency to pay for the cost of education including special education and related services of a child with a disability of a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.<sup>172</sup>

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 13.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 14.

<sup>168</sup> *Id.*

<sup>169</sup> 20 U.S.C. § 1412(a)(10)(C).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* § 1412(a)(10)(C)(i).

The second subchapter describes the proper course of action in a situation where a hearing officer or court may be required to award tuition reimbursement to the parents of a child with a disability for the private education of that child.<sup>173</sup> Under this provision, the parents may be awarded tuition reimbursement where the child “who previously received special education and related services under the authority of a public agency” was not provided FAPE by the school district.<sup>174</sup> Finally, the last subchapter of lists factors for a court to consider in making a determination to reduce or deny reimbursement when a failure of the parents to be cooperative in the IEP process is discretionary.<sup>175</sup>

The Supreme Court returned to the issue of tuition reimbursement under IDEA in *Forest Grove*. The Court examined whether the 1997 Amendments prohibited parents of children with disabilities from tuition reimbursement when a parent places a child with a disability in a private institution and the child has not “previously received special education and related services” initially from the public school.<sup>176</sup> The Court ultimately determined that the amendments did not bar parents from seeking tuition reimbursement in this manner under IDEA.<sup>177</sup> In examining this question, the Court relied heavily on its jurisprudence involving questions regarding tuition reimbursement in *Burlington* and *Carter*.

The dispute giving rise to the present litigation differs from those in *Burlington* and *Carter* in that it concerns not the adequacy of a proposed IEP but the School District's failure to provide an IEP at all. And, unlike respondent, the children in those cases had previously received public special-education services. These differences are insignificant, however, because our analysis in the earlier cases depended on the language and purpose of the Act and not the particular facts involved. Moreover, when a child requires special-education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP. It is thus clear that the reasoning of *Burlington* and *Carter* applies equally to this case. The only question is whether the 1997 Amendments require a different result.<sup>178</sup>

Again, the Court reached the determination that tuition reimbursement in a case such as this is permissible under IDEA: “[c]onsistent with our decisions in *Burlington* and *Carter*, we conclude that IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.”<sup>179</sup>

In reaching this conclusion, the Court also provided guidance to lower courts in terms of what they must consider in making determinations about tuition reimbursement to parents of

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<sup>173</sup> *Id.* § 1412(a)(10)(C)(ii).

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

<sup>175</sup> *Id.* § 1412(a)(10)(C)(iii).

<sup>176</sup> *Forest Grove*, 129 S. Ct. at 2488.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 2490.

<sup>179</sup> *Id.* at 2496.

children with disabilities in challenges against school districts.<sup>180</sup> The Court stated: “[w]hen a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child’s private education is warranted.”<sup>181</sup> The Supreme Court’s decision in *Forest Grove* was viewed by many in the disability community as a victory for parents of children with disabilities in addressing the inadequacies present in the current special education system.<sup>182</sup>

### Other Sources of Special Education

While IDEA serves as the primary vehicle for special education through federal law, there are several other sources that may provide for or impact the special education services of a child with a disability. The use of these other legal mechanisms for securing access to special education may come into play in the case of an autistic child in the event that the school determines the child does not meet the criteria defining “autism” under IDEA. One federal law that may protect a child’s right to educational opportunity is Section 504 of the Rehabilitation Act of 1973.<sup>183</sup> Section 504 is an alternative for special education planning to IDEA in more rare cases such as when a child is not eligible under IDEA because his or her disability does not fall into one of the 13 delineated categories.<sup>184</sup>

Section 504 also covers qualified students with disabilities who attend schools receiving Federal financial assistance.<sup>185</sup> To be protected under the regulation, a student must be determined to: (1) have a physical or mental impairment that substantially limits one or more major life activities; or (2) have a record of such an impairment; or (3) be regarded as having such an impairment.<sup>186</sup> Section 504 requires that school districts provide FAPE to qualified students in their jurisdictions who have a physical or mental impairment that substantially limits one or more major life activities.<sup>187</sup>

The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on the basis of an individual inquiry.<sup>188</sup> The Section 504 regulatory provision at defines a physical or mental impairment as:

Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> David G. Savage, *Supreme Court Victory for Parents of Disabled Students*, The LA Times, June 23, 2009, available at <http://articles.latimes.com/2009/jun/23/nation/na-court-disabilities23>.

<sup>183</sup> Pub. L. No. 93-112, 87 Stat. 394 (Sept. 26, 1973) (codified as 29 U.S.C. §§ 701 et seq.).

<sup>184</sup> *Id.*

<sup>185</sup> 29 U.S.C. § 794 (2002).

<sup>186</sup> 29 U.S.C. § 705(a)(4)(2010).

<sup>187</sup> *Id.* § 705 (2)(B).

<sup>188</sup> 34 C.F.R. 104.3(j)(2)(i)



disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>189</sup>

Notably, the regulatory provision does not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty in ensuring the comprehensiveness of such a list.

School districts may always use regular education intervention strategies to assist students with difficulties in school. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or related aids and services or modification to regular education if the student, because of disability, needs or is believed to need such services.

No Child Left Behind may also be implicated in special education matters. The law's impact on children with disabilities receiving special education has been questioned in recent years for its use of standardized testing to measure achievement in schools. The act's apparent lack of flexibility was called into question most recently by the Obama Administration's decision to rewrite the law formerly known as the Elementary and Secondary Education Act ("ESEA").<sup>190</sup>

Finally, state laws regarding special education may be an important source of legal protection in regards to special education. While federal law may be a floor in terms of what may be required of a state in order to receive federal funding under IDEA, the state may have more specific legal requirements for parents who may seek redress for a failure to provide their child special education services. Checking the law of the State where the child goes to school is paramount in determining the extent of protection available.

