

Report for Congress

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Individuals with Disabilities Education Act (IDEA): Possible Voucher Issues

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Summary

Congress is considering reauthorization of the Individuals with Disabilities Education Act (IDEA) program (the main federal program providing special education and related services to children with disabilities). Among the options being discussed is increasing parental choice under IDEA. This report provides background on current federal choice programs and on the Florida McKay Scholarship program, which provides scholarships for children with disabilities enrolled in the state's public schools to attend other public schools or to attend participating private schools. The report concludes with a discussion of possible issues that a federal special education voucher program might raise.

Congressional consideration of school choice is not new. Most recently the No Child Left Behind Act (P.L. 107-110), which amended and reauthorized the Elementary and Secondary Education Act (ESEA), contains several provisions to maintain and expand federal support of school choice for pupils and their families. For example, the Act requires that students attending schools identified as needing improvement be provided with the option of transferring to another school in the school district, consistent with state law.

There is also considerable state and local experience with choice programs. One such program, particularly relevant to children with disabilities, is the Florida McKay Scholarship program. This program provides parents who are dissatisfied with their disabled child's educational progress the opportunity to transfer the child to another public school in the state or enroll the child in a participating private school in the state. The amount of the scholarship is the lesser of the private school's tuition and fees or a calculated amount based on state funds the student would have generated if attending a Florida public school. If the value of the scholarship is insufficient to cover the full cost of the tuition of the private school, parents may contribute funds to cover the shortfall. In the second year of its existence, an estimated 5,000 students and 400 schools participated.

Proponents and opponents of voucher programs raise a variety of issues—for example, whether the increased competition vouchers could engender will improve or weaken public education. A federal voucher program for children with disabilities could raise additional issues. Perhaps the key set of issues is the degree to which the rights and obligations that IDEA requires will continue to be provided by private schools accepting federal special education vouchers.

This report will be updated to reflect relevant legislative action.

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Individuals with Disabilities Education Act (IDEA): Possible Voucher Issues

Introduction

Congress is considering reauthorization of the Individuals with Disabilities Education Act (IDEA) program (the main federal program providing special education and related services to children with disabilities). Among options being discussed is increasing parental choice under IDEA.¹ This report provides a brief overview of choice programs, including current and proposed federal programs and the Florida McKay Scholarship Program, which provides vouchers for children with disabilities. The report concludes with a brief summary of general issues related to choice programs together with possible additional issues with respect to children with disabilities.

Overview of Federal Choice Programs and Proposals²

On January 8, 2002, the President signed P.L. 107-110 (H.R. 1), The No Child Left Behind Act, which amended and reauthorized the Elementary and Secondary Education Act (ESEA).³ P.L. 107-110 contains several provisions to maintain and expand federal support of school choice for pupils and their families. It requires, as part of Title I-A accountability provisions, that students attending schools identified for school improvement after failing to make adequate yearly progress for 2 consecutive years will be provided intradistrict public school choice, consistent with state law. Further, it requires students from poor families attending schools that fail to make adequate yearly progress for 3 consecutive years to be provided the option of obtaining supplementary or tutorial services from providers of their choice. Additionally, it provides that public school choice must be made available to pupils who are victims of violent crimes or who attend unsafe schools. P.L. 107-110 authorizes increased funding for the Public Charter Schools Program to assist charter school start-up and for facilities, and also authorizes the use of Innovative Programs

¹See, for example, Chester E. Finn, Jr., Andrew J. Rotherham, and Charles R. Hokanson, Jr., "Conclusions and Principles for Reform." In Chester E. Finn, Jr., Andrew J. Rotherham, and Charles R. Hokanson, Jr. (eds.) *Rethinking Special Education for a New Century*. Washington, D.C., Thomas B. Fordham Foundation and Progressive Policy Institute, May 2001.

²For further information on current education choice programs and proposals, see *School Choice: Current Legislation*. CRS Issue Brief IB98035 by David P. Smole.

³Note that IDEA (20 U.S.C. 1400 et seq.) is not part of ESEA, although children with disabilities may participate in ESEA programs.

funds for activities to promote, implement, or expand public school choice. Previously, during floor debates of H.R. 1, both the House and the Senate rejected amendments that would have authorized federal aid to support **private school** choice programs.

