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THE RIGHTS OF PARENTALLY-PLACED PRIVATE SCHOOL STUDENTS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004 AND THE NEED FOR LEGISLATIVE REFORM

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I. INTRODUCTION

The Individuals with Disabilities Education Improvement Act ("IDEA/2004" or "the Act") inequitably restricts the educational rights of privately-schooled students with disabilities relative to students enrolled in public schools.2

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These laws provided financial support to state and local educational agencies for the education of children with disabilities in the nation's public schools.

2. According to the most current statistics, about 76% of the private schools in the United States are characterized as sectarian by the Department of Education, Office of Non-Public Educ., U.S. DEPT OF EDUC., STATISTICS ABOUT NON-PUBLIC EDUCATION IN THE UNITED STATES (2005), available at http://www.ed.gov/about/offices/list/oii/nonpublic/statistics.html (last visited Feb. 7, 2008). These entities enroll 82% of elementary and secondary private school students. Private schools represent about 23% of all the elementary and secondary schools in the United States and enroll 10% of the United States elementary and secondary population. Id. The total private school enrollment in the United States is approximately 5,057,520 students. Id. This information came to the attention of the
IDEA/2004 substantially limits the State’s duty to furnish special education services to privately-schooled students compared to students enrolled in public programs. Moreover, this inequity extends to procedural fairness on such matters as parental participation in the development of a child’s educational plan, access to administrative due process, and the availability of judicial remedies for the failure of educational agencies to design programs which meet the needs of these disabled students or deliver promised services. IDEA’s goal of serving all children with disabilities is thus thwarted by IDEA/2004 itself. This article is a call for a Congressional redressing of these inequities. In light of the recency of the IDEA/2004 amendments, the likelihood of reform is uncertain. A remedy may lie, however, in state legislatures, where parents and advocates may receive a more sympathetic ear.

Part II-A of this article reviews IDEA/2004’s core general provisions, including eligibility criteria, Individualized Educational Program (“IEP”) development and content, parental participation requirements, administrative due process and judicial review, and agencies’ child find obligations. Part II-B addresses IDEA’s funding mechanism for publicly-enrolled versus privately-enrolled students and the limitations under IDEA/2004 on privately-schooled students’ rights to services, including those delivered on-site and the agencies’ obligation to discuss services with both private school representatives and parents. Part II-C examines IDEA/2004’s

author in Ralph D. Mawdsley and Alan Osborn, Providing Special Education Services to Students in Religious Schools, 219 ED. LAW REP. 347, 348 (2007). It was derived from the NAT’L CTR. FOR EDUC. STATISTICS, PRIVATE SCH. UNIVERSE SURVEY, CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: THE 2003-2004 PRIVATE SCHOOL UNIVERSE SURVEY (March 2006).  

3. IDEA/2004 denies disabled students who are parentally-enrolled in private schools an individual right to special education services. 34 C.F.R. § 300.137(a)–(c) (2007). See also 20 U.S.C. § 1412(a)(10)(A); 34 C.F.R. §§ 300.130–300.144 (2007). Thus, Congress has virtually guaranteed that the needs of private school pupils would receive a less focused and thoughtful examination than their public school counterparts.  

4. 34 C.F.R. §§ 300.137(a)–(c), 300.134. In terms of sheer numbers, however, the negative impact on students attending religious schools is far greater. See supra, note 2. Moreover, when state constitutional and statutory enactments limit assistance to students attending religious schools, but not private non-sectarian schools, the adverse impact is exacerbated.  


treatment of home-schooled students.

Part III considers the rights of disabled students enrolled in sectarian schools to receive on-site services. This part reviews the Establishment Clause restrictions and whether the Free Exercise Clause requires the state to provide services comparable to those received by publicly-enrolled pupils.

Part IV scrutinizes IDEA/2004’s treatment of students enrolled in sectarian schools under the Fourteenth Amendment’s Equal Protection and Due Process Clauses.

Part V looks at IDEA/2004’s decision-making process concerning special education for privately-schooled students under IDEA/2004; it then asks whether an adequate remedy exists under state law for arbitrary determinations by the applicable agency.

Part VI focuses on state legislative enactments which provide benefits to parentally-enrolled private school pupils with disabilities in excess of IDEA/2004’s requirements.

Part VII examines the impact of restrictive state constitutional religion clauses and statutes on the right of disabled students enrolled in sectarian schools to receive IDEA-mandated services. The availability of IDEA/2004’s “by-pass” procedures to overcome these prohibitions and deliver such support is examined as well.

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7. Arguably, if the SEA or LEA employees furnished direct assistance to such students, it would be for the benefit of the student, and would not result in direct or indirect aid to the religious school. This may satisfy state constitutional restrictions. See, e.g., Bay Shore Union Free Sch. Dist. v. T. ex rel. R., 405 F. Supp. 2d 230, 239 (E.D. N.Y. 2005), vacated for lack of federal subject matter jurisdiction, 485 F.3d 730 (2nd Cir. 2007).

8. Assuming that there are no state constitutional bars to state provisions of special education and related services to parentally-placed disabled pupils, IDEA/2004 creates potential complications due to its “maintenance of effort” requirements. See IDEA/2004 §1412(a)(18)(A). The “maintenance of effort” requires that a state “not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.” Id. Thus, while supplementation of IDEA/2004 funding by states is permitted, agencies risk being required to continue the established funding level in future years, notwithstanding any newly arising fiscal constraints. See, Letter to DeLauro, 36 IND. WITH DISABILITIES EDUC. L. REP. 38 (Office of Special Education Programs 2001) (explaining that if a city discontinued funding LEA services to parentally-placed private school students with disabilities, the IDEA’s Part B “maintenance of effort” requirement might obligate the LEA to continue the established non-federal funding level). Since the maintenance of effort requirement applies only to the total amount, or per capita amount, from local funds actually expended, or the combination of State and local funds actually expended for educating special needs children, the Act would not necessarily compel an LEA to continue to spend state and local monies on private
Part VIII integrates Parts II through VII to propose certain amendments to IDEA/2004, as well as state statutory remedies, to rectify the inequities described in those sections. Part IX concludes by asserting that provisions requiring comparable educational programs and services to parentally-enrolled private school children with disabilities would better serve the overarching purpose of the Act, which is to provide children with disabilities an appropriate education, 9 without disrupting the delicate balance of power set out between state and federal governments in our constitutional scheme.

II. IDEA/2004

A. General Provisions

IDEA/2004 provides federal money to assist state education agencies ("SEAs") and local education agencies ("LEAs") in educating children with disabilities. This funding is conditioned upon compliance with extensive goals and procedures. 10 The Act requires states to provide disabled school students. Id. 9

Regardless of a private school's sectarian affiliation, private school students may be entitled to educational benefits under the Rehabilitation Act, 29 U.S.C. § 749, if the school directly or indirectly receives federal financial assistance. See Cain v. Archdiocese of Kan. City, 508 F. Supp. 1021, 1023 (D. Kan. 1981). Even when private schools do not receive federal financial assistance, they are subject to the public accommodations provisions of Title III of the Americans with Disabilities Education Act. See generally 42 U.S.C. §§ 12181-82. Religious institutions are exempted from the Department of Justice's authority to investigate disability discrimination complaints against public and private elementary and secondary schools, alleging violations of Title III. See OCR Senior Staff Memorandum, 19 IND. WITH DISABILITIES EDUC. L. REP. 889 (1992) (explaining the jurisdictional limits of the U.S. Department of Justice, as against religious institutions under the ADA).

10. 20 U.S.C. § 1234(c). The U.S. Department of Education audits states' use of IDEA funds after their receipt, and may order states to refund amounts that were spent improperly. Id; 20 U.S.C. § 1234(a); 34 C.F.R. § 76.910. See La. State Bd. of Secondary Educ. v. U.S. Dep't of Educ., 881 F 2d 204, 205-207 (5th Cir. 1989) (reversing decision that California must repay $1.2 million not obligated during correct time frame, on the ground that the decision went beyond issues identified in notice of hearing). But see Dep't of Educ. v. Bennett, 864 F.2d 655, 659-660 (7th Cir. 1988) (requiring State Board of Education to refund money despite argument that state superintendent was responsible for misapplication of funds). IDEA/2004 is interpreted under Congress's spending power. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49 (2005); U.S. CONST. art. 1, § 8, cl. 1. (This is a grant to Congress to spend money to provide for the "general welfare of the United States.") Because the power to legislate under the Spending Clause rests on whether the state voluntarily and knowingly accepts the terms of the contract, those conditions Congress intends to impose on the funding recipient must be expressed unambiguously. See Bd.
children with a "free appropriate public education" ("FAPE")\textsuperscript{12} which includes "special education\textsuperscript{13} and related services."\textsuperscript{14} IDEA/2004 recognizes thirteen categories of disability\textsuperscript{15} plus, at
the discretion of the states, one additional category of disability.16

To be eligible for special education and related services under IDEA/2004, a student must be between three and twenty-one years old17 and meet the requirements of a two-part test. First, the student must qualify under one or more of the thirteen disability categories, or the fourteenth, where applicable.18 Second, the child must need special education and related services as a result of his or her disability.19

blindness, deafness, emotional disturbance, hearing impairment, mental retardation, multiple disabilities, orthopedic impairment, other health impediments, specific learning disabilities, speech and language impairment, traumatic brain injury, and visual impairment. Id.

16. 34 C.F.R. § 300.8(b) (2007) provides that the term "child with a disability" ages three through nine may include a child “(1) [w]ho is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and (2) [w]ho, by reason thereof, needs special education and related services," (emphasis added)

This standard is incorporated in IDEA/2004 20 U.S.C. § 1401(3)(B). A state which adopts the term "developmental delay" under § 300.8(b) determines whether it applies to children aged three through nine, or to a subset of that age range, for example, ages three through five. See 34 C.F.R. § 300.111(b) (2007). Although a state may not compel an LEA to adopt and use the term developmental delay for children within its jurisdiction, those LEAs choosing to do so must employ the state's definition. See 34 C.F.R. §§ 300.111(b)(2)–(3) (2007). If a state does not adopt the term developmental delay, an LEA may not independently use that term for establishing IDEA/2004 eligibility. See 34 C.F.R. § 300.111(b)(4) (2006). The authority for adoption of this regulation is IDEA/2004 § 1401(3)(B).

17. See 34 C.F.R. §§ 300.101–102 (2007). A state need not provide IDEA/2004 Part B services to children with disabilities ages three, four or five if "inconsistent with State law or practice or the order of any court with respecting the prevision of public education" for nondisabled children in that age group. 34 C.F.R. § 300.102(a)(7) (2007). If a State does not provide public education to nondisabled children under age six, then it is not required to provide services under IDEA/2004 Part B until such children attain age six. See 34 C.F.R. § 300.102(a)(1) (2007).

18. See 34 C.F.R. § 300.8(o)(1)–(13) (2007); 34 C.F.R. § 300.8(b) (2007) (the fourteenth disability is separate and is applicable at the discretion of the state).