## II. The Case of Special Education in Public Education for Children with Autism

With a basic understanding of how public special education functions in the U.S., next we conduct a careful examination of the implementation of special education as provided through IDEA for children with autism. While the promise of IDEA brought optimism, the story of autistic children demonstrates that the system is far from being a perfect fit:

Enter autism. At its start, the movement was poised to give the public education system a shake, at least towards the limited goal of opening up meaningful educational opportunities for all the children on the autistic spectrum. So far, results have been mixed. On one hand, children anywhere in the country are much more likely to be diagnosed and serviced. On the other hand, inequities persist and are even less likely than before to be addressed in court. Judicial conflict, acute and disruptive through the 1990s, has been somehow normalized into routine educational business. The distributive reach of educational services, even within the pool of children with autism, remains generally regressive.<sup>191</sup>

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<sup>189</sup> *Id.*

<sup>190</sup> Pub. L. 89-10, 79 Stat. 27; reauthorized by the No Child Left Behind Act.

<sup>191</sup> Caruso, *supra* note 15, at 516.

Autism and special education under IDEA have been under careful scrutiny—including by the federal government. The following observations were found as a result of the Department of Education’s 27<sup>th</sup> Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2005, Vol. 1<sup>192</sup>:

Under IDEA, children with a disorder on the autism spectrum are usually found eligible for services under the category of “autism.” In the fall of 2005, more than 160,000 school-aged children (3-21) received special education and related services in the public schools under the “autism” category.<sup>193</sup>

Despite the federal legal protections available for children with autism through IDEA, the unique needs of those children and the effectiveness of IDEA in meeting those needs were still closely scrutinized by the federal government. In January 2005, the Government Accountability Office (“GAO”) produced a report on this issue.<sup>194</sup> The report opened with the following acknowledgement:

According to the Autism Society of America, about 1.5 million Americans are currently living with some form of autism. This figure includes over 100,000 school-aged children diagnosed with autism served under the Individuals with Disabilities Education Act (IDEA), the primary federal legislation that addresses the educational needs of children with disabilities. As the number of children diagnosed with autism has increased, interest in understanding how children diagnosed with autism are being served under IDEA has grown.<sup>195</sup>

The GAO emphasized that these statistics on the number of children that receive special education through IDEA has led to a further need to specifically examine the education of autistic children.<sup>196</sup> The increase in the number of children with autism receiving special education services under IDEA has been dramatic. According to the GAO report: “Data collected for the Department of Education indicate that the number of children ages 6 through 21 diagnosed with autism served under the IDEA has increased by more than 500 percent in the last decade.”<sup>197</sup> Also, the number of autistic children receiving special education services through IDEA has greatly surpassed the needs of children with other disabilities.<sup>198</sup> IDEA provides funding for various services for these children, in particular, early intervention services for children under age 3 and educational supports for children

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<sup>192</sup> U.S. DEPARTMENT OF EDUCATION, 27<sup>TH</sup> ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2005 Vol. 1, *available at* <http://www2.ed.gov/about/reports/annual/osep/2005/parts-b-c/27th-vol-1.pdf>.

<sup>193</sup> NATIONAL DISSEMINATION CENTER FOR CHILDREN WITH DISABILITIES, FACT SHEET 4, JUNE 2010, *available at* <http://www.nichcy.org/wp-content/uploads/docs/fs1.pdf>

<sup>194</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON HUMAN RIGHTS AND WELLNESS, COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES, SPECIAL EDUCATION: CHILDREN WITH AUTISM (GAO 2005 REPORT), January 2005, *available at* <http://www.gao.gov/assets/250/245066.pdf>.

<sup>195</sup> *Id.* at 1.

<sup>196</sup> *Id.* at 5.

<sup>197</sup> *Id.* at 9.

<sup>198</sup> *Id.* at 19. “The number of children ages 6 through 21 diagnosed with autism receiving services under IDEA has grown at a higher rate than the number of children diagnosed with certain other ‘low-incidence’ disabilities.”

ages 3 to 21.<sup>199</sup> The GAO articulated 3 primary reasons for the dramatic increase of children with autism receiving services under IDEA: 1) “the advent of better diagnoses;” 2) the categorization of Autism Spectrum Disorder (“ASD”) has become more widespread; and 3) “a higher incidence of autism in the general population.”<sup>200</sup> States have also acknowledged the “boom” of children being identified as autistic. Most recently, it was reported that the rate of children diagnosed with autism has tripled in the State of California with as of yet unidentified cause that will require further research.<sup>201</sup>

### **Specific Challenges for the Special Education of Children with Autism Public Funding & Special Education**

While the federal government has been committed to funding special education since the inception of IDEA, the extent of the funding promised by law has been minimal compared to the original promise.<sup>202</sup> The National Education Association (“NEA”) states, “the federal government has failed over three decades to fulfill its commitment to provide 40 percent of the excess costs of serving students with disabilities. Today, that gap is around \$15 billion each year, or a shortfall of almost \$2,300 per student with disabilities.”<sup>203</sup> Often the discussion of funding IDEA is linked to accountability in expecting all students to achieve at the highest possible levels. However, inadequate funding from IDEA continues to result in the further marginalization of disabled children.<sup>204</sup> As such, the issue of special education funding is not a problem in a vacuum but one that is largely the result of the U.S. educational system as a whole:

High standards for all students is a common theme heard at the local, state, and federal level of our educational system. The important idea here is that “all” students are expected to achieve at high levels and thus includes a population of students that are often not thought capable of achieving at high levels: students with disabilities. Within current K-12 education reform efforts, those who fail to achieve at certain levels face consequences in various forms, depending on the state’s policy. Simply put, students need to achieve at a certain levels or students, teachers, and school administration will be held accountable by the Federal Government. However, the Federal Government needs to be held accountable on an issue that has long hindered special education and it’s ability to get students to achieve at the highest level: fully funding special education at the 40% of the national average expenditure for all students (APPE) mandated by IDEA. IDEA mandates that 40% of the costs incurred in special education will be funded by the Federal Government.<sup>205</sup>

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<sup>199</sup> *Id.* at 23-24.