On June 7, 2001, the President signed into law P.L. 107-16 (H.R. 1836), the Economic Growth and Tax Relief Reconciliation Act of 2001. Among other provisions, this legislation modified the Education Individual Retirement Account authority to increase the annual contribution limit to \$2,000 and to permit these accounts to support elementary and secondary school expenses, including those for attendance at private schools. Subsequently, these accounts have been renamed Coverdell Education Savings Accounts.

On February 4, 2002, in his FY2003 budget request, the President proposed two new initiatives supportive of school choice involving public and private schools: a choice demonstration fund; and a refundable tax credit for certain costs associated with attendance at a different school for families of pupils assigned to public schools that fail to make adequate yearly progress.

Florida's McKay Scholarship Program

The 2000 session of the Florida legislature established the John M. McKay Scholarships for Students with Disabilities Program, which was substantially revised in 2001.⁴ The program allows parents who are dissatisfied with their disabled child's progress to request that the child be placed in another Florida public school or be provided with a scholarship so that the child can attend a participating private school in the state. The program applies to K-12 students with disabilities⁵ who attended a Florida public school in the prior school year. That is, students with disabilities already enrolled in private schools are not eligible.

If the parent opts for a scholarship to a private school, the parent must obtain the student's admission to a participating private school and request the scholarship from the school district at least 60 days prior to the first scholarship payment. In turn, the school district must inform the parent of all options available, including enrolling in another public school within the district or enrolling the student in a public school in an adjacent school district that offers the services the child requires and has space available. If the parent chooses either the private school placement or placement in another school district, the parent is responsible for transporting the child to the new school. In addition, the parent has the option to return the child to the public school system or to choose another participating private school, if the parent continues to be dissatisfied with services the student receives.

⁴ Fla. Stat. Ann. §229.05371.

⁵The statute defines students with disabilities as those "who are mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally handicapped, specific learning disabled, hospitalized or homebound, or autistic." (229.05371 (1)) Note that this definition differs somewhat from the IDEA definition of a child with a disability (Section 602 (3)).

Participating private schools may be either sectarian or nonsectarian and must meet certain state requirements:

- “Demonstrate fiscal soundness,”
- Notify the state department of education by May 1 of the preceding school year of their intent to participate and grade levels and services that will be available,
- Comply with federal antidiscrimination provisions with respect to race, color, and national origin (20 U.S.C. 2000d),
- Meet state and local health and safety requirements,
- “Be academically accountable to the parent for meeting the educational needs of the student,”
- Meet certain minimum teacher requirements,
- Comply with general Florida laws pertaining to private schools, and
- “Adhere to the tenets of its published disciplinary procedures prior to the expulsion of a scholarship student.”

In addition, the parent and the student accepting a scholarship must fulfill certain obligations and accept certain responsibilities. For example, the student must attend the school throughout the school year unless excused for good cause, such as illness, and must comply with the school’s rules of conduct. The parent must participate in the school’s parent involvement activities, unless excused. Perhaps of greatest importance, the statute notes that, in accepting a scholarship, the parent “is exercising his or her parental option to place his or her child in a private school.” The U.S. Department of Education (ED) has concluded that if the state of Florida and local educational agencies (LEAs) in the state have made a free appropriate public education (FAPE) available to eligible children with disabilities, as IDEA requires, “but their parents elect to place them in private schools through the Scholarship Program, then such children are considered ‘private school children with disabilities’ enrolled by their parents. . . . Under IDEA, such parentally placed private school students with disabilities have no individual entitlement to . . . special education and related services in connection with those placements.”⁶ ED also pointed out that federal nondiscrimination laws with respect to individuals with disabilities do not apply directly to participating private schools because Title II of the Americans with Disabilities Act (ADA) does not apply to private schools⁷ and Section 504 of the Rehabilitation Act of 1973 depends on the acceptance of federal funds.⁸

⁶U.S. Department of Education (ED) letter to John W. Brown, School Board Attorney, Pinellas County School Board, Largo, Florida, March 30, 2001. For a more detailed discussion of IDEA and private schools see Nancy Lee Jones, “Individuals with Disabilities Education Act: Services in Private Schools under P.L. 105-17,” CRS Rep. 98-854.

⁷Title II of the ADA, 42 U.S.C. §12131 *et seq.*, prohibits discrimination against individuals with disabilities by a public entity. A public entity is defined in relevant part as a state or local government or any department, agency, special purpose district, or other instrumentality of a state or states or local government.