19. See IDEA/2004 § 1401(3)(A)(ii). This definition is implemented at 34 C.F.R. § 300.8(a)(1) (2007). IDEA/2004 contains various exclusions from eligibility. According to 20 U.S.C. §1414(b)(5)(A), a child shall not be determined to be a child with a disability if the "determinant factor" is a "lack of appropriate instruction in reading, including the essential components of reading instruction [as defined in the No Child Left Behind Act ("NCLB"), 34 C.F.R. § 300.306(b)(1)(i)]". NCLB defines the term "essential components of reading instruction" to mean: "explicit and systematic instruction in phonemic awareness; phonics; vocabulary development; reading fluency, including oral reading skills; and reading comprehension strategies. 20 U.S.C. § 6368(b). Additionally, IDEA retained the previous law’s exclusion from eligibility for determinant factors of limited English proficiency and lack of instruction in math. 20 U.S.C. § 1414(c)(5)(B)–(C); 34 C.F.R. § 300.306(b)(1)(ii)–(iii).
Once the student is determined to be IDEA/2004 eligible, the child must receive an individualized education program ("IEP"). IEP teams must formulate the IEP before they make a placement decision. IEPs are written documents created by IEP teams which detail the individual services required to accommodate the educational needs of the disabled student. The IEP must be provided in the "least restrictive environment."IDEA/2004


21. 34 C.F.R. § 300.116(b)(2) (2007). The 1999 regulations implementing IDEA/97, 34 C.F.R. § 300.552(b)(2) (1999), provided that placement decisions could be made only after the development of an IEP and in accordance with its terms. The appendix to the implementing regulations explained: "The appropriate placement for a particular child with a disability cannot be determined until after decisions have been made about the child's needs and the services that the public agency will provide to meet those needs. These decisions must be made at the IEP meeting, and it would not be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement." 34 C.F.R. § 300 (app. A, question 14) (1999). The 2007 regulations continued this requirement. 34 C.F.R. § 300.116(b)(2) (2007). They provide that placement decisions can be made only after development of an IEP and in accordance with its terms. Id.

22. In essence, placement establishes the location to implement the child's IEP. Id. This is controlled by what the least restrictive environment for the child is. See generally 34 C.F.R. §§ 300.114–300.120 (2007). Effective placement depends upon the IEP. See 34 C.F.R. §300.116(b)(2) (2007). Generally, unless the IEP requires otherwise, when deciding where to educate the child, priority should be given to a place as close to the child's home as possible. See 34 C.F.R. § 300.116(b)(3) (2007). Further, each public agency must ensure that unless the IEP of a child requires otherwise, the school that the child would normally attend should educate the child. See 34 C.F.R. § 300.116(c) (2007).


25. 34 C.F.R. § 300.114(a)(2) (2007) provides: Each public agency must ensure that—(i) To the maximum extent appropriate, children with disabilities, including
lists the eight required components that must be included in every child’s IEP. For disabled children who have limited

children in public or private institutions or other care facilities, are educated with children who are non-disabled; and (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.” IDEA/2004 §1412(a)(5)(A) contains this language. IDEA/2004 defines “supplementary aids and services” as “aids, services, and other supports that are provided in regular education classes or other educational-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.” See IDEA/2004 § 1401(33). The 2004 amendments bar states from using "a funding mechanism by which [they] distribute[ ] funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a [free appropriate public education] according to the unique needs of the child as described in the child’s IEP.” IDEA/2004 § 1412(a)(5)(B)(i). The conference committee’s comment to IDEA/2004 §1412(a)(5)(B) describes the continuum of placement [from least to most restrictive] as “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.”

26. IDEA/2004 § 1414(d)(1)(A)(6)(I)-(VIII). These are: (I) a statement of the child’s present levels of academic achievement and functional performance, including (aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum; (bb) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities; and (cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives; (II) a statement of measurable annual goals, including academic and functional goals designed to (aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and (bb) meet each of the child’s other educational needs that result from the child’s disability; (III) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided; (IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—(aa) to advance appropriately toward attaining the annual goals; (bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and (cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph; (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described [above]; (VI)–(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A); and (bb) if the IEP Team determines that the child shall take an alternative assessment on a particular State or district wide assessment of student achievement, a statement of why—(AA) the child cannot participate in the regular assessment; and (BB) the particular alternative assessment selected is appropriate for the child; (VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and (VIII) beginning not later than the
English proficiency ("LEP"), the IEP team must consider the language needs of the child, as well.\textsuperscript{27} As long as the IEP meets the above-mentioned requirements, nothing more is required.\textsuperscript{28,29}

IEPs must be reviewed by the IEP team at least once annually.\textsuperscript{30} At the annual review, the IEP team evaluates the efficacy of the child's IEP, and makes appropriate changes to meet the child's current needs.\textsuperscript{31} IEP teams must formulate the first IEP to be in effect when the child is 16, and updated annually thereafter—(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; (bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and (cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child’s rights under this title, if any, that will transfer to the child on reaching the age of majority under section 1415(m). . . .

\textsuperscript{27} 34 C.F.R. § 300.324(a)(2)(ii). Among the factors IEP teams should discuss concerning limited English proficiency students are the extent to which the child should (1) receive instruction in English or his native language, (2) participate in the general curriculum, and (3) receive English language tutoring on his IEP. See 64 Fed. Reg. 12406, 12589 (1999). These provisions were not carried into the 2007 regulations implementing IDEA/2004. However, logic and good pedagogy would dictate they retain their vitality.

\textsuperscript{28} See IDEA/2004 §1414(d)(1)(A)(ii).

\textsuperscript{29} IDEA/2004 §1414(d)(1)(A)(i)(I)-(VIII) made the following changes in required IEP content, as compared to IDEA/97 § 1414(d)(1)(A)(i)(I)-(VIII) and its 1999 implementing regulations: in section I, "academic" and "functional" were inserted before "achievement" and performance, respectively; except for students who take alternative assessments aligned to alternative achievement standards, the requirement for benchmarks or short-term objectives for each goal has been eliminated; the IEP must state how the child's progress toward meeting annual goals will be measured and when reports on such progress will be provided; to the extent practicable the special education and related services to be provided the child must be based on peer-reviewed research; IEPs must contain a statement of individual appropriate accommodations necessary "to measure the academic achievement and functional performance" of the child on State and district assessments and the term "modifications" has been deleted from the text; where the IEP team determines that a child shall participate in alternative assessments, it must explain why the child cannot participate in the regular assessment and why the alternative assessment it selected is appropriate; a statement of needed transition services when the student attains age fourteen is no longer required; however, IDEA/2004 mandates that the first IEP in effect when the student reaches age sixteen must contain appropriate, measurable postsecondary goals and a list of the transition services needed to assist the student in achieving those goals.


\textsuperscript{31} IDEA/2004 § 1414(d)(4)(A). The statute lists five factors IEP teams should consider in recommending IEP changes: (1) any lack of expected progress toward the annual goals and in the general curriculum; (2) the results of any reevaluation; (3) information about the child provided to, or by, the parents during the evaluation process; (4) the child's anticipated needs; and (5) other matters. IDEA/2004 §1414(d)(4)(A)(ii); 34 C.F.R. § 300.324(b)(1)(ii) (2007).
IEP before they make a placement decision. 32

IDEA/2004 requires particularized written notice whenever the LEA proposes or refuses to change "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." 33

1. The child find obligation

IDEA/2004 imposes on funding recipients the so-called "child find" obligation. 34 Child find requires states to identify, locate, and evaluate all children with disabilities residing within their respective state. 35 This obligation encompasses all children with disabilities who are homeless, wards of the State,

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32. See IDEA/2004 at § 1414(d)(2)(A); 34 C.F.R. § 300.323(a) (2007). The 1999 regulations implementing IDEA/97 at 34 C.F.R. § 300.552(b)(2) (1999) provided that placement decisions can be made only after the development of an IEP, and in accordance with its terms. 34 C.F.R. § 300 (app. A, question 14) (1999) explained, "The appropriate placement for a particular child with a disability cannot be determined until after decisions have been made about the child's needs and the services that the public agency will provide to meet those needs. These decisions must be made at the IEP meeting, and it would not be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement." The 2007 regulations continued this requirement. 34 C.F.R. § 300.116(b)(2) (2007). They provide that placement decisions can be made only after development of an IEP and in accordance with its terms. Id. Placements are controlled by what is the least restrictive environment for the child. See 34 C.F.R. §§ 300.114-300.120 (2007). Such placements are dependent on the IEP. See 34 C.F.R. §300.116(b)(2) (2007). Generally, unless the IEP requires otherwise, the child should be educated as close as possible to the child's home. See 34 C.F.R. § 300.116(b)(3) (2007). Further, each public agency must ensure that unless the IEP of a child requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. See 34 C.F.R. § 300.116(c) (2007).

33. See IDEA/2004 § 1415(b)(3). The requirements of the notice is detailed in IDEA/2004 § 1415(c)(1), which states: The notice required by subsection (b)(3) shall include—(A) a description of the action proposed or refused by the agency; (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and , if this notice is not an initial referral for evaluation, the means by which a copy of the description of the procedural safeguards can be obtained; (D) sources for parents to contact to obtain assistance in understanding the provisions of this part; (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and (F) a description of the factors that are relevant to the agency's proposal or refusal.

34. See IDEA/2004 § 1412(a)(3)(A).This duty entails screening to identify children who are disabled, or suspected of having a disability, and being in need of special education and related services, as opposed to the actual delivery of special education and related services.

35. Id.
or attending private schools. There are no exceptions, regardless of the severity of the disability. The statute also mandates the development of a practical method to determine which children currently receive needed special education and related services.

The breadth of the child find obligations can be surprising. School districts’ child find duties begin at birth. Since child find duties are “affirmative,” a parent is not required to request an evaluation of the child. The child find obligation is sweeping and extends to “children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.” The design of child find activities must ensure equitable participation of parentally-placed private school children with disabilities and an accurate count of such children. Notably, IDEA/2004 imposes the child find obligation on the LEA where the private school is located, even when the LEA is located in a different state than where the child resides. This contrasts with IDEA/97’s child find obligation, which placed this responsibility on the school district of the child’s residence.