<sup>200</sup> *Id.* at 14

<sup>201</sup> Joanna Lin, *Autism Rate Triples Among California's K-12 Students*, THE HUFFINGTON POST, Feb. 4, 2011, [http://www.huffingtonpost.com/2011/02/04/autism-rate-triples-among\\_n\\_818709.html](http://www.huffingtonpost.com/2011/02/04/autism-rate-triples-among_n_818709.html).

<sup>202</sup> Michelle Diament, *Obama Tight-Lipped On Special Education Funding*, DISABILITY SCOOP, Feb. 11, 2011, <http://www.disabilityscoop.com/2011/02/11/obama-tight-lipped-sped/12274/>.

<sup>203</sup> National Education Association, *Invest in America's Future*, <http://www.nea.org/home/29988.htm>.

<sup>204</sup> Taylor Kearns, *Accountability In IDEA in U. S. Education*, 2001, The International Center for Disability Resources on the Internet, available at <http://www.icdri.org/Education/ACCOUNTIDEA.htm>.

<sup>205</sup> *Id.*

NEA advocates for the full mandated IDEA funding as a means to provide state and local governments the opportunity to ensure improvement in education: “Federal funding must be viewed in light of whether it makes it easier or more difficult for states and school districts to provide programs and services that truly make a difference. If the federal government fully funded Title I and IDEA, schools would have more of the flexibility policymakers say would help them improve achievement.”<sup>206</sup> Regarding IDEA specifically, NEA has stated: “Make funding for the program an entitlement, rather than discretionary spending, to ensure adequate and stable funding.”<sup>207</sup> Unfortunately, the optimist’s vision of IDEA has been plagued by the reality of financial resource limitations:

As commonly interpreted, the FAPE requirement imposes upon schools the obligation to provide individualized educational programs, strictly tailored to the special needs of each eligible student. Special education, therefore, is a significant component of local school budgets. So far, federal funds have covered no more than 17-18% of the costs of special education, letting states and districts foot the rest of the bill. The result is a profoundly uneven culture of special education across the country. The quality and the intensity of services range widely, depending on the wealth of states or districts and on the relative political clout of disability advocacy in each community.<sup>208</sup>

Special education funding has been an exceptionally political issue at the federal level for some time.<sup>209</sup> In 2002, Andrew J. Rotherham made the following observation in *Education Week* over the politics that has plagued special education funding:

The politicizing of IDEA funding has hindered rather than advanced a solution to the finance problem and distracted from other important reform issues in special education. Congress and the president can advance the debate by investing more in special education, but doing so based on policy instead of politics. That will require the president to lead and both parties in Congress to make concessions, but action on this issue is long overdue. The interminable special education funding fight is good for Washington partisans, but it does not benefit the students the Individuals with Disabilities Education Act is supposed to help, or their peers adversely affected by current funding shortfalls.<sup>210</sup>

The suggestion has also been made that the federally mandated 40 percent funding requirement by the federal government under IDEA may not be a proper estimate of the cost of required special education funding.<sup>211</sup>

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Caruso, *supra* note 15, at 515.

<sup>209</sup> Andrew J. Rotherham, *The Politics of IDEA Funding*, EDUCATION WEEK, Oct. 9, 2002, available at <http://www.dlc.org/print.cfm?contentid=250939>.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

Contrary to much of the rhetoric, God did not hand down the oft-cited 40 percent federal-funding target for the IDEA. It's not sacred, but based on a generation-old political compromise; and, because of the peculiarities of state and local school finance, it may in fact be too little for Washington to contribute or, conversely, more than what is required.<sup>212</sup>

While it is not this author's intent to begin an elaborate debate on how much the federal government should be expected to spend on special education, the controversy surrounding this area of funding is essential to acknowledge. The dilemma involving supporting special education services for a skyrocketing number of children with autism logically necessitates more special education and thus, more funding, whether that be from the federal government or otherwise. As a result, the financial burden of funding special education has been largely left to state and local organizations.

In general, states are seriously struggling with their own limited budgets to fund special education knowing that the ramifications of not funding special education, at least at a minimum level, could potentially result in a loss of federal funding.<sup>213</sup> Kansas serves as an example of the internal struggle at the state level.<sup>214</sup> While trying to increase funding for special education on one end, the Kansas House and Senate are at odds—one pushing for the increased spending for special education and the other rejecting it.<sup>215</sup>

While there is at least a considerable push in Kansas to provide greater funding for special education, other states around the country are seeking dramatic changes in the form of funding cuts.<sup>216</sup> As much as the story of securing educational rights for children with disabilities has involved the recognition of the dignity of these children and the benefits an education would provide, these rights cannot be fully actualized with the continued lack of financial support.

The 2005 GAO report provided the following information regarding the per pupil expenditure for children with autism receiving special education through IDEA developed by the Special Education Expenditure Project (“SEEP”):

The average per pupil expenditure for educating a child with autism was estimated by SEEP to be over \$18,000 in the 1999-2000 school year, the most recent year for which data were available. This estimate was nearly three times the expenditure for a typical regular education student who did not receive special education services and was among the highest per pupil expenditures for school-age children receiving special education services in public schools.<sup>217</sup>

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

<sup>213</sup> Scott Rothschild, *Kansas Senate Budget Bill Retains Funding for Special Education*, LJWORLD.COM, Feb. 15, 2011, <http://www2.ljworld.com/news/2011/feb/15/kansas-senate-budget-bill-retains-funding-special/>.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Nirvi Shah, *Special Education Programs, Private Placements, Under Assault*, EDUCATION WEEK, Feb. 14, 2011, *available at* [http://blogs.edweek.org/edweek/speced/2011/02/special\\_education\\_spending\\_und.html](http://blogs.edweek.org/edweek/speced/2011/02/special_education_spending_und.html).

