



FEDERAL LAW AND SCHOLARSHIPS FOR STUDENTS WITH SPECIAL NEEDS

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More than 6.6 million students receive special education from public schools across the United States. For most parents, the public school assigned to them works great. But what if they need another option, or more intensive services than those offered by public schools? This is often the case for students with special needs who often do not fit neatly into traditional general education or special education classrooms.

For two decades, some states have created additional options for students with special needs by providing tuition scholarships or customizable scholarship accounts for parents to direct their child’s education funding to the non-public option(s) of their choice. These programs are not meant to compete with public schools—they simply broaden the number of options available to families, all with voluntary participation.

There is widespread confusion about these programs, their intent and how they interact with federal requirements on public schools who serve students with special needs. This brief puts these programs into context. While it is true that public and private schools have different requirements related to serving students, that does not mean that these systems are mutually exclusive.

Statistics on Special Needs Scholarship Programs (2016-17)

There are 20 private educational choice programs for students with special needs. In the 2016-17 school year, there were more than 60,000 students enrolled in these programs (not including those who may be enrolled in a broader choice program). These students received an average scholarship of nearly \$8,000 each, with a total of \$630.1 million dollars expended in total.¹

Special Needs Scholarship Programs 2016-17 School Year	
 20 programs in 13 states	 More than 60,000 students served
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THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

Prior to the enactment of what is now called the Individuals with Disabilities Education Act (IDEA) in 1975, U.S. public schools served only one out of five students with disabilities, denying an estimated *one million students* access to public schools. Many of these students—particularly those with more severe disabilities—ended up in state institutions, which rarely provided educational opportunities and often only provided minimal food, clothing and shelter.²

One clear goal of IDEA is to ensure that each student has access to a free appropriate public education tailored to meet his or her individual needs. This comes in the form of an “individualized education program” (IEP), a legal document that describes the student’s strengths and weaknesses, educational goals and the services the school will provide to meet those goals. In other words, IDEA provides a mechanism for students with disabilities to have the same opportunities afforded to all students.

Another pillar of the IDEA law is a directive for schools to place students with disabilities in general education classrooms as much as possible, as opposed to grouping them in classrooms full of other students with disabilities (a practice that unfortunately continues in schools across the country today).

The IEP is developed by a group consisting of the child’s parent, teachers and other public school officials. Though envisioned by Congress to be a collaborative process, it is ultimately school officials who have final say over the IEP’s content, including the services the child will receive.

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What If Parents and School Officials Cannot Agree on an IEP?

IDEA gives parents two options if they disagree with the final content in a district-approved IEP.³

First, parents may appeal the decision to an administrative court via IDEA’s due process procedures. Unless agreed to by the school and the parents, students must remain in their current placement while the proceedings take place, which can often take many months or even years. This is not a comforting prospect to a parent who believes the child isn’t being adequately served there.

The second option is for a parent to enroll his or her child in a private school without school district consent, then sue the district for reimbursement. This move—commonly called “place and chase”—is financial risky for parents who have the burden of proving to a court that the public school was inadequate. And, since parents must pay the private school tuition upfront and out-of-pocket with no certainty of reimbursement, this option is realistically limited to affluent families. In addition, IDEA protections do not apply to students placed by their parents in a private school while proceedings take place.

In both cases, parents are saddled with the costs and frustration of a complex legal process, which often includes an appeal of the administrative ruling to a state or federal court.



The *Endrew* Case: A Complex, Costly and Tumultuous Path to Placement

IDEA recognizes the need for options—including private school placement—for students with special needs, but it does not go as far as empowering parents to make a choice without a district’s consent. If a parent and school officials agree on a private placement, then no further options would be needed. But districts are historically hesitant to agree to such a placement, since they are required to pay for what can often be expensive private school tuition.