36. Id.
37. Id.
39. See IDEA/2004 § 1431 (strengthens findings and policy on this point, as compared with §1431 of IDEA/97, the prior law). The duty to “child find” from birth has been an obligation of school districts for more than thirty years. See MARK WEBER, SPECIAL EDUC. LITIGATION TREATISE, Ch. 11 (LRP Publications 2004).
40. See Robertson County Sch. Sys. v. King, 99 F.3d. 1139 (6th Cir. 1996) (decided under IDEA/1990). Local school districts are ordinarily responsible for carrying out child find activities for children within their jurisdiction. Id.
41. IDEA/2004 §1412(a)(10)(A)(ii)(I) (emphasis added). Child find duties apply regardless of the severity of the disability, whether the child has ever attended or will ever attend a public school, or whether the state serves infants and toddlers (zero to two years old) under IDEA/2004 part C or preschool children (three to five years old) under IDEA/2004 part B. See 34 C.F.R. §§ 300.111, 300.131 & 300.201 (2007). Further, the child find duty applies where the child is in the custody or under the jurisdiction of any public or private agency or institution. Id.
42. 34 C.F.R. § 300.131(b)(1)–(2) (2007).
43. See 34 C.F.R. § 300.131(a) (2007).
44. See 34 C.F.R. § 300.131(f) (2007).
1. Child find for parentally-placed private school students

The rules surrounding child find are fairly equivalent for privately-enrolled and publically-enrolled children. With respect to privately enrolled pupils, an LEA or SEA, where applicable, must undertake child find activities in a manner similar to those it employs for public school children.\footnote{See IDEA/2004 20 U.S.C. § 1412(a)(10)(A)(i)(III). This would include activities such as distribution of informational brochures, provision of regular public service announcements, staffing exhibits at health fairs, creating liaisons with private schools, and similar activities. See 71 Fed. Reg. 46,593 (2006).} Child find activities for children enrolled in private schools must be completed in a time period comparable to that of children attending public schools.\footnote{See IDEA/2004 20 U.S.C. § 1412(a)(10)(A)(i)(V); 34 C.F.R. § 300.131(e) (2007).} School districts must consult with representatives of the private schools regarding child find procedures.\footnote{See IDEA/2004 20 U.S.C. § 1412(a)(10)(A)(iii).} The costs incurred by LEAs in conducting child find, including individual evaluations, cannot be considered in determining whether LEAs have met their expenditure obligations under IDEA/2004 to parentally-placed private school children.\footnote{See 34 C.F.R. §§ 300.131(d), 300.133 (2007).}

The parent of a privately-placed child may use the due process complaint hearing procedure when alleging a child find violation. Unless a child find violation is alleged, the parent may not use the due process complaint hearing procedures (available to publicly-enrolled students with disabilities) to obtain relief for violations of the Act.\footnote{See 34 C.F.R. § 300.140(b)(2) (2007).} Under such circumstances, the child find complainant must allege that the school district has failed to properly identify, locate, or evaluate the private school student.\footnote{See 34 C.F.R. § 300.140(b)(1) (2007).} In the absence of an allegation of such child find failures, parents of private school pupils must employ the complaint resolution or other procedures adopted by the state to obtain relief over implementation of the Act.\footnote{See 34 C.F.R. § 300.140 (2006).} \footnote{Where child find failures occur in connection with parentally-enrolled private
2. Expenditure of Part B funds

Although IDEA/2004 requires school districts to devote federal IDEA/2004 Part B funds to parentally-placed private school children with disabilities as a group, it does not obligate the expenditure of state funds for special education and related services for particular privately-schooled students. The expenditure of IDEA/2004 funds must be proportionate to the number of children enrolled in private schools within the district, not the number of resident children in the district as under IDEA/97. In essence, IDEA/2004 measures the LEA's financial obligation by the percentage of all private school children with disabilities being educated within the district. Although the Act does not require LEAs to expend state and local monies for special education and related services for parentally-placed private school children, IDEA/2004 does not prohibit SEAs or LEAs from spending beyond the federal allotment for provision of special education and related services.

school pupils, uncertainty exists as to whether parents may recover tuition and other costs incurred for the child's placement under IDEA/2004. § 1412(a)(10)(C)(ii) provides such a remedy for children “who previously received special education and related services under the authority of the agency.” See, e.g., Bd. of Educ. of City Sch. Dist. of N. Y. v. Tom. F. ex rel. Gilbert F., 193 Fed. Appx. 26 (2nd Cir. 2006), aff’d 128 S.Ct. 1. (2007). In Tom F., the Supreme Court, construing the salutary purposes of the law, affirmed the judgment of the Second Circuit (on a 4-4 vote, with Justice Kennedy not participating), permitting tuition reimbursement for a unilateral private school placement where the subject child had not “previously received” special education and related services under the auspices of the agency. Id.


To the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private, including religious, elementary and secondary schools located in the school district served by the LEA, provision [must be] made for the participation of those children in the program assisted or carried out under Part B of the Act by providing them with special education and related services in accordance with § 300.137 unless the [United States Department of Education] has arranged for services to those children under the by-pass provisions [of the Act]. 34 C.F.R. § 300.132 (2007).

55. See 34 C.F.R. § 300.133(a) (2007).


57. See 20 U.S.C. § 1412(a)(10)(A)(i)(IV); Letter to DeLauro, supra note 8 (commenting that there was nothing in IDEA/97 Part B that would prohibit an LEA from using non-federal funds to provide special education services to unilaterally-placed students).
In determining the “proportionate amount” of part B funds that must be devoted to parentally-placed private school children aged three through twenty-one, LEAs are required to conduct an annual count on any date between October 1st and December 1st of each year. This calculation determines the amount of part B funds that the LEA will spend on such children in the ensuing fiscal year. “Children aged three through five are deemed to be parentally-placed private school children with disabilities... if they are enrolled in a private school that meets the definition of elementary school under §300.13. Furthermore, the LEA must calculate the proportionate share of IDEA/2004 funds before earmarking funds for any authorized, early intervention activities. The proportionate share is based on the total number of children eligible, not the total children served. Additionally, the school district of location must consult with private school representatives to determine its number of enrolled disabled children and how to allocate the part B funds. This

59. See 34 C.F.R. § 300.133(c)(ii) (2007). The appendix to part B of the 2007 regulations contains a helpful illustration as to how to perform this calculation. The example assumes that there are 300 eligible students with disabilities enrolled at the LEA and twenty eligible parentally-placed private school children with disabilities enrolled in private schools located within the LEA. Since 6.25% (20/320) of the students attend private schools within the LEA, the private school students as a group will be entitled to 6.25% of the part B subgrant received by the LEA. If the LEA receives $152,500 in federal flow through funds, the example continues, the LEA must then spend $9,531.25 on special education and related services for the group of parentally-placed private school children with disabilities located in the LEA.
60. See 34 C.F.R. § 300.133(a)(2)(ii) (2007). Under IDEA/2004, a child who is home-educated may or may not be considered a parentally-enrolled private school student with a disability, since the Act makes this dependent upon state law. See 71 Fed. Reg. 46,584 (explaining the operation of the provision). Issues related to home-educated students are discussed in Part V.
61. 34 C.F.R. § 300.226 (2007).
62. See 34 C.F.R. §300 (app. part B).
63. IDEA/2004 § 1412(a)(10)(A)(iii). This consultation requires discussion with private school representatives and representatives of parents concerning, among other things, “[h]ow special education and related services will be apportioned if funds are insufficient to serve all parentally-placed private school children, and [h]ow and when these decisions will be made.” 34 C.F.R. § 300.134(d)(2) –(3) (2007). Where parents contend the proposed IEP denies their child a FAPE, and they place their child unilaterally in a private school program which meets the child’s special needs, IDEA/2004 permits them to be reimbursed for the tuition and related expenses they incur if they satisfy the substantive and procedural requirements set forth in the Act. 20 U.S.C. § 1412(a)(10)(C)(ii). IDEA/2004 continues without changing the language contained in IDEA/97 respecting parental reimbursement. See 20 U.S.C. § 1412(a)(10)(c)(ii). For an extensive discussion about IDEA/2004 reimbursement see Lewis M. Wasserman, Reimbursement to Parents of Tuition and Other Costs under the
consultation must be timely and meaningful.\textsuperscript{64}

3. No individual entitlement

Parentally-enrolled private school children with disabilities who receive special education and related services are entitled to this right as a group, not individually.\textsuperscript{65} Therefore, such children may not insist on receiving their proportionate share of part B monies for themselves.\textsuperscript{66} LEAs' obligation then, is to merely provide an opportunity for equitable participation in the services funded with part B monies.\textsuperscript{67} Moreover, the LEA in which the private school is located "must make the final decisions with respect to the services to be provided to eligible parentally-placed private school children with disabilities."\textsuperscript{68}

Where parents do not contest the adequacy of the IEP offered by the LEA and enroll the child in a private school, the agency has no obligation to prepare or update the child's IEP.\textsuperscript{69} The absence of an individual right for parentally-placed children contrasts starkly with the rights of children who, pursuant to an IEP, are placed in a private school or facility by the LEA, as a means of furnishing a FAPE.\textsuperscript{70} In the latter case, students retain all the procedural and substantive IDEA/2004

\textit{Individuals with Disabilities Education Improvement Act of 2004, 21 St. John's J. Legal Comment, 171, (2006).}
\textsuperscript{64} See 34 C.F.R. § 300.133(c)(1)(i) (2007).
\textsuperscript{65} 34 C.F.R. § 300.137(a) (2007).
\textsuperscript{66} 34 C.F.R. § 300.137(a) (2007). "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." Plainly then, under IDEIA/2004, "parentally-placed private school children with disabilities may receive a different amount of services than children with disabilities in public schools." 34 C.F.R. § 300.138(a)(2) (2007). There are apparently no exceptions to this rule. IDEIA/2004's predecessor, IDEIA/97, also made clear that parentally-placed private school children had no individual right to a FAPE. See also 71 Fed. Reg. 46,595 (2006).
\textsuperscript{68} See 34 C.F.R. § 137(b)(2) (2007).
\textsuperscript{69} Discussion accompanying the 1999 regulations implementing IDEIA/97 made clear that there was no provision which compels a school district to develop an IEP that assumes a public placement for each private school student each year. Since the parents may invoke their child's right to return to the public schools and receive a FAPE, LEAs "must be prepared to develop an IEP and to provide FAPE to a private school child if the child's parents re-enroll the child in the public school." 64 Fed. Reg. 12,601 (1999). IDEIA/2004's implementing regulations talk only about services plans for privately-enrolled students. 34 C.F.R. § 300.132(b).
rights enjoyed in public schools. 71

4. Services plans

In contrast to the detailed IEP requirements imposed on LEAs by the IDEA for eligible publically-enrolled pupils, LEAs must develop and implement a mere services plan for each privately-schooled child designated by the local district to receive special education and related services. 72 The services plan “describes the specific special education and related services that the LEA will provide to the child in light of the services that the LEA has determined . . . it will make available to [the] parentally-placed private school child[ ] with disabilities.” 73 IDEA/2004’s implementing regulations provide that “[t]he services plan must, to the extent appropriate, meet the requirements [set forth in the IEP content for publicly enrolled students].” 74 Although it is unclear as to which IEP components must be included in the services plan, it should at least include a statement of what special education, related services, and supplementary aids and services the child will receive. 75 The services plan should include goals for special education and related services of the kind included in IEPs. 76 LEAs must also adjust to the established lifestyle of the student by providing on-site services. 77 Such goals should

72. See 34 C.F.R. § 300.132(b) (2007). The United States Department of Education discourages LEAs from using IEPs as the child’s services plan. 71 Fed. Reg. 45,596 (2006). This is because the IEP will generally include much more services than just those to which a parentally-placed private school child with a disability may receive, if designated to receive such services. Id. There is nothing, however, in these regulations that would prevent a state that provides more services to parentally-placed private school children with disabilities than it is required to under the Act to use an IEP in place of a services plan, consistent with state law. 71 Fed. Reg. 46,596–46,596 (2006).
75. See 71 Fed. Reg. 46,596 (2006) (explaining the services plan requirement of 34 C.F.R. §300.138(b)(1): “The services plan also must, to the extent appropriate, meet the IEP content, development, review, and revision requirements described in section 636(d) of the Act . . . as to the services that are to be provided”). Analogous requirements apply to Individual Family Service Plans (“IFSPs”) for children with a disability aged three to five years. See 34 C.F.R. § 300.138(2)(6) (2007); 71 Fed. Reg. 46,596 (2006).
77. See 71 Fed. Reg. 46,596 (2006). The commentary makes clear that this recommendation is limited by federal First Amendment Establishment Clause and applicable state constitutional and statutory considerations.
provide, at a minimum, programmatic guidance to the special education and related service providers.