<sup>217</sup> GAO 2005 REPORT, *supra* note 194, at 2.

In computing per pupil expenditure for autistic children, the GAO considered the following: both regular and special education instruction, administration and support at the school and district levels as well as for special education programs, regular and special transportation services, and school facilities.<sup>218</sup> The SEEP went even further by determining how the allocation of these funds was divided in terms of services rendered to these children.<sup>219</sup> The majority of the financial resources were spent as follows: "Approximately 68 percent of total per pupil expenditures for autistic children in 1999-2000 (an estimated \$12,773) was used on instruction and related services."<sup>220</sup> Of this amount, it was estimated that 90 percent was for special education instruction compared to ten percent for regular education.<sup>221</sup>

As the number of cases of children with autism has grown, so has the impact on the amount of money states have required for special education.<sup>222</sup> Indiana provides the most recent example of this:

As conditions and diseases go, the range of autism spectrum disorders are relatively new. Autism first appeared in the medical literature in the early the early 1940s. Autistic Disorder didn't even become a diagnosis in the American Psychiatric Association's *Diagnostic & Statistical Manual (DSM)* until the third edition, the *DSM-III*, in 1980. But its relentlessly rising incidence has driven the equally relentless increase in special ed funding, even in the past two years, when the total number of special education students across all categories dropped for the first time since 1981-82.

Autism became a special ed category in Indiana six years after the *DSM-III*, when school districts across the state reported 59 students received services for it. That number dropped to 31 the next year and has risen every year since.

When the *DSM-IV* expanded the range of autism spectrum disorders in 1994 to include Asperger's Disorder and Pervasive Developmental Disorder-Not Otherwise Specified, autism diagnoses in Indiana public schools jumped 80 percent, from 487 to 877, representing the largest one-year increase in 21 years of data.

By 2007-08, 9,236 children received special ed for Autism, representing a 29,693 percent increase over the first count in 1986.<sup>223</sup>

The difficulties in funding special education generally combined with a rapid increase of children diagnosed with autism has resulted in a complicated funding struggle that is not going to disappear any time soon.

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<sup>218</sup> *Id.* at 27.

<sup>219</sup> *Id.* at 30.

<sup>220</sup> *Id.* at 29.

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

<sup>222</sup> Steven Higgs, *Autism Drives Special Ed Funding Hikes*, The Bloomington Alternative, Jan. 31, 2010, available at <http://www.bloomingtonalternative.com/articles/2010/01/31/10298>.

<sup>223</sup> *Id.*

### Individualized Education Program & Services Available

Services utilized by children with autism vary depending on the particular child's needs.<sup>224</sup> Indeed, "[c]hildren with [Autism Spectrum Disorders] may demonstrate a variety of manifestations of the disorder and need services accordingly."<sup>225</sup> While a child on the more severe end of the autism spectrum may require services to help in fostering the child's communication skills, at the other end of the spectrum a child with Asperger's Syndrome with much higher intellectual functioning may require different services.<sup>226</sup> For example: "A child with Asperger's disorder may be more verbal than other children with autism and may have average or above average intelligence, yet still be in need of services."<sup>227</sup> Additionally, it is critical to remember that the needs of a child with autism may change.<sup>228</sup> However, the GAO report indicated that early intervention is critical for educating children with autism.<sup>229</sup> Further, there is support for the ability of early intervention to improve the opportunities for children with autism in the long-term: "While no known cure for ASD exists, the general agreement is that early diagnosis followed by appropriate treatment can improve outcomes for later years for most children with ASD."<sup>230</sup> Children with autism may require a number of different services for education depending on the particular form of autism, including: special education teachers/aides, speech therapists, behavioral therapists, occupational therapists, physical therapists, and counselors/psychologists.<sup>231</sup> The needs of a child with autism in the educational setting may also differ over time.<sup>232</sup>

With the unique nature of the autistic child's needs, the IEP becomes even more important in terms of ensuring the appropriate services. As a result, the parent's role can be vital in this process of securing and/or advocating for services.<sup>233</sup> "A further source of variation and inequity, even within each district, is the relative power of each child's family to negotiate a strong individualized educational plan before the start of the school year. According to the IDEA, the parents or guardians of each student are both allowed and expected to work closely with the team of educators and therapists in the design of an appropriate range of services that meets that student's specific needs."<sup>234</sup> Whether or not this is truer in the case of children with autism than other children with disabilities is unclear. However, the role of a parent cannot be ignored in these cases when the vast majority involve disputes over increasingly individualized special education.<sup>235</sup>

The inference that can be drawn from this in the case of autistic children is that because these children often have very varied service needs, they are far more likely to result in increasingly intense battles with school districts over the services that will be provided compared to other children suffering from other disabilities. Because of this, the abilities of a parent as an advocate for

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<sup>224</sup> *Id.*

<sup>225</sup> GAO 2005 REPORT, *supra* note 194, at 23.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

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

<sup>229</sup> *Id.* at 10. "According to a 2001 National Research Council report, intervention at an early age is a key feature of successful approaches to educating children with autism."

<sup>230</sup> *Id.* at 13.

<sup>231</sup> *Id.* at 22.

<sup>232</sup> GAO 2005 REPORT, *supra* note 194, at 23.