In reality, IDEA’s version of school choice is limited to those with financial or political resources to navigate the process. The most recent data available shows that approximately *one-percent of all students with IEPs are placed in private schools* at district expense.⁴

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The complexity of the process is crystalized in a recent U.S. Supreme Court case, *Endrew F. v. Douglas County School District*. This landmark special education case involved Endrew, a student with autism from Douglas County, Colorado. Endrew’s parents, unhappy with the services being provided to their son, chose to “place and chase” by enrolling Endrew in a private school without the school district’s consent.⁵

While few disagreed that Endrew appeared to be making much better progress at the private school, the two sides disagreed about who was responsible to pay for the placement. The district argued that it was only legally responsible for providing “some educational benefit” to Endrew in a public school, and a federal appeals court agreed. Endrew’s parents, however, felt that the district needed to be held to a much higher bar.

The U.S. Supreme Court sided with Endrew’s parents, though the precedent they left for other courts to follow was ambiguous. The Court ruled that districts must create IEPs that are “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstance” based on the “unique circumstances of the child for who it was created.”

Endrew’s parents withdrew him from public school in May 2010, their due process hearing was in June 2012, and the Supreme Court issued an opinion in March 2017. But the case did not end there: Endrew’s parents had to go *back* to the federal district court and have the case tried based on the Supreme Court’s opinion, which it did in February 2018—again ruling in Endrew’s favor. The case likely ends there, and Endrew’s family will finally be reimbursed for his education, roughly eight years later.⁶

Those looking for definitive guidelines to improve the IEP negotiation process won’t find them in the *Endrew* ruling. Parents will continue to be at the mercy of district decisions. And if a parent and a district cannot come to an agreement, a drawn-out court case, countless hours and onerous legal fees should not be a family’s *only* option.



SPECIAL NEEDS SCHOLARSHIP PROGRAMS AND FEDERAL LAW

Special needs scholarship programs allow parents to apply for funding to enroll their child in a private school. These funds typically come in the form of a tuition voucher from the state; a scholarship provided by a nonprofit organization who solicits donations from taxpayers who, in return receive a tax credit from the state; or an education scholarship account (ESA), which is a funded account that parents can use to direct funds to the school, providers and educational services of their choice. Unlike IDEA public placements, special needs scholarship programs are not funded with any local district funds.

In effect, these programs provide an avenue for parents to seek funding needed to place their child in a nonpublic school that they have identified as a better fit. And, importantly, an avenue to avoid the high-risk, tumultuous and lengthy IDEA due process proceedings that neither party wants to pursue.

Are Districts Responsible for Providing Additional Services?

Parents who enroll their child in a non-public school without first reaching an agreement with the district are considered “parental placements” under IDEA.⁷ Because their parents have decided to unilaterally to place them in a nonpublic setting, these students are not entitled to IDEA due process protections, such as the IEP process, that are afforded to students in public schools or students placed by districts.

IDEA does require school districts to provide “equitable services” to private school students, including those who were unilaterally placed their by their parents. “Equitable services” include everything from identification of students eligible for services (“child find”), determining what services they are entitled to, sharing a proportional amount of certain federal funds and/or the district providing services to the student themselves.

However, since parentally placed students are not entitled to the same treatment under IDEA as public school students, districts have more discretion over which services to provide to parentally placed nonpublic students—including which students are served and what types and frequency of services are to be provided. These determinations are discussed during a consultation process with private schools, but the district makes the final decisions.⁸

A DIFFERENT FORM OF ACCOUNTABILITY: PARENTAL CHOICE

The decision to enroll a student in a nonpublic setting should not be made lightly, whether privately paid or with a scholarship. A parental placement is truly an agreement between the parent and the private school. Parents will be entirely responsible for paying the costs associated with educating the child in the nonpublic setting, including any costs that exceed the scholarship or private financial assistance provided for the child.

However, a key form of accountability espoused by many scholarship parents is the ability for the parent to withdraw his or her child from a school or a service provider at any time. While not the perfect arrangement for all parents, the power to “vote with your feet” is inherently different from the public system, which only allows parents to “shop” via a complex, district-controlled, and often time-consuming process - or by packing up and moving to a different school zone.

