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AN ANALYSIS OF THE LEGAL ISSUES OF SCHOOL VOUCHER PROGRAMS
FOR STUDENTS WITH DISABILITIES AND ITS IMPACT ON THE
INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

by

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A dissertation submitted in partial fulfillment of the requirements
for the degree of Doctor of Education
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ABSTRACT

This study examined the current case law on school voucher programs for students with disabilities and legal protections under IDEA. The idea of school vouchers can be traced back to the 1950s but have taken a new form in the past 13 years. There have been several court challenges to the constitutionality of school voucher programs with mixed results which will lead to court challenges in the future on a state by state basis based on the state's constitution. School vouchers have been developed to target specific populations of students including students with disabilities. But with very little accountability for the private schools accepting the school vouchers, parents are left to make choices about their child's education with the limited information provided to them. Parents of student with disabilities who participate in school voucher programs in order to attend a private school may lose many protections under IDEA, if not all of them.

The focus of the study was on the five states with school voucher programs for students with disabilities: Arizona, Florida, Georgia, Ohio and Utah. The review of case law in regards to school voucher programs for students with disabilities demonstrated difference and similarities depending on the state's constitution. This will lead to future case law for school voucher programs for disabilities to be determined on a case by case basis. The legislators developing new school voucher programs for student with disabilities will need to analyze the state's constitution in order to determine if any legal challenges would occur.

Federal legislators need to revisit the protections under IDEA for parentally placed private school students with the mindset that more and more school voucher programs for students with disabilities will be developed in years to come. In the

reauthorization of IDEA, federal legislators need to determine if more protections need to be provided to parentally placed private school students attending a private school on a school voucher program. Without more protections for students with disabilities, parents may have limited options when participating in a school voucher program and the students may not receive the appropriate special education and related services.

To Sofia, Diego, Ana Cristina, Angel Emilio, Bryce Christopher, Sebastian Andres
hoping this provides an example of everything you can achieve with dedication and
determination.

Love you!!

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CHAPTER 1: INTRODUCTION

Florida's Governor Rick Scott was elected in November 2010 with an education agenda to provide more school choices to parents of children attending a public school (Scott, 2010). One of the school choices Governor Scott provided was expanding the eligibility criteria for the John M. McKay Scholarship (McKay Scholarship), a school voucher program for students with disabilities in Florida to include students with a Section 504 Accommodation Plan (FL Statute 1002.39). The political arena has led to "interest in school vouchers has spiked during the past year at the federal, state, and local levels" (Usher & Kober, 2011, p. 2). For all the controversy in regards to school voucher programs, publicly funded school voucher programs represent only 0.1% of all public school students in the United States (Ryan, 2009).

School voucher programs have been a topic of debate and controversy for many years. The idea of school voucher programs can be traced to the 1950s but due to a great deal of criticism of the public school system in recent years and the nation considered at risk, the topic of school vouchers has come to the forefront. Use of public funding to provide students with a private education always sparks diverse public opinion and leads government officials to choose a side on the topic. The disparagement of public education in recent years has led to the increase support and development of school voucher programs in many parts of the United States (Anastasiou & Kauffman, 2009). Current research has not been conclusive in the effects of school voucher programs on students and public schools (Anastasiou & Kauffman, 2009); therefore, more research should be completed in regards to the effectiveness of school voucher programs.

Three important cases open the door for parents to have a choice to educate their students at private schools. “Beginning in 1960, the U.S. Supreme Court began to take a more expansive view of allocations of public aid to students in religious schools to pay for textbooks, transportation, and instructional materials” (Sutton & King, 2011, p. 256) this led to parents having other opportunities to educate their children in settings other than public schools. The first time private schools became a school choice for parents was in 1925, when the United States Supreme Court ruled that parochial schools can exist in the *Pierce et al v. Society of Sisters* (1925) case. In their ruling the United States Supreme Court stated that:

The fundamental theory of liberty upon which all governments in this Union rest excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations (*Pierce et al. v. Society of Sisters*, 1925, n.p.).

This decision on the Pierce case, “solidified the rights of parents to have more influence in matters pertaining to the education of their children” (Sutton & King, 2011, p. 252).

A second court ruling came in 1930, when the United States Supreme Court upheld the Louisiana Supreme Court ruling involving a statute that provided free textbooks for all children regardless if they attended a private or public school (*Cochran v. Louisiana*, 1930). The last court ruling was in 1947, when the United States Supreme Court determined that transportation can be provided to all children and was a reasonable service to be provided to all citizens (*Everson v. Board of Education*, 1947). These three cases allowed parochial schools to exist and provided textbooks and transportation to students attending the parochial schools. For school voucher supporters, “the Pierce decision continues today to be the constitutional life support for

voucher advocates who seek to opt out of the public education enterprise” (Sutton & King, 2011, 252).

Following the United Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the concept of school voucher programs was contemplated in the Southern parts of the United States in order to avoid desegregation. This led to:

Probably the most egregious attempt to adopt school vouchers and undermine the U.S. Supreme Court’s ruling in *Brown v. Board of Education* was the Virginia State Legislature’s enactment of state law which permitted public school closings in Prince Edward County and the district’s authorization of vouchers for white students only to attend segregation academies. The U.S. Supreme Court found this policy to violate the 14th Amendment’s equal protection guarantee (Sutton & King, 2011, p. 253).

Parents wanted to use school vouchers to send their children to a black only private school, white only private school or a mix race private school. School vouchers would provide parents with the option to choose the appropriate school for their children based on their beliefs and ideas (Fiala, 2010).

In 1973 a setback for school voucher programs was documented when the United States Supreme Court decided that tuition reimbursement grants for nonpublic schools violated the Establishment Clause (*Committee for Public Education & Religious Liberty v. Nyquist*, 1973). In recent court decisions the interpretation of the Establishment Clause was based on the state’s constitution; “if we can learn anything from the experience thus far, the real story of school choice will be written at the level of local politics” (Viteritti, 2005, p.138).

In the 2004 Reauthorization of the Individuals with Disabilities Education Act (IDEA), parentally placed private school students with disabilities were provided with new protections. Some of the protections provided were: school districts must conduct child find activities for all

private schools; a share of federal funds should be spent on special education and related services for students with disabilities enrolled by their parents at a private school; school districts must consult with the private schools on the provision of special education and related services to parentally placed private school students; and school districts must expend the proportionate share of federal funds on special education and related services to private school students and document the expenditure (Sopko, 2008).

Private schools located in states that have school voucher programs for students with disabilities receive state and federal funds to provide special education and related services to parentally placed private school students. Private schools have very little accountability under IDEA (2004) therefore; there are very few protections for students with disabilities who take a school voucher to attend a private school. Even though private schools are not required to comply with the guidelines and regulations set forth by the Individuals with Disabilities Education Act (IDEA), they must comply with requirements set forth by the Americans with Disabilities Act (ADA).

In order to comply with the ADA guidelines and regulations, private schools must understand their responsibilities to students with disabilities. According to Taylor (2005), some administrators at private schools were unaware of the guidelines and regulations in the ADA that would pertain to them. The lack of adequate school law knowledge by private school leaders was confirmed by Robinson (2011). This may lead to parentally placed private school students with disabilities not being provided the appropriate special education and related services they are entitled to receive based on ADA.

The lack of knowledge concerning the ADA by parents and private school administrators supports the idea that greater accountability must be expected from private schools that enroll

students with disabilities on school voucher programs. Parents should ensure that their disabled student receives the appropriate quality-driven education, special education and related services they deserve in order for them to become successful citizens. It is important that the public have an accurate account of the quality of education and services students with disabilities are receiving in private schools funded by public money. Public schools are held to a very high degree of accountability under IDEA (2004) when providing special education and related services to students with disabilities, the same should be expected of private schools who take students with disabilities on school voucher programs.

With new school voucher programs for student with disabilities being considered in Texas, Pennsylvania, North Carolina and South Carolina and the reauthorization of IDEA is expected by 2013-2014, legislators need to look at protecting students with disabilities who take school voucher programs to private schools and demand more accountability from the private schools taking state and federal funds. The developers of these new school voucher programs for students with disabilities need to ensure the school voucher programs can withstand court challenges at the state and federal levels.

Purpose of Study

The purpose of this study was to provide a qualitative analysis of the legal issues at the state and federal level governing the constitutionality of school voucher programs for students with disabilities in the United States and its impact on the Individual with Disabilities Education Act (IDEA). This research specifically studied the five states that currently have school voucher programs for students with disabilities: Arizona, Florida, Georgia, Ohio, and Utah. Students with disabilities are participating in school voucher programs to attend private schools but

private schools have few accountability and responsibilities under IDEA (2004) to monitor the students at the private schools.

First, a review of the history of policy trends supporting school choice and voucher programs for students with disabilities was examined. Second, a review of the litigation for the current school voucher programs at the state and federal level was completed. Next, the researcher examined the differences and similarities in the relevant case law regarding the constitutionality of school voucher programs for students with disabilities in states that currently have a school voucher program for these students. Finally, the protections provided by the Individuals with Disabilities Education Act to students with disabilities participating in a school voucher program were analyzed.

Recommendations for policymakers, legislators, departments of education, and school boards were made to ensure compliance with state and federal statutes when developing a school voucher program for students with disabilities and its impact on the Individuals with Disabilities Act.

Statement of the Problem

School voucher programs have been challenged at state and federal levels. To this date, decisions at each level of the court system have resulted in conflicting results. At the federal level, the United States Supreme Court reached the decision that the Ohio school voucher program (Cleveland Scholarship and Tutoring Program) did not violate the Establishment Clause of the Federal Constitution. More and more challenges are occurring at the state level where state courts are interpreting the Establishment Clause differently based on their states constitutions.

Based upon state constitutional provisions, school voucher programs developers need to study their state's constitutions prior to developing criteria for school voucher programs.

With the future reauthorization of IDEA expected in 2013-2014 and the increasing number of school voucher programs for students with disabilities being considered, guidelines must be developed to ensure the protection of students with disabilities participating in school voucher programs to attend a private school.

Research Questions

Using the theoretical framework as a guide, the researcher developed two guiding research questions regarding school voucher programs for students with disabilities in the United States that will be addressed:

1. What are the differences and similarities in the relevant case law regarding the constitutionality of school voucher programs for students with disabilities in states that currently have a school voucher program for students with disabilities?
2. What legal protection under the Individual with Disabilities Education Act (IDEA) do students with disabilities have when participating in a school voucher program to attend a private school?

Delimitations

1. This study was delimited to the five states that currently have a school voucher program for students with disabilities: Arizona, Florida, Georgia, Ohio, and Utah.

2. Another delimitation of the study was that in researching existing school voucher programs for student with disabilities, no attempt was made to examine pending school voucher programs for students with disabilities.
3. This study was also delimited to specific case law involving school voucher programs for students with disabilities in the states where the programs already exists.
4. The research was limited to school vouchers for students with disabilities in grades K-12.
5. This study did not review every legal issue of school vouchers that were not specific to students with disabilities.

Limitations

1. The primary focus of this study was to analyze the case law regarding school voucher programs for students with disabilities.
2. The result of the analysis was limited to the availability of case law in the states that have school voucher programs for students with disabilities: Arizona, Florida, Georgia, Ohio, and Utah.
3. This study was limited by the accuracy of information found in the *Lexis-Nexis* database for case law for school voucher programs for students with disabilities.

Definition of Terms

The definitions presented within are offered to enable understanding of the terms to be used in the analysis of case law of school voucher programs for students with disabilities.

Accountability: Accountability is the process by which schools are held liable for student knowledge.

Americans with Disabilities Act: A federal statute that prohibits discrimination in employment, public services, and public accommodations against any person because of the person's disability (*Black's Law Dictionary*, 2010, p. 98).

Blaine Amendment: A provision in a state constitution for stricter separation of church and state than is required by the Establishment Clause (*Black's Law Dictionary*, 2011, p. 193).

Case Law: The law to be found in a collection of reported cases that form all or part of the body of law within a given jurisdiction (*Black's Law Dictionary*, 2004, p. 229).

Charter School: a tax-supported established by a charter between a granting body (as a school board) and an outside group (as of teachers and parents) which operates the school without most local and state educational regulations so as to achieve a set goals (*Merriam-Webster Dictionary*, 2011).

Choice: Choice is the process by which parents exercise control over the education of their children through pursuing the most appropriate education placement in a traditional school, a private school, a charter school, a home school, or a virtual school.

Establishment Clause: The First Amendment provision that prohibits the federal and state governments from establishing an official religion, or from favoring or disfavoring one view of religion over another (*Black's Law Dictionary*, 2004, p. 586).

Expressio unius: A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative (*Black's Law Dictionary*, 2011, p. 661).

Free Exercise Clause: The constitutional provision prohibiting the government from interfering in people's religious practices or forms of worship (*Black's Law Dictionary*, 2011, p. 736).

Free or open market: A market in which any buyer or seller may trade and in which prices and product availability are determined by free competition (*Black's Law Dictionary*, 2004, p. 989).

Imprimatur: A general grant of approval; commendatory license or sanction (*Black's Law Dictionary*, 2011, p. 825).

Individuals with Disabilities Education Act: A federal statute that governs the public education of children with physical or mental handicaps and attempts to ensure that these children receive a free public education that meets their unique needs (*Black's Law Dictionary*, 2010, p. 843).

Individualized Education Plan (IEP): a written statement for each student with a disability that is developed, reviewed, and revised in accordance with the Individuals with Disabilities Education Act (Georgia Department of Education, 2012, n.p.).

Lemon test: A legal standard for judging the state's violation of the Establishment Clause of the First Amendment. The *Lemon* test has most often been used in school-related cases. It employs a three-pronged test to determine the state's action: (1) Does the state's action have a religious purpose? (2) Does the state's action have the primary effect of either promoting or inhibiting religion? (3) Does the state's action create an "excessive entanglement" between church and state? (*Black's Law Dictionary*, 2011, p. 984)

Nondenominational or Nonsectarian Private Schools: Private schools not related to a religious organization (*Merriam-Webster Dictionary*, 2011).

Opinion: A court's written statement explaining its decision in a given case, usually including the statement of facts, points of law, and rationale (*Black's Law Dictionary*, 2004, p. 1125).

Parentally –placed private school children with disabilities: Children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school in Sec. 300.13 or secondary school in Sec. 300.36, other than children with

disabilities covered under Sec. 300.145 through 300.147 (Individuals with Disabilities Act, 1997).

Private Schools: A school maintained by private individuals, religious organizations, or corporations, funded, at least in part, by fees or tuition, and open only to pupils selected and admitted based on religious affiliations or other particular qualifications (*Black's Law Dictionary*, 2004, p. 1372).

Public Schools: An elementary, middle or high school established under state law, regulated by local state authorities in the various political subdivisions, funded and maintained by public taxation, and open and free to all children of the particular district where the school is located (*Black's Law Dictionary*, 2004, p. 1372).

Sectarian: of or relating to a particular religious sect (*Black's Law Dictionary*, 2010, p. 1473).

Sectarian or Religious Private Schools: Private schools related to a religious organization (*Dictionary.com*, 2012).

School Voucher: a government cash grant or tax credit for parents, equal to all or part of the cost of educating their child at an elementary or secondary school of their choice (*Dictionary.com*, 2012).

Statute: A law passed by a legislative body (*Black's Law Dictionary*, 2004, p. 1448).

Students with Disabilities: As defined by IDEA, a student with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services (Individuals with Disabilities Education Act, 1997).

Summary Judgment: A judgment granted on a claim or defense about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law (*Black's Law Dictionary*, 2004, p. 1476).

Vouchers: A written or printed authorization to disburse money (*Black's Law Dictionary*, 2004, p. 1609).

Theoretical Framework

School vouchers were first addressed in the 1950s when Nobel Prize winning conservative economist Milton Friedman wrote “The Role of Government in Education” (Friedman, 1955). He was the first contemporary scholar to support school voucher programs in the United States. Friedman addressed the role of the government pertaining to “general education for citizenship and specialized vocational education” (Friedman, 1955, n.p.). He felt the government should not decide the best way to educate children but wanted to offer options for the public to consider. Friedman believed that “the private sector delivers goods and services more efficiently than public institutions” (Jacob, 2003, p. 4).

Friedman believed that “the denationalization of education would widen the range of choice available to parents” (Friedman, 1955, n.p.). School vouchers would provide more options to match the needs of the students and their educational interests and would give the parents school options for their children education rather than by chance based on where the student lives-resident school. In Friedman’s voucher program “(1) minimum level of education should be determined in every state, (2) parents should be provided with vouchers that they can use for the education of their children at a school of their choice, and (3) parents pay voluntarily additional sums above the voucher” (Maglakelidze, 2011, p. 3).

Friedman (1955) predicted that by providing vouchers for parents to choose the best education for their children would result “in a sizable reduction in the direct activities of government, yet a great widening in the educational opportunities open to our children” (n.p.). “They would bring a healthy increase in the variety of educational institutions available and in competition among them” while also providing choice options for parents (Friedman, 1955, n.p.). This concept would make public and private schools improve in order to compete for students to attend their school. Friedman concluded “that educational equity would improve through choice, since families could choose schools outside of their neighborhoods, and new schools would enter the marketplace within their present communities” (Levin, 2011, p. 9). It would also involve the development of a universal school voucher program that would be available to all parents regardless of their income.

The reason Friedman’s school voucher idea did not take much form in the 1950s was due to the American public being pleased with the quality of public education. Since that time, public education has been highly criticized due to:

Students continue to rank low in the international comparisons; dropout rates are high; scores on SATs and the like have fallen and remain flat. Simple literacy, let alone functional literacy, in the United States is almost surely lower at the beginning of the 21st century than it was a century earlier (Joyner, 2005, n.p.).

Friedman believed that in order to improve our public school system in the United States, public schools would need to compete with each other and private schools for students in order to remain open.

Friedman supports universal voucher programs that would be available to all students (National Council on Disability, 2003). “Under this system of universal school vouchers, families have the opportunity to shop for the best school for their children, and schools have to

compete to offer superior services and, thus, attract students” and parents who know what is best for their children (Lips & Feinberg, 2007, p. 3). Friedman believed that in a universal voucher program, “the government role would be minimal, setting approval standards and certifying schools for approval and funding the vouchers, but not managing and operating schools or regulating them beyond the approval standards” (Levin, 2011, p. 9). With the current success of school voucher programs for low income students and students with disabilities, voucher supporters believe this could lead to someday offering universal vouchers for all students (Jacob, 2003).

Overview of Methodology

The history of school voucher programs for students with disabilities, including the legal and statutory issues, was studied through a qualitative research. Legal cases and legislation were gathered from the five states (Arizona, Florida, Georgia, Ohio, and Utah) with school vouchers for students with disabilities to determine the similarities and differences in case law. Case law related to school voucher programs for students with disabilities and annotated statutes provided information related to the legality of school voucher programs for students with disabilities. The review of legal cases and case law of school voucher programs for students with disabilities were analyzed in order to determine reasons for possible legal challenges. Review of the IDEA (2004) examined the legal rights of students with disabilities participating in a school voucher programs at a private schools. *Lexis-Nexis* was used for case law research. Legal terms was researched using *Black's Law Dictionary*.

Significance of the Study

Education is a responsibility of states so any development of school voucher programs must be consistent with the state's constitution and federal laws. The legal challenges for these school voucher programs center on the Establishment Clause in the federal and states constitutions. School vouchers programs are being developed targeting students with disabilities which will impact their protections under IDEA. To research school voucher programs for students with disabilities “is important because the unique funding arrangement under which special education programs operate could impose different incentives on public school systems than are present under more conventional school choice programs” (Winters & Greene, 2011, p. 138). This analysis analyzed school voucher programs for students with disabilities that permitted public aid to private schools and the quality of protections under IDEA for students with disabilities who participate in school voucher programs to attend a private school.

Organization of the Study

Chapter 1 presented an overview of the legal history of private schools and the changes to IDEA for parentally placed private school students. Chapter 1 included the purpose of the study, statement of the problem, research questions, delimitations, limitations, definition of terms, theoretical framework, methodology, significance and assumptions of the study.

Chapter 2 presented a review of recent reforms for school choice; examining the philosophical and ideological argument for school choice; the legal and statutory issues involved with students with disabilities served under IDEA; accountability concerns for students with disabilities participating in a school voucher program; and review of recent case law on school voucher programs in the United States.

Chapter 3 included an analysis of the case law of school voucher programs for students with disabilities in Arizona, Florida, Georgia, Ohio and Utah. It also analyzed the protections under IDEA for parentally placed private school students. Chapter 4 provided an explanation of the data obtained in the study. Case laws were summarized as they pertain to the research questions; a discussion of the findings including implications to the IDEA; and recommendations for policy makers and school boards was provided.

CHAPTER 2: REVIEW OF LITERATURE

Introduction

Chapter two presents the rationale in conducting research on the relevant case law regarding the constitutionality of school voucher programs for students with disabilities. It also reviewed the legal protections under the Individual with Disabilities Education Act (IDEA) to parentally placed private school students with disabilities participating in a school voucher program.

School choice has been a growing educational reform that provides parents' choices in selecting the best educational environment for their children. According to Estes (2004), "school choice, and charter schools as a form of choice, are among those reforms touted as the solution to the inadequacies of public education" (p. 257). In order to provide parents' with as many choice opportunities as possible "no fewer than 13 states enacted or expanded charter or voucher legislation in 2011, while 28 states has legislation pending in midsummer" (Harvey, 2011, p. 1). The educational reform began with a movement to offer school choice to parents who were not satisfied with the education being provided in the public schools. School choice supporters state that "school choice policies allow parents to exercise an active role in selecting the school or educational program their children attend" (Ysseldyke, 1992, p. 5). This has led to the development of charter school law in many parts of the United States (National Council on Disability, 2003).

According to Harvey (2011), the problem with charter schools and school voucher programs is that "charters are no better (and frequently worse) than comparable public schools, and vouchers seem to have had little effect on student achievement" (p. 3). There are eight basic

types of school choice programs: “magnet schools, post secondary enrollment programs, drop-out preventions programs, intradistrict open enrollment, voucher programs, and charter schools” (Ysseldyke, 1992, p. 7). Another school choice program available in some states, including Florida, is a tax-credit program. Tax-credit programs allows corporations to make donations to scholarship funds and are able to receive tax-credits for up to 75% of their total state tax obligation (Figlio & Hart, 2011). Tax-credit programs now “send many low-income students to private schools than do traditional school voucher programs” (Figlio & Hart, 2011, p. 75).

A new movement that has become a popular choice in recent years is the development of school voucher programs for students with disabilities. The movement includes privatizing special education and related services with the development of school voucher programs for students with disabilities in Arizona, Florida, Georgia, Ohio and Utah. According to Dash (2009), privatization means “the transfer of activities, assets and responsibilities from government/public institutions and organizations to private individuals” which can include special education and related services for students with disabilities (p. 1). Public schools can privatize some special education and related services in order to concentrate on educating students (Dash, 2009). Some of the special education and related services that could be privatized are speech, language, occupational and physical therapies. Many experts believe that the development of school voucher programs for students with disabilities is a trial for future universal voucher programs; “children with disabilities may be elected as the poster children for the voucher movement because it is difficult politically to argue against benefits that will serve this vulnerable group” (Hensel, 2010, p. 3).

Levin (1990) recommends making a distinction between market choice and public choice models. According to Levin (1990), market choice models provide funding to a private school

where as, public school choice provides choice to other public schools in the school system and funding is not lost. Friedman believed school choice will ensue competition “that would force the closure of low-performing institutions, and the appropriation of public funding for non-public schools would create a market of new educational providers” (Viteritti, 2005, p.138). This would also provide parents a choice of selecting the best school to educate, provide special education and related services to their child with a disability.

School choice is embedded in the No Child Left Behind (NCLB) law. According to NCLB, students need to be offered school choices if they are attending a failing public school (National Council on Disability, 2003). Currently in NCLB, the school choice offered is for students to attend another public school. In the future, if school voucher programs are found to be successful, changes to NCLB could include the option for student to attend private schools including students with disabilities.

This author proceeds with a review of recent reforms for school choice; examining the pros and cons of school choice, including charter schools and school vouchers; the legal and statutory issues involved with students with disabilities served under IDEA; accountability concerns for students with disabilities participating in school voucher programs; and review of recent case law on school voucher programs in the United States.

Recent Reforms

Supporters of school choice believe that competition between schools would be a healthy way to solve the problems currently existing in the public schools:

Children will attend a particular school because their parents believe it to be the one that best accommodates their particular wants and needs-be it a district, charter, independent,

or religious school. These choices will not be limited to families that are well off. The next generation of schooling will promote both liberty and equality. That will be a great improvement over what we now have (Viteritti, 2005, p. 156).

This idea encourages competition between schools which would lead to good schools surviving in the market world and bad schools would close down. This healthy competition would benefit the parents and students who are looking for a better education than what is being provided in their neighborhood public school. The problem could be that “school choice forces parents to focus on self-interest and consumerism, rather than citizenship” (Etscheidt, 2005, p. 163).

Viteritti (2005) believes there are three reasons we should have school choice. First reason is that choice schools raise achievement and satisfies parents: “No study has demonstrated that choice significantly impairs learning” (Viteritti, 2005, p. 157). Another reason to support school choice is that school choice will benefit regular public schools. Supporters of school choice believe that public schools will improve in order to compete with other choices and keep students (Viteritti, 2005). A third reason is that parents have the ability to choose schools that are good for their children and can meet their children’s needs. According to Viteritti (2005), private schools surpass public schools in academic achievement. School choice would work best on a large scale as a universal program. This universal program would include charter schools and school voucher programs that would serve even students with special needs, and provide parents with school options for their child’s education (Viteritti, 2005).

Charter Schools

Charter schools are a current school choice to the solution of public education in many parts of the United States. Charter schools are “government funded schools but they are subject to fewer regulations than regular public school” (Dash, 2009, p. 4). The idea of charter schools is

to provide parents with another school choice for students attending a public school. Charter schools follow the majority of state and federal mandates as public school, such as, “the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 as amended, and the Americans with Disabilities Act (ADA)” (Estes, 2004, p. 257). The acceptance of charter schools in the 1990s would be a precedent for the support of school voucher programs in the United States (Sailor & Stowe, 2003).