<sup>233</sup> Caruso, *supra* note 15, at 515.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

an autistic child will be critical in dealings with school districts and their differing reactions in responding to the needs of autistic children.<sup>236</sup> As the nature of services for children with disabilities received under IDEA has involved an increasing amount of litigation, the cases of autism prove more complex.<sup>237</sup> These challenges have been captured as follows:

In terms of substance, the hearing officer must determine whether a child's IEP was properly written and implemented, and whether the child received "free appropriate public education" (FAPE) in a "least restrictive environment" (LRE). Such substantive benchmarks are never easy to assess, but when the disability happens to be autism, things can become particularly controversial.<sup>238</sup>

### III. Education & Parental Choice: Creating Alternatives to Special Education in Public Education for Children with Autism

While at first blush educational alternatives may seem radical, educational choice is not a new concept: "Choice within the public system began to be available in the 1960s when an educational reform movement added alternative schools to the available placements in some school systems."<sup>239</sup> The advent of alternatives in education and choice grew significantly in the next three decades with the development of magnet schools, charter schools, and school voucher programs.<sup>240</sup> This development of parental choice indicates that parents are electing not to educate their children in what would be the child's identified public school district:

According to the National Center for Education Statistics (NCES) report by Tice et al. (2006), statistics confirm that parental exercise of choice is a growing practice: between 1993 and 2003, the percentage of children enrolled in their assigned public schools decreased from 80% to 74% and children attending public schools chosen by their parents increased from 11% to 15%.<sup>241</sup>

Even with the current legal protections available for children with autism through IDEA, it has become increasingly evident that IDEA has not succeeded in providing the appropriate services to meet their educational needs as parents have not only turned elsewhere but state governments have begun implementing various mechanisms to meet these needs. Parental frustration over getting public schools to provide their children with services appropriate for their needs through IDEA has led many states to step in and create available alternatives to ensure children with autism are not left behind by the federal framework of IDEA.

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 516-17.

<sup>238</sup> *Id.* at 517.

<sup>239</sup> Policy Brief, Eve Muller and Eileen Ahearn, *Special Education Vouchers: Four State Approaches*, INFORUM, April 2007, available at <http://projectforum.org/docs/FinancingSpecialEducation-StateFundingFormulas.pdf>.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*



The following section will explore the most recent development in education that has been advanced in providing special education to children with autism outside the traditional system—school vouchers. Like the special education provided through IDEA, this relatively new alternative has had its own challenges in providing special education to children with autism. However, the system is significant as it provides a unique avenue for potential federal special education reform for children with disabilities, particularly children with autism.

### School Voucher Programs & Special Education

According to Eve Muller and Eileen Ahearn, “[t]he commonly accepted meaning of a school voucher is an allocation of public funds to parents to pay for the education of their children at a private school of their choice.”<sup>242</sup> The implementation of school voucher programs has not been without controversy. In particular, the constitutionality of such programs has been questioned on the grounds that, through the voucher, the government is providing money to parents to educate their children at private institutions, thus raising an argument involving separation of church and state.<sup>243</sup> This has necessitated the Supreme Court stepping in to decide the constitutionality of these programs, and while there has been some divisiveness on this issue, the Court has found that if these programs are “neutral” or “of direct benefit to students”, they can survive a constitutional challenge.<sup>244</sup> In *Zelman v. Simmons-Harris*, The Court also determined that voucher programs must comply with state requirements to pass constitutional muster.<sup>245</sup> With this general introduction to voucher programs, we proceed to examine the creation of voucher programs for children with special education needs.<sup>246</sup>

School vouchers have become a popular alternative for parents of children with disabilities to secure special education services they could not have otherwise received from a public school. One of the earliest school voucher programs for children with disabilities began in Florida in 1999.<sup>247</sup> The Florida program continued growing and eventually served as a model for the creation of similar programs in Arizona and Utah.<sup>248</sup> The creation of these special school voucher programs has not been limited to the general pool of children with disabilities.<sup>249</sup> In this case, vouchers are provided for the parents of autistic children who file a complaint with the state over the inadequacy of the special education services that their children have received with public schools.<sup>250</sup> The longest running program of this type is found in Ohio where legislation was passed in 2003 to create the Autism Scholarship Program as an option for parents of autistic children to seek to finance their children’s educational needs.<sup>251</sup>

However, not all attempts at creating voucher programs have been successful, and several serious debates have been raised regarding the law and policy of special education. The funding of these programs can create legal issues as “The voucher programs for students with disabilities are all

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> 536 U.S. 639 (2002).

<sup>246</sup> Muller, *supra* note 239.

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

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

financed through state and local funds and not federal funds.”<sup>252</sup> Because of this dependency on local funds and exclusion from federal funds for special education, children with disabilities receiving an education through these programs will not be guaranteed the same protection of educational rights in special education under IDEA:

The students using these vouchers are considered to be ‘parentally placed private school students’ under the federal special education law, the Individuals with Disabilities Education Act (IDEA). As such, they have no individual entitlement to a free appropriate public education. IDEA regulations provide that, “No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school” [CFR 34 §300.137].<sup>253</sup>

Due to the lack of IDEA protections, there is opposition to these programs arguing that they do not provide adequate special education services.<sup>254</sup> Opponents of special education vouchers also argue that the options for private placement already available under IDEA are sufficient.<sup>255</sup> The NEA has opposed these voucher programs largely because of the loss of the federal legal protections that are otherwise available to a child with a disability:

Those who want to privatize education claim that vouchers would provide children with special needs better access to education and services than are available under IDEA. The reality is that parents and children would lose a multitude of rights if special education were funded through vouchers or through education tax credits, with no guarantees that sacrificing these rights would yield a better quality education or better services. This is why NEA opposes vouchers for students with disabilities.<sup>256</sup>

NEA instead advocates for the continued improvement of the public education system: “The best way to ensure that every child, including those most vulnerable, has access to a free, quality education is to invest in our public school system and in strategies that have been proven effective for children with special needs.”<sup>257</sup>

NEA’s criticism of voucher programs also stems from the ability of private institutions to have more decision making authority in these cases, which could be detrimental to children with disabilities in numerous ways.<sup>258</sup> “Private schools may decline to accept students based on their disability, could decline to abide by the IEPs of students they do accept, or could segregate children with needs from other children.”<sup>259</sup> Another argument raised by opponents is that these programs

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> Stuart Buck & Jay P. Greene, *The Case for Special Education Vouchers*, EDUCATIONNEXT, Winter 2010 / Vol. 10, No. 1, available at <http://educationnext.org/the-case-for-special-education-vouchers/>.