⁸Section 504, 29 U.S.C. §794, in relevant part prohibits discrimination against individuals with disabilities in any program or activity that receives federal financial assistance.

The amount of the scholarship is the lesser of the private school's tuition and fees or a calculated amount based on state funds the student would have generated if attending a Florida public school. If the value of the scholarship is insufficient to cover the full cost of the tuition of the private school, parents may contribute funds to cover the shortfall.⁹ Payments of the scholarships are made quarterly in the form of an individual warrant to the parent, which the parent then endorses over to the private school for deposit in its account.

In the first year of the scholarship program, an estimated 1,000 students and 139 schools participated. The second year saw substantial increases in both students (5,000) and schools (400).¹⁰ Apparently the program is too new to have been systematically evaluated. Currently all that is available is anecdotal data. For example, Diane McCain, Director of the Choice Office in the Florida Department of Education, in recent testimony relayed the following success story:

The school admitted a middle school student who was identified in the public school system as Educable Mentally Handicapped (EMH). He could not read nor did he have any math skills. In addition, it was reported by the child and his parents that his teacher had verbally abused the child. Recognizing the extent of the verbal abuse, his mother removed him from the public school system and brought him to The Pathways School. When he arrived, his mother's aspirations were for her son to be able to complete basic life skills like reading road signs, filing out a job application. After several months of intensive encouragement, attention and a new school setting, her son now not only reads, but he can also add, subtract, and multiply. He is a model citizen. The administrator and the teacher report that the student is a pleasure to have at the school and they are very pleased with his progress and the fact that they have accepted students in the McKay Program.¹¹

Selected Issues for Choice Programs

This section begins with a brief overview of general issues sometimes raised regarding school choice programs. After providing a summary of IDEA

⁹This is unlike the Florida Opportunity Scholarship program in which schools cannot charge tuition greater than the value of the scholarship.

¹⁰Testimony by Ms. Diane McCain before the House Subcommittee on Education Reform, May 8, 2002. (Referred to hereafter as McCain Testimony). Some have attributed the substantial growth in the number of participating students and schools to changes made in the program in 2001. One significant change allows private schools to charge parents the difference between the amount of the school's tuition and fees and the amount of the scholarship. Apparently in the first year of the program, schools could only charge parents the amount of the scholarship. See "McKay Scholarships: Florida's Special Vouchers." Draft paper by Carolyn D. Herrington and Virginia R. Weidner, College of Education, Florida State University, January 2002. (Referred to hereafter as Herrington and Weidner.)

¹¹McCain Testimony. Not all anecdotes are positive. See, for example, the *Naples Daily News* story, which reported allegations that funds from the voucher program had been "pocketed" by owners of a firm operating private schools in Florida ("Pensacola Voucher School Workers Fired Amid Spending Questions", March 16, 2002).

requirements, the section discusses additional issues that could arise with respect to a federal special education voucher program.

Background on School Choice Programs. In general, school choice proposals have been made under the presumption that they would increase the range and quality of educational opportunities available to pupils, including those from low-income families, those who attend low-performing schools, and those whose families seek an education provided by an entity other than their local public school. Some proponents also suggest that the availability of school choice will improve public schools through market competition. Some opponents express concern about potential negative effects on public schools and their pupils, including the redirection of public education resources and an erosion of the ideal of a common public education for all. Additionally, some aspects of school choice raise constitutional questions, especially when involving religiously affiliated schools.¹² Although a detailed discussion of this issue is beyond the scope of this report, the Supreme Court recently held that a government educational assistance program does not run afoul of the establishment clause if it is neutral with respect to religion and provides assistance to a broad class of citizens who in turn direct the aid to schools of their choice, which may include religiously affiliated schools.¹³

Overview of IDEA. School choice proposals could raise additional issues for children with disabilities and their parents. To understand some of these issues, it is necessary to have some understanding of the IDEA, the central federal statute dealing with children with disabilities and special education. The IDEA both authorizes federal funding for special education and related services¹⁴ and, for states that accept these funds,¹⁵ sets out principles under which special education and related services are to be provided. The requirements are detailed, especially when the regulatory interpretations are considered. The major principles include requiring that:

- States and school districts make available a **free appropriate public education** (FAPE)¹⁶ to all children with disabilities, generally between the ages of 3 and 21; States and school districts **identify, locate, and evaluate** all children with disabilities, regardless of the severity of their disability, to

¹²For a detailed discussion of these constitutional issues see David M. Ackerman, “Education Vouchers: Constitutional Issues and Cases,” CRS Rept. RL30165.