Many supporters for charter schools support the idea that parents should have the right to choose the best way to educate their child without having to pay. Charter schools provide a school choice that is publicly funded and still has to meet some accountability guidelines from the state (Nathan, 2005). Many believe that charter schools provide another choice for some students whom otherwise would not be successful in the traditional public school setting, like students with disabilities (Nathan, 2005). Unlike the majority of school voucher programs, charter schools have academic accountability by participating in the same standardized testing as public schools. According to Carey (2011), “the general consensus among researchers is that, on average, charter schools perform evenly with regular public schools” (p. 17) in academic standards on standardized testing. This encourages parents’ in choosing a charter school to educate their children since it will have no negative impact on their child’s education.

The first charter school law was enacted in Minnesota in 1991. “Because charter schools were public schools, they seemed less bold than voucher schemes” (Viteritti, 2005, p. 143) and was accepted with support, even by teachers, over school voucher programs. Charter laws were passed in other states soon after Minnesota’s charter school law: California (1992), Colorado (1993), Georgia (1993), Massachusetts (1993), Michigan (1993), New Mexico (1993) and Wisconsin (1993) (Viteritti, 2005). “The charter school movement in Minnesota and elsewhere

was driven as much by educators who were fed up with the strangling regimen of factory model schooling as by parents seeking new educational alternatives” (Viteritti, 2005, p. 143), parents were looking for other options to educate their children other than their neighborhood public school. Charter schools promise to provide parents and educators a different option in education that would benefit students and promote creativity for teachers.

Currently in Florida, the popularity of charter schools is at an all time high with 517 charters schools in the state (Florida Department of Education, 2012). Parental satisfaction has exceeded 90% on most surveys over the last five years and academic progress has been strong and outpacing that of the traditional public schools (Scott, 2010). Florida’s Governor Scott would like to replicate high performing charter schools and get the government out of their way and develop a new classification of differentiated charter schools: High Performing Charter Schools (Scott, 2010).

Monitoring of charter schools depends on the charter law by each state. Some states “monitor academic and managerial performance and enforce accountability through corrective action and the threat of decertification” (Viteritti, 2005, p. 147). States need to assure charter laws developed incorporate guidelines of accountability unlike current school voucher programs. This will ensure charter schools that are making a difference are able to continue and the ones who do not are able to be closed (Nathan, 2005). In New York City, “in math, 50 percent of charter schools outperformed regular public schools while only 16 percent were worse” (Carey, 2011, p. 17). With guidelines on accountability, New York City could address the charter schools that performed worse than public schools. These guidelines would also protect students with disabilities and would ensure they receive the appropriate special education and related services.

With the increase support of school choice, charter schools have become a top choice in providing parents with choice and still having some accountability for student academic performance. Between 2010 and 2011, “the number of students in charter schools grew to 1.7 million, and several states raised caps on the number of charter schools that will be permitted to open in the future (Howell, West, & Peterson, 2011, p. 17). With the current support for school choice, more and more parents are looking to charter schools as a possibility “but the evidence of their effectiveness appears to be mixed” (Levin, 2011, p. 10).

Charter schools also need to provide special education and related services for students with disabilities. According to Estes (2004), there are three concerns for parents of students with disabilities when it comes to charter school options: (1) a potential for discrimination; (2) lack of expertise; and (3) limited funding. Charter schools need to make sure they follow all IDEA guidelines when providing special education and related services to students with disabilities. Based on data from the U.S. Department of Education in 2007, “in 8 of 10 states, charters served fewer students with disabilities that did other public school” which can lead parents to presume students with disabilities are being discriminated (Estes, 2004, p. 258). This supports the idea that some charter schools “counsel out” parents from attending their charter school (Estes, 2004). Charter school directors lead parents to believe that their student with a disability could be better served at another school choice that can provide the special education and related services that can be costly to charter schools (Estes, 2004). This could lead to discrimination of students with disabilities from some charter schools and can lead to legal actions by parents of students with disabilities.

Another concern with charter schools is the lack of expertise charter personnel may have in providing special education and related services to students with disabilities. As reported by

Estes (2004), charter schools administrators “felt unprepared to serve students requiring special services” (p. 258). The last concern with charter schools is the limited funding they may receive in order to provide special education and related services for student with disabilities. Charter schools feel that the “unanticipated expenses, such as those associated with special education” may add more weight to their financial responsibilities (Estes, 2004, p. 258).

School Vouchers

School vouchers “are supported by government funding but are not monitor by most of the government policies imposed to public school” and charter schools (Dash, 2009, p. 3). School vouchers are considered to be the start of privatization of public education in the United States (Jacob, 2003). “The success of Florida’s revenue-neutral special education voucher program, the McKay Scholarship program, demonstrates that when perverse financial incentives are replaced with school choice, the quality of education improves, benefiting all students” including students with disabilities (Ladner, 2003, p. 2). The movement to provide school vouchers as another school choice for parents was closely followed after the acceptance of charter schools and some voucher programs were directed to a targeted population like low income students and students with disabilities:

Voucher programs for disabled students are operating statewide in Florida, Georgia, Louisiana, Oklahoma and Utah, such a policy was operating in Arizona until it was struck down by the state’s Supreme Court, and Ohio has adopted a similar program specifically for autistic students (Winters & Greene, 2011, p. 138).

This has led to a choice movement that believes “that the private sector can provide educational services to all students more effectively and efficiently that can public institutions” including special education and related services (Hensel, 2010, p. 11). The main controversy that surrounds

school voucher programs can be narrowed to two main views: “that vouchers will be the demise of the public education system or that vouchers will stimulate reform in the public education through competition” (Etscheidt, 2005, p. 156). In Florida, the McKay Scholarship school voucher program for students with disabilities is seeing as a competition for public schools: “since schools must excel to attract and compete for students, all Florida’s schoolchildren, not just special education students, are the direct beneficiaries of a revitalized education system” (Ladner, 2003, p. 16). These main points are what opponents and supporters of school vouchers relay on in order to provide support for their point of view, only time will tell which of these arguments will come to fruition. But according to Conniff (2011), “private-school vouchers are an assault on the whole idea of high-quality, universal public education” (p. 17).

Supporters of school voucher programs state that since our public school education has been highly criticized and no immediate changes are forthcoming everyone should have a choice on the quality of education of their children (Forster, 2011). School voucher supporters “also point to the benefits of allowing each student to find the right school, and the healthy incentives created by competition” (Forster, 2011, p. 3) which can provide appropriate services to meet the needs of all students. Some parent’s choice of public education (neighborhood school) may be a crime-ridden school that fails in all measures of academia. Parents deserve a choice in education because families have different needs that are not being met by the public schools. By seeing the way the public schools have been criticized, the government is not doing a good job of running the public school system so maybe it’s time to privatized education. These school vouchers will provide disadvantaged students a chance to experience a better education. Rich parents have a choice of schools in order to provide the best quality of education for their children and so should poor parents. School vouchers provide low income families with the same educational

resources that middle and high income families have had access to all along. School voucher supporters also agree with the thought that by providing competition between schools (public and private) it will lead to greater efficiency in all schools. Competition will force public schools to look at themselves and force them to make changes to improve the quality of education for all students (Greene & Winters, 2008). From 2010 to 2011, support for school voucher program has increased (Howell et al., 2011). According to Howell et al (2011), support for school voucher programs “was the largest shift in public opinion over the course of the past year”, which is supported by government officials (p. 17).

Belfield (2002) identified three groups that have a high interest in school voucher programs: parents, tax-payers and homeowners. Parents have a strong stake on school voucher programs because it lets them have some control on the quality of education their children receive, especially if their neighborhood school is a low performing school (Belfield, 2002). If school vouchers demonstrate to be efficient, taxpayers may lobby to encourage their use (Belfield, 2002). School voucher supporters and taxpayers point out that they are paying twice for sending their children to private schools. Since all Americans pay taxes and these taxes are used to fund public education, parents who send their children to private schools not only pay taxes but also need to pay the private school tuition. These parents feel that since education is supported by tax money, they should have a right to decided where the money is spent in regards to their child’s education (People for the American Way Foundation, 2002). This is especially important for taxpayers who are retired and have no children attending the public schools. Since some home values are dependent on the public school assignments, school vouchers could lower the cost of home values if the parents choose to send their children to a private school and want to pay fewer taxes. This may have some homeowners not supporting school vouchers if it will

affect the value of their home (Belfield, 2002). But supporters of school vouchers state that “educating students in private schools rather than public schools not only accomplishes better results, it also costs less” which would benefit all taxpayers (Forster, 2011, p. 4).

Another group many people believed to be full supporters of school voucher programs, are parents of minority students. Some school voucher programs target a specific population, such as low income or students with disabilities, in order to provide some equality in education opportunities (National Council on Disability, 2003). “Choice was an elegant and appealing concept, especially to those whose children were trapped in dreadful public schools” or parents of students with disabilities (Viteritti, 2005, p. 142). Parents of students in urban cities public schools are sold with the idea of school voucher programs since it would provide their children access to an education in elite private schools. The problem with this idea is that school vouchers would only pay a fraction of the tuition at the private schools and parents would need to supplement the rest of the funding (Kozol, 2007). Parents of students in urban cities public schools may not have the funding to supplement the school voucher funding and would probably remain in the public schools. In the Cleveland Scholarship Program, “students who received voucher offers but choose not to use them were more likely to be minority students and have lower family incomes than students who used their vouchers” (Usher & Kober, 2011, p. 31). Kozol (2007) states “that while advocates argue that vouchers greatly benefit poor and disadvantaged children, the self-selectivity of the voucher process guarantees the opposite” (p. 59). In order for school voucher programs to be available to all students, “private schools would need to accept all students and limit tuition fees to the voucher amount” (Etscheidt, 2005, p. 162). This would include the acceptance of low income students and students with disabilities.

Even with this information, “polls continue to show that African American and Latino parents in urban communities are among the most consistent supporters of school vouchers” (Viteritti, 2005, p. 151). With the current support from African American and Latino parents, more school voucher programs will be developed to target students in urban public schools. According to Viteritti (2005), “parents in urban cities support school vouchers for three reasons: academic standards, safe environment, and, to a lesser extent, religious values” (p. 151). Until the public schools can meet these needs, parents in urban cities will continue to support school voucher programs as a school choice to provide their children a better education. “Even worse, a growing body of research shows that race plays a primary role in determining whether a public school labels a child disabled” (Ladner, 2003, p. 3) which leads to parents of children in urban school wanting to send their children to private schools. Even with this information, research has shown that parents of minority students prefer smaller class sizes rather than school voucher programs (People for the American Way Foundation, 2002). This is a solution public schools could offer in urban schools in order for parents to keep their children in public schools.

The majority of the school voucher programs in the United States target a specific population such as low income students or students with disabilities. Supporters of school vouchers state that “every child is unique and has unique educational needs (Forster, 2011, p. 4). According to Ji and Boyatt (2007):

Most of the public think that vouchers are likely to yield positive effects on racial and economic balance by giving ethnic minorities and those with low-incomes more opportunities and that vouchers will bring forth competition, which is good for schools, and help move children out of underachieving schools (p. 151).

That the students are improving academically and not by chance is something that would need to be researched more thoroughly to prove. Research has shown that there is no good data that

students who participate in school voucher programs do better academically than students in the public schools (People for the American Way Foundation, 2002). According to Usher & Kober (2011), “achievement gains for voucher students are similar to those of their public school peers” (p. 9) with the limited data available. This is a difficult point to demonstrate because private schools participating on school vouchers programs are rarely required to provide academic data to show the academic growth of the students participating in the program. Without such data, there is a lack of evidence to demonstrate if school voucher programs are successfully providing students’ opportunities for a better education and appropriate services to meet their needs. Based on research on the MPCP school voucher program, “voucher students scored lower on state tests than the average Milwaukee student but about the same as other low-income students who were eligible for vouchers but did not apply for them” (Usher & Kober, 2011, p. 31) and remained at the public school. Due to the lack of data to support the academic achievement of students participating in school voucher programs, there has been a shift in opinion, “some voucher advocates continue to maintain that vouchers have been found to improve student achievement, others note that vouchers have not been found to harm the achievement of participating students and may increase public school performance through competition” (Usher & Kober, 2011, p. 4).

Many opponents of school vouchers state that private schools participating in the program will be selective in the type of students they will accept. Students with disabilities and the neediest students will be left behind in the public schools with scarce resources to educate these students (Fox, 1999). School vouchers opponents believe:

That vouchers are not only unconstitutional, but would also serve as a mechanism to redirect valuable resources away from public schools serving students with the greatest need. Hence, they frequently espouse their support for uniform efforts aimed at increasing student achievement in existing schools (Sutton & King, 2011, p. 263).

This leaves the public schools having to provide a high quality of education with less funding and will make bad public schools worse. By drawing public school students to private schools, private schools “may draw away the most involved families from public schools, community monitoring of those schools may diminish, and schools may reduce the effort they put into educating students” (Figlio & Hart, 2011, p. 76).

People who oppose school vouchers predict that private schools would increase their tuition if vouchers were permitted, hence making more money, and would still turn away poor students whose parents could not afford to pay the difference of the tuition. The National Council on Disability (NCD) believes:

Policy makers and education leaders have a major challenge ahead of them to ensure that any development of school vouchers is based on the direct input of parents, positive results for students with disabilities, sound empirical research of its effectiveness as a policy option, and in accordance with applicable federal (and state) law and civil rights regulations (National Council on Disability, 2003, p. 3).

This would entail requiring some accountability measurement for private schools participating in school voucher programs, especially if they are targeting students with disabilities which require special education and related services.

Opponents of school vouchers feel that due to the exclusive requirements for admission to private schools this would lead to segregation of students (National Council on Disability, 2003). School vouchers would create a divide between the types of students at a private school versus a public school. “The impact of vouchers on racial and economic stratification must be thoroughly studied”, in order, to determine how it will affect society and public schools make up (Etscheidt, 2005, p. 163). Based on current data from the MCPC school voucher program, “the program has had no discernible effect on the racial segregation of schools or housing costs across

neighborhoods” in the time the school voucher program has been in effect (Usher & Kober, 2011, p. 24). This is supported by research on the Cleveland Voucher Program, “according to the study, private schools may have a greater potential to desegregate students because they are able to draw their students from across neighborhood and geographic boundaries in a way that a public school district cannot” (Usher & Kober, 2011, p. 34). Voucher opponents still feel that “privatizing public schools strikes at the core of the American democratic experiment, in which schools are expected to serve as the Great Melting Pot’s great melting pot” in order to educate all children (Harvey, 2011, p. 3).

Private schools can be selective in choosing the students they would accept where as the public school has to accept every student (Frigaard, 2008). “In theory, market pressures may create a powerful disincentive to exclude students who are costly to educate” or students who require special education and related services (Etscheidt, 2005, p.165). Public schools will always provide high quality of education to every student regardless of their disability, test scores, or religious background. Private schools establish their criteria for selecting or rejecting students. These eligibility standards can be difficult for poorer students to meet and may discriminate on some students, including students with disabilities. School vouchers opponents want the government to maintain the public funds in the public schools that accept all children and may have more challenges than private schools. By providing school vouchers to private institutions that choose their students it will further divide our society where the public schools attempt to unite. Even if private schools accept any student, research has shown that in the Cleveland Voucher Program “students who left the voucher program were more likely to be African American or Latino than voucher students who remained in private schools” (Usher & Kober, 2011, p. 32). “Almost 90% of the students who left the program were minority students”

which leads to believe that minority students that are no successful in private schools return to public schools (Usher & Kober, 2011, p. 32). These students would remain at the public schools since they would have no other choice and the public schools would be responsible to educate them with the limited funding that may be provided.

Another point school voucher opponent's address is that the majority of private schools are religious and may conflict with the First Amendment or the private schools are run by extremist groups (Frigaard, 2008). The challenge of school voucher programs in many court cases is with Amendment 1 of the Constitution of the United States:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances (U.S. Const. art. I, §3).

The fact is that a majority of all school vouchers go to religious private schools, thus government funding violates the First Amendment (separation of state and church). This issue was addressed at the federal level in 2002, "when the Supreme Court upheld the constitutionality of Cleveland's school voucher program" (Lips & Feinberg, 2007, p. 3) as not violating the federal constitution. People who oppose school vouchers predict that once the government starts funding religious schools, they may not stop there and can lead to funding other religious institutions. This may lead to a religion-dominated society which could lead to discrimination and take away individual freedoms.

To the argument that school vouchers violate the First Amendment of the United States Constitution, supporters of school vouchers retort with stating that the parents of the students make the choice between religious and non-religious schooling thus the government is not imposing religion. These supporters also claim that in a society where values have been restricted;

the private schools have a better history of getting results in teaching information and values than public schools, which many parents may be looking for their children. Private schools are allowed to be more flexible in their teaching methods which allow them to focus on teaching lifelong values that will benefit society as a whole. School vouchers to private schools (secular and non-secular) will increase diversity in these schools since choice will no longer be a factor of income (People for the American Way Foundation, 2002). Parents feel public schools may expose their children to values that parents may not agree to for their children. By choosing a religious school, parents feel they have a choice to the type of values they would like their children to be exposed (Frigaard, 2008). This is a very important reason for parents to participate in school voucher programs to private schools, especially for parents in urban cities and parents of students with disabilities.

According to the National Council on Disability (2003), “for a voucher system to work, there needs to be a very strong connection between financial and educational success” that can be related to parents and taxpayers (p. 34). School voucher programs reduce the amount of funding for public school programs that have proven to help students, like smaller class sizes (People for the American Way Foundation, 2002). In order for people to support school voucher programs, there needs to be data to support that financially school voucher programs work and do not remove funding from public schools. Etscheidt (2005) states that with the current data available there is no conclusive evidence to support that the McKay Scholarship program, a school voucher programs for students with disabilities in Florida, is cost-effective. In the MPCP school voucher program, there has been data to support the success of the program:

Vouchers students are more likely to graduate from high school than Milwaukee public school students. For six of the seven years analyzed, the graduation rate for voucher

students exceeded that of the public school students by anywhere from 6 to 27 percentage points (Usher & Kober, 2011, p. 24).

School vouchers have not fare well in situations where the American public has been asked to vote in order to support the school choice proposal. The majority of school voucher programs have been passed through legislatures. In recent years, voters in California, Michigan and Utah have defeated school voucher proposals in their states (Tomsho, March 2009). In California, Proposition 38 was presented to voters to answer the question “of whether the state should adopt a program authorizing vouchers worth of at least \$4,000.00 to any student who wanted to attend a religious or secular private school” (Usher & Kober, 2011, p. 20). In 2000, this initiative was defeated, “with more than 70% of the electorate voting against it” (Usher & Kober, 2011, p. 20). In Utah, in 2007, “the state legislature passes a legislation to create what would have been the nation’s first statewide universal voucher program” (Usher & Kober, 2011, p. 21). After putting the school voucher program as a referendum for Utah’s voters to vote, “62% of the electorate voted against implementation of the voucher legislation, and the program did not go into effect” based on these voting results (Usher & Kober, 2011, p. 21). This would lead to believe that, even though the American public may not be satisfied with our public educational system, they would rather reform the public school system than provide public funding for a private education. The American people have shown that without data to support that school voucher programs are successful they are not willing to spend state and federal funding for students to attend a private school (Tomsho, March 2009).

Parents have stated three reasons why they participate in school voucher programs to private schools: “better teachers at the new school, unhappiness with the curriculum or teaching at the prior school, and the school’s reputation among other parents” (Viteritti, 2005, p. 158). If

public schools could meet these needs of the parents, then parents would be more willing to remain at the public schools. This is supported by the idea from opponents of school voucher programs that is not the amount of school choices available but the quality of the school choices parents have to choose from that can provide the best educational opportunities for their children (Etscheidt, 2005).

According to parents whose children participate in school voucher programs, they feel the students are provided with smaller class sizes and they have a better communication with the school (National Council on Disability, 2003). Reports have demonstrated that the success of students on school voucher programs is due to class size not the voucher opportunity (National Council on Disability, 2003). If public schools provided smaller classes and students were successful, parents would keep their children in the public schools. Parents currently have several options as school choice other than school voucher programs. Moe (2001) states that parents rather stay at their neighborhood school than to attend a private school where it is unknown territory for them. Historically, public officials do not chose school vouchers programs as the last resort to solve public school problems such as class size. In Florida, school voucher programs (Opportunity and McKay Scholarships) were developed prior to consideration of a class size amendment that was voted in by citizens (People for the American Way Foundation, 2002). From this example, critics of school vouchers “note the irony of some legislators’ support for special needs vouchers at the same time they reject legislation mandating smaller class sizes in public school” (Hensel, 2010, p. 20).

Supporters of school voucher programs state that currently the public school system has a monopoly on educating children. Without competition, public schools will not improve or change the way they are doing business-business as usual (Frigaard, 2008). A competition

market is a concept this country has stood for, competition benefits everyone as long as there is not a monopoly. Supporters of school voucher programs believe “the lack of competition has made school administrators fat and lazy” and the students are the ones losing on a quality education (Frigaard, 2008, p. 9). By providing a competition between schools, all schools would need to improve, meet the needs of the parents and students or they risk the chance of having to close down. According to Forster (2011), “probably the most important reason vouchers would improve public schools is because they give parents a meaningful way to hold schools accountable for performance” which would provide a better education for their children (p. 4).

According to Belfield (2002), the popularity of school voucher programs in the future will depend on “the legal framework for vouchers, the extent of the demand for them, and the sufficiency of the supply of school accepting voucher funds” (p. 2). In order for school voucher programs to work, not only there needs to be a demand from parents but private schools need to want to participate in the program. If not, there could be a high demand for a school voucher programs but no private school choice (Belfield, 2002). Opponents of school voucher programs are concern that there are not enough private schools to absorb the number of student’s that could be eligible if a universal school voucher system was developed (Jacob, 2003). This would have an impact on the demand for school voucher programs and the selection of students by the private schools.

Several factors will influence if a private school participates in a school voucher program: amount of funding, type of students, and government regulations (Belfield, 2002). The school voucher program needs to cover expenses that the private school will adhere by taking more students in order for private schools to want to participate. Private schools are also concerned with the types of student that will participate in school voucher programs (students

with disabilities, ESOL, low-income). Some private schools may not feel comfortable in taking students with disabilities since they may not be able to provide the special education and related services the students may require. Private schools may be hesitant to take students on school vouchers if doing so will lead to regulations from the government. Some of the regulations from the government may dictate the type of curriculum to be taught at the private school or the types of special education and related services they would need to provide to students with disabilities. Private schools may not want to participate if the government would be dictating these requirements and leave private schools with no choice.

People for the American Way (2003) have identified several problems with the McKay Scholarship program, a school voucher for students with disabilities in Florida. The first problem is that private schools participating in the McKay Scholarship program are free to discriminate based on religion, gender or type of disability (People for the American Way, 2003). There is also a limited choice of participating private schools based on where the family lives. In some rural areas in Florida, there may be very few private schools that participate in the McKay Scholarship program (People for the American Way, 2003). One last problem is that the school voucher may not pay full tuition to selected private school so parents need to pay the difference (People for the American Way, 2003). This tends to subsidize middle and upper income parents that can afford to pay the difference.

By private schools choosing the students that attend their school, it supports the idea that “it is private schools that exercise the real choice in voucher programs, not parents” (Jacob, 2003, p. 21). This supports the point that private schools “are not required to educate every child” and can be selective in type of students they accept in their schools (Jacob, 2003, p. 23). Parents may not have a choice of private schools for their children instead the private schools

have a choice of the type of children to accept to their school. This would really have an impact on parents of students with disabilities that require special education and related services.

The bottom line is that “the empirical evidence regarding the impact of vouchers in parent choice, student achievement, and fiscal management is inconclusive and incomplete” (Etscheidt, 2005, p.156). Until more research is made in these areas, school vouchers developers need to be careful in the development of more school vouchers programs. Belfield (2002) states that alternative to public schools (charter schools, private schools) are not proven to be better or cost effective. After two decades since the implementation of the MPCP, “there’s hasn’t been much evidence since then to recommend vouchers as a solution to the nation’s systematic educational challenges” (Toch, 2012, p. 68).

Currently, students with disabilities participating in school vouchers programs at a private school “may risk both the substantive and procedural protections mandated by the IDEA” (Etscheidt, 2005, p.158). These protections for students with disabilities, under the Individuals with Disabilities Education Act, may have an impact on the success of school vouchers programs for students with disabilities.

Individuals with Disabilities Education Act

In 1975, with the passage of the Individuals with Disabilities Education Act (IDEA), students with disabilities were no longer segregated and were guaranteed a free and appropriate public education (People for the American Way, 2003). IDEA has always included private school options for parents with students with disabilities, if the public schools cannot provide a free and appropriate public education or be cost effective in providing the special education and

related services. “School districts have made a market-based decision to contract with these schools because they provide specialized services that public schools cannot easily replicate on their own” this would provide the necessary special education and related services for students with disabilities that could not be provided in public schools (Fox, 1999, p. 26).

Students with disabilities who take a school voucher to a private school are not provided the same legal protections under IDEA as in the public schools. In 2003 the Board of Directors for the Council for Exceptional Children (CEC), stated that “ a voucher option would both contradict and undermine central purposes of the Individuals with Disabilities Education Act and the No Child Left Being Act” (p.74). Based on Public Law 94-142 (The Education for All Handicapped Children Act, 1975), students with disabilities need to be provided a free and appropriate public education (FAPE); are entitled to special education and related services as documented on an Individual Education Plan (IEP); and need to be educated in the least restrictive environment to the maximum extent as possible with non-disabled students. Private schools do not have these same accountability requirements under IDEA as public schools (Sailor & Stowe, 2003). Once parents have taken the school voucher to attend a private school, parents give up the majority of their legal protections under IDEA (People for the American Way, 2003). Parents may also lose the right to hold the private school accountable for their child’s education and for the private school to provide the appropriate special education and related services for the child (People for the American Way, 2003).

IDEA defines parentally placed private school students with disabilities as:

Children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school in Sec. 300.13 or secondary

school in Sec. 3000.36, other than children with disabilities covered under Sec. 300.145 through 300.147 (34 CFR 300.130).

Parentally placed private school students with disabilities have no rights to receive some or all of the special education and related services afforded under IDEA. Since private schools are not required to provide the special education and related services the students with disabilities may need, parents of student with disabilities have limited private school choice options for their children and usually remain in the public schools.

The local education agency (LEA) is responsible for a timely and meaningful consultation with private schools and parents of parentally placed private school students in order to inform them of the protections they have under IDEA and the special education and related services afforded to them. Some of the protections are: the opportunity for child find activities and some special education and related services opportunities as determined by the school district. The special education and related services do not have to be the same as the ones that could be provided in the public schools. Private “choice schools may not be able or willing to individualize programs for students who require adaptations in the content or delivery of instruction” participating on a school voucher program (Etscheidt, 2005, p.164). This would highly affect the quality of special education and related services provided to students with disabilities at a private school.