5. Program and service delivery

Program and delivery service vehicles are provided for both privately and pubically-enrolled students. The special education and related services in a services plan must be provided by employees of the public agency, or through a contract entered into between the agency and "an individual, association, agency, organization or other entity." The special education and related services, as well as any materials and equipment employed in rendition of same, must be "secular, neutral and nonideological."

6. Transportation

LEAs must furnish transportation to a parentally-placed child with a disability where services are offered off-site and if such transportation is necessary to enable the child to receive the services offered under a services plan. If services are offered to a parentally-placed child with a disability at a site separate from the child's private school, the LEA may be required to transport the child to and from that other site.

7. Personnel qualifications

The personnel qualifications required for public programs are vastly superior to those required by private entities. IDEA/2004 requires "highly qualified" personnel for public agencies responsible for delivery of special programs and services to children with special needs. These requirements

78. 34 C.F.R. § 300.138(c)(1) (2007).
79. 34 C.F.R. § 300.138(c)(2) (2007).
80. See 34 C.F.R. § 300.139(b)(1) (2007). This is because denial of such transportation may effectively deny the child of the opportunity to benefit from the services offered in the services plan. 71 Fed. Reg. 46,596 (2006). The expenses incurred in providing such transportation may be deducted from the proportional share of funds allocated to parentally-placed private school children. See 34 C.F.R. § 300.139(b)(2) (2007).
82. See 34 C.F.R. § 300.18 (2007).
83. IDEA/2004 revised substantially the qualification requirements to ensure that personnel which carry out the purposes of part B are appropriately and adequately prepared and trained. This includes assuring that those personnel have the content knowledge and skills to serve students with disabilities. See 20 U.S.C. §
apply to special education teachers of core academic subjects, special education teachers in general, special education teachers applying alternative standards, special education teachers of multiple subjects, and they also apply a separate high objective uniform State standard of evaluation [HOUSSE] standards for special education teachers. The requirements do not apply to teachers hired by private elementary schools and secondary schools, including private school teachers hired or contracted by LEAs to provide equitable services to parentally-placed private school children with disabilities under 34 C.F.R. § 300.18(a)(1).

8. The rejection option

There is nothing in IDEA/2004 or its implementing regulations which compels parents who have placed their child in a private school to accept the special education and/or related services offered to their disabled child in a services plan. It is very unlikely that Congress intended otherwise.

9. LEA reporting requirements

Apparently to enable SEAs to perform their oversight functions of LEAs' compliance, each LEA must maintain records and provide the SEA with the following information about parentally-placed private school children: the number of children it evaluated, the number of children it determined to have disabilities, and the number of children it served.

10. Relinquishment and reinstatement of the FAPE obligation

Where the LEA of residence determines the child is IDEA/2004 eligible, and parents make clear their intent to keep their child in a private school located in another LEA,

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84. See 34 C.F.R. § 300.18 (2007).
86. Even for students who are entitled to a free appropriate public education, the agency "may not use ...the due process procedures ... in order to obtain agreement or a ruling that the services may be provided to the child." 34 C.F.R. § 300.300(b)(3)(2007). Moreover, if the agency tries, but fails to obtain parental consent, the school district "will not be considered to be in violation of the requirement to make available FAPE to the child for failure to provide the child with the special education and related services for which [it] requests consent." 34 C.F.R. § 300.300(b)(4)(i).
87. See 34 C.F.R. § 300.132(c) (2007).
IDEA/2004 relieves the LEA of residence from its obligation to furnish a FAPE to that child. This provision assists LEAs in defining their then current obligation to the child and the parents in understanding what services they may be relinquishing by unilaterally enrolling their child in a private school. However, parents exercising this option may later decide to refer the child to their district of residence for provision of a FAPE, in which case the district of residence will, under most circumstances, have to comply.

11. LEA consultation obligation

IDEA/2004 requires school districts to “timely and meaningfully” consult with private school representatives and representatives of parents of private school students when designing and developing the services plan for privately-schooled students. The Act requires such consultation to include how, where, and by whom services will be provided to private school students, as well as the types of services (both the direct and alternative delivery options) that will be offered. If the private school officials disagree with the LEA’s decision not to provide direct services, the LEA must furnish a

88. See 71 Fed. Reg. 46,593 (2006) (commenting on 34 C.F.R. § 300.131). Neither the regulations themselves nor the commentary accompanying the regulations indicate how an LEA ascertains parental “intent” in this regard. Surely, the LEA of residence may develop a form containing an adequate explanation of the parents’ options relative the child’s receipt of a FAPE [including the child’s right to return to the LEA of residence for services] with a written waiver of the right to a FAPE, or simply offer an IEP providing a FAPE.

89. 71 Fed. Reg. 46,593 (2006). This may create conflicts among the pertinent interests. For example, the LEA of residence child study team could determine that the child is ineligible for IDEA/2004 benefits upon its review of the record, and any additional evaluations it performs. Moreover, it could agree that the child is eligible for services but that the kinds of programs and services which are appropriate for the child are different than those recommended by the LEA of location. Further, the duration, frequency or intensity of the services deemed appropriate might vary as between LEAs.

90. 34 C.F.R. § 300.622(b)(4) requires parental consent for release of information about parentally-placed private school children between LEAs. Therefore, nothing in the regulations would prohibit parents from requesting that their child be evaluated by the LEA responsible for FAPE (usually under state law the LEA where the parents reside) for purposes of having a FAPE made available to the child, while at the same time requesting the LEA in which the private school is located to evaluate the child for purposes of considering the child for equitable services. 71 Fed. Reg. 46,593 (2006). Nevertheless, the DOJ discourages repeated testing of such children by separate LEAs. Id.


92. Id.
written explanation of that decision.93 LEAs must also confer with private schools as to when service allocation decisions will be made by the LEA and how services will be apportioned if funds are insufficient to serve all children.94 When the consultation process has occurred, LEAs must obtain a written affirmation signed by representatives of participating private schools.95 If such information is not forthcoming within a reasonable period of time after it is sought, the LEA must forward documentation of the consultation process to the state agency.96

Private school officials may lodge a complaint regarding either the consultation process or whether the school gave “due consideration” to the views of the private school.97 The complaint is made to the SEA and must assert the grounds for the “non-compliance.”98 The LEA must respond to the SEA with “appropriate documentation.”99 Although states may use their regular state complaint resolution process for addressing such disputes,100 they may employ other procedures for accomplishing this purpose, as well.101 Where the private school is dissatisfied with the decision of the SEA, it may submit a complaint to the United States Department of Education (“USDOE”), in which case the SEA must provide corresponding documentation to the USDOE.102

C. IDEA/2004 and Home-Schooled Students

IDEA/2004’s regulatory scheme103 assigns to states the responsibility of defining “private schools or facilities” under the Act for both elementary104 and secondary105 students. Thus,

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94. Id.; See 34 C.F.R. § 300.134 (2007).
99. Id.
103. See 34 C.F.R. §300.130 (2007).
105. See 34 C.F.R. § 300.36 (2007).
1] THE RIGHTS OF PARENTALLY-PLACED STUDENTS

state law determines whether a disabled, home-schooled pupil is a private school pupil eligible for the proportional distribution of services funded with IDEA/2004 money. This creates a hodgepodge of approaches across states. Thus, IDEA/2004 further curtails the rights of home-schooled pupils relative to the already diminished rights enjoyed by students educated at places deemed "private schools" under state law.

III. THE IMPACT OF THE RELIGION CLAUSES OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION ON THE RIGHTS OF DISABLED STUDENTS ATTENDING SECTARIAN SCHOOLS TO RECEIVE SPECIAL EDUCATION AND RELATED SERVICES FROM LEAS AND SEAS

A. Establishment Clause Considerations

The Establishment Clause of the First Amendment does not necessarily bar IDEA/2004 public support for special needs children in sectarian private schools, but it does not require a state to support the child with public funds. In the leading case of Zobrest v. Catalina Foothills School District, the United States Supreme Court held that the Establishment Clause does not bar a school district from providing a public employee to serve as a sign language interpreter for a profoundly deaf student placed by his parents in a Roman Catholic high school. The Court made clear that there is no general constitutional bar to furnishing such services on the site of a sectarian

106. These provisions concerning parentally-placed private school students do not apply to students placed there by SEAs and LEAs for the purpose of receiving a free appropriate public education. See 34 C.F.R. § 300.145 (2007).


Regardless of whether a home schooled child is considered a "private school" student for purposes of receiving IDEA/2004 benefits, a school district may not compel the parents to submit the child to an evaluation. Fitzgerald v. Camdenton R-III Sch. Dist., 439 F.3d 773 (8th Cir. 2006).

school.\footnote{Id. at 8–10. Since the parties stipulated on this appeal that rendition of the service pursuant to IDEA/2004 was clearly secular, the Supreme Court did not analyze this factor in its opinion. Id. at 4 n.1. In the court below the United States Court of Appeals for the Ninth Circuit, the court applied the three-part test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971) (the services must advance a secular legislative purpose, neither advance nor inhibit religion, and must not result in excessive government entanglement in the religious mission of the sectarian school), and found the service had the primary effect of advancing religion. Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190, 1194-96 (1992). It therefore found an Establishment Clause violation. \textit{Id.} Lemon criteria have been written into the EDGAR regulations at 34 C.F.R. § 76.532(a). They prohibit use of federal monies for religious purposes including payment for religious worship, instruction or proselytism or equipment or supplies furnished by the State or its subgrantees for any of these purposes. \textit{Id.}}

The Zobrest Court explained that the Establishment Clause does not bar religious organizations from participating in publicly sponsored welfare programs that neutrally provide benefits to a broad class of citizens defined without reference to religion (disabled children). The court held that IDEA/2004 is such a program.\footnote{110. The Zobrest court relied in part on the Supreme Court’s 1983 decision in \textit{Mueller v. Allen}, 463 U.S. 388 (1983) in its analysis. 509 U.S. at 8–10. In \textit{Mueller}, the Court held that a state statute which permitted parents to take income tax deductions for educational expenses they incurred in sending their children to public and private schools (including sectarian ones) did not violate the Establishment Clause. 463 U.S. at 402–04. The court reasoned that the statute was neutral as to religion in that it benefitted all parents, not just those parents who chose to send their children to religious schools. \textit{Id.} at 397. Moreover, the court saw the decision to send children to religious schools as a parent, not government initiated determination, thereby avoiding governmental activities which offended the Establishment Clause. \textit{Id.} at 399.}