¹³*Zelman v. Simmons-Harris*, 2002 US Lexis 4885 (June 27, 2002).

¹⁴Related services (for example, physical therapy) assist children with disabilities to benefit from special education (20 U.S.C. §1401(22)).

¹⁵Currently all states receive IDEA funding.

¹⁶It should be emphasized that what is required under IDEA is the provision of a free appropriate public education. The Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 177 (1982), held that this requirement is satisfied when the state provides personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction and that this instruction should be reasonably calculated to enable the child to advance from grade to grade. IDEA does not require that a state provide sufficient resources and services to maximize the potential of children with disabilities.

determine which children are eligible for special education and related services;

- Each child receiving services has an **individual education program (IEP)** spelling out the specific special education and related services to be provided to meet his or her needs; the parent must be a partner in planning and overseeing the child's special education and related services as a member of the **IEP team**;
- “To the maximum extent appropriate,” children with disabilities must be **educated with children who are not disabled**; and states and school districts provide **procedural safeguards** to children with disabilities and their parents, including a right to a due process hearing, the right to appeal to federal district court and, in some cases, the right to receive attorneys' fees.¹⁷

Possible Additional Issues with Respect to IDEA. Because of the unique nature of IDEA as both a grants program but also a civil rights act, additional issues could arise with respect to a federal voucher program for children with disabilities.

Would Students' Rights Continue? One set of issues with respect to a potential IDEA voucher program involves the extent to which the rights of children with disabilities and their parents guaranteed under IDEA would continue under a federal special education voucher system. Apparently, IDEA requirements and protections do not apply to the Florida voucher program, because federal funds are not included in the voucher payments and because parents are determined to have unilaterally decided to place their children in private schools. But with an IDEA voucher program federal funds could flow to private schools. The question would then become what student and parental rights and private school obligations would be attached to those funds.

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. Although ED stated that section 504 and title II of the ADA were not directly applicable to the Florida McKay program, the rationale for that conclusion was that the McKay program received no federal funds. If federal IDEA funds were involved, that rationale would no longer apply. In addition, private schools are covered under title III of the ADA.¹⁸

¹⁷For additional information on IDEA requirements, see *Individuals with Disabilities Education Act: Statutory Provisions and Selected Issues*. CRS Report for Congress RL31529, by Nancy L. Jones and Richard N. Apling.

¹⁸ See 42 U.S.C. §12181 which defines public accommodation in part as “a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education.”

However, title III specifically exempts entities controlled by religious organizations from coverage¹⁹ thus limiting ADA coverage of religiously affiliated schools.

Would State and Local Funding Be Included? 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*²⁰ and *Mills v. Board of Education of the District of Columbia*.²¹ 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. Although there have been few interpretations of these constitutional rights since they were codified in the statute, it is likely that courts would find some rights to exist even in the absence of IDEA although the exact parameters of these rights are difficult to determine. One of the issues vouchers would raise in this context is whether states and LEAs would be obligated to provide funds to follow the child with a disability to a private school in addition to a voucher for federal IDEA funds. It could be argued, based on *PARC* and *Mills*, that if a state chooses to educate children without disabilities, it must also educate children with disabilities and the existence of a federal voucher does not negate that responsibility. On the other hand, it could be argued that if the state was willing to provide a free appropriate public education and the parents opted to place their child in a private school with the federal voucher, there are no other obligations on the state.

How Would Voucher Funding Be Structured? 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 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?

Could Least Restrictive Environments Be Provided? To the extent that IDEA guarantees continued to be provided under an IDEA voucher program, another set of issues could involve the student make-up of participating private schools. As noted above, a basic principle of IDEA is that children with disabilities are to receive services in the “least restrictive environment” (LRE). This means that “to the maximum extent appropriate” children with disabilities are to be educated with their nondisabled peers in regular classrooms. “Only when the nature or

¹⁹ 42 U.S.C. §12187.

²⁰ 343 F.Supp. 279 (E.D. Pa. 1972).