Many parents who participate in a school voucher program have to supplement funding because the scholarship does not cover all costs at the private school (People for the American Way, 2003). “In the 2001-02 school year, 83 percent of McKay parents had to pay some amount of money in addition to their voucher to cover the full costs of tuition and other fees” which include special education and related services (People for the American Way, 2003, p. 9). This

provides better options for affluent parents rather than low and middle income parents. Some students with disabilities lose some of the special education and related services that would be available in the public schools when attending a private school. If the parents do not have the funds to provide these special education and related services at the private school, the students may regress in their education. “A market-based plan modeled after the Florida program may diminish the equity-based goals of the IDEA” and the special education and related services available to students with disabilities (Etscheidt, 2005, p. 164).

IDEA already allows for federal funding to student with disabilities to attend a private school if the parents finds a better program to better meet the needs of their child compared to the program offered by the IEP team or if the IEP team recommends the student to attend a private school (Individuals with Disabilities Act, 1997). If an IEP team recommends placement at a private school, the child would still keep their protections under IDEA. But if a student with a disability is parentally placed in a private school, there are limited services and protections under IDEA (Sailor & Stowe, 2003). According to Fox (1999), there were 66,000 students with disabilities opting not to follow the procedures of IDEA for a private placement and placing students in a private school with minimal support from the government. If the school voucher does not cover the entire tuition for the private school, the parent can file due process in order for the school district to cover the rest of the tuition based on the fact that the public school was not able to provide FAPE (Sailor & Stowe, 2003). This process could be time consuming and costly for some parents of students with disabilities. Voucher advocates believe that by providing school vouchers for students with disabilities it would “give parents an exit strategy more readily employed while simultaneously diminishing the public resources spent on litigation over the scope of services provided” by the public schools (Hensel, 2010, p. 2).

Parents of students with disabilities are afforded due process rights if there is a disagreement with the recommendations made by an IEP team. Students with disabilities participating in a school voucher program at a private school are not afforded the same due process rights (Individuals with Disabilities Act, 2004). This may leave parents vulnerable to the recommendations of special education and related services private schools provide with no rights to challenge these services. If the parent feels the public school has not provided FAPE and takes a school voucher to a private school, the parent can still file due process (National Council on Disability, 2003). This can help provide further funding for the private school if the parent wins the due process in order to provide the special education and related services the student may need at the private school setting.

Private schools are not responsible to provide an appropriate education to students with disabilities or ensure that the students are provided with the special education and related services they need to progress academically. Private schools may not be able to afford to provide the special education and related services in order for students with disabilities to be successful in their education program (Etscheidt, 2005). In the MPCP school voucher program, “only about 1% of the participating private schools surveyed offered special education services” to students with disabilities (Usher & Kober, 2011, p. 30). If these services are not provided by the private school, parents have no legal recourse (National Council on Disability, 2003). Research has shown that:

Students with disabilities have a legal right to participate equally in a public school reform effort, yet the empirical data suggest that schools participating in choice programs are not yet serving the same proportion of students with disabilities as are public schools (Etscheidt, 2005, p. 162).

In Florida, private schools that participate in the McKay Scholarship program, a school voucher program for students with disabilities, can select the admission guidelines. This could lead to private schools specializing in a specific disability and the entire school can be made of students with disabilities (National Council on Disability, 2003). Research has supported the idea of including students with disabilities in regular education classroom “yet, if a market provided an incentive, special education schools might increase, and parents might choose those schools” (Etscheidt, 2005, p.164). This could result in the segregation of students with disabilities not being educated in the least restrictive environment (Etscheidt, 2005). This placement at a private school would be the most restrictive placement for a student with a disability and may not have the opportunity to interact with non-disabled students.

Florida’s school voucher program for students with disabilities provides tax funds to private schools but private schools “are not obligated to hire certified staff, and not required to test all special education students” (People for the American Way, 2003, p. 4). Parentally placed private school students with disabilities do not have to meet the IDEA requirement of being involved in state and district wide assessments. By not requiring testing for students with disabilities, very few data is available to compare students with disabilities attending a private school on a school voucher program and students with disabilities that remain in the public school. “Private schools are exempt from such assessment and accountability” unlike the public schools educating students with disabilities (Etscheidt, 2005, p. 164). Parents may not have access to information regarding their child and a comparison to other students on assessments or the academic progress the student may, or may not be making.

Due to parents’ complaints that private schools participating in school voucher programs are not providing the special education and related services for students with disabilities there is

a push for the inclusion of a school voucher program in the reauthorization of IDEA. The main support comes from the results of the McKay Scholarship, a school voucher program for students with disabilities in Florida (People for the American Way, 2003). This issue of accountability is a critical concept for states developing school voucher programs need to consider (Etscheidt, 2005). “An HMO-style approach to IDEA could significantly compromise the quality of services that students with disabilities receive” at a private school (People for the American Way, 2003, p. 4).

Special education is a part of education that some educators believe is very costly. With the increase in market place approaches and competition for school choice, special education has been considered as a part of education that can be eliminated. This idea is supported with the push for inclusion of all students with disabilities in the general education classroom and the development of school voucher programs targeting students with disabilities (Anastasiou & Kauffman, 2009). As of 1999, school vouchers for students with disabilities have allowed about 6.7 percent of students with disabilities to be educated at private schools with public school funds (Buck & Greene, 2010).

Accountability

In this education era where school voucher programs are becoming more popular, educators are trying to determine what accountability, if any, needs to be enforced on private schools that accept public funds through school voucher programs. “Opponents often contend that vouchers unfairly channel tax dollars to private schools without requiring these schools to abide by the same requirements as public schools in such areas as accountability, testing, or special education” and related services (Usher & Kober, 2011, p. 3). According to Hensel

(2010), “this lack of accountability, structure, and legal protections can pose serious challenges” to students with disabilities participating in school voucher programs (p.11). With the recession and every public fund being accounted for, the public has opinions of how public funds are being spent. So, what is the place of accountability in school voucher programs?

The Council of Exceptional Children Board of Directors opposes school vouchers for students with disabilities (CEC Boards of Directors, 2003). They do understand that there are already school vouchers for students with disabilities enacted, so they believe the current school vouchers programs for student with disabilities should have some set assurance:

The same standards of accountability as those required of state and local agencies- including all federal and state rules and regulations-along with on-going public monitoring, full transparency of private programs, and regular reporting to parents and the public; full and demonstrated accessibility for all students, including students with special learning needs; provision for a complete program of special education, related services, and supplementary aids and services in the context of full implementation of the IEP, with periodic review and revision; a guarantee of a free, appropriate, public education; full access for children regardless of racial or ethnic heritage, and children who are English language learners; a guarantee of all procedural safeguards under the IDEA, Section 504, the ADA, and other relevant civil rights laws of the United States; a guarantee of education in the least restrictive environment; and fiscal protections to guarantee that public education funds are not diverted to a voucher program at the expense of the students remaining in the public schools (CEC Boards of Directors, 2003, p. 74, 75).

One major issue with school voucher programs, that speaks the loudest with the public, is accountability for the private schools participating in the school voucher programs. In an article by Finn, Hentges, Petrilli and Winkler (2009), they interviewed 20 experts in the school choice world and found some points in regards to accountability that all the experts agreed on. The

researchers discovered that the majority of the education policy experts who support school voucher programs agreed on the following areas that should not be regulated by public school policies: accreditation; teacher qualifications; religious activities and instruction; admissions standards; and student retention. The one point these experts did not agree on was when it comes to making school academic results and financial audits transparent by the participating private schools. If public funds will be provided to students to attend private schools then some accountability will need to be enforced especially when research has not shown conclusive academic improvement for the students who take school vouchers to attend a private school.

Education policy experts have disagreements in what type of policies, if any, should private schools be held accountable for in regards to student testing and school finances (Finn et al., 2009). The five areas the education policy experts disagreed were:

- (1) who should be tested and how;
- (2) what other academic performance information should be required of private schools;
- (3) who should have access to academic data from private schools;
- (4) what financial information should be required of private schools; and
- (5) under what circumstances may participating private schools be dropped from the school voucher program (Finn et al., 2009, p. 11).

In order for school voucher programs for students with disabilities to continue to grow, there will need to be some type of accountability guidelines for private schools participating in school voucher programs. Private schools accepting students with disabilities on a school voucher program must be at least held accountable to implement the special education and related services documented on the student's Individual Education Plan, as required by the Individuals with Disabilities Education Act (Sailor & Stowe, 2003). Private schools should also provide a continuum of services including least restrictive placement for student with disabilities participating in a school voucher program. There is an increase pressure that private schools that

take students' with school vouchers need to also be held accountable by the same guidelines as public schools. Julia Mead, Professor of Educational Leadership at the University of Wisconsin-Madison, "suggests that states with general voucher programs could require private schools to provide more specific information on the special education students they serve, the severity of the disability, and the services provided to them" (Cavanagh, 2012, p. 10). But according to Patrick Wolf, Professor of Education Reform at the University of Arkansas, questions "the fairness of holding voucher schools to the public schools' standards for delivering services, in cases where the amount of public money they receive is not sufficient to cover those costs" (Cavanagh, 2012, p. 10).

The education policy experts agreed that private school students should have an academic evaluation in order to monitor the students' academic progress (Finn et al., 2009). By evaluating the private school students, private schools have data to demonstrate the academic progress the students are making. The education policy experts differ in the way these academic evaluations should occur. There were three different approaches that education policy experts suggested to evaluate school voucher students at private schools: "(1) private schools would choose and administer the evaluation instrument, (2) a third party or government agency administers the evaluation instrument, or (3) school voucher bearing students are evaluated with the same instrument use to evaluate public school students" (Finn et al., 2009, p. 13). This is an important aspect of accountability that private schools participating in school voucher programs would need to accept if they want to participate. The MPCP voucher program has determined the need for academic accountability and "as of the 2010-2011 school year, MPCP schools are required to administer the Wisconsin Knowledge and Concepts Exam to all voucher students in grades 3-8, as well as grade 10" (Dickman & Schmidt, 2011, p. 6).

In regards to the results of the academic evaluation for private school students participating in school voucher programs, the education policy experts once again did not agree on who should have access to the data (Finn et al., 2009). Few of the education policy experts recommended that private schools should not have to release the results of the academic evaluations to the government or any other entity. Some of the education policy expert's respondents recommended the results of the academic evaluations for private schools be accessible to the state government in order to monitor the progress of school voucher students. Still, other education policy experts recommended that the results of the academic evaluations should be accessible to the public including parents of students participating in the school voucher program. These respondents believed this would actually enable the private schools to ensure future students to attend their private school on a school voucher based on the results of the academic evaluations. Public access to results of academic evaluations for voucher bearing students would provide information about the academic success of students to parents who are trying to select the best private school for their child. With the limited current data on school voucher and student achievement "the best research to date on publicly and privately funded voucher programs has found small and mostly insignificant achievement gains for students who are offered vouchers" (Usher & Kober, 2011, p. 44). In order for people to continue to support school voucher programs, more academic data would need to be available to show the success of the students attending a private school on a school voucher.

In regards to how the academic evaluation results should be compiled was another point of contention with the education policy experts (Finn et al., 2009). Some respondents recommended the academic evaluation data be available as a whole for the school voucher program while other respondents recommended the academic evaluation data should be

segregated by individual private schools. In order to provide any useful information to parents of school voucher eligible students, the results of the academic evaluation should be segregated by individual private schools for comparison between private schools. This would provide important information to parents when determining which private school to select for their child.

Some suggestions, in order to provide accountability for private schools who participate in school voucher programs, are to “require reporting how voucher money is spent, requiring the use of state certified instructors, reporting student scores on standardized tests, assuring compliance with the Americans with Disabilities Act, and meeting state requirements for health, safety, and curriculum” (Sailor & Stowe, 2003, p. 32). Parents of students with disabilities would be able to make better decisions in regards to the best education for their child if this information is available. This would ensure that students with disabilities are provided with the appropriate special education and related services. Currently, private schools do not have to ensure that student with disabilities are provided with the special and related services and if these services are not provided, parents have no legal recourse (Sailor & Stowe, 2003).

Private schools that participate in the McKay Scholarship, a school voucher program for students with disabilities in Florida, program only have to meet the following guidelines:

Demonstrating fiscal soundness; submitting a schedule of tuition and fees; complying with federal laws that prohibit discrimination on the bases of race, color or national origin; employing teachers with a college degree or higher, three years of teaching experience, or those with special skills, knowledge, or expertise; meeting state and local health and safety codes; adhering to their own published disciplinary procedures; and being academically accountable to the parent for meeting a student’s needs (People for the American Way, 2003, p. 11).

Although Friedman believes school voucher programs will provide market competition and level playing field, none of the current school voucher laws “requires participating private schools to

comply with all of the accountability standards, financial disclosure rules, state testing requirements and other mandates to which public school are held” accountable (Jacob, 2003, p. 12). According to Harmon (2010):

Whether parents use tax credits or vouchers, the fundamental question still remains whether the individual legal rights of students with disabilities will be guaranteed within the private school sector by a comprehensive accountability system with more substances than market forces (p. 240).

Due to the lack of accountability from private schools who participate in school voucher program some of the problems are: “inappropriate student selection and unlawful admissions policies; hiring unqualified staff and staff with criminal records; misappropriation of public funds; failure to meet safety codes; unlawful discipline of students; and failure to provide adequate supplies for students and staff” (Jacob, 2003, p. 18). If any public schools were cited for any of these criteria, the public, government officials and parents would be demanding consequences for the public schools. Opponent of school voucher programs believe the government “should be required to cut off public funding to private and religious schools that have a chronic record of academic failure” (Viteritti, 2005, p. 147). This criteria school also be implemented to charter and district schools in order to provide the best education for our students (Viteritti, 2005). This has led to school voucher supporters to “become more willing to concede the need for a governmental role in establishing accountability” (Viteritti, 2005, p. 146). School voucher supporters understand that some type of accountability guidelines would need to be made in order for school voucher programs to continue. The debate continues to be on what these guidelines would be in order to still provide some independence to the private schools that would participate in a school voucher programs and still protect the students participating on the school voucher programs, especially students with disabilities.

By holding private schools accountable to follow federal and state disability laws, students with disabilities taking school vouchers to attend a private school would be protected (National Council on Disability, 2003). This could include the IDEA requirement that private schools should provide a continuum of services including educating student with disabilities in the least restrictive environment (LRE). If LRE is not provided at the private schools, it could lead to private schools providing segregated programs for students with disabilities (Sailor & Stowe, 2003). Private schools can specialized in a specific disability and the entire school can be made of students with disabilities (Sailor & Stowe, 2003). This goes against the LRE requirement of the IDEA that public schools are required to implement. Current data from the McKay Scholarship program demonstrates that “the disability profiles of students exercising choice through the program closely match the population of disabled students in the Florida public school system, meaning that private schools are serving children with a full spectrum of disabilities” (Ladner, 2003, p. 15).

People who support school voucher programs state that accountability is the responsibility of the parents. School vouchers “return control of education to parents, where it had rested for much of our nation’s history” (Forster, 2011, p. 30). If the parents are happy with the services being provided at the private school they will remain, if not, parents will look for a better school, public or private. “Despite the massive investment of resources, many parents with children in public schools special education programs express dissatisfaction with the level and types of services their children receive” including special education and related services (Ladner, 2003, p. 4). School voucher supporters feel “that the threat of losing students to private schools may give schools greater incentive to cultivate parental satisfaction by operating more efficiently and improving the outcomes valued by students and parents” (Figlio & Hart, 2011, p. 76).

The problem is how the government can determine that parents are holding the private schools accountable for providing the adequate education services for their children (Dash, 2009). In order for parents to make a decision on the best education for their child, they need to be provided with accurate information (Sailor & Stowe, 2003). In the MPCP school voucher program, “voucher parents tended to have lower incomes but higher levels of education than did Milwaukee public school parents” (Usher & Kober 2011, p. 27). These parents can be more involved in their students’ education and report any issues they may have with the private schools participating in the school voucher program. The Florida Department of Education School Choice office, who monitors the private schools participating on the McKay Scholarship program, will not investigate a private school unless a complaint is brought to them (People for the American Way, 2003). In the Washington school voucher program, “parents and students expressed generally high levels of satisfaction with their schools; among parents who were dissatisfied with their school choice, most were still satisfied with the voucher program” (Usher & Kober, 2011, p. 40). A problem parents may face is that “judging whether a school is bad, however, can require many weeks or even months of interacting with teachers and administrators, and monitoring progress and experiences of students” (Jacob, 2003, p. 19). This can take time which students would be missing a proper education including special education and related services for students with disabilities. Based on research on the MPCP school voucher program, parents of students who participated in the voucher program “were less likely to report problems at school and had slightly higher expectations for their children than the comparable public school parents” (Usher & Kober, 2011, p. 27).

Parents need to be informed and have access to all information, in regards to private schools, in order to make an educated decision on their child’s education (National Council on

Disability, 2003). For the school vouchers provided to students with disabilities in Florida (McKay Scholarship), the Florida Department of Education provides parents with a directory of private schools that includes information on contact person for the private school, religious affiliation, military, residence facilities, grade levels, students (male, female, coed), religious denomination, profit or non-profit, accreditations and disabilities served (Florida Department of Education, 2011). This provides parents with some general guidelines regarding private schools that enable them to choose an appropriate private school for their child. The parents still are encouraged to visit the private school and have a meeting with the staff prior to selecting a private school. "Districts must provide the quality of service expected by parents, or parents can seek satisfaction elsewhere" this would also be true of private schools (Ladner, 2003, p. 17). Parent's satisfaction with private schools participating in school voucher programs "may stem in part from the absence of meaningful accountability measures" (Hensel, 2010, p. 15).

In order for parents to make educated decisions about their children's education, they will need to understand the education process. These parents would need:

To find out about such matters as a lottery for a specific private school or charter school, to make an appointment for an interview and receive a call-back from the school when an appointment is confirmed, to get to the place they're supposed to go on the appointed day, and then to make a well-informed decision on the merits of the pedagogy that the school promotes (Kozol, 2007, p. 58).

Parents need to be very involved in the process in order to gain the best opportunities for their child's education. Some parents may be overwhelmed when following this education process or may not understand the process. Parents may choose a private school for convenience and not because it provides the best educational opportunity for their child.

Private schools are not accountable to demonstrate the academic progress students with disabilities are making when participating on the McKay Scholarship program, a school voucher for students with disabilities in Florida (People for the American Way, 2003). Because the private schools are not required to administer assessments there is no data to determine if students with disabilities are making academic progress. The lack of information in regards to academic progress could be a negative factor for school vouchers programs and not provide information for parents in order to make the best educational decision for their child.

Due to the fast growth and demand for alternative school choices, such as school voucher programs, accountability measures for private schools have not caught up to the demand (Frigaard, 2008). Another negative impact in regards to accountability for private schools is that private schools have opened overnight in order to take advantage of public funds provided by the McKay Scholarship, a school voucher program for student with disabilities in Florida (People for the American Way, 2003). These private schools have minor accountability criteria to the parents and taxpayers. “The failure of Florida officials to monitor private and parochial schools participating in voucher programs has become a significant point of concern among supporters and opponents of choice in the Sunshine State” especially since this school voucher program targets students with disabilities (Viteritti, 2005, p. 147). According to Hensel (2010), the lack of accountability from school voucher programs for students with disabilities “is certain to leave at least some children with disabilities worse off upon exiting public school” (p. 13). In the future, school choice programs (including charter schools and vouchers) should:

Not set legal caps on the number of choice schools, thereby eliminating the unseemly waiting lists that are especially common at charter schools. Funding for all forms of choice programs would be both adequate and equitable, maximizing the potential for success. Finally, all schools receiving public finding-whether district schools, charter

schools, or private schools-would be held to strict levels of accountability so that no child must attend a school that is incapable of teaching basic skills (Viteritti, 2005, p. 148). These accountability measures could impact the goal of school vouchers for students with disabilities. Hensel (2010) states that with accountability measures added to school voucher programs for student with disabilities, it “would conflict both with the states goal of expanding the availability of state voucher programs and enhancing states’ flexibility in offering services to children with disabilities” (p. 14).

Related Case Law

School vouchers and education tax credits “that would direct financial assistance to parents whose children attend private parochial schools have often been challenged in the courts” both at the state and federal level (Sutton & King, 2011, p. 254). Historically, there have been several challenges to the constitutionality of school voucher programs in the United States based on that school voucher programs violate the Establishment Clause of the First Amendment. The Establishment Clause is a provision in the First Amendment of the United States Constitution that prohibits the federal government from declaring or financially supporting a national religion (Harvard Law Review, 2007).

Increasingly, moderate U.S. Supreme Court interpretations of the establishment clause have virtually eliminated federal barriers to voucher expansion. These decisions have had the effect of focusing attention on state laws that restrict the allocation of public dollars to religious organizations when legislators strive to adopt vouchers in school reform (Sutton & King, 2011, p. 245).

At the state level, “some state constitutions do present different legal hurdles” due to the interpretation of the state constitution (Lips & Feinberg, 2007, p. 3). “Currently, constitutions of

39 states and the District of Columbia have clauses that place some form of restriction on government aid to religious schools notwithstanding establishment clause language in the U.S. Constitution” which can prevent the development of school voucher programs in some states (Sutton & King, 2011, p. 246).

According to the National Council on Disability (2003), there are five questions that provide a significant effect on the legality and/or efficacy of a school voucher program: “(1) Who can participate? (2) What are the choice options? (3) How is the funding handled? (4) What are the accountability measures? And (5) how does it address barriers to successful implementation?” (p. 24). States beginning to develop school voucher programs need to review these questions in order to develop a program that could withstand any legal challenges based on the Establishment Clause in the states constitution. “Civil litigation that addresses education clauses within state constitutions may be a viable strategy for voucher opponents” and can defer some states to develop school voucher programs (Sutton & King, 2011, p. 259).

The Milwaukee Parental Choice Program (MPCP), which is considered the nation’s first modern era school voucher program, began in 1990 and currently has about 20,000 students and 127 private schools participating in the program. The school voucher program provides state funding for low-income students to attend private schools located in Milwaukee. When the school voucher program was first implemented, students could only attend secular private schools. In 1995, the program was expanded to include non-secular schools. Currently, “approximately, 30% of private schools participating in the Milwaukee voucher program are secular; the remainder have some sort of religious affiliation” (Usher & Kober, 2011, p. 29). The expansion of this program to include non-secular schools was widely opposed leading to legal challenges (National Conference of State Legislatures, 2010). In March 1998, the Supreme Court

of Wisconsin ruled that the MPCP school voucher program did not violate the Establishment Clause of the First Amendment thus reversing the decision of the courts of appeal (*Jackson et al v. Benson et al*, 1998). This ruling meant that school vouchers could be used for students to attend religious schools. In November of the same year, the United States Supreme Court refused to review the case thus the Wisconsin Supreme Court decision still stands. This decision was used as a precedent in the *Simmons-Harris et al v. Zelman et al* (2002) “in declaring the Ohio Scholarship and Tutorial Plan to be a non-religious effort to create school choice opportunities for students within the Cleveland City School District’s lowest performing schools-effectively satisfying the federal establishment clause” (Sutton & King, 2011, p. 255). Currently the MPCP voucher program continues to grow, “a budget bill enacted in June 2011 will expand the state-funded voucher program beyond Milwaukee to include students who attend suburban schools in Milwaukee County and students in the Racine Unified School District” (Usher & Kober, 2011, p. 14). This lifted the capped number of students eligible to participate in this school voucher program and allowed middle-class students to have access to the voucher. The success of this school voucher program in legal challenges can lead to a universal school voucher programs in Wisconsin.

Maine’s school voucher program was developed due to having rural and lightly populated areas in their state. In Maine, “if no public secondary school exists to serve the surrounding community's students, the state allows school districts to send its students to private schools and pay their tuition” the participating private schools are nonsectarian (National Conference of State Legislatures, 2010, n.p.). In November 1998, a group of parents filed suit against the Raymond School District stating that their children were denied tuition benefits because they attended a religious private school (*Bagley et al v. Raymond School Department et al*, 1999). The parents

stated that by the students attending the religious private school it did not violate any constitutional provisions. The Supreme Court in Maine ruled in April 1999, that if the school district paid for the tuition of these students attending a religious private school it would violate the state's constitution Establishment Clause.

Washington D.C developed the first federal voucher program but it took several years for the school voucher program to be approved. In 1997, the United States Congress first tried to appropriate funding outside the normal budget for the D.C Opportunity Scholarships Fund, which would have provided school vouchers for students to leave Washington's public schools and attend private schools. President Bill Clinton vetoed this bill. The bill for this school voucher program was reintroduced again under President George Bush and became law in 2003 as a five year pilot program-The Opportunity Scholarship Program.

The Opportunity Scholarship Program provides a school voucher to students in grades K-12, if they qualify, for the free and reduced lunch program and are living 185 percent below the poverty level. This school voucher allows disadvantage children in grades K-12 to leave public schools in Washington, D.C and attend a private school. According to the United States Department of Education to date about 90% of participants have been African-American and an additional 9% Hispanic (Gardner, 2009). A 2007 Government Accountability Report found some concerns with the administration of the Opportunity Scholarship Program and the lack of adequate accounting controls (Tomsho, October, 2009). In an evaluation released in March 2009, researchers found:

That in reading skills, voucher recipients overall were approximately 3.1 months ahead of eligible students who didn't receive scholarships. There was no difference in math skills and school voucher recipients from the worst-performing public schools got no boost in either subject (Tomsho, October, 2009).

Another report from the Department of Education has found “that mostly minority students are making measurable academic gains and narrowing the black-white learning gap” (Anonymous, 2009, n.p.). As part of the federal spending package, Congress voted to end the Opportunity Scholarship Program in Washington, DC after the 2009-2010 school year. According to President Obama’s press secretary “the President doesn’t believe that vouchers are a long-term answer to our educational problems” (Mangu-Ward, 2009). President Obama readdressed this school voucher program in order to resolve the 2011 budget and added “a provision to renew the program for five more years” (Usher & Kober, 2011, p. 15). To date, this school voucher program has not been challenged on the court.

In Ohio, lawmakers created the Cleveland Scholarship and Tutoring Program in 1995.