<sup>256</sup> NEA, VOUCHER SCHEMES: A BAD IDEA FOR STUDENTS WITH DISABILITIES 1 (2008) [http://www.nea.org/assets/docs/PB14\\_SpecEdVouchers08.pdf](http://www.nea.org/assets/docs/PB14_SpecEdVouchers08.pdf).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

lack the regulation of special education teachers in terms of training.<sup>260</sup> The argument is made that without having high qualifications for these professionals, there is no security that children with disabilities are going to truly benefit from being placed in a voucher program. Additionally, another argument is that many of these programs that are set up to allow public funds to be streamed to private institutions have no regulations that require the private institutions to account for how these public monies are spent.<sup>261</sup> Not only is the issue of public funds being used in private institutions raised but also that the cost associated with voucher programs will increase the cost of special education.<sup>262</sup>

A few examples of recent challenges involving voucher programs for special education are important to note. The Arizona Supreme Court struck down school voucher programs as unconstitutional for using public money to pay for private institutions.<sup>263</sup> This created a complete ban on voucher programs including those created to benefit children with autism for educational purposes.<sup>264</sup> In Ohio, the voucher program created specifically for autistic children has recently been challenged for a number of issues, including the extreme financial cost taken on by the state government, the increase in the number of complaints filed by parents against public schools asking to be accepted into the program, and the lack of regulations in ensuring that the services provided are meeting appropriate standards.<sup>265</sup> Opponents argue that special education vouchers will actually result in an increase in children classified as being affected by disabilities and that parents will seek to have their children labeled as such in order to benefit from the programs.<sup>266</sup> Another technical problem in evaluating voucher programs for special education is the lack of research in this area:

There has been very little research conducted on the topic of voucher programs for students with disabilities and most of the published analyses have come from organizations that work either in support of or opposition to vouchers (e.g., Greene and Forster, 2003; People for the American Way and Disability Rights Educational Defense Fund, 2003).<sup>267</sup>

Despite a large amount of opposition, voucher programs are still winning the battle. In April 2011, the Supreme Court upheld challenges to the constitutionality of the Arizona voucher program.<sup>268</sup> They also continue to be advanced as a means of solving the complex issues involved in providing special education to children with disabilities. Compared to other school voucher

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> See Buck, *supra* note 255.

<sup>263</sup> Pat Kossan & Emily Gersema, *Arizona's High Court Bans School Vouchers*, THE ARIZONA REPUBLIC, March 26, 2009, Pg. 1, available at <http://www.azcentral.com/arizonarepublic/news/articles/2009/03/26/20090326vouchers0326.html>.

<sup>264</sup> *Id.* see also Buck, *supra* note 255. (“Arizona’s special education voucher law was struck down by the state courts after a challenge from the teachers union and civil liberties groups, which claimed that the law violated a state constitutional provision barring any public funds from flowing to religious institutions. Whether these state “Blaine Amendments,” named after the 19th-century presidential candidate who promoted anti-Catholic bigotry nationwide, will survive federal constitutional muster is not yet known. And whether other states of the 37 that have Blaine Amendments will interpret them as restrictively as Arizona or will follow Wisconsin’s example and still permit vouchers to be used at religiously affiliated schools is also not yet known.”).

<sup>265</sup> See Buck, *supra* note 255.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> Lee Ross, *Supreme Court Upholds Arizona School Vouchers*, FOX NEWS, April 4, 2011, <http://www.foxnews.com/politics/2011/04/04/supreme-court-upholds-arizona-school-vouchers/>.

programs, special education vouchers differ in that they are able to cross all political lines to provide educational benefit:

Special education vouchers have a political advantage that vouchers for low-income students lack: they can benefit not only the poverty-stricken disadvantaged, almost never a politically potent interest group, but also anyone who has a child with disabilities, a population that crosses all social and economic boundaries.<sup>269</sup>

As voucher programs are able to make special education services available to a wide range of backgrounds, enacting legislation to support them is not likely to be politically divisive. One of the biggest arguments against special education vouchers is that they inevitably deny the same legal protections as IDEA. However, proponents of special education voucher programs offer a much different perspective in arguing that vouchers are merely an alternative to special education through public education, and that public education will always remain an option:

Parents don't lose rights with special education vouchers; they only gain an additional mechanism for making the rights of their disabled children a reality. Even where special education vouchers are adopted, families can always choose to pursue their right to appropriate services in public schools through the legal system. Vouchers simply offer those families an alternative to engaging in a legal struggle or accepting subpar services. Instead, they can use their voucher-derived market power to purchase the services their disabled children need. If the market doesn't provide satisfactory outcomes, parents can always return to the public schools with their relatively impotent legal rights.<sup>270</sup>

There is also evidence that parents have better access to services through the use of vouchers: "The empirical research shows that when parents are empowered with vouchers, they are actually more likely to obtain necessary services."<sup>271</sup> Furthermore, "The concept also stands on particularly strong constitutional grounds, inasmuch as special education vouchers add nothing in principle to the rights established by federal law in 1974."<sup>272</sup>

Those who believe that special education works adequately through the federal protection that comes through IDEA may be ignoring a significant consideration in that framework: the history of challenges to the inadequacy of services and how that can be detrimental to serving the special education needs of a child with a disability. The reality of the situation is described as follows: "But schools tend to win most legal challenges brought by parents. Given the long odds and financial and psychological toll of suing the same people who take care of their child each day, most parents tend to accept whatever services are offered, even if the services fall well short of those required by law."<sup>273</sup> The private placement option created through special education vouchers eliminates major barriers that are implicit in the framework of IDEA: "Special education vouchers essentially use