²¹ 348 F.Supp. 866 (D.D.C. 1972).

severity of the disability . . . is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily” can the child be placed in a separate classroom or in a special school.²² “Inclusion” or “mainstreaming” with children who are not disabled is not a problem for public schools, at least in one sense, since children with disabilities usually account for 10% or 12% of the overall enrollment. However one could imagine, under a voucher system, private schools that specialize in serving children with certain disabilities. (Such schools exist now for serving certain relatively severely disabled children.) These specialized private schools might attract few, if any, nondisabled children. Thus children in such schools would not be educated with their nondisabled peers, even if those children’s disabilities were mild enough to permit their being educated full time in regular public classrooms.²³

Who Would Be Eligible for Vouchers? Another set of issues involves the criteria under which parents and students could participate in an IDEA voucher program. As discussed above, some federal public choice programs are linked to evidence over time of school failure. For example, the No Child Left Behind Act would only authorize intradistrict public school choice for students attending schools that had failed to make adequate yearly progress for 2 consecutive years. On the other hand, the Florida McKay Scholarships are available to parents who express dissatisfaction with their **child’s** educational progress.²⁴ The nature of participation criteria could significantly influence the popularity of an IDEA voucher program. For example, some could argue that the popularity of the Florida program can be attributed, in part, to the ease with which parents can demonstrate eligibility. Eligibility for Florida’s other voucher program—Opportunity Scholarships—is based on school performance. To be eligible to transfer to a high performing public school or receive a voucher to attend a private school, a student must be attending a school that has failed, i.e., it is rated as an “F” school for two years in a four-year period. Perhaps because an entire school must fail, rather than just a parent being dissatisfied, participation in this program, according to at least one report, is more modest: During its first year, only 2 schools were judged as “failures” and only about 140 students either transferred to a higher performing public school or took

²²See 20 U.S.C. 1412(a)(5)(A).

²³One exception to the LRE requirement in the statute involves a child with a disability who has been convicted as an adult and incarcerated in an adult prison. Based on a demonstrated “bona fide security or compelling penological interest that cannot otherwise be accommodated” the IEP team may modify this (and other) requirements of IDEA (20 U.S.C. 1414(d)((6)(B)).

²⁴Apparently the original statutory language tied eligibility to a student’s academic performance: scholarship availability required that “the student’s academic progress in at least two areas has not met expected performance levels for the previous year as determined by the student’s IEP—or, absent specific performance levels identified in the IEP, the student performed below grade level on state or local assessments and the parent believes that the student is not progressing adequately towards his/her IEP goals” Quoted in “The Little-Known Case of America’s Largest School Choice Program” by Daniel McGroarty in *Rethinking Special Education for a New Century*. Thomas B. Fordham Foundation and Progressive Policy Institute. Chester E. Finn, Andrew J. Rotherham, and Charles R. Hokanson, Jr., eds., p. 303.

advantage of the voucher to attend a private school.²⁵ Issues for a parental IDEA voucher program include whether eligibility will be based on individual or school performance or on parental dissatisfaction with the FAPE being provided. In addition, would children with disabilities previously placed in private schools by their parents be eligible? Under the McKay Scholarship program, such children are not eligible.

Would Sufficient Choice Be Provided ? A related issue is the extent to which private schools will choose to participate in an IDEA voucher program. The McKay Scholarship experience suggests that participation rates can be quite high if eligibility requirements are modest, and schools are permitted substantial flexibility. Indeed this is one argument for vouchers and other choice programs, such as charter schools; namely, that by reducing regulatory requirements, schools are freed to be more creative and provide better education. However, the degree of freedom from legal requirements may be inversely related to the degree to which IDEA guarantees and protections follow the child and the IDEA funding to the private school. One can surmise that the greater the degree to which federal statutes and regulations are applicable to publicly funded children with disabilities served in private schools, the more likely some or many private schools will choose not to participate.

In brief, current and proposed federal choice programs providing educational options to a broad array of students and the Florida McKay Scholarship program can inform a congressional deliberation on an IDEA voucher program. At the same time, the special needs and unique rights of children with disabilities and their parents suggest that additional issues are likely to be considered in any debate on such a program.

²⁵Herrington and Weidner, p. 1. Students from 10 failing schools will be eligible for Opportunity Scholarships in school year 2002-2003. (For further information, see [<https://www.opportunityschools.org/Info/OSP/default.asp>] .)