The school voucher pilot program was established:

To provide parents of students within the boundaries of the Cleveland City School District (CCSD) the opportunity to apply for either a tutoring grant or a scholarship to attend a private school. The scholarships may also be used to attend public schools in participating adjacent districts (National Conference of State Legislatures, 2010, n.p.). The school voucher program initially was for students in grades kindergarten through third but was changed to include students in grades kindergarten through twelve in the 2006-2007 school year. In 2002, the United States Supreme Court upheld, in a 5-4 vote, that the Ohio school voucher scheme was constitutional under the United States Federal Constitution (*Simmons-Harris et al v. Zelman et al*, 2002). In the *Simmons-Harris v. Zelman* ruling the court “developed a list of five criteria that a voucher program must meet to be deemed constitutional: having a secular purpose, distributing funds to parents, covering a broad range of beneficiaries, not favoring any particular religion, and including a nonreligious options” (Usher & Kober, 2011, p. 19).

The court did not feel that the school voucher program was unconstitutional solely on the litigation focus that providing federal and state funds to students to attend a private school went against the federal and state Establishment Clause.

It noted that the U.S. Supreme court's declaration in *Zelman*-permitting states to provide parents with vouchers for tuition payment in religious schools-does not mean that states have an affirmative duty to include religious schools in programs which permit voucher use in other nonreligious private school (Sutton & King, 2011, p. 256).

This decision led to the development of school voucher programs in other states in the United States.

In 2003, Colorado tried to develop a school voucher program, the Colorado Opportunity Contract Pilot Program. The school voucher program would provide school vouchers to students in grades K through 12 who qualify for free or reduced lunch and attended a public school in the previous year. The program would apply to any Colorado school district with eight or more schools that rate poorly under the state accountability system (National Conference of State Legislatures, 2010). The Colorado Supreme Court in June 28, 2004, ruled that the school voucher program was unconstitutional based on the grounds that it violates the state's local control requirements (*Owens et al v. Colorado Congress of Parents, Teachers and Students*, 2004). The court ruled that because the school districts had to turn over portion of their school funding in order to support the school voucher program it violated the Colorado Constitution.

Florida developed two school voucher programs under Governor John Bush. One school voucher program is currently still available (McKay Scholarship) and the other has been found unconstitutional (Opportunity Scholarship Program, *Bush et al v. Holmes et al*, 2006). The Opportunity Scholarship Program began when Florida developed the A+ Plan for Education in 1999. Public schools were given a grade from A-F, largely depending on the performance of

students in the Florida Comprehensive Achievement Test (FCAT). If a school received an F in two out of four years and had an F in the current year, students became eligible for the Opportunity Scholarship Program (OSP). The scholarship allowed the students to attend a different public school or a private school of the parent's choice. The school voucher program was funded by the state providing the amount of funds that the school district would have received for the student to the parent's private school choice.

Parents' of students and various organizations files suit in the Circuit Court of Leon stating the OSP was unconstitutional both under the Establishment Clause of the United States Constitution and several provisions of the Florida Constitution (*Bush et al v. Holmes et al*, 2006). Following the circuit court ruling that the OSP violated the Florida Constitution, the case went to the First District Court of Appeal. The First District of Court of Appeal reversed the ruling from the circuit court. The Court of Appeal remanded for further proceedings stating that "nothing in the constitution prohibited the well-delineated use of public funds for private school education" (Harvard Law Review, 2007). In January 2006, the Florida Supreme Court, in a 5-2 decision, declared the school voucher program unconstitutional (*Bush et al v. Holmes et al*, 2006). The Florida Supreme Court gave three reasons for their decision:

First, the OSP undermines the public school system by diverting funds that were previously earmarked for public schools to private ones. Second, the OSP violates the requirement that the school system be uniform. Finally, the court distinguished the other state programs not at issue, a preschool program for four-year-olds and a scholarship program for students with disabilities, indicating that funding of those programs would not violate the education clause (Harvard Law Review, 2007, n.p.).

Since that ruling, students can use the OSP to attend another public school choice but not a private school. In their ruling decision "the Florida Supreme Court relied on language in the state

education clause in ruling that the OSP diverted public dollars to separate private systems that compete with Florida public schools” (Sutton & King, 2011, p. 259). Florida law currently prohibits tax-payer funded school voucher programs for private school tuition. Florida wanted to have voters vote on Amendment 7 in November 2008, to “remove a clause on Florida’s Constitution that prohibits state money going ‘directly’ or ‘indirectly’ to religious institutions” (Fineout, 2008, n.p.). By removing this from the Florida’s constitution, the OSP school voucher program would withstand the legal challenges. The State Supreme Court in Florida ruled this amendment could not appear in the November 2008 ballot. The judges questioned whether the way the amendment was worded would be misleading to voters. This will be addressed again in 2012, when “officials will be asking voters to approve a statewide voucher program for disadvantaged students” (Toch, 2012, p. 68).

In 2006, the Arizona Legislature endorsed two school voucher programs, the Arizona Scholarship for Pupils with Disabilities and the Arizona Displaced Pupils Choice Grant Program. Both programs began in the 2007-2008 school year. The state allocated funding for children participating in these scholarships to enroll in private schools. Once a student enrolls in the program, the student may remain in the program through grade 12 (National Conference of State Legislatures, 2010). The Arizona state’s teachers union and local school boards filed a suit and appealed to the Arizona state high court after losing in county court that these school voucher programs were unconstitutional since they were providing public funding to private schools. In March 2009, the Arizona State High Court ruled, in a unanimous decision, that two Arizona school voucher schemes are unconstitutional (*Cain et al v. Horne et al*, 2009). Justice Michael D. Ryan wrote: “These programs transfer state funds directly from the state treasury to private

schools. That the checks or warrants first pass through the hands of parents is immaterial” (*Cain et al v. Horne et al*, 2009).

In July 2011, the School Choice Scholarship program was enacted in Indiana. The state bill, HEA 1003, “will provide tuition vouchers, based on a sliding scale fee, for students to attend a private or parochial schools of their choice” (Belanger, 2011, p. 1). The Indiana Voucher program “is the only active voucher program in the country that is not limited to low-income students or students who have attended a low-performing school, and the only one with no eventual cap on enrollment” (Zubrzycki, 2012, p. 1). After the Indiana School Choice Scholarship program was in effect, the Indiana State Teachers Association and other opponents including teachers and religious leaders filed suit stating the voucher program was unconstitutional:

It questions whether the voucher program meets Indiana’s constitutional obligation to provide a common education to its students and asks whether public funds can go to private institutions. Nearly all the private schools signed up for the program so far are religious affiliated (Zubrzycki, 2012, p. 14).

On Friday, January 13, 2012, the Indiana Superior Court ruled that the Indiana School Choice Scholarship program “did not violate the state constitution because the state isn’t directly funding parochial school” (Wilson, 2012, p. 1). The Indiana Supreme Court cited the U.S. Supreme Court ruling affirming the constitutionality of school vouchers programs. (*Simmons-Harris et al v. Zelman et al*, 2002). The Indiana State Teachers Association and other opponents of the Indiana School Choice Scholarship program have stated they will continue to fight the school voucher program by appealing the court’s decision (Wilson, 2012).

With different rulings at the state and federal court levels in regards to school voucher programs, it appears that “future voucher litigation is destined to remain a local issue that will play out in state courts” (Sutton & King, 2011, p. 263).

Conclusion

Market choice for education has gained great momentum on the past 30 years to include charter schools and school voucher programs. School voucher programs for students with disabilities to attend a private school have been part of this movement. Currently five states have developed school vouchers for students with disabilities (Arizona, Florida, Georgia, Ohio, and Utah) and it appears the trend will be for other states to follow (Alabama, Arkansas, Colorado, Kansas, Kentucky, Maryland, Missouri, Mississippi, Oklahoma, Nevada, Oregon, South Carolina and Texas) (Hensel, 2010). The result of the success of school voucher programs is still waiting to be seen; “until empirically rigorous, longitudinal data are available, the impact of school choice plan on the educational programs of students with disabilities remains unclear” (Etscheidt, 2005, p. 165). This is especially important because students with disabilities are a unique population of students that requires specialize instruction.

More studies will need to be developed to trace these student’s academic gains in order to demonstrate the success or failure of these school vouchers programs. The problem in gathering this type of data is that the majority of private schools who accept school vouchers are not required to provide information on student’s academic gains as an accountability requirement. Based on the review of the most prominent school voucher programs in the United States, some school vouchers programs are being amended to required private schools to provide this academic data in order to be able to compare school voucher to non-school voucher students.

With the lack of this data, “the empirical focus of the evaluative research has created a mind-set in the policy community that suggests that we should not implement choice on a large scale until there is some evidence that it works” (Viteritti, 2005, p. 148).

At this time in education we are in a cross road in regards to public education and school voucher programs. We will either continue the school voucher programs and develop research to demonstrate the educational impact of the program on students or turn our attention to the problems in public education and put a good forth effort to resolve those problems.

Despite the rhetoric coming from many policy advocates, the overall results reflected in the research do not provide the compelling support for voucher programs that many expected to find. Indeed, a comprehensive review of the research indicated that the initial optimistic expectations from theoreticians and policy advocates for improved academic outcomes are not supported by the growing body of research on this question (Lubienski & Weitzel, 2008, p. 448).

Current research has not been conclusive in the effects of school vouchers on students and public schools. More studies will need to be developed to trace these student’s academic gains in order demonstrate the success or failure of these vouchers programs. “Many key questions about vouchers remain unanswered, including their longer-term impacts on graduation rates, college enrollments, or future wages, and whether vouchers could provide a cost-neutral alternative to the current U.S. system of public education”, these questions would need to be answered before more school vouchers for students with disabilities are developed (Usher & Kober, 2011, p. 44).

The American public and policy makers need to make a decision in regards to the future of public education and school voucher programs. The American public feels strongly in the separation of church and state that includes providing public funding to student to receive a

private education. Legal cases to the constitutionality of school voucher programs for students with disabilities will be reviewed on a case by case basis depending on the Establishment Clause in the state constitution, “amendments to state constitutions may be another method to expand or restrict school vouchers as a reform” (Sutton & King, 2011, p. 262). The main point to understand is that:

It is important to keep in mind that most U.S. students are, and will continue to be educated in public schools. Even if voucher programs were more widespread, and even if the evidence for vouchers were more clearly positive, many students who are eligible for vouchers do not use them, and some who use them end up leaving private schools to return to public schools. Thus, whatever one’s view about vouchers, they should not be seen as a comprehensive solution for the problems of education (Usher & Kober, 2011, p. 48).

CHAPTER 3: STATES' CONSTITUTIONS AND CASE LAW

Introduction

The purpose of this study was to provide a qualitative analysis of the legal issues at the state and federal level governing the constitutionality of school voucher programs for students with disabilities in the United States and its impact on the Individual with Disabilities Education Act (IDEA). This research specifically studied the five states that currently have school voucher programs for students with disabilities: Arizona, Florida, Georgia, Ohio and Utah. Students with disabilities are participating in school voucher programs to attend private schools but private schools have few accountability and responsibilities under IDEA (2004) to monitor the students at the private schools.

First, a review of school voucher programs for students with disabilities in Arizona, Florida, Georgia, Ohio and Utah was examined. Second, a review of each states constitution was completed for the following states Arizona, Florida, Georgia, Ohio, and Utah that have developed school vouchers for students with disabilities. Third, a review of the litigation for the current school voucher programs at the state and federal level was completed. Finally, the impact of school voucher programs for students with disabilities on the Individuals with Disabilities Education Act was be analyzed.

In the U.S. Supreme court decision in *Simmons-Harris v. Zelman*, the court “held that publicly-funded school choice programs are consistent with the federal Establishment Clause so long as the program is the product of ‘true choice’” (Hensel, 2010, p. 8). Based on this court ruling, school vouchers for students with disabilities need to be review to determine if they are constitutional based on the states constitutions rather than the federal constitution.

Arizona

There have been two school vouchers for students with disabilities in Arizona: Arizona Scholarship for Pupils with Disabilities and Arizona Empowerment Scholarship Accounts. The Arizona Scholarship for Pupils with Disabilities was found unconstitutional and the Arizona Empowerment Scholarship Accounts currently exists. Both of these school vouchers for students with disabilities in Arizona will be discussed.

Arizona Scholarship for Pupils with Disabilities

In 2006, the Arizona Legislature passed an educational voucher program for students with disabilities called the Arizona Scholarship for Pupils with Disabilities (Carpenter & Peterson, 2007). Arizona House Bill 2676 provides all the regulations and criteria for the Arizona Scholarship for Pupils with Disabilities. The Arizona Scholarship for Pupils with Disabilities became effective on September 21, 2006.

The Arizona Scholarship for Pupils with Disabilities “provides pupils with disabilities with the option of attending any public school of the pupil’s choice or receiving a scholarship to any qualified private school of the pupil’s choice” (AZ HB 2676, 2006, n.p.). The eligibility criteria for the Arizona Scholarship for Pupils with Disabilities are : (1) the student needs to have attended a public school in Arizona the prior school year and the parent must have been accepted to a qualify school and notified the public school districts at least 60 days prior to the first scholarship payment (AZ HB 2676, 2006). A student who receives the Arizona Scholarship for Pupils with Disabilities maintains the scholarship until the student returns to a public school or graduates from high school (AZ HB 2676, 2006).

Arizona House Bill 2675 (2006) addresses the responsibilities of the public school districts and the Arizona Department of Education in regards to the Arizona Scholarship for Pupils with Disabilities. The first responsibility of the public school district is to notify parents of students with disabilities of all options regarding the Arizona Scholarship for Pupils with Disabilities including the opportunity of parents to enroll their students in another public or a private school (AZ HB 2676, 2006). The parent has the option to enroll the student at a participating private school or another public school that may include a public school in an adjacent school district. The parent needs to notify the public school district of their choice 60 days prior to the first scholarship payment (AZ HB 2676, 2006). If the parent chooses another public school, the public school must be able to implement the students IEP. A public school district needs to notify the Arizona Department of Education within ten days after the public school district receives notification from parents of their intent to apply for the Arizona Scholarship for Pupils with Disabilities (AZ HB 2676, 2006). Students who participate in the Arizona Scholarship for Pupils with Disabilities are eligible to participate in any statewide assessments. If a parent wants their child to participate in any statewide assessments the public school district needs to provide location and times of the statewide assessments to the parents (AZ HB 2676, 2006).

Arizona House Bill 2675 (2006) states that the only qualification of a private school to participate in the Arizona Scholarship for Pupils with Disabilities is that the private school needs to be located in the state of Arizona. The private school may be sectarian or nonsectarian (AZ HB 2676, 2006). The qualified private school does not have to alter its “creed, practices or curriculum” in order to accept students in the Arizona Scholarship for Pupils with Disabilities

program (AZ HB 2676, 2006, n.p.). It is the parent's responsibility to select a qualified private school and apply for admission of their child to the selected private school (AZ HB 2676, 2006).

Arizona House Bill 2675 (2006) addresses the responsibilities of program participants. Parents wanting to participate in the Arizona Scholarship for Pupils with Disabilities have the responsibility of selecting their school choice from the qualified schools provided by the state. The parent is also responsible of notifying the public school district of their choice 60 days prior to the first scholarship payment (AZ HB 2676, 2006). Students who participate in the Arizona Scholarship for Pupils with Disabilities must be in attendance at the qualified school and follow the schools written conduct policies (AZ HB 2676, 2006). Parents are responsible to comply with any parental involvement requirements by the qualified school. If the parent chooses for their child to participate in any statewide assessments, the parent is responsible of transporting their child to and from the assessment location (AZ HB 2676, 2006). The parent is responsible for endorsing all scholarship payments to the qualified school (AZ HB 2676, 2006). If parents violate any of these responsibilities, they could forfeit their eligibility to the Arizona Scholarship for Pupils with Disabilities.

Arizona House Bill 2675 (2006) details the funding and payment of the Arizona Scholarship for Pupils with Disabilities, "the maximum scholarship granted for a pupil with a disability shall be equivalent to the base support level prescribed in section 15-943 for that particular pupil" (AZ HB 2676, 2006, n.p.). Section 15-943 addresses the weighted student funding that takes into account the student's disability. The public school district needs to notify the Arizona Department of Education of all eligible students for payment of the Arizona Scholarship for Pupils with Disabilities (AZ HB 2676, 2006). After the Arizona Department of Education has approved all eligible students, the Superintendent of Public Instruction is to make

scholarship payments in four quarterly payments in dates selected by the Arizona Department of Education (AZ HB 2676, 2006).

Arizona Empowerment Scholarship Accounts

Senate Bill 1553 was signed by Arizona's Governor Brewer that created the Arizona Empowerment Scholarship Account for students with disabilities to attend private schools on April 12, 2011 (AZ SB 1553, 2011). A student is eligible for the Arizona Empowerment Scholarship Account if a student is eligible as having a disability under the IDEA or Section 504 of the Rehabilitation Act. The student needs to have attended a public school as a full time student in Arizona at least the first 100 days of the prior school year (AZ SB 1553, 2011).

The Arizona Empowerment Scholarship Accounts are developed in order to provide educational options for students with disabilities in Arizona. If a parent applied for an Arizona Empowerment Scholarship Account, the parent has to agree to the following criteria: (1) that the parent will ensure the student receives and education in at least the following subject areas: reading, grammar, mathematics, social studies and science; (2) ensure the student is not enrolled in a public school or charter school and release the public school district from any obligations to educate the child; (3) not to accept any other scholarship from a school tuition organization in the same year; and (4) use the funds provided by the scholarship account for the expenses approved the scholarship (AZ SB 1553, 2011). Accepted purposes to use the funds of the Arizona Empowerment Scholarship Account include: tuition and fees for qualified schools, textbooks, educational therapies or services from a licensed provider, tutoring from an accredited tutor, curriculum, tuition and fees for an online learning program, fees to take an achievement test, contributions to a qualified tuition program under federal law, tuition, fees, textbooks for an

eligible postsecondary institution, and fees for management of the scholarship account (AZ SB 1553, 2011).

A parent needs to annually renew the Arizona Empowerment Scholarship Account. The student can retain the Arizona Empowerment Scholarship Account “until the student graduates from a postsecondary institution or after any period of four consecutive years after high school graduation in which the student is not enrolled in an eligible postsecondary institution” (AZ SB 1553, 2011, n.p.).

Funding for the Arizona Empowerment Scholarship Account comes from the special education fund for students with disabilities in Arizona (AZ SB 1553, 2011). Eligible students receive an account in which the Arizona treasurer deposits 90 percent of state funds that would have been provided to the public school district. The Arizona Department of Education makes quarterly payments for eligible student to the Arizona Treasurer in order for the payments be made for the Arizona Empowerment Scholarship Account (AZ SB 1553, 2011).

Private schools participating in the Arizona Empowerment Scholarship Account are “not be required to alter its creed, practices, admissions policy or curriculum in order to accept students whose parents pay tuition or fees from an Empowerment Scholarship Account” (AZ SB 1553, 2011, n.p.). Based on the information from the Arizona Department of Education the Arizona Empowerment Scholarship Account provided “about 92 percent of the \$198,764 in scholarship funds spent in the first quarter of 2012 went to private schools” (Ryman, 2012, n.p.).

Arizona’s State Constitution

Arizona’s Blaine Amendment in the state constitution can be found in both Article II, §12. Article II, §12 of the Arizona State Constitution states:

The liberty of conscience secured by the provision of this constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony (n.p.).

Article IX, §7 of the Arizona State Constitution address the use of public funds:

Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state (n.p.).

Article IX, §10 of the Arizona State Constitution addresses the aid of church, private or sectarian school, or public service corporation. Article IX, §10 states that “no tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation” (Arizona Constitution, Article IX, §10).

Arizona Case Law

In November 14, 2006, school choice opponents filed suit against the constitutionality of the Arizona Scholarship for Pupils with Disabilities (Carpenter & Peterson, 2007). The two points the plaintiffs claimed were that the school voucher program violated Article II, § 12, that addresses the religion clause and Article IX, §10, that addresses the aid clause, of Arizona’s State Constitution (Hensel, 2010). In February 2007, the petitioners tried to have the school voucher

program stopped from being implemented but the trial court found the school voucher program “did not violate the provisions of the Arizona Constitution cited by Cain, and dismissed all of Cain’s claims with prejudice” (*Cain v. Horne*, 2008, p. 4).

The Superior Court in Arizona “upheld the scholarship program, concluding that it was constitutional” (Hensel, 2010, p. 9) based on the provision in Article II, § 12 and Article IX, §10. The Superior Court in Arizona supported the trial court’s decision that the Arizona Scholarship for Pupils with Disabilities “did not result in an appropriation of public money for, or an application of public money to, any religious worship, exercise, or instruction or to the support of any religious establishment in violation of Ariz. Const. art. II, §12” (*Cain v. Horne*, 2008, p.1).

The petitioners did not agree with the Superior Court of Arizona decision. The petitioners argued that the Arizona Scholarship for Pupils with Disabilities violates Article II, §12 and Article IX, §10 of the Arizona Constitution (*Cain v. Horne*, 2008). The Arizona Scholarship for Pupils with Disabilities violates Article II, §12: “no public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment” (Arizona Constitution, Article II, §12). This is the religion clause in the Arizona Constitution. The petitioners also state that the Arizona Scholarship for Pupils with Disabilities violates Article IX, §10, “the statutes are unconstitutional pursuant to the prohibitions in article IX, §10 of the Arizona Constitution, read either alone or in conjunction with other constitutional provisions establishing a system of public education” (*Cain v. Horne*, 2008, p. 5).

On appeal, the appellate court agreed that the school voucher program “violated the Aid Clause of the state constitution” (Hensel, 2010, p. 9). The court stated that “since parents are

required to endorse the funds directly to the qualified school, which thereafter manages the money as it sees fit” (Harmon, 2010, p. 238) then private schools determines how to spend the public funds without parent input. In 2009, the Arizona Supreme Court agreed with the decision of the appellate court. The Arizona Supreme Court stated that the Arizona Scholarship for Pupils with Disabilities “provided aid to private schools in violation of Ariz. Const. art. IX, §10” (*Cain v. Horne*, 2008, p.1). The Arizona Supreme Court declared that even though some of the public funds were provided to public schools there were still public funds directed aid private schools in violation of Article IX, §10 (*Cain v. Horne*, 2008). The Arizona Supreme Court ruled that the Arizona Scholarship for Pupils did not violate Article II, §12:

Where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause of the federal constitution. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits (*Cain v. Horne*, 2008, p. 3).

According to Hensel (2010)“because many state constitutions include provisions similar to those at stake in the Arizona litigation, the logic of this case may serve as a significant check to the establishment of voucher programs in the future” (p. 9).

The Arizona Supreme Court agreed with the trial court’s finding that the Arizona Scholarship for Pupils did “not result in an appropriation of public money for, or an application of public money to, any religious worship, exercise or instruction or to the support of any

religious establishment in violation of Article 2, Section 12 of the Arizona Constitution” (*Cain v. Horne*, 2008, p. 6).

Since the Arizona Scholarship for Pupils with Disabilities was found unconstitutional, the legislation enacted a new school voucher program for disabilities called the Arizona Empowerment Scholarship Account in 2011 and was implemented for the 2011-2012 school year. This new school vouchers for students with disabilities is being challenged due to the program violating “the Arizona Constitution because public money is going to private schools” (Ryman, 2012, n.p.). A Maricopa County Superior ruled early this year that the Arizona Empowerment Scholarship Account “did not violate the state Constitution because the money was first going to parents, who could then decide where to spend the funds (Ryman, 2012, n.p.). At the time of this research, this decision by the Maricopa County Superior court is being appealed (Ryman, 2012).

Supporters of the Arizona Empowerment Scholarship Account state that this school voucher program for students with disabilities is different from the Arizona Scholarship for Pupils that was found unconstitutional by the Arizona Supreme Court. According to Ryman (2012), the Arizona Scholarship for Pupils:

The state would give a check or other guarantee instrument to parents, who would endorse the payment of state funds to a private school. The Empowerment Scholarship Accounts are slightly different, with the state giving money to a student’s debit-card account; parents choose how to spend the funds on educational expenses (n.p.). Article IX, §10 of the Arizona Constitution, “does not bar programs that aid churches, private or sectarian schools, or public service corporations. It bars programs passed ‘in aid of’ those various institutions” (Keller, 2010, p. 243). The Arizona Empowerment Scholarship Account is currently

still being implemented in the state of Arizona. The results of the appellate courts would need to be monitored.

Florida

John M. McKay Scholarship Program

The John M. McKay Scholarship Program (McKay Scholarship) is a school voucher program for students with disabilities in Florida. Florida rule 6A-6.0970 addresses the requirements of the McKay Scholarship Program which allows student to attend a private school or another public school (John M. McKay Scholarships for Students with Disabilities Program, 2007). The McKay Scholarship was enacted in 1999 and was amended on April 21, 2009; November 12, 2009 and February 28, 2012 (John M. McKay Scholarships for Students with Disabilities Program, 2007). The state rule addresses ten points for the McKay Scholarship program: (1) application procedure for the scholarship; (2) option for a public school choice; (3) terms of scholarship; (4) funding of scholarship; (5) scholarship payments; (6) criteria for private school participation; (7) duties of the Commissioner; (8) process for complaints; and (9) process of inquiry (John M. McKay Scholarships for Students with Disabilities Program, 2007).

The scholarship application procedure in the original development of the McKay Scholarship starts with the parent filing an intent on the Florida Department of Education website for the scholarship. A key step in the intent process is for the parent to file the intent while the student is still enrolled in a Florida public school. Once the intent is received, the Florida Department of Education with the assistance of the public school districts determine if the student is eligible or not eligible for the McKay Scholarship. The first criterion of eligibility is to verify that the student has met the prior school year attendance requirement in a Florida public

school. Exemptions to this criterion are students whose parents are a member of the United States Armed Forces:

Who transferred to a school in this state from out of state or from a foreign country pursuant to a parent's permanent change of station orders and such transfer occurred less than one (1) full academic year from the time the notice of intent was filed (John M. McKay Scholarships for Students with Disabilities Program, 2007, n.p.).

The second criterion is if a valid intent was filed and the last criterion is determining the student is a student with a disability with an active Individual Education Plan (IEP).

The McKay Scholarship also provides parents the option to attend another public school other than their neighborhood school. Parents can choose another public school in their current school district or an adjacent school district (John M. McKay Scholarships for Students with Disabilities Program, 2007). The public school district can limit the choices of public schools due to school capacity or ability to provide the services documented on the student's IEP. Once the parent has provided the intent of the McKay Scholarship, it is the school districts responsibilities to determine if the student is eligible or not for the McKay Scholarship within 30 days of the intent date (John M. McKay Scholarships for Students with Disabilities Program, 2007).