Upon examining the issue of whether IDEA/2004 “advances or inhibits religion,” the Court concluded that the presence of the interpreter neither added to nor subtracted from the religious environment of the school.\footnote{111. Zobrest, 509 U.S. at 13.}

Moreover, the Court observed that children with disabilities are the primary beneficiaries of IDEA/2004, and that whatever benefits were reaped by the sectarian school were only incidental.\footnote{112. Id. at 12.}

The Court found that since the IDEA/2004 neither creates an incentive nor directly benefits religious schools, it does not unconstitutionally encourage religion.\footnote{113. \textit{Id.} at 10–13. The Zobrest case foreshadowed Mitchell v. Helms, 530 U.S. 793 (2000), which held that Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, under which federal government distributes funds to state and local governmental agencies, which in turn lend educational materials and equipment to public and private schools, did not violate the Establishment Clause. The 2007 IDEA Final Part B Regulations require that the public agency retains title to property, equipment and supplies used to provide special education and related services to parentally-placed private school students and that they only be applied to uses and
Courts have adhered to Zobrest in holding that providing special education and related services on-site at sectarian schools does not violate the Establishment Clause.\textsuperscript{114}

In 2002, the Supreme Court upheld an Ohio statute against an Establishment Clause challenge.\textsuperscript{115} The statute publicly funded a school voucher program, in which ninety-six percent of the student participants from the underperforming Cleveland public schools chose to attend religious schools.\textsuperscript{116} An important reason the Court upheld the constitutionality of the program was that it provided parents with a wide range of choices among religious and non-religious schools, including an after-school tutorial program at students' home schools.\textsuperscript{117} The court viewed this as short-circuiting direct government support of sectarian schools, since the parents independently chose where the money went.\textsuperscript{118}

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\textsuperscript{114} See, e.g., Peter v. Wedd, 155 F.3d 992 (8th Cir. 1998) (one-on-one paraprofessional services); Helms v. Picard, 151 F.3d 347 (5th Cir. 1998) (direct instruction to parochial school student); Russman v. Bd. of Educ., 150 F.3d 219 (2d Cir. 1998) (consultant teacher services to religious school teacher); Peck v. Lansing Sch. Dist., 148 F.3d 619 (6th Cir. 1998) (occupational therapy and behavioral therapy).

For an interesting case which found an Establishment Clause violation, see Americans United for Separation of Church and State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862 (S.D. Iowa 2006) (where the court held, among other things, that the state violated the excessive entanglement requirement when it financed a pre-release rehabilitation program in state prison through a contract with a group that, in effect, set up an Evangelical Christian church with compelled participation of inmates seeking rehabilitation).

\textsuperscript{115} Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

\textsuperscript{116} Id. at 643–47.

\textsuperscript{117} Id. at 652–54.

\textsuperscript{118} Id. The court also found that no financial incentives existed which were skewed toward religious institutions, since the aid was allocated on the basis of neutral secular criteria. Id. at 653–654. The fact that a higher percentage of students selected sectarian schools was deemed irrelevant by the court. Id. at 658–69.

Notably, in her \textit{Zelman} concurrence Justice O'Connor applied the so-called "endorsement test" for determining the constitutionality of governmental aid programs, such as the one challenged there. \textit{Id.} at 668–676. Instead of the \textit{Lemon} criteria, she proposed a two-part test. \textit{Id.} First, a program must administer "aid in a neutral fashion, without differentiation based on the religious status of the beneficiaries or providers of the services." \textit{Id.} Second, the "beneficiaries of indirect aid [the parents] must have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid." \textit{Id.} To date, a Supreme Court majority has not adopted O'Connor's endorsement test.

In reliance on \textit{Zelman}, the court in \textit{L.M by H.M. v. Evesham Township Bd. of Educ.}, 256 F. Supp. 2d 290, 303–05 (D. N.J. 2003), rejected a school district's challenge to a parent's tuition reimbursement claim on Establishment Clause grounds, concluding that IDEA's reimbursement provisions satisfied the no "endorsement test" and had a "secular legislative purpose." Further it found the reimbursement was "indirect aid
In 2006, the United States Department of Education adopted the long-awaited IDEA/2004 Final Part B Regulations, which appear to be consistent with IDEA/2004's provisions concerning privately-placed students and the United States Supreme Court's Establishment Clause jurisprudence. The new regulations make clear that services to parentally-placed private school children with disabilities may be legally provided on the premises of private, including religious, schools.\(^{119}\) LEAs may not, however, use IDEA/2004 monies to finance the existing level of instruction in a private school, or to otherwise benefit the private school.\(^{120}\) Further, Part B funds must be expended to meet the special education and related services needs of parentally-placed private school children with disabilities,\(^{121}\) but cannot be used to meet the needs of private schools or the general needs of students enrolled in private schools.\(^{122}\) Finally, LEAs may use IDEA/2004 funds to make public school personnel available in non-public facilities to the extent necessary to provide services,\(^{123}\) so long as those services are not normally provided by the private school.\(^{124}\)

...neutral with respect to religion... [and] the reimbursement funds reach[ed] sectarian institutions only as a result of the wholly independent choices of individual parents.”

\(^{119}\) 34 C.F.R § 300.139(a) (2007).

\(^{120}\) 34 C.F.R. § 300.141(a) (2006).

\(^{121}\) 34 C.F.R. § 300.141(b) (2006).

\(^{122}\) 34 C.F.R. § 300.141(b)(1)(2)(2006).

\(^{123}\) See 34 C.F.R. § 300.130-144 (2006).

\(^{124}\) 34 C.F.R. § 300.142(a)(b) (2006). Arguably, the 2006 IDEA Part B Regulations are built on the erroneous assumption that religious schools do not provide special education and related services to disabled children. What if, for example, a sectarian school contracts with a private agency to deliver group speech and language therapy services to three of its students (predicated on a prior arrangement with the children's parents they would reimburse the sectarian school on a pro-rata basis for its out-of-pocket costs). Whether analyzed under Zobrest, Zelman, or Justice O'Connor's "endorsement test," no constitutional harm would ensue by the LEA reimbursing the sectarian school for the speech and language services with IDEA/2004 funds, to the extent consistent with other IDEA/2004 provisions; paying the service provider directly, to the extent consistent with other IDEA/2004 provisions; or paying the money to the parents (through a special education voucher) redeemable by either the service provider or the sectarian school in an amount consistent with other IDEA/2004 provisions.

The 2006 IDEA Part B Regulations at 34 C.F.R. § 300.144 contain rules for delivery on-site at private schools of property, equipment, and supplies. LEAs may purchase personal computers for privately placed students where the computer helps the student overcome disability-related communication difficulties. Id. Computers are similar to the interpreter in Zobrest, in that their purpose is to assist the child in overcoming his ability to communicate and not for religious worship, instruction or proselytism, or in violation of Establishment Clause prohibitions. Of course, the fact that the
B. Free Exercise Clause Considerations

The Free Exercise Clause does not require a state to fund all educational programs permitted under the Establishment Clause. In *Locke v. Davey*, a non-special-education case, the Supreme Court dismissed a claim asserting that regulations promulgated by Washington State violated the First Amendment’s Free Exercise Clause. The state regulations forbade using state scholarship funds to train students for the ministry, but they permitted using them for training in other occupational categories. The Supreme Court explained that the Free Exercise Clause did not require funding all government programs that are permitted under the Establishment Clause. It held that the state of Washington did not, in this case, violate the Free Exercise Clause by refusing to fund devotional degrees. The Court determined that the state had a compelling interest to refuse the funding of theological instruction, even though it funded training for secular professions; the state’s refusal was not based on religious hostility, but on the permissible purpose of avoiding religious establishment in violation of state constitutional requirements.

Similar results were obtained in Free Exercise claims based on unequal treatment under the IDEA. In *Gary S. v. Manchester School District* the First Circuit Court of Appeals
rejected a Free Exercise claim that private school students are entitled to receive benefits equal to those of public school students under IDEA/2004. According to the court, the plaintiffs were not being deprived of a generally available public benefit because they exercised their religious convictions; rather, they made a choice not to accept IDEA/2004 benefits only available to them in the public setting. Neither the student's nor the parents' free exercise of religion were infringed upon by Congress' refusal to fund sectarian or nonsectarian private schools, and the Court held that IDEA/2004 did not selectively burden religious conduct. Ultimately, the court observed that "no cognizable burden on religion has been caused by the federal government's failure to provide to disabled children attending Catholic schools the same benefits it provides to disabled public school children." Thus, it is unlikely that parents who sue LEAs or SEAs on the ground that IDEA's unequal treatment of privately versus publicly enrolled students unduly burdens their First Amendment Free Exercise liberty will succeed in their efforts.

IV. TREATMENT OF PUBLIC VERSUS PRIVATE SCHOOL STUDENTS UNDER IDEA/2004: FOURTEENTH AMENDMENT EQUAL PROTECTION AND DUE PROCESS SCRUTINY

A. Equal Protection Clause Considerations

Similarly, claims which have asserted a violation of the Equal Protection Clause of the United States Constitution based on a different treatment of private and public school students under the IDEA have been unsuccessful.

LEAs are not required to furnish a FAPE to students unilaterally placed in private schools. The court in Gary S. rejected an Equal Protection Claim, in addition to the Free

132. Id. at 20.
133. Id. at 18–22.
134. Id. at 21.
135. In Anderson v. Town of Durham, 89 A.2d 944, 958–959 (2006), cert denied, 127 S.Ct. 661 (2006), a non-special education case, the court applied a rational basis test and held that the Free Exercise Clause was not violated when the State provided tuition vouchers to students attending nonsectarian, but not sectarian private schools. Among other reasons, "excessive entanglement" of state and religion was considered an adequate justification for withholding tuition vouchers to sectarian schools. Id. at 961.
Exercise Claim. There, parents asserted that IDEA/2004 had "infringed upon their fundamental right to direct [their son's] upbringing and education because it deprives him of a FAPE and a due process hearing while offering these benefits to students who receive special education services at public schools and therefore should be subject to strict scrutiny." The court applied a rational basis test to the distinctions made between students enrolled in public school programs and those unilaterally placed in private schools. The court concluded there was no constitutional violation.

It held that requiring LEAs to furnish a FAPE was a heavy burden, and that Congress acted rationally in deciding not to increase this responsibly by extending it to students enrolled unilaterally in private schools.