As one parent in a special needs scholarship program noted, “IDEA ‘rights’ are meaningless if the school system cannot provide the facilities for your child or has historically demonstrated failure to serve special needs students.”⁹ Crafted properly, a scholarship program works alongside IDEA to ensure that all children with special needs have an opportunity to reach their full potential.



STATE EXAMPLE: FLORIDA'S MCKAY SCHOLARSHIP FOR STUDENTS WITH DISABILITIES

Florida's McKay Scholarship for Students with Disabilities program provides students with an IEP or 504 Accommodation Plan with a scholarship to attend a private school. Scholarships are equal to the amount the student would have received in a public school, with an average scholarship amount of \$8,000 in 2016-17.¹⁰

The McKay program is the oldest and largest special needs scholarship program in the country, serving more than 31,000 students in the 2017-18 school year. While the program is large, only 5-7 percent of eligible students in the state participate.

FACT: Parents in the McKay Scholarship Program Are More Satisfied with Their Schools

An early study of the McKay program surveyed participating parents and found the following:¹¹

- 93 percent of participating parents were satisfied with their private school their child was enrolled in. These parents expressed only 33 percent satisfaction with their prior public school.
- Only 30 percent of scholarship parents reported receiving all services required under federal law from their previous public school, while 86 percent reported receiving services promised by a private school.
- McKay participants reported being bothered (47 percent) and physically assaulted (25 percent) more often in their previous public school than in their current private school (5 percent and 6 percent).
- Of former McKay participants who removed their child from the program, more than 90 percent felt the program should continue to be available for those who wish to use it.

Another large survey of the parents of McKay participants *and* parents of special needs students in public schools found: "almost 90 percent of McKay respondents...were satisfied or very satisfied with the school their child attends, whereas only 71.4 percent of public school respondents were satisfied or very satisfied with the school their child attends."¹²

FACT: Students Remaining in Public Schools Improve

Eligible public school students who did not participate in the program made significant gains in both math and reading *after a nearby private school began accepting McKay students*. This is particularly true for students with milder disabilities, which represent the majority of McKay students.¹³

FACT: The McKay Program Had Led to a Reduction in the Labeling of Mild Disabilities.

As a public school's exposure to more competition increased, they were 12 percent less likely to diagnose a student with mild disabilities. In other words, when there is a greater threat to losing a student to a nearby private school, a public school is less likely to label a student with mild learning challenges as "disabled" and more likely to consider them a general education student.¹⁴

¹ American Federation for Children. "[2016-17 School Choice Yearbook](#)."

² U.S. Department of Education. "[A 25 Year History of the IDEA](#)."

³ Statutory language for the procedural safeguards can be found at 20 U.S. Code § 1415.

⁴ National Center for Education Statistics. "[Digest of Education Statistics](#)." Table 204.60.

⁵ *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).



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- ⁶ John Aguilar, *Denver Post*, “[Douglas County Schools must pay the private education costs of student who has autism, judge rules.](#)”
- ⁷ 20 U.S. Code § 1412(a)(10)(A)
- ⁸ 34 C.F.R. § 300.134, 300.137, 300.138.
- ⁹ Patricia Levesque, *Tampa Bay Times*, “[McKay Scholarships expand choices for students.](#)”
- ¹⁰ Florida Department of Education. “[Fact Sheet: McKay Scholarship Program.](#)”
- ¹¹ Jay P. Greene and Greg Forster. “[Vouchers for Special Education Students: An Evaluation of Florida’s McKay Scholarship Program.](#)”
- ¹² Virginia R. Weidner and Carolyn Herrington. “[Are Parents Informed Consumers: Evidence From the Florida McKay Scholarship Program.](#)”
- ¹³ Marcus A. Winters and Jay P. Greene. “[The Effect of Special Education Vouchers on Public School Achievement: Evidence From Florida’s McKay Scholarship Programs.](#)”
- ¹⁴ Marcus A. Winters and Jay P. Greene. “[Public School Response to Special Education Vouchers: The Impact of Florida’s McKay Scholarship Program on Disability Diagnosis and Student Achievement in Public Schools.](#)”