Criteria for maintaining the McKay Scholarship is describe in section three of Florida Statute 6A-6.0970 (John M. McKay Scholarships for Students with Disabilities Program, 2007). A student may lose their McKay Scholarship if the student returns to public school. For the purpose of the scholarship returning to public school means "the enrollment of a McKay Scholarship student in a public school or public school program" (John M. McKay Scholarships for Students with Disabilities Program, 2007, n.p.). An eligible student maintains eligibility for the McKay Scholarship program "until a student returns to public school, graduates or turns

twenty-two, whichever comes first” (Hensel, 2010, p. 4). The Matrix of Services in Florida is a tool used to determine appropriate funding:

Consistent with the services identified through the Individual Educational Plan (IEP), family support plan, or Educational Plan (EP) process, the Matrix of Services was used to determine which one of five cost factors would apply to each eligible exceptional education student (John M. McKay Scholarships for Students with Disabilities Program, 2007, n.p.).

A Matrix of Services is completed for every intent submitted for students applying for the McKay Scholarship. The school district needs to complete the Matrix of Services within 15 days from the intent date (John M. McKay Scholarships for Students with Disabilities Program, 2007).

The next section of Florida Statute 6A-6.0970, addresses the payments for the McKay Scholarship. This section details “information related to scholarship payments including timeframes, eligibility, and Departmental procedures” (John M. McKay Scholarships for Students with Disabilities Program, 2007, n.p.). The Florida Department will make scholarship payments on or before September 1, November 1, February 1, and April 1 of each school year for eligible students to the private school the student is attending (John M. McKay Scholarships for Students with Disabilities Program, 2007). In order for students to be eligible for scholarship payments: (1) a notice of intent for the McKay Scholarship must have been filed 60 days prior to the first payment date; (2) the student must have been enrolled at a private school 30 days prior to the first payment date; (3) the student must not be enrolled at a public school; and (4) “the private school must verify each student’s continues enrollment and attendance using the Department’s website three times per year before the November, February, and April scholarship payments” (John M. McKay Scholarships for Students with Disabilities Program, 2007, n.p.). It

is the responsibility of private school and Office of School of Choice to determine if funds are sent by mistake. If funds are not returned to the Office of School of Choice that was sent by mistake to the private school could result in the initiation of noncompliance procedures by the Office of School of Choice (John M. McKay Scholarships for Students with Disabilities Program, 2007).

The criteria for a private school to participate in the McKay Scholarship program is as follows: (1) they need to register with the Florida Department's of Education website; (2) complete an annual survey that that private school verify that they have met the states background check requirements; (3) the private school meets all requirements for private schools based on Rule 6A-6.03315, F.A.C.; and (4) adheres to all statutory and rule requirements of the McKay Scholarship (John M. McKay Scholarships for Students with Disabilities Program, 2007, n.p.).

The Commissioner has several duties based on Florida Statute 6A-6.0970 of the McKay Scholarship program. The Commissioner can issue a letter of noncompliance if the private school is not abiding by any of the McKay Scholarship regulations. The Commissioner can also deny, suspend or revoke a private school from participating in the McKay Scholarship program. Lastly, the Commissioner can suspend payments to private school if they are not abiding by the McKay Scholarship regulations (John M. McKay Scholarships for Students with Disabilities Program, 2007).

There is a process a complaint can be made to the Florida Department of Education if a private school is not abiding by the McKay Scholarship regulations. Any person can file a complaint with the Florida Department of Education. Once the complaint is received at the Florida Department of Education, the department will determine if the complaint is valid. If the

complaint is found to be valid, an inquiry will be started. The Florida Department of Education is responsible to provide results of inquiry to the complainant (John M. McKay Scholarships for Students with Disabilities Program, 2007). If an inquiry is started, the Commissioner needs to follow guidelines based on Florida Statute 6A-6.0970 (John M. McKay Scholarships for Students with Disabilities Program, 2007). At any point in the process of the inquiry, the Commissioner can suspend any payments to the private school.

Florida Statute 6A-6.0970, that addresses the McKay Scholarship, has been amended three times since its implementation in 2007. The first amended occurred in April 21, 2009. The changed made to the statute was in regards to scholarship payments. It was amended to state that a private school can make claims to missed scholarship payments “by June 1 of the fiscal year in which the scholarship payment was originally due” (John M. McKay Scholarships for Students with Disabilities Program, 2007, n.p.).

The second amendment of the Florida Statute 6A-6.0970 occurred in November 12, 2009. Several changes were made to the statute for the McKay Scholarship program. The first amendment is requiring parents provide an affidavit to affirm the validity of the parent’s signature (John M. McKay Scholarships for Students with Disabilities Program, 2007). This was added since the parents have to consign the scholarship payments prior to the private school receiving the funds. The requirements in regards to the procedures for returning funds to the Florida Department of Education were added for private schools to follow. The inquiry process was also amended to include parents’ responsibilities and allowing the Florida Department of Education to “conduct a site audit/inspection as appropriate” of participating private schools (John M. McKay Scholarships for Students with Disabilities Program, 2007, n.p.).

The last amendment to the McKay Scholarship statute was made on February 28, 2012. Two changes were made to the McKay Scholarship. The first amendment was to allow students with a 504 accommodation plan to be eligible to participate in the McKay Scholarship program, unless the accommodation plan has a duration of 6 months or less (John M. McKay Scholarships for Students with Disabilities Program, 2007). The other amendment to the McKay Scholarship program was to extend the period students enter the Department of Juvenile Justice detention center from 15 to 21 days without revoking their eligibility for the McKay Scholarship (John M. McKay Scholarships for Students with Disabilities Program, 2007).

Based on the information from the Florida Department of Education School Choice Office, during the 2010-2011 school year \$148.5 million of public funds was paid for students with disabilities to attend a private school on the McKay Scholarship program (Florida Department of Education, 2011). The number of students with disabilities attending a private school on the McKay Scholarship program for the 2010-2011 school year was 22,198 (Florida Department of Education, 2011). The number of participating private schools in the McKay Scholarship program for this same school year was 1,013 (Florida Department of Education, 2011). Out of this number of participating private schools in the McKay Scholarship program, 64% were religious schools and 36% were non-religious schools (Florida Department of Education, 2011). The majority of students with disabilities attending a private school on the McKay Scholarship program attend a religious private school, 57% (Florida Department of Education, 2012).

Florida State Constitution

In Florida's state constitution, Article I, § 3, it states that "no revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution" (p. 2). This section of the Florida Constitution is very specific in stating that public funds should not be used to directly or indirectly aid any religious institution. The no-aid provision in Article I, § 3 was added to the Florida Constitution in 1868, the "goal was to prevent the Legislature from using money from the public treasury to fund sectarian schools" (Kahn, 2006, p. 838). According to Kahn (2006), the number of states that have a similar provision in their states constitution is over 40 (Kahn, 2006, p. 838). The reason Article I, § 3 was adopted to the Florida Constitution "was to bar the use of public funds to support religious schools" (*Bush v. Holmes*, 2004, n.p.).

Article IX, § 1, of the Florida state constitution states "it is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders" (p. 35). This means that the state of Florida has the responsibility to provide an acceptable education for all children residing within the state. Article IX, § 1 of the Florida Constitution continues to explain what adequate provision means:

Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require (p. 35).

This clause to the Florida Constitution has been expanded over time to ensure the importance of public education in Florida. In 1998, there was an amendment to Article IX, § 1, this amendment

“added the third sentence of the education clause, specifically addressing the uniformity, security, safety, and quality of the public school system” (Kahn, 2006, p. 835-836).

Article IX, § 6, of the Florida state constitution states “the income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools” (p. 35-36). This supports the idea that public school funds are to be used for public schools and not to support private schools.

Florida Case Law

To current date of this research there is no case law in regards to the constitutionality of the McKay Scholarship program, a school voucher for students with disabilities. Case law is documented in regards to Florida’s other school voucher program the Opportunity Scholarship Program (OSP). The case law of the OSP provides some insights in regards to future case law on the McKay Scholarship program or other school voucher programs in Florida and will be discussed in this section.

The Opportunity Scholarship Program began when Florida developed the A+ Plan for Education in 1999. Public schools were given a grade from A-F, largely depending on the performance of students in the Florida Comprehensive Achievement Test (FCAT). If a school received an F in two out of four years and had an F in the current year, students became eligible for the Opportunity Scholarship Program (OSP). The scholarship allowed the students to attend a different public school or a private school of the parent’s choice. The school voucher program was funded by the state providing the amount of funds that the school district would have received for the student to the parent’s private school choice.

Plaintiffs filed suit in Florida circuit court stating that the OSP violated the Article 1, §3 and Article IX, §1 of the Florida Constitution “as well as the Establishment Clause of the First Amendment to the United States Constitution” (*Bush v. Holmes*, 2004, n.p.). In the first trial court of this case, the court ruled that the OSP “establishes a program through which the State pays tuition for certain students to attend private schools, is declared to be unconstitutional on its face under Article IX, §1 of the Florida Constitution” (*Bush v. Holmes*, 2004, n.p.). This ruling was appealed and reversed. The appeal court stated “that nothing in Article IX, §1 clearly prohibits the Legislature from allowing the well-delineated use of public funds for private school education, particularly in circumstances where the Legislature finds such use necessary” (*Bush v. Holmes*, 2004, n.p.). The court remanded the case back to the trial court to determine the remaining issues, including if the OSP violated Florida’s Constitution Article I, § 3 (*Bush v. Holmes*, 2004).

During the time period the case was awaiting in trial court to determine the remaining issues, the United States Supreme Court ruled on the *Simmons-Harris v. Zelman* case which challenged the constitutionality of the Ohio Pilot Project Scholarship Program based on the Establishment Clause of the Federal Constitution. In the *Simmons-Harris v. Zelman*, the United States Supreme Court held the Ohio Pilot Project Scholarship Program was constitutional under the Establishment Clause of the Federal Constitution (*Simmons-Harris v. Zelman*, 2002). Soon after this ruling, the plaintiffs of the *Bush v. Holmes* case dismissed their “challenges under the Establishment Clause of the First Amendment to the United States Constitution and under Article IX, Section 6 of the Florida Constitution” (*Bush v. Holmes*, 2004, n.p.). The plaintiffs continued their suit based on that the OSP violated the Article 1, §3 of the Florida Constitution (*Bush v. Holmes*, 2004).

The OSP was also challenged in the courts because it violated Florida Constitution Article 1, §3. Florida's Constitution Article I, § 3 is very similar to the Federal Constitution Establishment Clause. Article I, § 3 of the Florida Constitution states that "no revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution" (p. 2). This added language in the Article I, § 3 of the Florida Constitution, "expands the restrictions in state aid and to religion by specifically prohibiting the expenditure of public funds directly or indirectly to aid sectarian institutions" (*Bush v. Holmes*, 2004, n.p.).

In the OSP, "a state warrant is made payable to a student's parent or guardian and is mailed to the private school chosen by the parent or guardian; the parent or guardian then is to restrictively endorse the warrant to the private school" (*Bush v. Holmes*, 2004, n.p.). The private schools that were participating on the OSP program were required to meet specific requirements in order to participate in the OSP. One of those requirements was to agree "not to compel any student attending the private school on an opportunity scholarship to profess a specific ideological belief, to pray, or to worship" (*Bush v. Holmes*, 2004, n.p.).

When reviewing the *Bush v. Holmes* (2004), the First District Court of Appeal in Florida utilized three elements to determine the constitutional prohibition of the no-aid provision in Article I, § 3 of the Florida Constitution:

(1) the prohibited state action must involve the use of state tax revenues; (2) the prohibited use of state revenues is broadly defined, in that state revenues cannot be used directly or indirectly in aid of the prohibited beneficiaries; and (3) the prohibited beneficiaries of the use of state revenues are any church, sect or religious denomination or any sectarian institution" (*Bush v. Holmes*, 2004, n.p.).

The First District Court of Appeal in Florida also considered the Lemon Test used in the Federal Establishment Clause. The Establishment Clause three parts to the Lemon test are: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster an excessive government entanglement with religion” (*Bush v. Holmes*, 2004, n.p.). The difference the court needed to take into account is that the Florida Constitution Article I, § 3 “adds a fourth: The statute must not authorize the use of public moneys, directly or indirectly, in aid of any sectarian institution” (*Bush v. Holmes*, 2004, n.p.). Before beginning its examination of the OSP program, the First District Court of Appeal in Florida noted that the Blain Amendment in the Florida Constitution is more restrictive than others “not only limiting its prohibition to direct funding of religious schools, but also preventing the State from indirectly providing public money to these institutions” (Kahn, 2006, p. 838-839).

When considering the second component of the Lemon test, the court considered if “there is a distinction between those programs which provide aid directly to religious schools and those programs which provide aid by means of genuine and independent private choice of an individual” (*Bush v. Holmes*, 2004, n.p.). Supporters of school voucher programs believe that if the aid provided was to support the independent choice of a parent to select a private school this would not violate the Establishment Clause (*Bush v. Holmes*, 2004). But the trial court did not agree with this argument. The trial court expressed that just because the state provides public funds to a parent of a student eligible for the voucher and the parent endorses the funds to a private school of choice, OSP may still “directly or indirectly benefit any particular church, religious denomination or sectarian institution” (*Bush v. Holmes*, 2004, n.p.). Based on this interpretation, the trial court ruled that the OSP was unconstitutional (*Bush v. Holmes*, 2004).

The trial court found three reasons to determine the OPS was unconstitutional. The first reason the trial court stated focused on the no-aid provision which “focuses on the use of state funds to aid sectarian institutions, not on other types of support” (*Bush v. Holmes*, 2004, n.p.). The trial court determined that undisputedly the OSP provides state funds for students to attend a private school of the parent’s choice. The court explained that “this use of state revenues which distinguishes the OSP from the facts in other cases in which the state has provided assistance to a religious or secular institution” (*Bush v. Holmes*, 2004, n.p.).

The second reason the trial court determined the OPS was unconstitutional was that providing state funds to parent to choose a private school for their child to attend indirectly violated the no-aid fund of Article I, § 3 of the Florida Constitution. The court explained that:

The legislature need not use state revenues to provide direct financial aid to sectarian institutions for the OSP to violate the no-aid provision. An indirect or secondary benefit to sectarian institutions from the use of state funds would be sufficient to violate the provision (*Bush v. Holmes*, 2004, n.p.).

The last reason the trial court determined the OPS was unconstitutional was based on the no-aid provision Article I, § 3 which states “the no-aid provision prohibits not only aid to ‘any church, sect or religious denomination’, but also aid to ‘any sectarian institution’” (*Bush v. Holmes*, 2004, n.p.). The OSP could provide school vouchers for students to attend a non-sectarian school but could not support sectarian schools which are considered a sectarian institution (*Bush v. Holmes*, 2004). The appellate court in final summary stated that OSP:

Violates the no-aid provision found in the last sentence of article I, section 3 of the Florida Constitution because the OSP uses state revenues to aid sectarian schools. We hold that the no-aid provision does not violate the federal Free Exercise Clause (*Bush v. Holmes*, 2004, n.p.).

The appellate court strongly felt they could not ignore the no-aid of Article I, § 3 of the Florida Constitution even if they agree with parent's choice to select their child school. The court stated that it would not be responsible to argue that the public funds provided in the OSP is not assisting the private schools participating in the program. These participating private schools' mission which includes a religious component are "advanced and enhanced by the additional, financial support received through operation of the Opportunity Scholarship Program" (*Bush v. Holmes*, 2004, n.p.). The appellants did not dispute the fact that state funds are provided to private schools, the majority religious, participating in the OSP. The court suggested that "if Floridians wish to remove or lessen the restrictions of the no-aid provision, they can do so by constitutional amendment" (*Bush v. Holmes*, 2004, n.p.).

Appellants in the *Bush v. Holmes* case responded to the First District Court of Appeal opinion in ruling the OSP unconstitutional. The appellants first argued that the OSP does not violate the no-aid provision because the state funds are provided to the parents and not the private schools. The appellants stated that it is the parent who is implementing their right to choose the state funds to pay tuition at a private school (*Bush v. Holmes*, 2004). The appellants continued to state that the private schools participating in the OSP do not benefit from the voucher funds. Since the voucher funds may not cover the total cost of the private school tuition, the parents would be responsible to pay the remaining amount. This led the appellants to reason "that the voucher payments cannot constitute 'aid' as a matter of law" based on the no-aid provision of the Florida Constitution (*Bush v. Holmes*, 2004, n.p.).

Another point the appellants expressed was in regards to excluding religious private schools from participating on the OSP. Appellants stated that excluding the religious private schools from the OSP, they would be violating the Free Exercise Clause of the First Amendment

(*Bush v. Holmes*, 2004). The court responded to this argument by stating that the “Florida’s no-aid provision, Florida Constitution Article I, § 3, can preclude state financial aid to religious institutions without violating either the Establishment Clause or Exercise Clause” (*Bush v. Holmes*, 2004, n.p.). The court went further to state that a state constitution can be more stringent than the United States Constitution (*Bush v. Holmes*, 2004). The courts in Florida usually interpret Florida’s Free Exercise Clause as equal to the Federal Free Exercise Clause (*Bush v. Holmes*, 2004). The court explained that since the Establishment Clause, the Free Exercise Clause and the no-aid provision are all included in Article I, § 3 of the Florida Constitution, “it seems clear that its drafters intended the three clauses to be read as a whole” (*Bush v. Holmes*, 2004, n.p.). With this in mind the court declared that “it is well-established that constitutional provisions must be read in pari material to form a congruous whole so as not to render any language superfluous” (*Bush v. Holmes*, 2004, n.p.). The court determined that “the no-aid provision does not violate the federal Free Exercise Clause” (*Bush v. Holmes*, 2004, n.p.).

The appellants felt that schools are not different than other state supported programs under Article I, §3 of the Florida Constitution. The appellant opinion was that the OSP is no different than other state funded programs that fund “affiliated or operated health care institutions providing free or subsidized medical care”. (*Bush v. Holmes*, 2004, n.p.). The appellants presented other examples in which state funds are used to support religious based institutions like “organization for preservation of historic structures, rent paid to churches for use of their facilities as polling places, and government subsidized pre-K or childcare programs operated by churches or faith-based organizations” (*Bush v. Holmes*, 2004, n.p.).

The court responded to the appellant's statement that schools are not different than other state supported programs under Article I, §3 of the Florida Constitution by explaining the difference of the other state supported programs and the OSP:

Tax exemptions and general subsidies are qualitatively different than the payment of state funds. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, in the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches, while in the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions (*Bush v. Holmes*, 2004, n.p.).

With taking everything into account the Florida First District Court of Appeal ruled that:

There is no dispute in this case that state funds are paid to sectarian schools through the OSP vouchers. Thus, we hold the OSP unconstitutional under the no-aid provision to the extent that the OSP authorizes state funds to be paid to sectarian schools (*Bush v. Holmes*, 2004, p. n.p.).

After the decision by the Florida First District Court of Appeal, the case was appealed by Governor Bush to the Supreme Court in Florida. The Supreme Court of Florida was to consider "whether the State of Florida is prohibited by the Florida Constitution from expending public funds to allow students to obtain a private school education in kindergarten through twelve, as an alternative to a public school education" (*Bush v. Holmes*, 2006, n.p.).

The OSP was challenged for violating two sections of Article IX of the Florida Constitution. It was first challenged in that it violated the Florida's Constitution to "provide by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows to obtain a high quality education" (Hensel, 2010, p. 7). The OSP was also challenged due

to “the public support of private schools violated Article IX, § 6 of the state constitution” (Hensel, 2010, p. 7). Article IX, § 6 of Florida’s constitution states “the income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools” (p. 35-36).

The Florida Supreme Court in 2006 “held that the Opportunity Scholarship was in ‘direct conflict’ with Article IX, §1 (a)’s mandate to provide ‘a uniform, efficient, safe, secure, and high quality system of free public school’” (Hensel, 2010, p. 8). The Florida Supreme Court determined that “because the state lacked oversight over the private schools and teachers participating in the program, it could not guarantee the uniformity required by the state constitution” (Hensel, 2010, p. 8). The Florida Supreme Court focused on the second and third sentence of Article IX, §1 (a). The Florida Supreme Court ruled that “second and third sentences must be read in pari material, rather than as distinct and unrelated obligations” (*Bush v. Holmes*, 2006, n.p.). These two sentence would need to be interpret together in order to understand the full purpose of Article IX, §1 (a), “The provision should be construed as a whole in order to ascertain the general purpose and meaning of each part; each subsection, sentence and clause must be read in light of the others to form a congruous whole” (*Bush v. Holmes*, 2006, n.p.).

By interpreting these two sentences together of Article IX, §1 (a), the Florida Supreme Court concluded:

The OSP is in direct conflict with the mandate in article IX, section 1 (a) that it is the state’s ‘paramount duty’ to make adequate provision for education and that the manner in which this mandate must be carried out is ‘by law for a uniform, efficient, safe, secure, and high quality system of free public schools’ (*Bush v. Holmes*, 2006, n.p.).

The Florida Supreme Court continued by stating that the OSP takes public funds earmarked for public school to pay for a private education. The education provided at the private

school is usually the same basic education (*Bush v. Holmes*, 2006). By removing these public funds from public schools it affects the “adequate provision for the education of children” (*Bush v. Holmes*, 2006, n.p.). The defendants claim that the OSP “supplement the public education system” and does not affect the adequate provision of education (*Bush v. Holmes*, 2006, n.p.). The OSP does the opposite and “undermines the system of ‘high quality’ free public schools that are the sole authorized means of fulfilling the constitutional mandate to provide for the education of all children residing in Florida” (*Bush v. Holmes*, 2006, n.p.). By providing funds for students to attend private schools, the OSP sets up public schools to compete for funds with private schools. In addition the Florida Supreme Court stated, “funding these private schools does not promote a ‘uniform’ system because some of the state’s educational standards that are imposed on public schools do not apply to the private school” (Guilfoyle, 2007, p. 1336-1337).

Another important point made by the Florida Supreme Court is that the OSP does not regulate the quality of education provided to students attending attend the private schools. By not regulating the private schools participating in the OSP, “the OSP makes no provision to ensure that the private school alternative to the public school system meets the criterion of uniformity” (*Bush v. Holmes*, 2006, n.p.). Additionally, the Florida Supreme Court observed that even though the students participating in the OSP must participate in the statewide assessments required of public school students, “the private school’s curriculum and teachers are not subject to the same standards as those in force in public schools” (*Bush v. Holmes*, 2006, n.p.). The Florida Supreme Court further supported their decision that the OSP is unconstitutional based on Article IX, §6. Article IX, §6 states that all public funds addressed are to be used “only to the support and maintenance of free public school” (p. 36). The Supreme concluded in their ruling that:

Because we conclude that section 1002.38 violates article IX, section 1 (a) of the Florida Constitution, we disapprove the First District’s decision in *Holmes I*. We affirm the First District’s decision finding section 1002.38 unconstitutional in *Holmes II*, but neither approve or disapprove the First District’s determination that the OSP violates the ‘no aid’ provision in article I, section 3 of the Florida Constitution, an issue we decline to reach. In order not to disrupt the education of students who are receiving vouchers for the current school year, our decision shall have prospective application to commence at the conclusion of the current school year (*Bush v. Holmes*, 2006, p. 16).

Georgia

Georgia Special Needs Scholarship Program

Georgia’s Senate Bill 10 was signed into law on May 18, 2007 that created the Georgia Special Needs Scholarship Program (Georgia Department of Education, 2012). The purpose of this bill was to provide parents with students with disabilities the choice to determine the best educational placement “that will best serve the interests and educational needs of their children (Georgia Department of Education, 2012, n.p.). Parents can choose to send their child to another public school other than their residence school as long as the public school choice has the available space and are able to implement the child’s IEP (Georgia Department of Education, 2012). Parents can also use the scholarship to attend one of the state’s school for the deaf and blind or send their child to a private school participating in the Georgia Special Needs Scholarship Program (Georgia Department of Education, 2012). The Georgia Special Needs Scholarship Program “will continue as long as it is authorized and funded in state law” (Georgia Department of Education, 2012, n.p.).

A student is eligible for the Georgia Special Needs Scholarship Program if they meet five criteria set forth in Georgia’s Senate Bill 10. The first criterion is that the students needs to reside

in Georgia and has been a resident for at least one year (Georgia Department of Education, 2012). The second criterion is that “the student has one or more of the following disabilities: autism; deaf/blind; deaf/hard of hearing; emotional and behavioral disorder; intellectual disability; orthopedic impairment; other health impairment; specific learning disability; speech-language impairment; traumatic brain injury; or visual impairment” (Georgia Department of Education, 2012, n.p.).

The third criterion is that the student must have attended a public school in Georgia the prior school year and has an active IEP. A preschool student that is receiving special education and related services does not qualify for the Georgia Special Needs Scholarship Program. The student needs to attend a complete full year in kindergarten in order to be eligible for the Georgia Special Needs Scholarship Program (Georgia Department of Education, 2012). The fourth criterion is that the parent has obtained acceptance of their child to a participating private school in the Georgia Special Needs Scholarship Program. The last criterion is that the parent has completed and submitted an application for the Georgia Special Needs Scholarship Program by the deadline established by the Georgia Department of Education (Georgia Department of Education, 2012). For the 2010-2011 school year, there were 2,550 students enrolled in the Georgia Special Needs Scholarship Program attending a private school (Georgia Department of Education, 2012).

Once a student receives the Georgia Special Needs Scholarship, they keep the scholarship until the student returns to their assigned residence public school, “graduates from high school, or reaches the age of 21, whichever occurs first” (Georgia Department of Education, 2012, p. 4). A student can forfeit the Georgia Special Needs Scholarship if a parent:

Fails to endorse the scholarship payment to the private school within the 30 days provided; refuses to endorse the scholarship payment to the private school for deposit into the account of the participating school; enrolls the student in a non-participating private school; re-enrolls the student in a public school; places the student in a home school setting; or is no longer a resident of Georgia (Georgia Department of Education, 2012, n.p.).

The scholarship may also be forfeited when the student:

Does not remain in attendance at a private school throughout the school year; is expelled from a private school and does not enroll in another participating private school within 30 calendar days; or enrolls in a school operating for the purpose of providing educational services to youth in any Department of Juvenile Justice program (Georgia Department of Education, 2012, n.p.).