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<sup>269</sup> See Buck, *supra* note 255.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

public funds to democratize access to private placement by reducing legal and financial barriers.”<sup>274</sup> Additionally, a less onerous financial burden compared to fighting the public education system is among the benefits of utilizing school voucher programs for special education:

Although few and far between, private placements nonetheless are an important constitutional precedent for special education vouchers, as the latter constitute only an extension of a long-standing practice that dates back to the civil-rights revolution. But unlike the procedures established under IDEA, school-voucher laws give parents the right to select a private placement without having to convince public school officials of the need for such services, to say nothing of the legal costs of proving to a hearing officer, or a state court judge, that the decision of the school district was in error. The rights of parents are seemingly identical under IDEA and under special education voucher laws, but the ease with which parents can exercise those rights is profoundly different.<sup>275</sup>

The argument that special education voucher programs will cause a dramatic increase in the cost of special education has also been criticized as largely farcical:

It is true that the overall cost of special education has become a significant financial issue for school districts nationwide as enrollments have steadily grown over the years, although our previous research found that the cost has been widely exaggerated in the media. However, vouchers are unlikely to increase the burden on districts: Special education voucher laws stipulate that the voucher amount should reflect the severity of the disability, that is, students who have more severe disabilities receive more generous vouchers, and that the cost to the district may not exceed the average cost the state pays for the education of children with similar conditions.<sup>276</sup>

In fact, there is evidence that less public money may be spent in these cases than those where children receive special education through the traditional public system: “In Florida, eligible students are provided with a voucher equivalent to the lesser of the amount the assigned public school would have spent on the child and the tuition at the accepting private school.”<sup>277</sup>

Opponents’ claims that special education vouchers increase the number of children identified as having disabilities has also been challenged.<sup>278</sup> “Though no one disputes that disabilities are real and that disabled students are more expensive to educate, it is not true that vouchers will necessarily increase the identification of disabilities, thereby raising overall education costs.”<sup>279</sup> More specifically, proponents of vouchers argue that the *current* public system actually creates an increase of children identified as having disabilities:

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

It is current government funding policies that generate incentives for over-identification of disabilities. A number of studies have found a higher incidence of identified disabilities in those states that provide districts with additional dollars for each student diagnosed as disabled. Other states award a special education grant to each district, based on past numbers of disabled students, thereby reducing any incentive to over-identify students with disabilities.<sup>280</sup>

Instead, the availability of special education vouchers will result in an opposite effect: “Special education vouchers provide a different incentive. They discourage school districts from over-identifying disabled students, because any student identified as disabled becomes a potential choice student who might leave the district for a private school, reducing district revenue received from the state.”<sup>281</sup>

Another advantage for special education vouchers is the present environment in which these programs are developing.<sup>282</sup> The timing is ripe for special education voucher programs to be prosperous:

Almost 15 percent of students in the United States are said to have a disability under the procedures established by IDEA, so in states with special education vouchers, the potential for program growth is considerable. As the opportunity for private placement with a special education voucher becomes better known to parents, and as private providers become aware of the possibility of a larger clientele, one can anticipate an inexorable growth in the size and popularity of these programs.<sup>283</sup>

The question then becomes whether these voucher systems can work on the state level. The issue is two-fold: first, we must decide whether these voucher systems should continue at the state level even though they will surely possess different structures and regulations; and second, whether the difficulty of providing education to children with autism will become so complex that it must be addressed at the federal level. Arguably, a voucher system should not be necessary in light of the existence of IDEA; but the reality is that IDEA has not had the benefits for children with autism that it intends to have.<sup>284</sup>

Another question involving the voucher system is whether or not it should be limited to cases involving autistic children and whether allowing these programs to cover children with different disabilities (such as attention deficit disorder) will “open Pandora’s box for parents using the voucher system to get the “best” for their children when in reality the promise of IDEA is only to provide an “appropriate” education.”<sup>285</sup>

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<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> Cara Fitzpatrick, *Despite Criticism, a Voucher Program Grows - and Brings Long-Sought Relief to Parents*, THE PALM BEACH POST NEWS, Sept. 24, 2010, available at <http://www.palmbeachpost.com/news/schools/despite-criticism-a-voucher-program-grows-and-brings-936355.html>.

A final looming question is whether or not the growth of these voucher programs on the state level could be financially sustained if current trends continue.<sup>286</sup> With this in mind, one must consider whether the educational needs of autistic children are so specific such that the ability of state governments to accommodate those needs will require separate federal voucher system or some as yet unidentified alternative implemented at the national level.

#### IV. Is a Federal Voucher Program Feasible?

At the time of a reauthorization of IDEA, legislation was introduced in the 108<sup>th</sup> Congress to address amending the Act to allow increased parental choice for the parents of children with disabilities through a federal voucher program.<sup>287</sup> Indeed, “Congressional consideration of school choice is not new. The No Child Left Behind Act (P.L. 107-110), amended and reauthorized the Elementary and Secondary Education Act (“ESEA”), to contain several provisions to maintain and expand federal support of school choice for pupils and their families.”<sup>288</sup> Notable concerns have been expressed regarding the implementation of a federal voucher program: “A federal voucher program for children with disabilities might raise additional issues. Perhaps the key set of issues is the degree to which the rights and obligations conferred by IDEA would continue to be provided by private schools accepting federal special education vouchers.”<sup>289</sup> During the 108<sup>th</sup> Congress, the following proposal was made regarding a federal voucher program that would amend IDEA:

In the 108th Congress, legislation has been introduced (H.R. 1373) to amend the IDEA to authorize funding for grants, contracts, and cooperative agreements with eligible entities to support the planning, design, and implementation of state school choice programs for students with disabilities.<sup>21</sup> In states that have school choice programs for students with disabilities, the bill would authorize the use of IDEA funding to supplement state program funding. The bill also would provide that the authorization of a parent to exercise private school choice under such a program would fulfill the state’s obligation to provide a free appropriate public education to the parent’s child while the child is enrolled in the private school, and would provide that a private school’s acceptance of IDEA funding deems it to be providing a free appropriate education and to be in compliance with Section 504 of the Rehabilitation Act of 1973. The bill would also authorize the use of IDEA funding to support the accommodation of students with disabilities who are eligible to receive supplemental education services under ESEA.<sup>290</sup>

But critics of a federal voucher program suggest that the relationship between IDEA and such a program are incompatible: “Because of the unique nature of IDEA as both a grants program and also a civil rights act, additional issues could arise with respect to a federal voucher program for

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<sup>286</sup> See Buck, *supra* note 255.