B. Fourteenth Amendment Due Process Clause Considerations

IDEA's discrimination between publicly- and privately-enrolled pupils does not offend constitutional due process principles either. In Gary S., the parents also contended that IDEA/2004 violated their substantive due process rights because it required them to relinquish their religious beliefs

136. 374 F.3d at 17.
137. Id. at 22.
138. Id. at 22–23.
139. Id. at 23. See also Eulitt ex rel. Eulitt v. Maine Dep't of Educ., 386 F.3d 344 (2004). The Eulitt court considered whether "the Equal Protection Clause require[d] Maine to extend tuition payments to private sectarian secondary schools on behalf of students who reside in a school district that makes such payments available on a limited basis to private nonsectarian schools." Id. at 346. It held that it does not. Id. In reliance on Locke, 540 U.S. at 712, the court observed that the Free Exercise Clause was the primary framework for assessing religious discrimination claims, and that if the challenged program does no violence to Free Exercise, no religious discrimination claim can be stated. Eulitt, 386 F.3d at 354. Thus, in Eulitt the plaintiff could not circumvent the Free Exercise Clause by asserting under the Equal Protection Clause, an unconstitutional burden on the fundamental right of religious practice, and achieve a heightened level of scrutiny of the government's classification. Id. Accordingly, the court applied rational basis standards and found they were easily satisfied. Id. Those grounds included concentration of the state's limited funds, avoiding religious entanglement and allaying concerns about state oversight of religious schools' curricula. Id. at 356. See also Bristol Warren Reg'l Sch. Comm. v. R.I. Dept of Elementary and Secondary Educ.,253 F. Supp. 2d 236, 243 (D.R.I. 2003) (the court held that the decision of the local school district under IDEA/2004 to provide a resource room program to disabled students on-site at some religious schools (which were within walking distance of public schools), but not on-site at others (which were farther away), did not violate the Equal Protection Clause of Fourteenth Amendment. The court applied the rationale basis test and found that district's "walking distance rule" passed constitutional muster).
and their right to control their child's education in order to receive a FAPE and IDEA/2004's procedural protections. Like their other claims, this one was unsuccessful. Here, the court applied the "unconstitutional conditions" doctrine. It noted that both the Supreme Court and the First Circuit have "consistently refused to invalidate laws which condition a parent's ability to obtain educational benefits on the parent's relinquishment of her right to send her child to private school." Moreover, the court determined that, in this case, the parents were not forced to surrender their religious beliefs or their right to control their child's education in order to receive IDEA/2004 benefits.

V. DECISION MAKING AS TO SPECIAL EDUCATION AND RELATED SERVICES FOR PRIVATE SCHOOL STUDENTS UNDER IDEA/2004: THE ISSUE OF ARBITRARINESS AND ADEQUACY OF THE REMEDIES

In addition to IDEA/2004's failure to create an individual entitlement to programs and services for parentally-enrolled private school pupils, to guarantee that programs and services will correspond to students' needs, and to insure that agreed-to education will be delivered on-site at the private school the disabled child attends, IDEA/2004 lacks discernable criteria for LEA's to apply when making decisions concerning these children. Moreover, LEAs' virtually unfettered discretion in assignment of IDEA/2004 benefits with respect to parentally-placed private school children, coupled with the vagueness of the statutory remedies for compliance failures, will probably leave parents with rights in name, but not in fact.

140. Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 23 (1st Cir. 2004).
141. Id.
142. See Id.
143. Id. The court relied on Norwood v. Harrison, 413 U.S. 455, 462. (1973); Maher v. Roe, 432 U.S. 464, 477 (1977); Harris v. McRae, 448 U.S. 297, 318 (1980); Strout v. Albanese, 178 F.3d 57, 66 (1st Cir. 1999) for this proposition. Id. at 23. Relying on Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983), the court observed that the Supreme Court has held that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right, and thus is not subject to strict scrutiny." Id. at 22.
144. Id. at 23.
145. Similarly, IDEA/2004 fails to provide states with specific guidance on how to ensure LEA compliance with IDEA's substantive provisions. See A.A. v. Phillips, 386 F.3d 455, 459 (2nd Cir. 2004) (observing that while assigning a general supervisory
Assuming that actionable claims under the Fourteenth Amendment Equal Protection or Due Process Clauses are unavailable, claims may exist under state laws which have established educational entitlements in privately enrolled disabled students, on the ground that the public agency's actions were arbitrary or capricious. Thus, a state cause of action may be available on behalf of these privately enrolled students to redress program, service, or implementation failures. Where parents initiate a direct action against an LEA or SEA, those agencies will very likely interpose the defense that the parents have failed to exhaust IDEA and/or state mandated administrative remedies before going to court. Thus, parents will likely end up being relegated to the very procedures they hoped to avoid.

VI. STATE LEGISLATIVE ENACTMENTS WHICH PROVIDE BENEFITS TO PARENTALLY-ENROLLED PRIVATE SCHOOL PUPILS WITH DISABILITIES IN EXCESS OF THOSE PROVIDED UNDER THE IDEA

State statutes may require LEAs to provide more generous

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146. Professor Mark Weber of the DePaul University School of Law has suggested "another thread of due process doctrine" may be available to aggrieved parentally-placed private school pupils. Mark C. Weber, Services for Private School Students Under the Individuals with Disabilities Education Improvement Act: Issues of Statutory Entitlement, Religious Liberty, and Procedural Regularity, 36 J. L. & EDUC. 163, 206–07 (2007). Relying on, among other cases, White v. Roughton, 530 F.2d 750 (7th Cir. 1976), he suggested that Due Process requires ascertainable standards which are "written down and publicly available" in the context of distributing government benefits like IDEA's. Weber, at 206–207. Since IDEA/2004 sorely lacks meaningful standards for LEA decision making with respect to parentally-placed private school pupils, those decisions may be subject to Due Process attack. Notably, this "transparency in government administration of benefits" requirement does not depend on the existence of a property or liberty interest for its viability. Id. at 207.

147. See Weber, supra note 146.

148. See IDEA § 1415(l); 34 C.F.R. § 300.512 (2007) (requiring parties to exhaust their available administrative remedies before filing a civil action).

149. Generally states are prohibited from using Part B funds to provide services to children who are not included in IDEA's definition of children with disabilities as defined in 34 C.F.R. § 300.8. However, they may use those funds where special education, related services or supplementary aids and services are "provided to a child with a disability in a regular class or other education-related setting to a child with a disability in accordance with the IEP of the child, even if one or more nondisabled children benefit from these services." 34 C.F.R. § 300.208(a)(1).
benefits to parentally-placed private school students than IDEA/2004 in at least four ways. First, state standards of “appropriateness” may require more than IDEA’s “basic floor of opportunity,” as set forth in Rowley. This may result in students receiving a greater frequency, duration, and/or intensity of services than under IDEA/2004 itself. Second, state laws may create an entitlement to a broader range of programs and services than mandated by the IDEA. Although related to “appropriateness,” such mandates might provide for programs and services not included in IDEA’s definition of special education and related services—for example, habilitation or medical services in addition to those for “diagnostic or evaluation purposes”. Third, state laws may require that programs and services be delivered on-site at a private school or other locations, whereas IDEA/2004 may not require provision of location-specific services. Fourth, state laws may expand the scope of coverage beyond IDEA/2004 for privately-educated pupils to include, for example, home-schooled pupils. Most claims on behalf of students who are parentally-placed in alternative private settings have asserted entitlements under more than one of these alternatives.

A. Appropriateness

Where state law standards of appropriateness exceed IDEA’s FAPE minimum, those standards may become enforceable as a matter of federal law under IDEA/2004. This is because IDEA/2004 provides that “the term [FAPE] means special education and related services that – meet the standards of the [SEA]... “ For example, state law

150. 458 U.S. at 200.
151. IDEA/2004 medical services are limited to evaluations. 34 C.F.R. §§ 300.34(a), (c)(5).
152. See Geis v. Bd. of Educ. of Parsippany-Troy Hills, 774 F.2d 575, 580-81 (3d Cir. 1985) (commenting that where the federal law incorporates by reference requirements established by state law, the federal law confers on the federal courts authority to enforce those standards under their “federal question” jurisdiction); David D. v. Dartmouth Sch. Comm., 615 F. Supp. 2d 639, aff'd 775 F.2d 411, 418 (1st Cir. 1985) (noting, among other things, that Massachusetts requirement that a child's services “maximize” his potential was incorporated into IDEA/2004 such that they become enforceable as a matter of federal law); Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 620 (6th Cir. 1990) (observing that “even if a school district complies with federal law, it will still violate the [IDEA] if it fails to satisfy the more extensive state protections that may also be in place”).
provisions that exceed IDEA/2004 mandates may require programming to meet the child's needs "according to how the pupils can best achieve success in learning," and to provide "the fullest possible opportunity to develop their intellectual capacities." Such provisions have been incorporated into federal law. In the same vein, federal courts have enforced state laws that exceed IDEA's minimum by requiring that educational programs provide "an equal opportunity for each individual with exceptional needs to achieve his or her full potential commensurate with the opportunity provided to other pupils." Such state laws have also established procedures for reconciliation of inconsistent expert opinions beyond those required by IDEA/2004. But state standards that exceed the

154. Geis, 774 F.2d at 582. In applying New Jersey law, the Geis court affirmed the district court's determination that required the child's placement to continue at the private residential school preferred by the parents rather than the public placement recommended by the school district. Id. at 583. In Bd. of Educ. of E. Windsor Reg'l Sch. Dist. v. Diamond, 808 F.2d 987, 992 (3d Cir. 1986), the Third Circuit again applied the "how the student can best achieve success in learning" standard, operative at the time the services were rendered and on the date of review by the New Jersey Department of Education, and concluded the parents' placement of their severely disabled child in a residential facility was appropriate under New Jersey law, and ordered reimbursement to the parents for the costs incurred in making the placement. But see Ewing Twn. Bd. of Educ. v. P.S.V., 1991 WL 186691 (D. N.J. 1991). There, the court rejected the parents' argument that a higher standard applied and concluded the Rowley standard was applicable. This was based on New Jersey regulations issued in 1989 rejecting any notion that New Jersey's standards for appropriateness exceeded Rowley's. Id. at 984.

155. Geis, 774 F.2d at 582 (emphasis in original). In Burke County Bd. of Educ. v. Denton, 895 F.2d 973, 982–983 (4th Cir. 1990), the Fourth Circuit, observing that the policy of the state was to "ensure every child a fair and full opportunity to reach his full potential," recognized that North Carolina "requires a level of substantive benefit greater than that required under federal law." The court nevertheless denied the parents' request for habilitative services in the child's home. Id. It reasoned that, even under North Carolina's more generous provisions (as compared to federal education law), habilitative services did not fall within the ambit of state special education mandates. Id. at 984.

156. Geis, 774 F.2d at 581 (observing that "incorporation of state standards is explicit in the Act.").


158. See Seattle Sch. Dist. No. 1 v. B.S., 82 F.3d 1493, 1499 n.2 (9th Cir. 1996) (where the court found the district violated Washington law). But see Soraru v. Pinckey Cnty. Schools, 208 F.3d 315 (Table), 2000 WL 245501 (6th Cir. 2000). In an unpublished opinion, the Sixth Circuit rejected the parents' contention that a Michigan statute, which required school boards to "provide special education programs and services designed to develop the maximum potential of each handicapped person," imposed an appropriateness standard higher than Rowley's. The Soraru court deferred to the SEA's interpretation of the quoted language and concluded that it was in essence precatory. Id. at 3, requiring only that the program "was reasonably calculated to
standards set forth in IDEA/2004 will not be enforceable if they conflict with other IDEA/2004 provisions. Notably, there are a number of cases where parents have failed to establish that state standards exceeded those of the IDEA. Provide [the student] with educational benefits." *Id.* The Sixth Circuit in Renner v. Bd. of Educ. of the Pub. Sch. of Ann Arbor, 185 F.3d 635 (1999), applying the same statute, also rejected the parents' claim. However, the *Renner* court stated: "Under the higher Michigan standards [], defendants proposed an adequate and sufficient plan to provide [the student] a free appropriate public education offering to meet and develop the 'maximum potential' of this child in light of his abilities and needs" (emphasis added). *Id.* at 646. According to the court "maximum potential" does not require a "model" education. *Id.* at 645. In light of the apparently conflicting language (applying an amorphous higher standard and later reverting to *Rowley* standards) it is unclear how to apply the Michigan law.