Once a parent accepts the Georgia Special Needs Scholarship, they assume any other financial responsibility from the private school including transportation cost (Georgia Department of Education, 2012). A student who participates in the Georgia Special Needs Scholarship can take the state-wide assessments if requested by the parent but this is not mandatory to maintain the scholarship (Georgia Department of Education, 2012). Parents could be responsible for paying the cost of “providing special accommodations such as materials and personnel costs for providing one-on-one administration” of the state wide assessments (Georgia Department of Education, 2012, n.p.). A parent acceptance of the Georgia Special Needs Scholarship “shall have the same effect as a parental refusal to consent for services pursuant to the Individuals with Disabilities Act” (Georgia Department of Education, 2012, p. 4). Therefore, the private schools are not required to provide special education and related services for students participating in Georgia Special Needs Scholarship Program.

In order for private schools to participate in the Georgia Special Needs Scholarship Program, they need to be approved by the Georgia Department of Education as meeting all the

following requirements. The first requirement is that the private school is located in Georgia and students have direct contact with teachers (Georgia Department of Education, 2012). The teachers at the private school must “hold a bachelor’s degree or higher degree or have at least three years of experience in education or health and annually provide parents the relevant credentials of the teachers who will be teaching their students” (Georgia Department of Education, 2012, p. 5). The next requirement is that the private school demonstrates fiscal soundness. The private school must also comply with antidiscrimination provisions and health and safety laws (Georgia Department of Education, 2012). The last requirement private schools need to comply with in order to participate in the Georgia Special Needs Scholarship Program is to regularly report to the parents and Georgia Department of Education the academic progress of students. The academic progress needs to be assessed by using pre-test and post-test for students participating in the Georgia Special Needs Scholarship Program. The private school decides on the specific type of assessment they will use (Georgia Department of Education, 2012). Private schools are not required to make changes to their curriculum or program of instruction in order to participate in the Georgia Special Needs Scholarship Program (Georgia Department of Education, 2012). For the 2010-2011 school year, 190 private schools were participating in the Georgia Special Needs Scholarship Program (Georgia Department of Education, 2012).

Funding provided to students participating in the Georgia Special Needs Scholarship Program is the “amount equivalent to the costs of the educational program that would have been provided for the students in the resident school system” (Georgia Department of Education, 2012, p. 6). Federal and local funds are not included in the scholarship funding (Georgia Department of Education, 2012). The parents and participating private school received payment from the Georgia Department of Education as follows:

Payment to the parents must be made by individual warrant made payable to the student's parent and mailed by the department to the participating school of the parent's choice, and the parent shall restrictively endorse the warrant to the participating school for deposit into the account of such school (Georgia Department of Education, 2012, p. 7). Funding for the Georgia Special Needs Scholarship Program ranges from \$2,500-\$13,500 with the average scholarship amount being \$6,000 (Georgia Department of Education, 2012).

The Georgia Department of Education completes an end of the year report in regards to the Georgia Special Needs Scholarship Program every school year. The latest end of the year report for the Georgia Special Needs Scholarship Program posted on the Georgia Department of Education website is for the 2009-2010 school year. Based on this report here are some program highlights:

Number of participating private schools increased from 145 private schools in 2008-2009 to 168 private schools in 2009-2010, an increase of 23 schools. The average number of students enrolled in private school was 13; the range of students enrolled in each private school was 1-76; and 13 private schools did not enroll any students under the Georgia Special Needs Scholarship Program (Georgia Department of Education, 2010, p. 1). This end of the year report also documents that public school participation in the Georgia Special Needs Scholarship Program increased.

At the start of the 2009-2010 school year there were 2, 068 students attending a private school on the Georgia Special Needs Scholarship Program (Georgia Department of Education, 2010). Of those 2, 068 students attending a private school, private schools reported math assessments for 1,798 and reading assessments for 1,789 students (Georgia Department of Education, 2010). Some students were not reported for assessments due to student leaving the private school prior to the pre-and post-assessments (Georgia Department of Education, 2010).

The results of the private school assessments are based on the self-reported information the private schools provide to the Georgia Department of Education.

For the 2009-2010 school year, the private schools participating in the Georgia Special Needs Scholarship Program reported the following:

In math: 12% of their students showed progress of less than one year; 25% of their students showed no progress; 38% of their students showed progress of one school year; and 25% of their students showed progress of more than one school year.

In reading: 10% of their students showed progress of less than one year; 25% of their students showed no progress; 38% of their students showed progress of one school year; 27% of their students showed progress of more than one year (Georgia Department of Education, 2010, p. 2).

The end of the year report for the 2009-2012 also addressed the amount of funding paid for the Georgia Special Needs Scholarship Program. The total amount paid for the 2009-2010 school year for the Georgia Special Needs Scholarship Program was \$12,641,932 (Georgia Department of Education, 2010). The average amount paid for a scholarship was \$6,342 (Georgia Department of Education, 2010). The range of scholarship amounts was from \$2,580 to \$15,100 (Georgia Department of Education, 2010).

Georgia's State Constitution

The significant article in the Georgia State Constitution that may have an impact on the constitutionality of the Georgia Special Needs Scholarship Program is Article I, §1. In Georgia's State Constitution Article I, §1, paragraph IV:

No inhabitant of this state shall be molested in person or property or be prohibited from holding any public office or trust on account of religious opinions; but the right of

freedom of religion shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state (p.1).

Georgia Case Law

As of date of this research, there is no case law on this school voucher program for students with disabilities.

Ohio

Autism Scholarship Program

In Ohio, the Autism Scholarship Program was enacted effective July 1, 2009 based on Chapter 3301-103 of the Ohio Administrative Code (Ohio Department of Education, 2012). The Autism Scholarship Program was developed:

To permit the parent of a qualified special education child the choice to send the child to a special education program, instead of the one operated by or for the school district in which the child is entitled to attend school, to receive the services prescribed in the child's IEP once the IEP is finalized" (Ohio Department of Education, 2012, p. 4).

A student is eligible for the Autism Scholarship Program by meeting five eligibility requirements. The first requirement is that student has been identified as a child with autism by the public school district (Ohio Department of Education, 2012). For the purpose of this scholarship program "a child who has been identified as having a pervasive developmental disorder-not otherwise specified (PDD-NOS)-shall be considered to be a child with autism" (Ohio Department of Education, 2012, p. 6). The second requirement is that the student needs to have a current IEP developed by the public school district. The third requirement of the Autism

Scholarship Program is that the current IEP developed by the public school district is finalized and all parties are in agreement. There should be no pending administrative or mediations in regards to the IEP developed by the public school district (Ohio Department of Education, 2012).

The fourth requirement is that the student needs to be between three and twenty-one years old.

The last requirement is that:

The child either was enrolled in the school district in which the child is entitled to attend school (school district of residence) in any grade from preschool through twelve in the school year prior to the year in which a scholarship is first sought for the child or is eligible to enter school in any grade preschool through twelve in the school district in which the child is entitled to attend school (school district of residence) in the school year in which a scholarship is first sought for the child (Ohio Department of Education, 2012, p. 7).

If a parent wants to apply for the Autism Scholarship Program they need to complete and submit an application to the Ohio Department of Education. Parents need to include the following documents with their application “the current IEP; the evaluation team report of the current evaluation; all progress reports and interim reports from the previous school year; and the previous year’s IEP” (Ohio Department of Education, 2012, p. 6). This application process needs to be submitted annually. The Ohio Department of Education will notify parents of the approval or disapproval of the application in writing.

Even when a student with a disability is accept in the Autism Scholarship Program the school district of residence still has many responsibilities. First responsibility is that the school district of residence is responsible for the evaluation, reevaluation and IEP for students participating in the Autism Scholarship Program (Ohio Department of Education, 2012). The district of residence is not responsible for providing FAPE to a student with a disability participating in the Autism Scholarship Program (Ohio Department of Education, 2012).

Parents of students participating in the Autism Scholarship Program have the right to file complaints and due process requests. The parents can file a complaint to the Ohio Department of Education if the parents claim that the private provider has violated any requirements under the Autism Scholarship Program (Ohio Department of Education, 2012). Parents can also file a due process request if the parent claims that the schools district of residence did not follow the requirements under the IDEA 2004 Act (Ohio Department of Education, 2012).

The third responsibility of the school district of residence is the assessment of students participating in the Autism Scholarship Program. Students participating in the Autism Scholarship Program “will participate in state assessments in accordance with rules of the state board of education regarding participation in assessments” (Ohio Department of Education, 2012, p. 10). The last responsibility of the school of residence is to report to the Ohio Department of Education of any students withdrawing from the Autism Scholarship Program and reenrolling at the public school district (Ohio Department of Education, 2012).

The Autism Scholarship Program also has responsibilities for parents whose children will be participating in the program. The parent needs to be responsible for guaranteeing that the Ohio Department of Education “has at all times current contact information for the parent and child and providers who are implementing the child’s individualized education program and current information about the status of the child’s participation in the autism scholarship program” (Ohio Department of Education, 2012). The parent is also responsible for providing the new providers information if the parent moves a student participating in the Autism Scholarship Program from one private provider to another or adds any new private provider (Ohio Department of Education, 2012).

The parent of a student participating in the Autism Scholarship Program is responsible of notifying the Ohio Department of Education is the child moves to a new school district of residence. If a parent of a student participating in the Autism Scholarship Program “decides to withdraw the child from the program, the parents shall provide notice of the withdrawal to the school district of residence, the providers, and the office for exceptional children, Ohio Department of Education” (Ohio Department of Education, 2012, p. 12).

The Ohio Department of Education developed some procedures for providers that want to participate in the Autism Scholarship Program. The first step a provider needs to pursue is to register with the Ohio department of Education and meet their requirements as a provider. Another step a provider needs to complete in order to participate in the Autism Scholarship Program is:

A private provider, who wishes to continue to provide special education and related services to children in the autism scholarship program in the succeeding fiscal year, must submit a completed new application for the succeeding year that includes an affidavit, prescribed by the Ohio Department of Education, in which the private provider swears or affirms that the private provider continues to meet all requirements for registration. The Ohio Department of Education must receive all applications and affidavits by July first of the current year from private providers who wish to participate in the autism scholarship program for the current program year that begins July first (Ohio Department of Education, 2012, p. 17).

Private providers who want to participate in the Autism Scholarship Program are required to agree to participate in any on-site monitoring visit that is requested by the Ohio Department of Education (Ohio Department of Education, 2012). The private providers that are approved to participate in the Autism Scholarship Program by the Ohio Department of Education need to develop written policies and practices to share with parents of students participating in the school

voucher program. These written policies and practices are to be shared with parents of students participating in the school voucher program at no cost to the parent (Ohio Department of Education, 2012).

The Ohio Department of Education can revoke the participation of a private provider in the Autism Scholarship Program at any time if they determine the private provider has not comply with any rules and regulations of the Autism Scholarship Program established by the Ohio Department of Education (Ohio Department of Education, 2012). A list of all providers that are registered by the Ohio Department of Education eligible to participate in the Autism Scholarship Program will be made accessible to parents. The amount of funding provided to parents to participate in the Autism Scholarship Program “is the lesser of the fee charged for the child by the special education program or up to twenty thousand dollars per program year” (Ohio Department of Education, 2012, n.p.).

Ohio’s State Constitution

There are three sections of the Ohio State Constitution that would have an impact on the constitutionality of the Autism Scholarship Program. The first one would be Article I, § 7 which states:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preferences shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good

government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceful enjoyments of its own mode of public worship, and to encourage schools and the means of instruction (p. 3).

This is Ohio's version of the Blaine Amendment. This could impact the Autism Scholarship Program if the private providers include religious institutions.

In Article VI, §1 of the Ohio State Constitution address how public funds for education purposes should be used:

The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this state for education and religious purposes, shall be used or disposed of in such manner as the General Assembly shall prescribe by law (p. 25).

The last article of the Ohio Constitution that address education and public funds is Article VI, §2. This article states:

The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state (p. 25).

Ohio Case Law

To current date of this research, there is no case law in regards to the legality of the Autism Scholarship Program. Case law is document in regards to Ohio's other school voucher program the Ohio Pilot Scholarship Program. The case law of the Ohio Pilot Scholarship Program provides some insights in regards to future case law on the Autism Scholarship Program and will be discussed in this section.

In 1995 the Ohio legislature ratified the Ohio Pilot Scholarship Program. This program was created to deal with educational crisis occurring in Cleveland's public schools. Cleveland's

public schools administration was taken over by the state based on a U.S. District court order (*Simmons-Harris v. Zelman*, 1999). This program enacted in 1995 was found unconstitutional by the Ohio Supreme Court for violating the Ohio State Constitution. The Ohio Pilot Scholarship Program was reenacted by the Ohio Legislature in “June 29, 1999, as part of the Education Budget Bill” (*Simmons-Harris v. Zelman*, 1999, n.p.).

There are two parts to the Ohio Pilot Scholarship Program: “a scholarship program to enable students to attend ‘alternative schools’; and a tutorial program for children attending the Cleveland Public Schools” (*Simmons-Harris v. Zelman*, 1999, n.p.).

In order to be eligible students need to be in grades kindergarten through third grade. Once admitted to the Ohio Pilot Scholarship program, students continue to participate until the eighth grade. Private schools with the District of Cleveland or adjacent District can participate in the Ohio Pilot Scholarship Program as an alternative school. Eligible students of the Ohio Pilot Scholarship program can received up to \$2,500 to enable them to attend a private school. The amount of funding is determined on the student’s family income: “students whose family income is not more than 200% of the federally-established poverty level receive 90% of their school tuition; other scholarship recipients whose family income is above this threshold receive 75% of their tuition” (*Simmons-Harris v. Zelman*, 1999, n.p.).

The state of Ohio pays out the scholarship funds by “sending a check to the chosen school made payable to the parents of the recipient; thereafter, the parents must endorse the check to the school” (*Simmons-Harris v. Zelman*, 1999, n.p.). The private schools participating in the Ohio Pilot Scholarship Program have no restrictions from the state in how to use the funds provided by the State (*Simmons-Harris v. Zelman*, 1999).

The first challenge to the Ohio Pilot Scholarship Program was filed “on the ground that it violates the Establishment Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment to the U.S. Constitution” (*Simmons-Harris v. Zelman*, 1999, n.p.). The Ohio Pilot Scholarship Program that was developed in 1995 was found unconstitutional by the Ohio Supreme Court (*Simmons-Harris v. Zelman*, 1999, n.p.). This court ruled that the Ohio Pilot Scholarship Program was unconstitutional based on Ohio’s Article II, §15(d) of the state constitution. “The Ohio Supreme Court also addressed the federal constitutional issues raised in that case, whether the pilot program violated the Establishment Clause of the First Amendment” in this ruling they concluded that it did not violate the Establishment Clause of the First Amendment (*Simmons-Harris v. Zelman*, 1999, n.p.).

The Ohio Pilot Scholarship Program that was enacted in 1999 was challenged in the United States District Court for the Northern District of Ohio, Eastern Division. On August 13, 1999, a preliminary hearing was held in order to consider an injunction to the Ohio Pilot Scholarship Program (*Simmons-Harris v. Zelman*, 1999). On August 24, 1995, the court granted a preliminary injunction of the Ohio Pilot Scholarship Program (*Simmons-Harris v. Zelman*, 1999). The court then granted a stay for students who were currently enrolled on the Ohio Pilot Scholarship Program on August 27, 1999 (*Simmons-Harris v. Zelman*, 1999). This stay was only granted for one year or until the courts “rendered a final decision on permanent injunctive relief, whichever first occurred” (*Simmons-Harris v. Zelman*, 1999, n.p.).

The United States District Court for the Northern District of Ohio, Eastern Division, examined if the Ohio Pilot Scholarship Program violated the Establishment Clause of the First Amendment to the United States Constitution (*Simmons-Harris v. Zelman*, 1999, n.p.). The court

needed to analyze “first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster an excessive entanglement with religion” (*Simmons-Harris v. Zelman*, 1999, n.p.) If the Ohio Pilot Scholarship Program violates any of these parts then it violates the Establishment Clause of the First Amendment to the United States Constitution (*Simmons-Harris v. Zelman*, 1999).

The United States District Court for the Northern District of Ohio, Eastern Division used three criteria to determine if the Ohio Pilot Scholarship Program provided aid that would advance religion. The three criteria were: “whether the challenged governmental aid (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement” (*Simmons-Harris v. Zelman*, 1999, n.p.). The court concerned was “not whether a party has choices beyond those provided by a state aid program, but whether, when one chooses a state program-perhaps over other choices-he can exercise his options within that program without being steered toward a religious institution” (*Simmons-Harris v. Zelman*, 1999, n.p.). The court acknowledges that there are some “governmental aid to religious institutions do not implicate the concerns which underlie the Establishment Clause or run afoul of its requirements, while other types do” (*Simmons-Harris v. Zelman*, 1999, n.p.). The court continued to explain:

Where a program is found to have a permissible secular purpose and does not foster an excessive entanglement between church and state, it will be upheld against an Establishment Clause challenge as long as two principles are satisfied. First, a program must not result in government-sponsored religious indoctrination. Where aid is provided under a neutral program and only flows to religious schools as a result of the genuine and independent choices of beneficiaries, a challenged program will not be found to result in

government inculcation of religious beliefs. Second, program criteria must not create incentives for student to attend religious schools (*Simmons-Harris v. Zelman*, 1999, n.p.). The United States District Court for the Northern District of Ohio, Eastern Division also acknowledges that there is an exception to this rule that was addressed by the Supreme Court. The principles the Supreme Court held that needed to be met in order for the Ohio Pilot Scholarship Program not to violate the Establishment Clause were:

First, a program must not result in government-sponsored religious indoctrination. Where aid is provided under a neutral program and only flows to religious schools as a result of the genuine and independent choices of beneficiaries, a challenged program will not be found to result in government inculcation of religious beliefs. Second, program criteria must not create incentives for students to attend religious schools (*Simmons-Harris v. Zelman*, 1999, n.p.).

The court needed to determine if the Ohio Pilot Scholarship Program “has the impermissible effect of advancing religion by resulting in government indoctrination of religious beliefs or creating an incentive to attend religious schools” (*Simmons-Harris v. Zelman*, 1999, n.p.). The United States District Court for the Northern District of Ohio, Eastern Division concluded that the Ohio Pilot Scholarship Program violates the Establishment Clause as a matter of law because it violates both of these principles” (*Simmons-Harris v. Zelman*, 1999, n.p.).

The case was challenged by the defendants and the case was heard at the United States Court of Appeals for the Sixth Circuit in June 20, 2000 and decided on December 11, 2000. The United States Court of Appeals of the Sixth Circuit after reviewing the case found the Ohio Pilot Scholarship Program unconstitutional. The court asserted that the Ohio Pilot Scholarship Program “has the primary effect of advancing religion and constituted an endorsement of religion and sectarian and sectarian education in violation of the Establishment Clause”

(*Simmons-Harris v. Zelman*, 2000, n.p.). The United States Court of Appeals of the Sixth Circuit affirmed the district's court decision (*Simmons-Harris v. Zelman*, 2000).

The case was then argued to the Supreme Court of the United States on February 20, 2002 and decided on June 27, 2002. The Supreme Court of the United States reversed the decision by the United States Court of Appeals of the Sixth Circuit (*Simmons-Harris v. Zelman*, 2000). The Supreme Court of the United States declared that the Ohio Pilot Scholarship Program did not violate the Establishment Clause of the First Amendment (*Simmons-Harris v. Zelman*, 2000).

The first reason the Supreme Court of the United States provided to reverse the decision of the appeals court was that any private school, religious or nonreligious, could participate in the Ohio Pilot Scholarship Program as long as the private school is located within the District boundaries or in an adjacent District (*Simmons-Harris v. Zelman*, 2000). The Supreme Court of the United States affirmed that:

Where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause (*Simmons-Harris v. Zelman*, 2002, n.p.).

The court continued by stating that any logical observer would reach the conclusion that is the parent's decision to choose the private school and the government has no involvement in that neutral decision. The parent's decision of the private school does not carry the endorsement of the government (*Simmons-Harris v. Zelman*, 2000). This logical observer would conclude that:

The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. If numerous private

choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment (*Simmons-Harris v. Zelman*, 2002, n.p.).

In conclusion, the Supreme Court of the United States declared that the Ohio Pilot Scholarship Program is a neutral program and does not support any religious institutions. The Ohio Pilot Scholarship Program:

Provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause (*Simmons-Harris v. Zelman*, 2002, n.p.).

Utah

Carson Smith Special Needs Scholarship

The Carson Smith Needs Scholarship is a school voucher for students with disabilities that was enacted in 2005 and launched in the 2005-06 school year in the state of Utah (The Friedman Foundation for Educational Choice, 2012). Based on the data from the 2011-2012 school year, “a total of 679 students received scholarships and 40 private schools participated” in the Carson Smith Special Needs Scholarship program (The Friedman Foundation for Educational Choice, 2012, n.p.). The Carson Smith Special Needs Scholarship program was developed to provide parents with choices to have their children with special needs served in private schools (Milligan, 2011). Students eligible for the Carson Smith Special Needs Scholarship are “public

school students identified as disabled under federal disability-rights law as well as students with disabilities in private schools that served students with disabilities prior to participating in the program” (The Friedman Foundation for Educational Choice, 2012, n.p.).

Students need to meet five criteria in order to be eligible for the Carson Smith Special Needs Scholarship program. The first criterion the student needs to meet is that the parent or legal guardian must reside within the state of Utah (Utah State Office of Education, 2012). The second criterion is that the student must have one or more of the following disabilities:

Mental retardation; hearing impairment; speech or language impairment; visual impairment; serious emotional disturbance; orthopedic impairment; autism; traumatic brain injury; other health impairment; specific learning disability; or developmental delay, provided that the student is at least five years of age and less than eight years of age (Utah State Office of Education, 2012, n.p.).

The third criterion for student eligibility for the Carson Smith Special Needs Scholarship is that the student needs to be at least five years old prior September 2nd of the school year and no more than twenty-two years old (Utah State Office of Education, 2012). The fourth criterion is that the student needs to meet one of these two conditions:

The student was enrolled in a Utah public school in the previous school year, had a current IEP during the school year, and had been admitted to an eligible private school; or the student is enrolled in or has been admitted to an eligible private school designated as a ‘School that had Previously Served Students with Disabilities’, and an assessment team has determined that the student would qualify to receive special education services if enrolled in a public school (Utah State Office of Education, 2012, n.p.).

The last criterion for the Carson Smith Special Needs Scholarship is that the parent or guardian of the student has submitted a completed application (Utah State Office of Education, 2012).

Once a parent accepts a Carson Smith Special Needs Scholarship there are some conditions the parent has to understand. First, the parent is responsible for any extra financial

fees to the private school the scholarship may not cover. By accepting the scholarship, parents have revoked their consent to special education and related services (Utah State Office of Education, 2012). Parents need to provide accurate information to the Carson Smith Special Needs Scholarship program in order to process voucher payments and determine continuing eligibility in the program (Utah State Office of Education, 2012).

Payments for the Carson Smith Special Needs Scholarship are made quarterly and the amount “may not exceed the tuition and fees charged to parents by the private school” (Utah State Office of Education, 2012, n.p.). The scholarship amounts are determined by “the amount of the current year’s weighted pupil unit, which is the funding a school district receives for each child” (Osterstock & et al., 2008, p. 3). The scholarship also takes into account the following when determining the amount of funds for students participating in the Carson Smith Special Needs Scholarship program:

The amount of a scholarship is also based on the amount of special needs services a child is to receive each day. Students who received-or would receive- fewer than 180 minutes per day of special education services in a public school receive the partial scholarship, and students receiving 10 minutes or more receive the full scholarship (Osterstock & et al., 2008, p. 3).

The scholarship remains in effect for three years as long as the student is continued to be enrolled in an eligible private school. Every three years, an assessment team determines if the student is still eligible for the scholarship. The assessment team verifies if the student continues to meet the eligibility requirement for the Carson Smith Special Needs Scholarship program (Utah State Office of Education, 2012).

Based on the Report to the Utah Legislature in regards to the Carson Smith Special Needs Scholarship program “parents of students currently receiving or who have received, the Carson

Smith Scholarship are overwhelmingly in favor of the program and find it a success” (Osterstock & et al., 2008, p. ii). This report is based on the information provided by parents. Supporters of the program state that the way to determine if the school voucher program is successful is parent response (Osterstock & et al., 2008). Supporters of the school voucher program state that “the majority of the parents are satisfied with the program and understood the scholarship process” (Osterstock & et al., 2008, p. ii).

The Carson Smith Special Needs Scholarship program is different from the McKay Scholarship in several ways. The first two differences are:

“(1) new scholarship recipients are selected by lottery when the number of applicants exceeds the funding allocated by the state; and (2) students enrolled in private schools that have previously served students with disabilities are permitted to apply for scholarships when an assessment team can readily determine with reasonable certainty that the student has a disability and would qualify for special education services” (Hensel, 2010, p. 4).

Another difference between the McKay Scholarship and the Carson Smith Special Needs Scholarship program is in regards to the information private schools have to disclose to parents. In the Carson Smith Special Needs Scholarship program, “participating schools to disclose to parents the special education services that will be provided to their child, the cost of such services, and the credentials of the teaching staff to facilitate placement decisions” (Hensel, 2010, p. 5). Private schools participating in the McKay Scholarship do not have to disclose this information to parents.

Another big difference between the McKay Scholarship and the Carson Smith Special Needs Scholarship program is with the eligibility criteria for the programs. Unlike the McKay Scholarship, students eligible for the Carson Smith Special Needs Scholarship program do not

have to attend a public school at any point of their academic career (Osterstock & et al., 2008). Actually, more than 60% of students accepting Carson Smith scholarships were not enrolled in public school at the time of the scholarship application (Hensel, 2010, p. 17). Opponents of the Carson Smith Special Needs Scholarship program feel that “money spent to educate private school students with no prior connection to public education is a direct loss of revenue available to provide special education and related services to children in public school with few private options” (Hensel, 2010, p. 17).

Utah’s State Constitution

In reviewing the Utah’s State Constitution there are three sections that address state funding, religious institutions and education that could affect the constitutionality of the Carson Smith Special Needs Scholarship program. The first section is Article I, § 4:

The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election nor shall any person be incompetent as a witness or juror on account of religious belief or the absence of thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment (p. 1).

The importance of Article I, § 4 is that it express that no state funds can be used to support religious establishments.