<sup>287</sup> Richard N. Apling, Nancy L. Jones, & David P. Smole, *Individuals with Disabilities Education Act (IDEA): Possible Voucher Issues*, Report for Congress, Updated April 8, 2003, available at <http://www.oswego.edu/~ruddy/Educational%20Policy/CRS%20Reports/IDEA-Possible%20Voucher%20Issues.pdf>.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

children with disabilities.”<sup>291</sup> While IDEA requirements have not previously applied to state created voucher programs, the creation of a federal voucher program would potentially raise issues concerning how the rights of children and parents provided by IDEA would be affected.<sup>292</sup> However, “under an IDEA voucher program, federal funds potentially could flow to private schools. A central question likely would arise concerning what student and parental rights and private school obligations would remain attached to those funds.”<sup>293</sup> Concern over the inclusion of child and parental rights if such a federal voucher program were created has been expressed as follows:

Clearly, any legislative language on this issue would be key in making the determination of what rights would apply. However, it should be noted that the student and parental rights at issue would include not only those delineated in IDEA but also those contained in other civil rights statutes, notably Section 504 and the Americans with Disabilities Act, as well as constitutional rights.<sup>294</sup>

Another concern is how the structuring of the funding for a federal voucher program would be designed and the extent to which, if at all, a state would be required to contribute.<sup>295</sup> Because of this, it has been acknowledged that several constitutional issues may arise as a result of creating a federal voucher program:

Regardless of the receipt of federal funds, certain constitutional rights regarding an education for children with disabilities may apply. The constitutional rights of children with disabilities to receive an education if education is being provided to children without disabilities were examined in two seminal cases: *PARC v. State of Pennsylvania* and *Mills v. Board of Education of the District of Columbia*. In essence, these cases found constitutional due process and equal protection violations when children with disabilities were denied education and were the impetus to the enactment of P.L. 94- 142, the original IDEA legislation.<sup>296</sup>

Several other questions arise with respect to the actual voucher:

Other issues could arise with respect to the mechanism for providing vouchers and the amount of the voucher. Would states continue to receive their full IDEA formula allocation and then distribute some portion of that allocation to parents via vouchers; or would the federal government establish a separate source of funding to provide vouchers directly to parents? What would be the amount of the voucher? For example, would each child receive a voucher for the same amount, or would the amount of the voucher be related to the type of disability? What could the voucher be used for? For example, the voucher could be limited to tuition, or it could

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*



be used for other expenses, such as transportation. Could private schools charge more than the amount of the voucher (with parents making up the difference), or would tuition be limited to the amount of the voucher? H.R. 1373 would allow federal funds allocated to states under Section 611 of the IDEA to be used to supplement state voucher funds.<sup>297</sup>

Although there are many questions regarding the design of a federal voucher program, it is not a concept that should be tossed aside merely because it presents a challenge, especially in the wake of an increasing number of states initiating voucher programs as alternatives to a failing public school system. For example, as Wisconsin is in the process of trying to renew its state voucher program, cries are heard from advocates for children with disabilities being denied access to these programs.<sup>298</sup> Although this case may be an isolated one, it nonetheless sheds light on the fact that children with disabilities are frequently left with little to no educational options. While the notion of taking a federal approach special education may prove exceptionally challenging, the alternative is the status quo, and autistic children cannot afford to continue to be the victims of the present state of special education in the U.S.

With this in mind, I take the position that a federal voucher program must be considered. Some will argue that we already have federal special education law that is failing children with disabilities and, as a result, to attempt to solve the program on a national level is a recipe for disaster. A recent Colorado court ruling effectively preventing vouchers was soundly criticized: “Freedom involves choice. Oppression opposes choice. It denies a child with autism a chance to attend the right school. Let’s hope this ignorant, backward ruling is soon overturned.”<sup>299</sup> For many parents of autistic children who cannot get the support they need from a public school system, these programs provide a light of hope.<sup>300</sup>

## V. Conclusion

While there are many objections to voucher programs, a significant number of children are benefiting from them when special education services through public education are clearly inadequate and there is no push for reform. The response that a federal special education voucher program represents an impossible task is based on fear potential obstacles, but the greater fear should be that a generation of children with disabilities, especially those with autism, will suffer from a failure to act now. As Confucius once said, “When it is obvious that the goals cannot be reached, don’t adjust the goals, adjust the action steps.” Until federal reform is sought, autistic children will simply fall through the cracks of a fatally flawed special education system.

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<sup>297</sup> *Id.*

<sup>298</sup> Michelle Diament, *Disability Advocates Call For Federal Probe Of School Vouchers*, DISABILITY SCOOP, June 8, 2011, available at <http://www.disabilitycoop.com/2011/06/08/disability-federal-probe/13289/>.

<sup>299</sup> Wayne Laugesen, *OUR VIEW: Backward Voucher Ruling Favors Oppression*, THE GAZETTE, Aug. 20, 2011, available at <http://www.gazette.com/opinion/ruling-123555-douglas-stop.html>.

<sup>300</sup> Russell Haythorn, *District May Appeal Judge's Decision On School Choice*, THEDENVERCHANNEL.COM, Aug. 15, 2011, <http://www.thedenverchannel.com/news/28874857/detail.html>.