In Doe v. Tullahoma City Sch. Bd. of Educ., 511 U.S. 1108 (1994) the court, applying Tennessee law, rejected the parents' claim that the state's appropriateness standards exceeded *Rowley*'s. The statute at issue, Tenn. Code Ann. Section 49-10-101(1)[1], stated: "It is the policy of this state to provide, and to require school districts to provide, as an integral part of free public education, special education services sufficient to meet the needs and maximize the capabilities of handicapped children" (emphasis added). The Court based its decision on the fact that: the Tennessee law pre-dated the original 1975 version of the IDEA, the Education for All Handicapped Children Act, P.L. 94-142, thereby making it impossible to infer that the legislature intended to exceed federal requirements. The Tennessee state courts had not interpreted the law to require more than what IDEA/2004 requires, and "there was no hard evidence to indicate that the Tennessee legislature intended anything more than to remedy the past inadequacies of educational opportunities for the handicapped." *Id.* at 458.

159. See 34 C.F.R. § 300.17(b) (2006). See also Amann v. Stow Sch. System, 982 F.2d 644 (1st Cir. 1992) (notwithstanding state's maximizing standard, the appropriate placement for a learning disabled pupil was in a public school rather than a private school program exclusively for learning disabled pupils, in light of IDEA's least restrictive environment requirements).

160. See, e.g., Erickson v. Albuquerque Pub. Sch., 199 F.3d 1116, 1122 (10th Cir. 1999) (recognizing that if New Mexico regulations respecting "stay-put" rights exceeded the federal standard they would be enforceable under IDEA/2004, if they are not inconsistent with IDEA/2004, but finding that New Mexico law did not exceed IDEA's requirements in that case); O'Toole v. Olathe Dist. Schs. Unified Sch. Dist., 144 F.3d 692, 701 (10th Cir. 1998) (holding that Kansas law does not exceed *Rowley* standard of appropriateness); Johnson v. Indep. Sch. Dist. No. 4, 921 F.2d 1022, 1029-1030 (10th Cir. 1990) (concluding Oklahoma does not provide for a heightened standard). In the same vein, a United States District Court in Florida recently ruled that the Florida constitution did not create a standard which exceeded *Rowley*'s for an appropriate education for children with disabilities. Sch. Bd. of Lee County v. M. M., 2007 WL 983274 (M.D. Fla. 2007). Where state standards exceed IDEA's minimum, they arguably create a liberty or property interest protected by the Procedural Due Process Clause of the Fourteenth Amendment. State laws may do this explicitly, or by creating an expectation that gives rise to a vested right. See, e.g., Paul v. Davis, 424 U.S. 693 (1976); Bd. of Regents v. Roth, 408 U.S. 564 (1972) (state law defines the existence of property and liberty for the purposes of procedural due process).

B. Individual Entitlements and On-Site Services under State Law

With respect to privately enrolled students with disabilities, two principal state law questions arise: (1) does the student enjoy an individual entitlement to services? And, (2) if so, must they be provided on the site of the private school? Since courts have tended to treat them together, these issues will be treated together in this article.

In John T. v. Marion Independent School District, the court determined that Iowa law requires an LEA to provide the services of a full-time communications assistant to a student attending a private religious school.\textsuperscript{161} Applying New York law, the Bay Shore Union Free School District v. T. court ordered an LEA to furnish a one-to-one aide to a “health impaired” student with attention deficit hyperactivity disorder on the premises of a private sectarian school.\textsuperscript{162} In Fowler v. Unified School District, the Tenth Circuit ruled that, under Kansas law, enforceable under IDEA/2004, a deaf child enjoyed an individual entitlement in excess of IDEA/2004 obligations to the on-site services of a sign language interpreter in a private non-sectarian school, to the extent that its cost did not exceed the average cost of providing hearing impaired students the

\textsuperscript{161} 173 F.3d 684 (8th Cir. 1999). In John T., the parties agreed that the student required a full-time communications assistant in order to function in a classroom environment. \textit{Id.} at 687. This service was included in the student’s IEP. \textit{Id.} The LEA refused to provide the service at the religious school upon the parents’ request, claiming that its obligation did not extend to furnishing the assistance on the private school premises. \textit{Id.} at 686–87. The Iowa statute stated that school districts “shall make public school services … available to children attending nonpublic schools in the same manner and to the same extent that they are provided to public school students.” IOWA CODE § 256.12(2). The court denied the parents an attorneys’ fee award on the ground they prevailed under state law and not IDEA. \textit{Id.}, 173 F.3d at 689–90. In his dissent on this point, Judge Gibson argued the majority improperly characterized the parents’ prevailing claim as exclusively state based. \textit{Id.} at 691–93. He reasoned that state law standards that impose a greater duty than IDEA/2004 to educate handicapped children are enforceable under IDEA/2004, if those standards are not, as in this case, inconsistent with federal law. \textit{Id.} In light of cases like David D. v. Dartmouth Sch. Comm., 615 F. Supp. 2d 639 (1st Cir. 1985) (not cited by the dissent), the dissent arguably got the better of the argument.

\textsuperscript{162} Bay Shore, 405 F. Supp. 2d at 250. Interpreting New York’s Dual Enrollment statute, the court said: “In a case such as this one, where a child requiring special education services is attending an appropriate private school for his core elementary education, and a requisite service can be effective only in that private school, under New York Law the school district must deliver the service on the premises of the private school.” \textit{Id.}
same service in the public schools. In *John T. v. Delaware County Intermediate Unit*, the court applied Pennsylvania law as incorporated into IDEA/2004, concluding that the LEA was obligated to supply speech therapy, occupational therapy, a classroom aide and an itinerant teacher on-site at a Catholic school at levels reasonably calculated to afford the pupil educational progress for secular subjects only. One Pennsylvania Court, construing its own laws, found that they contained requirements in excess of IDEA's requirements for parentally-placed student with disabilities. Notwithstanding these results, states have tended to mirror IDEA/2004 in limiting parentally-enrolled private school students' individual right to on-site services.

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163. Fowler v. Unified Sch. Dist., 128 F.3d 1431, 1439 (1997). In 1999, Kansas amended this statute. See KAN. STAT. ANN. § 72-5393 (as amended by L. 1999, ch. 116, § 40). It now provides that the district of residence determines the site of service delivery after consulting with the parents. Id. This represents a retreat from the prior law which created an entitlement to on-site services at the private school selected by the parents. Id. at 1438 (citing KAN. STATE. ANN. § 72-5393). Notably, the new law mandates provision of services to private school enrollees based on the district of residence, not location like IDEA/2004. See 20 U.S.C. §1412(a)(10)(A)(ii); Memorandum to Chief State Sch. Officers, 43 IND. WITH DISABILITIES EDUC. L. REP. 224 (OSEP 2005) Thus, Kansas mandates services in excess of the IDEA/2004 minimum in this respect.


165. *Id.* at 9–10.

166. See Veschi v. Nw. Lehigh Sch. Dist., 772 A.2d 469, 475 (Pa. Commw. Ct. 2001) (the court determined that an IDEA-eligible student was entitled to receive speech services in his local district while still attending his parochial school. The principle statute applied, 24 PA. CONS. STAT. §§502, provided in pertinent part: “No pupil shall be refused admission to the courses in these additional schools or departments, by reason of the fact that his elementary or academic education is being or has been received in a school other than a public school.”); see also Lower Merion Sch. Dist. v. Doc, 931 A.2d 640 (2007) (a non-IDEA case). The Supreme Court of Pennsylvania held that a school district was required to provide occupational therapy services pursuant to the Rehabilitation Act, § 504, to an otherwise eligible §504 student who was enrolled full time in a private school kindergarten program. The court interpreted the Pennsylvania Code in relation to § 504 and constitutional Supremacy Clause principles. *Id.* It firmly rejected the district's argument that the student's right to services hinged on his taking courses in the public school setting. *Id.* It stated that “§ 504's mandates apply to all potentially eligible students based on their residency, not their school of attendance; as long as Doe is in the District's jurisdiction, the District has to provide what § 504 mandates.” *Id.* at 5. Thus, where LEAs refuse to supply programs and services to privately educated special education students under IDEA/2004 or state law, section 504 may be a source of rights not otherwise available under those statutes.

167. Judge Jack Weinstein observed that the "widespread practice [among states] is to permit, but not require, school districts to provide services to students in private schools." *Ray Shore*, 405 F. Supp. 2d at 249. He found this "unsurprising" in light of the fact that "most state programs, are patterned explicitly on the federal statute,[ citing to California. Pennsylvania, and Texas enactments,] and regulations,[ citing to Virginia's
C. Home-Schooled Students

Services to home-schooled students are not required by IDEA/2004, but states may grant the students additional protection. Since IDEA/2004 delegates responsibility to the states to determine whether home-schooled students are to be considered "private school" pupils, such students may obtain even fewer IDEA/2004 benefits than the already attenuated ones enjoyed by parentally-enrolled private school students. The leading case addressing this issue is *Hooks v. Clark County School District*. The Ninth Circuit flatly rejected the parents' claim for reimbursement for speech therapy services that the parents had obtained for their home-schooled child, because a "home school" was not included within the definition of a "private school" under Nevada law at that time.

Although *Hooks* bars claims for IDEA-based services for home-schooled pupils where state law does not treat them as "private school" students, state law may nevertheless afford greater protection for home-schooled students. In *Forstrom v. Byrne*, for example, the Superior Court of New Jersey, Appellate Division, held that a home-schooled child's right to equal protection under the New Jersey constitution was violated when an LEA refused to provide speech and language services to him, the school had invited nonpublic school children to participate in the services, and the student was willing to go to the public school to receive those services.

VII. RESTRICTIVE STATE CONSTITUTIONAL RELIGION CLAUSES AND STATUTES, THEIR IMPACT ON THE RIGHTS OF STUDENTS WHO ATTEND SECTARIAN SCHOOLS AND THE INVOCATION OF IDEA/2004 BY-PASS PROCEDURES

While *Zobrest*’s sign language interpreter and *Zelman*’s
vouchers may be permissible as a matter of federal Establishment Clause jurisprudence, they might offend State constitutional anti-establishment provisions. After all, principles of federalism may require deference to more restrictive state constitutions.

Since state actors may be forbidden from engaging in Zobrest- or Zelman-type activities under state constitutional law, IDEA/2004 provides for so-called by-pass procedures. These procedures allow the United State Secretary of Education, upon complying with mandated procedures, to withhold federal funds from the LEA and apply them directly for the benefit of disabled students. This avoids federal-state conflicts, while enabling students to receive the benefits they would have received, absent such conflicts, under IDEA’s proportionality provisions. Where a by-pass is invoked, states may obtain a review of the Department of Education’s decision.