Article X, Section 1 states: “The legislature shall provide for the establishment and maintenance of a uniform system of public schools, which shall be open to all children of the

State, and be free from sectarian control” (p. 20). This article addresses the maintenance of a uniform public school system that is available to all children residing in Utah.

Article X, Section 13, states: “Neither the Legislature nor any county, city, town, school district or other public corporation, shall make any appropriation to aid in the support of any school, seminary, academy, college, university or other institution, controlled in whole, or in part, by any church, sect or denomination whatever” (p. 21). This article supports Article I, § 4 in that state funds should not be used to aid religious establishments.

Utah’s Case Law

As of date of this research, there is no case law on this school voucher program for students with disabilities.

Protections Provided by the Individuals with Disabilities Education Act (IDEA)

Students with disabilities are provided protections by the Individuals with Disabilities Education Act (IDEA). Students with disabilities parentally placed at a private school are provided some protections but not to the extent students receive at the public schools. There are seven protections parentally placed private schools students with disabilities have protections under the IDEA. In general, parentally placed private school students with disabilities do not have the right to receive special education and related services under the protections of IDEA (IDEA, 34 CFR §300.129-300.144). This entails that parentally placed private schools students with disabilities are no provided a free an appropriate public education as students would with disabilities would receive in the public schools.

The first protection parentally placed private school students with disabilities have is an evaluation of any student suspected with a disability as long as the private school is located within a public school district. This protection is provided to any students attending a non-profit or for-profit private school. The district is required to identify and evaluate any parentally placed private school student suspected of a disability at no cost to the private school or parent (IDEA, 34 CFR §300.131). The second protection provided to parentally placed private school students with disabilities is in regards to funding. The district where the private school is located is responsible to expend a proportionate share of the federal funds for students with disabilities to parentally placed private school students with disabilities (IDEA, 34 CFR §300.133). The proportionate share funds are to provide some special education and related services. This protection only is provided to students who are attending a non-profit private school if the state where the private school selects too. This proportionate share of funds is allocated based on the total number of students with disabilities in the district compare to the students with disabilities parentally placed in private schools.

The third protection provided to parentally placed private school students with disabilities is the responsibility of the district to consult with the private schools located within their district. The meaningful consultation the district has to have with the private schools has to entail specific requirements. The district needs to consult with private schools regarding:

The child find process itself, and whether parentally-placed private school students may participate equitably, as well as how parents of those students and private school representatives are notified of the process; how the school district determined the proportionate share of federal dollars that will be spent; the consultation process itself, including how that process will operate throughout the school year so as to ensure meaningful participation in services; how, where, and by whom special education and

related services will be provided, including the types of services and how such services will be apportioned if funds are insufficient to serve all students, and how and when these decisions will be made; and if the district disagrees with views of private school officials on the provision and types of services, how the local unit will provide a written explanation of the reasons why the district made the decisions that it did (IDEA, 34 CFR §300.134).

The fourth protection provided to parentally placed private school students with disabilities under IDEA is the provision of determined equitable services (IDEA, 34 CFR §300.137). The district where the private is located is responsible to have a meaningful consultation with the private school representatives “with respect to the services to be provided to eligible parentally-placed private school students with disabilities” (IDEA, 34 CFR §300.137). The district determines the special education and related services based on input from the private school and parents of parentally placed private school students.

The fifth protection under IDEA for parentally placed private school students is to be provided with equitable services. The district where the private school is located is responsible to documenting the special education and related services to be provided to parentally placed private school students with disabilities on a Services Plan (IDEA, 34 CFR §300.138). The district is responsible to ensure the Services Plan is reviewed and revised as appropriate “in a manner consistent with the development of an IEP” (IDEA, 34 CFR §300.138). The state can determine if these services will be provided students attending a for-profit private school.

The sixth protection for parentally placed private school students under IDEA is the right to request a due process hearing (IDEA, 34 CFR §300.140). Parentally placed private school students with disabilities have the right to file for a due process hearing if the parents feel the district did not comply with the child find activities (IDEA, 34 CFR §300.140). Child find

activities include the identification of students suspected as a student with a disability attending a private school. The last protection provided to parentally placed private school students with disabilities is to file a state complaint (IDEA, 34 CFR §300.140). The parents or private school representative can file a state complaint if they allege the district has not meet one of the following obligations:

The opportunity for equitable participation of parentally-placed private school students provided under IDEA; expenditures; the consultation process; provision of equitable services (IDEA, 34 CFR §300.140).

Summary

The following table (Table 1) provides a summary of the case law of the five states that have developed school voucher programs for students with disabilities. The table contains: name of school voucher program, description and any case law. Table 2 provides a summary of the protections provided to students with disabilities parentally placed at private schools and students with disabilities that attend a public school.

Table 1: School Vouchers for Students with Disabilities

State	School Voucher	Year Enacted	Description	Case Law
Arizona	Arizona Scholarship for Pupils with Disabilities	2006	School voucher for students with disabilities to attend another private school (sectarian or non-sectarian); students maintain scholarship until they graduate HS or return to public school	Unconstitutional; violated the no-aid clause of Arizona's constitution
	Arizona Empowerment Scholarship Accounts	2011	School voucher for students with disabilities to attend a private school (sectarian or non-sectarian); school voucher eligibility needs to be renewed annually; students maintain scholarship until the student graduates from a postsecondary institution	Constitutional; Appealed
Florida	John M. McKay Scholarship	1999	School voucher for students with disabilities to attend another public school or a private school (sectarian or non-sectarian); students maintain their scholarship until they graduate HS, return to public school or turn 22 years old	No Case Law
Georgia	Georgia Special Needs Scholarship Program	2007	School voucher for students with disabilities to attend another public school or private school (sectarian or non-sectarian); students maintain scholarship until they graduate HS, return to public school or turn 22 years old	No Case Law
Ohio	Autism Scholarship Program	2009	School vouchers for students identified as a child with autism to attend a private special education program; school voucher eligibility needs to be renewed annually; students maintain scholarship until they graduate HS, return to public school or turn 22 years old	No Case Law

State	School Voucher	Year Enacted	Description	Case Law
Utah	Carson Smith Special Needs Scholarship	2005	School voucher for students with disabilities to attend another public school or private school (sectarian or non-sectarian); school voucher eligibility needs to be renewed every three years; students maintain scholarship until they graduate HS or turn 22 years old	No Case Law

Table 2: Requirements for Students with Disabilities Enrolled by their Parents in Private Schools

	IDEA Code	Summary
General Information	34 CFR §§300.129-300.144	Students parentally placed at a private school student do not have the right to a free and appropriate education or special education and related services.
Child Find Activities	34 CFR §300.131	Students parentally placed at private school have the right to be evaluated and identified as a student with a disability by the district the private school is located. The district’s child find responsibilities are the same as for students enrolled in a public school.
Expenditures	34 CFR §300.133	The district, in which the non-profit private school is located, is responsible to expend a proportionate share of the federal funds for students with disabilities to parentally placed students with disabilities at a private school.
Consultation	34 CFR §300.134	The district, in which the non-profit private school is located, is responsible to consult with the private schools in regards to the special education services and related services the district will provide to parentally placed private school students with disabilities.
Equitable Services Determined	34 CFR §300.137	The district, in which the non-profit private school is located, is responsible to make a final decision on the special education and related services for parentally placed private school students with disabilities are eligible.

	IDEA Code	Summary
Equitable Services Provided	34 CFR §300.138	The district, in which the non-profit private school is located, is responsible for reviewing and revision a Services Plan detailing the special education and related services to be provided for parentally placed private school students with disabilities.
Due Process Hearing	34 CFR §300.140	Parentally placed private school students can apply for a due process hearing if the district has failed to meet its child find activities.
State Complaints	34 CFR §300.140	A state complaint can be filed if the District did not follow the above responsibilities.
IDEA 20 U.S.C §1400 et seq.		

CHAPTER 4: SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Introduction

The purpose of this study was to provide a qualitative analysis of the legal issues at the state and federal level governing the constitutionality of school voucher programs for students with disabilities in the United States. The study also considered the impact of school voucher programs for students with disabilities on the Individual with Disabilities Education Act. This research specifically studied the five states that currently have school voucher programs for students with disabilities: Arizona, Florida, Georgia, Ohio, and Utah. Students with disabilities are participating in school voucher programs to attend private schools but private schools have less accountability and fewer responsibilities under IDEA (2004) to monitor the students at the private schools. Since there are a growing number of states that will be developing school vouchers programs for students with disabilities, the impact of the services provided at the private schools and the protections under IDEA was closely looked at. Local school boards, state boards of education, policymakers, and legislators will benefit from the knowledge of current legal and case law issues regarding school voucher programs for students with disabilities. This research will assist state boards of education, policymakers, and legislators in developing school voucher programs for students with disabilities in the future especially in Texas, Pennsylvania, North Carolina and South Carolina where school vouchers for students with disabilities are being developed. The results of this research enable federal policymakers in the reauthorization of the IDEA in considering the protections for parentally placed private school students with disabilities.

Summary and Discussion of the Findings

Research Question 1

What are the differences and similarities in the relevant case law regarding the constitutionality of school voucher programs for students with disabilities in states that currently have a school voucher program for students with disabilities?

School voucher programs for students with disabilities from Arizona, Florida, Georgia, Ohio and Utah have had similarities and differences in the legality of the programs. As of this date, the only school voucher program for students with disabilities that has been found unconstitutional is the Arizona Scholarship for Pupils with Disabilities. Future case law for school voucher programs for students with disabilities will depend on the states constitutions “because education is one of the foundational obligations of each state, state law provides the most immediate check on any legislature’s ability to implement a voucher program” (Hensel, 2010, p.7). Based on the review of the case law of school voucher programs for students with disabilities in Arizona, Florida, Georgia, Ohio and Utah, two main points have emerged. The legal success or failure of the constitutionality of the school voucher programs for students with disabilities will depend on the no-aid provision and education clause in the state’s constitution.

The no-aid clause in state’s constitutions “prevent public taxpayer funds from being sent to sectarian institutions and entities” (Americans United for Separation of Church and State, 2012, n.p.). Currently, there are 38 states that have a no-aid provision in their state constitutions (Americans United for Separation of Church and State, 2012). According to Shah (2012), “in states that prohibit tax dollars from being spent at educational institutions that have a religious affiliation, special education vouchers aren’t any more defensible, legally, than voucher

programs for other students” (Shah, 2012, p.14). Future case law can rely on the interpretation of the no-aid clause in state’s constitutions when developing school voucher programs for students with disabilities.

The no-aid clause in Florida’s constitution is one of the most restrictive; “most states adopted provisions less restrictive than the Florida no-aid provision” (*Bush v. Holmes*, 2004, p.11). Florida’s no-aid clause includes that no direct or in-direct aid can support religions or religious institutions (*Bush v. Holmes*, 2004). Other states’ no-aid provisions “in state constitutions was limited to ensuring that public education was free of sectarian instruction and prohibiting direct public funding of private schools or institutions” (*Bush v. Holmes*, 2004, p.11). The other states’ constitutions “prohibit direct funding of religious institutions or schools, ‘but leave open, at least in their constitutional texts, the question of whether or not indirect state funding, such as vouchers, are permissible’” (*Bush v. Holmes*, 2004, p.12). Based on this no-aid clause in Florida, Florida’s First District Court found the Opportunity Scholarship Program unconstitutional (Kahn, 2006). States that have the direct or in-direct aid in the no-aid clause in their state constitutions would make it challenging for school voucher programs for students with disabilities to surpass any legal challenges.

When the Opportunity Scholarship Program was assessed by the Florida Supreme Court, they found the voucher program unconstitutional based on that it violated the uniformity clause of Article IX, §1(a) but did not address if it violated the no-aid clause (*Bush v. Holmes*, 2004). Kahn (2006) found it interesting that the Florida Supreme Court “found it unnecessary to determine whether the OSP violated the ‘no aid’ provision of the Florida Constitution, as the First District court had held” (p.835). According to Guilfoyle (2007):

It is peculiar that Florida's Supreme Court did not assess the OSP under the 'no aid' provision, but rather decided to return to the circuit court's original holding that the OSP violated article IX, section 1(a). Perhaps, the court's decision to rule against the OSP would have been more convincing had it found it unconstitutional due to its patent inconsistency with the 'no aid' provision, rather than make tenuous findings based on methods of constitutional interpretation (p.1352).

To date, Florida's school voucher program for students with disabilities, the McKay Scholarship program, has not been challenged in the courts. Another state that has a school voucher program for students with disabilities with the direct or in-direct aid clause in their state constitution is Georgia (*Bush v. Holmes*, 2004, p.12). Georgia's school voucher program for students with disabilities, Georgia Special Needs Scholarship Program, has not been challenged in the court system.

Supporters of the OSP school voucher program believe that the no-aid provision is coexistent with the Establishment Clause of the Federal Constitution. Since *Zelman*, decided that Wisconsin's school voucher program did not violate the Establishment Clause of the First Amendment, school vouchers for students with disabilities could be used for students to attend religious schools (*Jackson et al v. Benson et al*, 1998). Florida's First District court did not agree with this statement. The First District court in Florida stated:

Article I, section 3, while incorporating the language of the Establishment Clause, adds an *additional* restriction in the form of the 'no aid' provision. This interpretation of the state constitution is what opens the court to the analysis of the OSP under the 'no aid' provision and allows it to find the programs unconstitutional (Kahn, 2006, p.838).

The Florida First District court identified three elements that are a violation of the no-aid provision in the Florida Constitution:

A court must find that (1) the law in question involves the use of state revenues; (2) the prohibited use of the state revenues directly or indirectly aids the beneficiaries of the

program; and (3) the beneficiaries of the law are sectarian institutions (Kahn, 2006, p.839).

The Florida First District Court continued by stating these elements applied only to the OSP and not to other state programs such as hospitals that could be run by “religious affiliated organizations” (Kahn, 2006). But according to Keller (2010), that “private schools receive some incidental financial benefit from a voucher program does not undermine their constitutionality so long as the program provides aid directly to families and does so with the intent to benefit children and not private schools” (p. 243).

The other clause that should to be analyzed in state’s constitutions in order to determine the constitutionality of school vouchers for students with disabilities is the education clause. In court rulings in Wisconsin by the Wisconsin Supreme Court and in Florida by the Florida Supreme Court addressed this issue based on each state’s constitutions.

The Wisconsin Supreme Court ruled in 1998 that the Milwaukee Parental Choice Program did not violate “the uniformity provision of that state’s education clause” in *Jackson v. Benson* (Kahn, 2006, p.842). The plaintiffs in the *Jackson v. Benson* case was dependent in the reasoning that private schools participating in the Milwaukee Parental Choice Program “became ‘district schools’, which must be held to the uniformity standard and are not permitted offer religious instruction” (Kahn, 2006, p.842). If Wisconsin Supreme Court agreed with the plaintiffs reasoning, then the Milwaukee Parental Choice Program would have been found unconstitutional based on the uniformity clause in the state’s constitution. The Wisconsin Supreme Court did not agree with the reasoning of the plaintiffs that just because the private schools participated in the school voucher program the private schools did not become school district. The Wisconsin Supreme Court went further and stated in *Jackson v. Benson* “in no way

deprives any student of the opportunity to attend a public school with a uniform character of education” (Kahn, 2006, p.842).

In Ohio, in *Simmons-Harris v. Goff* the court did not agree with the interpretation that the education clause in their state’s constitution “prohibited the establishment of non-public schools that were supported by public monies” (Kahn, 2006, p.843). The court in Ohio stated that just because the school voucher program provided some support to participating private schools it did not “undermine the state’s obligation to public education” (Kahn, 2006, p.843). The court did state that if the school voucher program was expanded and public schools would be affected by the funding taken away from them and provided to private schools, then the school voucher program may be found unconstitutional (Kahn, 2006). When compare to Florida’s education clause, Ohio’s education clause is not as strong.

In *Bush v. Holmes*, the Florida Supreme Court ruled that the OSP was unconstitutional based on the education clause in the Florida Constitution. The Florida Supreme Court stated “the public school system is the only constitutional means by which the state can provide for education, and the voucher program removes money from that system and redirects it to private schools” (Kahn, 2006, p.835). The Florida Supreme Court explained that the private schools do not provide a uniform education as stated in the Florida Constitution; “private schools are not subject to the same standards as those applicable to public schools, their curricula need not address the same material, and their teachers need not have the same qualifications as their public school counterparts” (Kahn, 2006, p.837). The Florida Supreme Court found OSP unconstitutional based on the education clause which differed from the Florida First District court that ruled the OPS unconstitutional based on the no-aid clause in Florida’s constitution. The Florida Supreme Court did not address the constitutionality of the OSP based on the no-aid

clause. According to Guilfoyle (2007), “this decision will slow down the neo-conservative plan to privatize the states’ system of public education” in Florida (p.1356).

Based on the ruling by the Florida Supreme Court on the OSP voucher program, critics believe this “could be applied to the state’s charter school system and to the McKay Scholarship program, which allows disabled students to attend the private schools that are better-equipped to facilitate their education” (Guilfoyle, 2007, p. 1355-1356). Other critics state that the McKay Scholarship may not be impacted by this ruling since “the court’s exception of providing services that public schools cannot offer, since this would be akin to an admission that the state cannot provide FAPE to students with disabilities in the public school” (Hensel, 2010, p.8). Until date, the Florida’s courts have not addressed the constitutionality of the McKay Scholarship, a school voucher program for students with disabilities.

Based on the rulings in *Jackson v. Benson*, *Simmons-Harris v. Goff*, and *Bush v. Holmes*, the constitutionality of school vouchers for students with disabilities may depend on the strength of their state’s education clause on their state’s constitution.

Given that every state education clause requires, at minimum, that the state government provide for some system of free public schools, the argument in *Holmes* that the education clause forbids the state to use public funds to fund private schools may be applicable to any state that chooses to enact a school voucher program. Moreover, *Holmes*’ discussion of the ‘uniformity’ and ‘high quality’ requirements could apply to states that fall under the second or third category of education clauses-that is, those states whose constitutions provide explicit educational standards (Kahn, 2006, p.841-842). As school voucher programs for students with disabilities continue to grow and not challenged in the court system “unlike other publicly financed tuition vouchers-can be the perfect way to clear a path for other students to get school options, according to school choice proponents” (Shah, 2012, p.1). This could lead to universal school voucher programs in the future.

Research Question 2

What legal protection under the Individual with Disabilities Education Act (IDEA) do students with disabilities have when participating in a school voucher program to attend a private school?

Students with disabilities that accept school vouchers to attend a private school lose many protections under the IDEA. There are several issues that could impact the constitutionality of school voucher programs for students with disabilities especially if the school voucher programs for students with disabilities affect the protections for students with disabilities under IDEA. In regards to school voucher programs for students with disabilities, since there have not been clear decisions on the constitutionality of the voucher programs “the question remains, however, whether voucher programs conflict with federal education and civil rights laws, including IDEA, §504 of the Rehabilitation Act, and Americans with Disabilities Act” (Hensel, 2010, p.9).

One of the major concerns in regards to school voucher programs for students with disabilities is that some school voucher programs include that if a parent accepts the school voucher they revoke their protections under IDEA. Currently students with disabilities participating in the Georgia Specials Needs Scholarship and the Carson Smith Special Needs Scholarship, parents revoke their consent for special education once they accept the school voucher. Parentally placed private school students who participate in school voucher programs for students with disabilities at a private school “forfeit their legal rights of due process, participation in evaluations and reevaluations, and continuous support to meet the mandates of their IEP as designated by IDEA, since private schools do not have to meet these legal mandates” (Harmon, 2010, p.239). This will have an impact in regards to the type of special

education and related services student with disabilities receive in private schools and their protections provided under IDEA.

The U.S. Department of Education's Office of Civil Rights (OCR) has concluded "that when a parent elects to accept a private school voucher, the child in question is 'parentally placed' for the purposes of...freeing school districts from the requirement to provide FAPE to that child" (Hensel, 2010, p.9). This denotes that student with disabilities are waiving the most meaningful protection under IDEA once parents accept a school voucher to attend a private school (Hensel, 2010). According to Hensel (2010), there needs to be attention in that when parents accept school vouchers for students with disabilities to attend a private school, the parents are relinquishing the majority of their legal rights under IDEA. With the loss of the protections under IDEA, parents "lose their rights to participate actively in their child's education and to object when they believe their child isn't getting the educational services he or she is entitled to under the federal Individuals with Disabilities Education Act" (Shah, 2012, p.14).

On the other hand many supporters of school vouchers for students with disabilities agree that the school voucher programs "expand and supplement existing rights under IDEA and result in greater accountability to students and increased parental satisfaction" (Keller, 2010, p.243). Parents who support school vouchers for students with disabilities report that public school districts may not always provide the best special education and related services for their children. School vouchers for students with disabilities goes "beyond IDEA's promise to provide a mere 'appropriate' education by expanding IDEA's existing 'opt out' rights to offer parents a genuine opportunity to provide their children the best education available" (Keller, 2010, p.244). While the IDEA provides a free and appropriate public education, student with disabilities "deserve

more than merely an ‘appropriate’ education. They deserve the best available education” at any location-public or private school (Keller, 2010, p.245).

If a student with a disability is placed by a school district at a private school due to not being able to provide all services on the IEP, parents still maintain their IDEA protections. If the IEP team places a student with disabilities at a private school setting, “the particular receiving school must meet all of the standards that apply to the state and local educational agencies and the child and the child’s family must be guaranteed all the rights and protections of the IDEA” (CEC Boards of Directors, 2003, p. 74). By the IEP team placing the student with disability at a private school, the “full authority, responsibility, and public accountability rest with the public school district, thus requiring on-going supervision and monitoring of the private placement” (CEC Boards of Directors, 2003, p. 74). Keller (2010) states that based on the IDEA requirements, IEP teams can place a student at a private school and pay their education with public funds. Supporters of school voucher programs for students with disabilities do not see a difference in this IDEA requirement and the parent choosing the best educational placed for their child by using a school voucher.

Some critic’s state how can the courts differ between IEP teams’ placing students with disabilities in a private school setting versus parents choosing to place their child at a private school setting (Keller, 2010). But according to Harmon (2010):

When a public school district decides a student will be better served in a private school with no cost to the parent, this decision is made, after continuous review and deliberation, with the parent and/or guardian and a team of specialized educators, regarding the extent to which the goals and objectives of the Individualized Educational Plan (IEP) are being met. The state funds that support the transfer of the student to the private school are funds that the taxpayers have already put in the hands of the government and public school

system to be utilized for the secular educational purposes identified by the public school district, the parent, and others involved in the IEP process (p. 238-239).

The major difference is that if a student with a disability is placed at a private school by the IEP team “the public school district is still accountable for the child’s education, the student retains his or her rights under IDEA, and structures of accountability remain in place for all parties involved” (Harmon, 2010, p. 239).

Another issue with students with disabilities participating in school voucher programs is that parents have no legal protections when it comes to the type of special education and related services if any the private schools may provide. Parents of students with disabilities that participate in school voucher programs at private schools are often astonished that the quality of special education and related services is not equivalent to the quality provided in the public school. At this point, the parents’ only choice “is the highly disruptive option of moving their child to another school” or paying outside agencies to provide the special education and related services their child may need (Hensel, 2010, p.12). Parents have no protections under IDEA to require the private schools to provide a better quality of special education and related services. This could lead to parents who are not satisfied with the education their child is receiving at a private school with the burden of removing their child from the private school or “they must remain in a school that does not adequately meet their child’s needs” (Hensel, 2010, p.15). “In short, the acceptance of vouchers leaves parents operating with no legal safety net and few meaningful options when things go wrong” or appropriate special education and related services for their child (Hensel, 2010, p.15).

Private schools participating in school voucher programs for students with disabilities need not abide by the same accountability measures as public schools under the IDEA

protections. Private schools participating in accepting students with disabilities on a school voucher program “are not obligated to provide a meaningful education and cannot legally be held accountable when a student makes no academic progress” (Hensel, 2010, p.14). The lack of “meaningful accountability measures is exacerbated by the waiver of legal rights required in order for students with disabilities to participate in special needs vouchers programs” (Hensel, 2010, p.14).

The other opinion is that if parents of students with disabilities are not satisfied with the special education and related services provided by the public schools, they need to follow the long and sometimes costly process of mediation and due process hearings. School vouchers for students with disabilities provide “parents with options that do not require expensive, protracted negotiations with public schools is important and should be welcomed among the disability rights community” in order to ensure parent satisfaction (Hensel, 2010, p.15). There are significant burdens with IDEA’s due process procedures, “burdens that often mean those protections are illusory for parents without the means to hire an attorney to enforce them” (Keller, 2010, p. 244). School voucher programs for students with disabilities will provide parents with an option rather than to get into a battle with the school districts. According to Keller (2010), “a parent who contracts directly with a private school for education services is in a far stronger bargaining position than a parent whose child’s education is governed by IDEA” (p. 244). By using the school voucher instead of battling the school districts, parents do not burn their bridges with the public school personnel and can always return. Public schools also may support school voucher for students with disabilities since “schools violating the IDEA’s provisions may actually encourage contentious students to elect vouchers, thereby skirting their

legal obligations” (Hensel, 2010, p.14). According to Keller (2010), two themes have developed based on his collection of data from parents of students with disabilities:

The first was that parents overwhelmingly believed that their public schools were little more than glorified babysitting services. The second was that parents believed that public school special education teachers did not believe that children with disabilities have the capacity to grow either academically or socially. Parents gladly renounced IDEA’s due process ‘rights’ in favor of private education because they found private school teachers who believed their children could learn and grow and who were interested not in babysitting children but in educating them (p.247).

This also leads many parents to want to identify their child as a student with a disability in order to be eligible for a school voucher to attend a private school. This issue is complicated in that some school vouchers for students with disabilities “do not impose re-eligibility provisions for students with disabilities accepting private school vouchers” (Hensel, 2010, p.17). This leads to students being identified as students with disabilities for their academic career; “this approach endorses an imagery of disability that is static and unchanging, a particularly faulty assumption in the context of child development” (Hensel, 2010, p.17). This will lead to school district spending more funding in child find activities since more parents would like their child evaluated to determine if they are a child with a disability. Districts will spend time and funding on “students who do not qualify for coverage” (Hensel, 2010, p.17). Due to the requirement of response to intervention as part of the eligibility for the learning disability program, “the potential for delays between the onset of difficulty in the classroom and the identification of disability is very real despite the IDEA’s general mandate that eligibility assessments take place within sixty days” (Hensel, 2010, p.19). This could lead to school districts policing “the eligibility determination more carefully when a positive result carries the potential for loss of revenue” (Hensel, 2010, p.19).