173. 20 U.S.C. §1412(a)(10)(A). These involve “dividing the total amount received by the State under Part B of the Act for the fiscal year by the number of children with disabilities served in the prior year as reported to the Secretary ... by ...[t]he number of private school children with disabilities ... in the State, LEA or other public agency, as determined by the Secretary on the basis of the most recent satisfactory data available, which may include an estimate of the number of those children with disabilities,” 34 C.F.R. §§ 300.190–198(2006), and deducting this amount from the total monies paid to the state, 34 C.F.R. § 300.191(2006).

174. A state may obtain further review in the United States Court of Appeals for the Circuit where the state is situated. 20 U.S.C. § 1412(f)(3)(B). Although there is little reported litigation involving IDEA/2004 by-pass procedures, the court in Foley v. Special Sch. Dist. of St. Louis County, 153 F.3d 863, 865 (8th Cir. 1998) recognized that where the Missouri state constitution forbade public school educators from rendering services on private school premises, IDEA/2004 by-pass could be applied for the students’ benefit. It observed that by-pass "was an adequate and less intrusive remedy" when state law frustrated delivery of IDEA/2004 services. Id.
VIII. Rectifying Inequities in Educational Opportunity for Disabled Students Who Are Enrolled in Private, Including Sectarian, Elementary and Secondary Schools

Those who support treating parentally-enrolled disabled children equitably, as compared to publicly-enrolled pupils, might consider lobbying Congress for appropriate amendments to IDEA/2004. Broadly speaking, supporters could demand comparability of programs and services to those provided by LEAs and SEAs to publicly enrolled students. In most cases, this would require LEAs and SEAs to satisfy IDEA’s appropriateness standards (albeit in a private setting), or more demanding state requirements, where applicable, for parentally-enrolled private school children. To be effective, such legislation would have to be carefully drafted to ensure that states received the “clear notice” mandated by the Spending Clause, especially in the wake of current “unfunded mandates” litigation. Such careful drafting would include, for example, the express incorporation into IDEA/2004 of state standards which exceed IDEA’s standards.

In fairness to LEAs and SEAs, the cost of comparable programs and services should not exceed those incurred by public agencies for identical programs or services. This would require the development of appropriate formulae to determine the costs of such activities when rendered by the public agency. For purposes of consistency in implementation, these formulae should be developed by the United States Department of Education and not delegated to the states.

In the same vein, Congress should amend the Act to provide for the uniform treatment of home-schooled pupils. Since the current IDEA/2004 allows states to furnish home-schooled pupils with fewer services than other privately educated students, their rights should be made comparable to other privately-educated disabled students under the proposed amendments. When providing comparable services would cost more than providing services for a publicly-enrolled student, LEAs and SEAs would retain the right to refuse to support those costs. That would be the price paid by the child for his parents’ choice. This should not occur frequently, and where it

175. See, e.g., City of Pontiac, 512 F.3d at 267.
does, the reduction in most cases would be *de minimus*.

IDEA/2004 should be amended to provide parentally-enrolled private school students with an individual entitlement to the comparable programs and services described above. These would be based on the LEA’s recommended IEP. There is no sound reason to have IEPs for publicly-enrolled pupils, but “service plans” for parentally-placed private school pupils. These differences invite public agencies to exercise diminished care to the special needs children who are privately enrolled. Arguably, it suggests disrespect for such permissible parental choices. Since LEAs would not be obligated to fund the non-special-education portion of the parentally-placed child’s program, and cost ceilings of the kind mentioned above for special services could easily be incorporated into the Act, the special needs of unserved children would be met and fairly balanced against the costs incurred by public agencies.

The amendments to IDEA/2004 relative to parentally-placed private school pupils should include procedural parity as well. Where the public agencies fail to implement an agreed-to-program, for example, privately-enrolled children should be protected through due process procedures identical to those protecting publicly-enrolled students. IDEA/2004’s state complaint procedures for implementation and other failures provide a remedy in name, but not in substance, for parentally-enrolled private school pupils. Without possessing the teeth of individually enforceable orders, the remedies contained in IDEA/2004 for privately-placed children are largely illusory. The coupling of substantive and procedural rights comparable to publicly-enrolled students would serve as a check on arbitrary decision-making by public agencies and encourage more thoughtful consideration by public agencies of individual students’ needs.

Where states could not comply with the proposed revisions due to state constitutional anti-establishment or other obstacles,176 they would be obligated to give notice to the

176. IDEA/2004 recognizes three circumstances which will trigger intervention by the Secretary through use of its by-pass procedures for parentally placed private school children with disabilities. These are the Secretary’s determination that (1) state law prohibits providing equitable services in private schools, (2) that the school district or state educational agency have substantially failed to provide equitable services in private schools, or (3) that the school district or SEA is unwilling to provide equitable services in private schools. 20 U.S.C. § 1412(f)(1); 70 Fed. Reg. 35856 (2005): 34 C.F.R. § 190(a) (2007).
USDOE of their inability or unwillingness to comply with the law’s requirements. The USDOE would then be required to invoke IDEA/2004’s by-pass procedures to ensure that privately-enrolled disabled children would be protected and receive benefits directly from the United States, comparable to the benefits given to disabled students enrolled in public schools. To support the comparable programs and services, the USDOE could deduct monies from IDEA/2004 allotments proportional to the number of children who would be unserved due to the state’s unwillingness or inability to comply with the law’s requirements and, where needed, from other federally funded educational programs. The amended IDEA/2004 would provide for a direct, private right of action to enforce the amended statute against the state recipients of IDEA/2004 monies, including class action relief, and extend to prevailing parent plaintiffs the same rights as enjoyed by parents of publicly-enrolled children for the recovery of attorneys’ fees and statutory costs. Of course, all these provisions would be made express, unequivocal and consistent with the Spending Clause notice requirements.

Since such provisions might be difficult to achieve in Congress, advocates for parentally-placed, privately-enrolled children should focus their efforts in state legislatures, as well.

177. IDEA/2004 provides that where the Secretary invokes the law’s by-pass procedures he shall “arrange for the provision or services to such children.” 20 U.S.C. § 1412(f)(1); 70 Fed. Reg. 35856 (2005); 34 C.F.R. § 300.190(a).

178. Under current law, if the Secretary is required to provide equitable services for privately-enrolled pupils under the by-pass procedures, payment for those services must be made by the U.S. Department of Education. 20 U.S.C. § 1412(f)(2)(A); 70 Fed. Reg. 35856 (2005); 34 C.F.R. § 300.191(b)–(c). The amount of payments to the provider(s) of such services shall be determined, after consultation with private and public school officials, to be an amount per child that does not exceed the amount established by the established formula. Id. The formula amount is determined by dividing the “total amount received by the State for the fiscal year” by the “number of children with disabilities served in the prior year.” 20 U.S.C. § 1412(f)(2)(A)(i)–(ii); 70 Fed. Reg. 35856, 35885 & 35889 (2005); 34 C.F.R. §§ 300.706; § 811 (2007).

179. Such programs could include the aforementioned “No Child Left Behind Act of 2001.” 20 U.S.C. §§ 6301-7941, for example. Given their natural resistance to “unfunded mandates,” some states would undoubtedly resist encroachment on federal funding beyond that provided by IDEA. However, the conditioning the receipt of federal money on compliance with Congress’ determination of what the General Welfare requires is firmly established in this country. See City of Pontiac, 512 F.3d at 261 (explaining, in part, the evolution of federal aid programs to public schools). Moreover, “the overwhelming burden of [educational] funding in this country is and has always been borne by State and local governments.” Id. at 277 (emphasis added). Even with NCLB, the federal government provides only seven percent of the total funding for local education. Id.
They might consider, for example, lobbying for legislation which ensures that parentally-placed private school children with disabilities enjoy (1) an individual entitlement to all programs and services based on their IEP, (2) comparability of funding supporting services received by students enrolled in public school programs, and (3) access to qualified personnel of the same kind as publicly-enrolled students. Where state statutes contain ambiguities concerning whether they exceed IDEA/2004 minimums, advocates for privately educated students could propose language which expressly states that the law is intended to exceed IDEA's floor of opportunity and the Rowley minimum, and delineate in what way.

IX. CONCLUSION

The inequitable treatment received by parentally-enrolled private school children under IDEA/2004 defeats the stated purpose of IDEA/2004 itself: to provide all disabled children with an appropriate education. The administrative effort to serve such children equitably is more than amply justified by the educational benefits the children would receive if Congress had enacted comparability legislation of the kind suggested above. Since this proposal caps the cost to public agencies, so that they would not be required to spend more money than they would if these children were publicly-enrolled, there should be few objections to the proposal on financial grounds. Since privately-educated pupils' parents bear the cost of tuition for the student's general education, public agencies are relieved from that cost. Thus, there is a financial incentive for public agencies to render comparable special programs and services to parentally-placed private school children with disabilities and avoid the student's return to the public school.

Since Congress failed to address the concerns raised in this article in IDEA/2004, advocates for parentally-enrolled private school students with disabilities should consider lobbying at the state level in tandem with their Congressional efforts. In most respects, efforts at the state level should mirror those at the federal level. State legislative enactments should, however, avoid ambiguities which appear in some laws previously passed and later became the subject of the litigation reviewed in this article. In particular, such laws should articulate in what ways they exceed IDEA/2004 protections with respect to, for
example, individual entitlements, standards of appropriateness, kinds of programs and services available to students, as well as the remedies for program and service compliance failures and the procedures for vindicating such rights.

Parents of privately-educated disabled students who hope to obtain substantially equal educational benefits for their children under IDEA/2004, as compared to publicly-enrolled students, are unlikely to find the Fourteenth Amendment Equal Protection and Due Process Clauses as sources of such rights. Although the Establishment Clause of the First Amendment permits Congress under IDEA/2004 to confer educational benefits on a comparable basis to privately-enrolled pupils who attend sectarian schools, Congress is not required to and has chosen not to do so. Furthermore, under current constitutional interpretation, Congress’s decision does not run afoul of their First Amendment Free Exercise rights, notwithstanding some parental contentions to the contrary. Thus, the Supreme Court has respected states’ sovereignty where their anti-Establishment provisions forbade assistance to religious schools, or they exercised their sovereign powers in an otherwise rational manner.

The legislative initiatives suggested above do not disrupt the delicate balance of power between the federal and state governments set out in our constitutional scheme. Instead, they provide an opportunity for Congress to pick up the gauntlet of reform in a manner consistent with the requirements of the Spending Clause, while showing appropriate respect for state sovereignty. Moreover, the reforms suggested at the state level may be undertaken independently so as to afford each jurisdiction the opportunity to exercise their traditional control over educational policy and to select the alternatives which meet the special needs of the students they serve. Although Congress and most states have decided to discriminate in the provision of special education and related services between parentally-placed private school pupils with disabilities and disabled children who are publicly-enrolled, it is within the entities’ power to do so. The contention of this article is that they have made a bad choice.