The last concern regarding school voucher programs for students with disabilities is the idea students with disabilities may be segregated and not provided their education in the least restrictive environment. Parents may select private schools participating in school voucher programs that are specialized and only educate students with disabilities. This takes a step back “from the LRE requirement of the IDEA and has the potential to negatively impact student’s educational development” (Hensel, 2010, p.18).

In conclusion, school vouchers for students with disabilities have a great effect on the protections under IDEA:

A sample of these consequences include the re-segregation of students with disabilities in special schools, the lack of accountability in private schools in meeting the federal standards, the inequitable access for students with disabilities with highly specialized and costly services, and the underlying partisan agendas of think-tanks that create research to perpetuate their political power and influence-agendas that arguably have less to do with the actual needs of children and more to do with political and social ideologies (Harmon, 2010, p.240).

This is supported by the Board of Directors of the Council for Exceptional Education which opposes school voucher programs for students with disabilities for the following reasons: “(a) absence of necessary accountability, (b) no guarantee of a free and appropriate education, (c) no guarantee of procedural protections, (d) segregation within private schools, (e) no guarantee of equal access, and (f) promotion of resegregation rather than diversity” (Harmon, 2010, p.240).

Although Congress has attempted to reauthorize IDEA in order to provide better protections for student with disabilities, “at least some continue to believe that the current delivery model cannot effectively meet the highly diverse and at times intense instructional needs that are present across today’s K-12 population” (Hensel, 2010, p. 1). When parents parentally place a student at a private school, “the taxpayers have not given that autonomy or

authority to the parents to use tax monies for their potentially sectarian desires” (Harmon, 2010, p. 239).

Conclusions and Recommendations

Future states developing school voucher programs for students with disabilities should study their respective state constitutions in order to be able to create legally defensible programs. The two articles of the state’s constitutions that will need to be reviewed are the no-aid provision and education clauses. Based on the legal challenges to Florida’s OSP program, the no-aid clause can determine if school voucher programs for students with disabilities can be defended. Even though Florida’s no-aid clause is very restrictive, other states like Georgia have a similar clause that could make it difficult for school voucher programs for students with disabilities to win legal challenges.

The other clause in a state constitution that can affect the legal challenges of school voucher programs for students with disabilities is the education clause. “Generally speaking, state education clauses that provide stronger constitutional mandates will pose greater challenges to school voucher programs” for students with disabilities (Kahn, 2006, p.840). Based on the case law in Wisconsin and Florida, school voucher programs for students with disabilities can be impacted by court interpretation of the education clause of the state’s constitution. In Wisconsin, the courts did not agree that school voucher programs were unconstitutional based on the education clause of the state’s constitution but in Florida such was not the case. According to Kahn (2006),

One reason *Holmes* may be especially important is that the education clause is not an innovation unique to Florida. At present, forty-nine states have language in their

constitutions guaranteeing to their children the right to some level of education provided by the state. Many states also have specific provisions mandating that public education be 'uniform'. However, the strength of the various states' education clauses varies. It is therefore worthwhile to note the different types of education clauses that exist and examine the potential impact of *Holmes* based on the similarities and differences between Florida's education clause and the analogous provisions incorporated into other state constitutions (p.840).

These different interpretations of the education clause can have an impact on future legal challenges for school voucher programs for students with disabilities.

School voucher programs for students with disabilities have an impact on the protections provided by IDEA. The major concern is when school voucher programs for students with disabilities have parents revoke protections under IDEA when accepting a school voucher to attend a private school. In both the Georgia Special Needs Scholarship and the Carson Smith Special Needs Scholarship programs, parents revoke any protections under IDEA when accepting the school voucher program. These parents are left to fend for themselves in ensuring the private schools provide the appropriate special education and related services for their child. Since the private schools are not responsible to provide the special education and related services for students with disabilities, parents have no legal option to challenge the private schools' services. The lack of protections for students with disabilities participating in school voucher programs can lead to legal challenges based on the civil rights for students with disabilities. In the reauthorization of IDEA, the federal government needs to consider adding more protections for students with disabilities who participate in school voucher programs. This may entail more accountability requirements to private schools participating in the school voucher programs to provide special education and related services for students with disabilities.

Implications of the Study

The school choice movement is one that is growing fast and there is no evidence it will be slowing down anytime soon. The impact school voucher programs have on students with disabilities can be positive or negative. The idea of providing parents of students with disabilities school choice to educate their child is not a negative idea. Parents of students without disabilities already exercise choice options such as charter schools, home instruction, virtual instruction and private schools. An elaboration on how this review of relevant case law would provide the opportunity for state decision makers to avoid certain legislation and replicate the legislation that has proven to work.

Future states considering developing school voucher programs for students with disabilities should consider possible legal challenges that can occur based on the no-aid and education clauses of the states constitutions. The interpretation of state's no-aid and education clauses of the constitution could prevent future school voucher programs for students with disabilities to withstand legal challenges. Another consideration is the impact of school voucher programs is the protections for students with disabilities under IDEA. Parents should not have to make a choice between selecting a school voucher program and losing their legal protections under IDEA. This may entail including accountability measures for private schools that accept students with disabilities on a school voucher program. Some of these accountability measures are academic monitoring and the provision of special education and related services for students with disabilities.

The federal government should review the protections provided under IDEA to parentally placed private school students. Students with disabilities participating in a school voucher program to a private school need to be ensured that special education and related services will be

provided to them. This may entail the federal government including accountability measures under IDEA to private schools accepting students with disabilities on a school voucher program. Students with disabilities should maintain more legal protections under IDEA in order to be provided the appropriate education.

Recommendations for Further Research

Recommendations for further research were identified from the review of research and data analysis. Further research should be conducted concerning:

1. data analysis on the types of students with disabilities participating in school voucher programs to attend a private school.
2. data analysis on the academic achievement of students with disabilities participating in school voucher programs to attend a private school.
3. data analysis on the types of parents (income, education) with children with disabilities choosing to participate in school voucher programs.
4. analyze the reasons parents of students with disabilities chose to participate in a school voucher program to attend a private school.
5. analyze the private school teacher's credentials providing special education and related services to students with disabilities participating in a school voucher program.
6. comparison on all states constitutions in regards to their no-aid and education clauses.
7. Comparison of the programs and services offered to students with disabilities between public schools and private schools where students attend under voucher programs.

APPENDIX A: IRB COMMITTEE APPROVAL FORM



University of Central Florida Institutional Review Board
 Office of Research & Commercialization
 12201 Research Parkway, Suite 501
 Orlando, Florida 32826-3246
 Telephone: 407-823-2901, 407-882-2012 or 407-882-2276
www.research.ucf.edu/compliance/irb.html

NOT HUMAN RESEARCH DETERMINATION

From : **UCF Institutional Review Board #1**
FWA00000351, IRB00001138

To : **Patricia Fontan**

Date : **July 04, 2012**

Dear Researcher:

On 07/04/2012 the IRB determined that the following proposed activity is not human research as defined by DHHS regulations at 45 CFR 46 or FDA regulations at 21 CFR 50/56:

Type of Review: Not Human Research Determination
 Project Title: An Analysis of the Legal Issues of School Vouchers Programs for Students with Disabilities and its Impact on the Individuals with Disabilities Education Act (IDEA)
 Investigator: Patricia Fontan
 IRB ID: SBE-12-08347
 Funding Agency:
 Grant Title:
 Research ID: N/A

University of Central Florida IRB review and approval is not required. This determination applies only to the activities described in the IRB submission and does not apply should any changes be made. If changes are to be made and there are questions about whether these activities are research involving human subjects, please contact the IRB office to discuss the proposed changes.

On behalf of Sophia Dziegielewski, Ph.D., L.C.S.W., UCF IRB Chair, this letter is signed by:

Signature applied by Patria Davis on 7/04/2012 11:11:19 AM EDT

IRB Coordinator

APPENDIX B: TABLE OF STATE CONSTITUTIONS, HOUSE BILLS, SENATE BILLS
AND STATUTES

Arizona

Arizona Constitution, Article II, §12.

Arizona Constitution, Article IX, §7.

Arizona Constitution, Article IX, §10.

Arizona House Bill, 2676

Arizona Senate Bill, 1553

Florida

Florida Constitution, Article I, §3

Florida Constitution, Article IX, §1

Florida Constitution, Article IX, §6

Florida Statute, 1002.39

Georgia

Georgia Constitution, Article I, §1

Ohio

Ohio Constitution, Article I, §7

Ohio Constitution, Article VI, §1

Ohio Constitution, Article VI, §2

Utah

Utah Constitution, Article I, §4

Utah Constitution, Article X, §1

Utah Constitution, Article X, §13

U.S. Const. art. I, §3 (1789).

APPENDIX C: TABLE OF CASES AND FEDERAL STATUTES

Americans with Disabilities Act of 1990, 42 U.S.C. §§12101 et seq. (1990).

Bagley et al v. Raymond School Department et al, 728 A.2d 127 (Me. 1999). Retrieved from LexisNexis

Brown v. Board of Educ., 347 U.S. 483 (1954). Retrieved from LexisNexis.

Bush v. Holmes, 886 So. 2d 340 (Fla. 2004). Retrieved from LexisNexis.

Bush v. Holmes, 919 So. 2d 392 (Fla. 2006). Retrieved from LexisNexis.

Cain et al v. Horne et al, 183 P.3d 1269 (Ariz.2008). Retrieved from LexisNexis.

Cain et al v. Horne et al, 202 P.3d 1178 (Ariz.2009). Retrieved from LexisNexis.

Cochran et al. v. Louisiana State Board of Education et al., 281 U.S. 370 (1930). Retrieved from LexisNexis.

Committee for Public Education & Religious Liberty et al. v. Nyquist, Commissioner of Education of New York, et al., (1973) 413 U.S. 756. Retrieved from LexisNexis.

Everson v. Board of Education of the Township of Ewing et al., 330 U.S. 1(1947). Retrieved from LexisNexis.

Individuals with Disabilities Education Act, 20 U.S.C. §§1400 et seq. (1997).

Individual with Disabilities Education Improvement Act, 20 U.S.C. 1413 (b). (2004).

Jackson et al v. Benson et al, 218nWis 2d 835 (1998). Retrieved from LexisNexis.

Owens et al. v. Colorado Congress of Parents, Teachers and Students et al, 92 3d 933 (Colo. 2004). Retrieved from LexisNexis.

Pierce, Governor of Oregon, et al v. Society of Sisters, 268 U.S. 510 (1925). Retrieved from LexisNexis.

Simmons-Harris et al, v. Zelman et al, 72 F. Supp.2d 834 (1999). Retrieved from LexisNexis.

Simmons-Harris et al, v. Zelman et al, 234 F.3d 945 U.S. App. (2000). Retrieved from LexisNexis.

Simmons-Harris et al, v. Zelman et al, 536 U.S. 639 (2002). Retrieved from LexisNexis.

The Education for All Handicapped Children Act, 1975, Public Law 94-142.

LIST OF REFERENCES

- Anonymous. (2009, September 30). Dick Durbin and D.C. School vouchers. *The Wall Street Journal*, pp.A.22.
- Americans United for Separation for Church and State (2012). What are no-aid provisions? Retrieved from www.au.org/content/what-are-no-aid-provisions
- Anastasiou, D. & Kauffman, J.M. (2009). When special education goes to the marketplace: the case of vouchers. *Exceptionality*, 17(4), 205-222. Retrieved from Ebscohost database.
- Belanger, I. (2011, June 2). Indiana enacts most expansive school voucher program in the US. *World Socialist Web Site*. Retrieved from www.wsws.org.
- Belfield, C. (2002). The prospectus for education vouchers after the supreme court ruling. ERIC Clearinghouse on Urban Education. Retrieved from Ebscohost database.
- Black's Law Dictionary (8th ed. 2004). St. Paul, Minnesota: West Publishing Co.
- Black's Law Dictionary (9th ed. 2010). St. Paul, Minnesota: Thomson Reuters.
- Black's Law Dictionary (9th ed. 2011). St. Paul, Minnesota: Thomson Reuters.
- Buck, S. & Greene, J.P. (2010). The case for special education vouchers. *Education Next*, 10(1),36-43. Retrieved from Ebscohost database.
- Carey, K. (2011). The dissenter: What happened when the education world's most prominent intellectual switched sides. *The New Republic*, December 15, 2011, 14-18. Retrieved from Ebscohost database.
- Carpenter, D.M. & Peterson, S. (2007). *Private choice in public programs: how private institutions secure social services for Arizonians*. A Report by the Institute for Justice. Retrieved from <http://heartland.org/policy-documents/private-choice-public-programs-how-private-institutions-secure-social-services-ariz>
- Cavanagh, S. (2012). Researchers probe special ed. students' access to vouchers. *Education Week*, March 14, 10. Retrieved from www.edweek.org
- Conniff, R. (2011, September). The GOP attack on special ed. *The Progressive*, pp.16-17. Retrieved from Ebscohost database.
- Council for Exceptional Children Board of Directors (2003). Our position on school vouchers and IDEA reauthorization. *Teaching Exceptional Children*, Nov/Dec., 74-75. Retrieved from Ebscohost database.
- Dash, N. (2009). Privatization of education. Retrieved from Ebscohost database.

- Dickman, A. & Schmidt, J. (2011). Slight decline in use of private school tuition vouchers in 2010-2011. *Public Policy Forum Research Brief*, 99 (2), 1-7. Retrieved from Ebscohost database.
- Dictionary.com Unabridged (2012). Random House Dictionary, 2012. Retrieved from www.dictionary.com.
- Estes, M.B. (2004). Choice for all? Charter schools and students with special needs. *The Journal of Special Education*, 37 (4), 257-267. Retrieved from Ebscohost database.
- Etscheidt, S. (2005). Vouchers and students with disabilities: a multidimensional analysis. *Journal of Disability Policy Studies*, 16 (3), 16-168. Retrieved from Ebscohost database.
- Fiala, T.J. (2010, April). *Education policy and friedmanomics: free market ideology and its impact on school reform*. Paper presented at the 68th Annual National Conference of the Midwest Political Science Association, Chicago, IL. Abstract retrieved from EBSCOhost database.
- Figlio, D. & Hart, C.M.D. (2011). Does competition improve schools? New evidence from the Florida tax-credit. *Education Next*, 11, 1, 74-80. Retrieved from Academic Search Premier database.
- Fineout, F. (2008, September 4). Court blocks Florida ballot measures intended to help school vouchers. *The New York Times*. Retrieved from Academic Search Premier database.
- Finn, C.E., Hentges, C.M., Petrilli, M.J., & Winkler, A.M. (2009). When private schools take public dollars: what's the place of accountability in school voucher programs? *Thomas Fordham Institute*, 48. Retrieved from Academic Search Premier Database.
- Florida Department of Education (2002). *Use of the Exceptional Student Education Matrix of Services*. Bureau of Instructional Support and Community Services. Retrieved from <http://www.fldoe.org/ese/pdf/matrixnu.pdf>
- Florida Department of Education (2011). *Florida Charter School Directory*. Office of school Choice. Retrieved from http://www.floridaschoolchoice.org/Information/Charter_Schools.
- Florida Department of Education (2011). *Florida Private School Directory*. Office of School Choice. Retrieved from <http://www.floridaschoolchoice.org/>.
- Florida Department of Education (2011). *John M. McKay Scholarship Program Statistics*. Office of School Choice. Retrieved from <http://www.floridaschoolchoice.org/>.

- Florida Department of Education (2012). *John M. McKay Scholarship Program June Quarterly Report*. Office of School Choice. Retrieved from <http://www.floridaschoolchoice.org/>.
- Forster, G. (2011). A win-win solution: The empirical evidence on school vouchers. *The Foundation for Education Choice*, March 2011. Retrieved from Ebscohost database.
- Fox, J. (1999). Sending public school students to private school. *Policy Review*, 93, 25-29. Retrieved from Ebscohost database.
- Friedman, M. (1955). The role of government in education. *In Economics and the public*. New Jersey: Rutgers University Press. Retrieved from <http://www.schoolchoices.org/roo/fried1.htm>.
- Frigaard, C. (2008). School voucher programs: Are they the answer?. A doctoral dissertation defended October, 2008. Retrieved from Ebscohost database.
- Gardner, W. (2009, March 16). School vouchers leave too many children behind. *Christian Science Monitor*. Retrieved from Academic Search Premier database.
- Georgia Department of Education (2010). *Georgia special needs scholarship program-2009-2010 end of school year report*. Retrieved from <http://www.gadoe.org/External-Affairs-and-Policy/Policy/Pages/Special-Needs-Scholarship-Program-Resources.aspx>
- Georgia Department of Education (2012). *Special needs scholarship program resources-state law*. Retrieved from <http://www.doe.k12.ga.us/External-Affairs-and-Policy/Policy/Pages/Special-Needs-Scholarship-Program-Resources.aspx>
- Georgia Department of Education (2012). *Special needs scholarship program-frequently asked questions*. Retrieved from <http://www.doe.k12.ga.us/External-Affairs-and-Policy/Policy/Pages/Special-Needs-Scholarship-Program-Resources.aspx>
- Georgia Department of Education (2012). *Special needs scholarship program-parents responsibilities*. Retrieved from <http://www.doe.k12.ga.us/External-Affairs-and-Policy/Policy/Pages/Special-Needs-Scholarship-Program-Resources.aspx>
- Georgia Department of Education (2012). *Special needs scholarship program-preliminary quick facts report*. Retrieved from <http://www.doe.k12.ga.us/External-Affairs-and-Policy/Policy/Pages/Special-Needs-Scholarship-Program-Resources.aspx>
- Greene, J.P., & Winters, M.A. (2008). The effect of special education vouchers on public achievement: evidence from Florida's McKay scholarship program [Abstract]. *Civic Report*.

- Guilfoyle, V. (2007). Constitutional law-education-state-wide school voucher program declared unconstitutional under the “uniformity” provision of Florida’s education article. *Rutgers Law Journal*, 38(1329), 1329-1357. Retrieved from Ebscohost database.
- Harmon, C. (2010). Beyond Cain v. Horne: comment on Tim Keller’s “the national implications of Cain v. Horne”. *Journal of School Choice: Research, Theory, and Reform*, 4(2), 236-241. Retrieved from Ebscohost database.
- Harvey, J. (2011). A drain on public schools. *Educational Leadership*, 2011. Retrieved from Ebscohost database.
- Hensel, W.F. (2010). Vouchers for students with disabilities: the future of special education. *Journal of Law & Education*, 39 (291), 1-52. Retrieved from Ebscohost database.
- Howell, W.G., West, M.R., Peterson, P.E. (2011). The public weighs in on school reform. *Education Next*, 11(4), 10-22. Retrieved from Ebscohost database.
- Jacob, M. (2003). *The voucher veneer: The deeper agenda to privatize public education*. People for the American Way Foundation. Retrieved from Ebscohost database.
- Ji, C.C., & Boyatt, E. (2007). Religion, parental choice, and school vouchers in urban parochial schools: the case of five schools in southern California [Abstract]. *Journal of Research on Christian Education*, 16. Retrieved from Ebscohost database.
- John M. McKay Scholarships for Students with Disabilities, FL 1002.39 (2007).
- Joyner, J. (2005, June 10). Milton Friedman on school vouchers. *Outside the Beltway*. Retrieved from http://www.outsidethebeltway.com/milton_friedman_on_school_vouchers.
- Kahn, B. (2006). *Bush v. Holmes*: school vouchers and state constitutions. *Legislation and Public Policy*, 9 (833), 833-845. Retrieved from Ebscohost database.
- Keller, T. (2010). Special needs vouchers aid children and promote excellence: a response to “Beyond Cain v. Horne”. *Journal of School Choice: Research, Theory, and Reform*, 4(2), 242-247. Retrieved from Ebscohost database.
- Kozol, J. (2007). The single worst, most dangerous idea. *Principal*, 87 (1), 56-69. Retrieved from Ebscohost database.
- Ladner, M. (2003). *Race and disability: Racial bias in Arizona special education* (Policy Report No.178). Retrieved from Ebscohost database.
- Levin, H.M. (1990). The theory of choice applied to education. *Choice and Control in American Education Volume 1: The Theory of Choice and Control in Education* (p. 247-284). London, New York, Philadelphia: The Falmer Press.

- Levin, H.M. (2011). The economics of education. *Albany Government Law Review*, 4(394), 1-22. Retrieved from Ebscohost database.
- Lips, D. & Feinberg, E. (2007). Utah's revolutionary new school voucher program. *The Heritage Foundation*, February 16, 2007. Retrieved from Ebscohost database.
- Lubienski, C., & Weitzel, P. (2008). The effects of vouchers and private schools in improving academic achievement: a critique of advocacy research [Abstract]. *Brigham Young University Law Review*, 2.
- Maglakelidze, S. (2011). Education reform and school funding: An analysis of the Georgian experience. Retrieved from Ebscohost database.
- Mangu-Ward, K. (2009). Gutting D.C. school vouchers after they work as predicted. *Reason*, 41(2). Abstract retrieved from Retrieved from Academic Search Premier database.
- Merriam-Webster Dictionary (9th ed. 2012). Merriam-Webster, Inc.
- Milligan, P. (2011, November). *Carson smith special needs scholarship program*. Charter School Administrator's Meeting, Utah. Retrieved from www.schools.utah.gov/charterschools
- Moe, T.M. (2001). *Schools, vouchers, and the American public*. Washington, DC: Brookings Institution.
- Nathan, J. (2005). Charters "yes!" vouchers "no!". *Educational Horizons*, Winter 2005. Retrieved from Ebscohost database.
- National Conference of State Legislatures. (2010). *Publicly funded school voucher programs*. Retrieved from <http://www.ncsl.org/IssuesResearch/Education/SchoolChoiceVouchers>.
- National Council on Disability (2003). *School vouchers and students with disabilities*. Retrieved from Ebscohost database.
- Ohio Department of Education (2012). *Autism scholarship program-chapter 3301-103 of the Ohio administrative code*. Retrieved from <http://www.ode.state.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=849&ContentID=6678&Content=125908>
- Ohio Department of Education (2012). *Ohio autism scholarship program fact sheet*. Retrieved from www.ode.state.oh.us

- Osterstock, T., Herring, D., & Buys, B. (2008). *A performance audit of the Carson Smith scholarship for students with special needs*. A Report to the Utah Legislature. Retrieved from http://le.utah.gov/audit/ad_2008dl.htm
- People for the American Way Foundation (2002). *Myths and facts about school vouchers*. Retrieved from Ebscohost database.
- People for the American Way Foundation (2003). *Jeopardizing a legacy: A closer look at IDEA and Florida's disability voucher program*. Retrieved from Ebscohost database.
- Robinson, Rev. D. (2011). *An Analysis of Knowledge of the Bible, Private School Law, and Business and Finance Between Christian School Principals with and without Graduate Degrees*. A doctoral dissertation defended May, 2011. Retrieved from Ebscohost database.
- Ryan, J.E. (2009). The big picture. *Phi Delta Kappan*, June 2009, 20-723. Retrieved from Ebscohost database.
- Ryman, A. (2012, May 15). Arizona school-choice program expands: new law lets more opt for private education. *The Republic*. Retrieved from <http://www.azcentral.com/news/politics/20120515arizona-school-choice-program-expands>
- Sailor, W. & Stowe, M. (2003). *School vouchers and students with disabilities*. National Council on Disability. Retrieved from Ebscohost database.
- Scott, R. (2010). 7-7-7 plan: world class education. *Let's Get to Work*, 2010. Retrieved from <http://letsgettowork.state.fl.us/Home.aspx>.
- Shah, N. (2012, February 29). Special ed. and choice ties grow. *Education Week*, pp.1, 14. Retrieved from Ebscohost database.
- Sopko, K.M. (2008, October). *An analysis of a critical issue in special education: parentally placed private school students with disabilities*. Retrieved from the National Association of State Directors of Special Education website: www.projectforum.org.
- State constitutional law-education clause-Florida supreme court declares state's school voucher program unconstitutional-Bush v. Holes, 919 So. 2d 392 (Fla. 2006). (2007). *Harvard Law Review*, 120(4). Abstract retrieved from Academic Search Premier Database.
- Sutton, L.C. & King, R.A. (2011). School vouchers in a climate of political change. *Journal of Education Finance*, 36(3), p.244-267. Retrieved from Ebscohost database.
- Taylor, S.S. (2005). Special education and private schools: principals' points of view. *Remedial and Special Education*, 26(5), 281-296. Retrieved from Ebscohost database.

- The Friedman Foundation for Educational Choice (2012). *Report on the Utah-Carson Smith Special Needs Scholarship Program*. Retrieved from <http://www.edchoice.org/School-Choice/Programs/Carson-Smith-Special-Needs-Scholarship-Program.aspx>
- Toch, T. (2012). Vouchers redux. *Kappan*, 93(4), 68-69. Retrieved from Ebscohost database.
- Tomsho, R. (2009, March 26). School-voucher movement loses ground after democratic gains. *The Wall Street Journal*, pp.A.10.
- Usher, A. & Kober, N. (2011). *Keeping informed about school vouchers: A review of major developments and research*. Center on Education Policy, July 2011. Retrieved from Ebscohost database.
- Utah State Office of Education (2012). *Carson Smith Special Needs Scholarship-Program Overview for Parent Applicants*. Retrieved from <http://www.schools.utah.gov/sars/Quick-Links/Carson-Smith-Scholarship.aspx>
- Viteritti, J.P. (2005). School choice: How an abstract idea became a political reality. *Brookings Papers on Education Policy*, 2005, 137-173. Retrieved from Ebscohost database.
- Wilson, C. (2012, January 13). Indiana school voucher law upheld, ruled constitutional. *The Huffington Post*. Retrieved from www.huffingtonpost.com/2012/01/14/indiana-school-voucher-law_n_1206364.html.
- Winters, M.A. & Greene, J.P. (2011). Public school response to special education vouchers: The impact of Florida's mckay scholarship program on disability diagnosis and student achievement in public schools. *Educational Evaluation and Policy Analysis*, 2011, 138-158. Retrieved from Ebscohost database.
- Ysseldyke, J.E. (1992). School choice programs in the fifty states. Research Report No. 7. Enrollment Options for Students with Disabilities. Retrieved from Ebscohost database.
- Zubrzycki, J. (2012). Indiana grapples with impact of voucher law. *Education Week*. 31(15), 1-3. Retrieved from Ebscohost database.