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

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

Summary

The 108th Congress is considering reauthorization of the Individuals with Disabilities Education Act (IDEA) program (the main federal program providing special education and related services to children with disabilities). Proposals that would provide increased parental choice under IDEA are likely to be debated during reauthorization.

This report provides background on current federal choice programs and on the Florida McKay Scholarship program, which provides scholarships for children with disabilities who are enrolled in the state's public schools to attend other public schools or to attend participating private schools. It also describes and analyzes legislation introduced in the 108th Congress (e.g., H.R. 1373) that would authorize school voucher programs under the IDEA. The report concludes with a discussion of possible issues that a federal special education voucher program might raise.

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

States and localities also operate school choice programs. The Florida McKay Scholarship program provides school choice opportunities specifically for children with disabilities. The program offers parents of children with disabilities the opportunity to transfer their child to another public school or to enroll him or her in a participating private school if they are not satisfied with their child's educational progress. The scholarship amount is the lesser of the tuition and fees of the private school, or the amount of state funds the student would have generated if attending a Florida public school. If the value of the scholarship is insufficient to cover the full cost of the tuition of the private school, parents are permitted to contribute funds to cover the shortfall. Over 8,000 students and more than 450 schools currently participate in the program.

Proponents and opponents of voucher programs raise a number of important issues, such as whether expanded school choices and the increased competition that vouchers might engender would improve or weaken public education. A federal voucher program for children with disabilities might raise additional issues. Perhaps the key set of issues is the degree to which the rights and obligations conferred by IDEA would continue to be provided by private schools accepting federal special education vouchers.

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

Introduction

Congress is considering reauthorization of the Individuals with Disabilities Education Act (IDEA) program, the primary federal program providing special education and related services to children with disabilities.¹ Options being discussed during IDEA reauthorization include increasing parental choice,² which also was a recommendation of the final report of the President's Commission on Excellence in Special Education.³

This report provides a brief overview of school choice programs, including current and proposed federal programs and the Florida McKay Scholarship Program, which provides vouchers for children with disabilities in the state of Florida. The report provides a brief summary of general issues related to choice programs and a discussion of additional issues related to school choice for children with disabilities.

¹ H.R. 1350, 108th Cong., a bill to amend IDEA, has been introduced in the House and was marked up the House Subcommittee on Education Reform on April 2, 2003. Full committee markup is scheduled for April 9, 2003. This bill currently contains no provisions related to parental choice. For a discussion of H.R. 1350, see CRS Report RL31830, *The Individuals with Disabilities Education Act (IDEA): Selected Changes that Would be Made to the Law by H.R. 1350, 108th Congress*, by Nancy Lee Jones and Richard N. Apling.

² See, for example, Chester E. Finn, Jr., Andrew J. Rotherham, and Charles R. Hokanson, Jr., "Conclusions and Principles for Reform." In Chester E. Finn, Jr., Andrew J. Rotherham, and Charles R. Hokanson, Jr. (eds.) *Rethinking Special Education for a New Century* (Washington, D.C.: Thomas B. Fordham Foundation and Progressive Policy Institute, May 2001). See also Marie Gryphon and David Salisbury, *Escaping IDEA: Freeing Parents, Teachers, and Students through Deregulations and Choice*, Cato Institute, Policy Analysis, no. 444, July 10, 2002.

³ President's Commission on Excellence in Special Education, "A New Era: Revitalizing Special Education for Children and their Families" (July 1, 2002), [<http://www.ed.gov/inits/commissionsboards/whspeialeducation/reports/index.html>]. The Commission's recommendation states in part: "IDEA should allow state use of federal special education funds to enable students with disabilities to attend schools or to access services of their families choosing, provides states measure and report outcomes for all students benefitting from IDEA funds." At 35.

Overview of Federal Choice Programs and Proposals⁴

On January 8, 2002, the President signed P.L. 107-110 (H.R. 1), The No Child Left Behind Act, which amended and reauthorized the Elementary and Secondary Education Act (ESEA).⁵ P.L. 107-110 contains several provisions to maintain and expand federal support of school choice for pupils and their families. It requires, as part of Title I-A accountability provisions, that students attending schools identified for school improvement after having not made adequate yearly progress (AYP) for 2 consecutive years be provided intradistrict public school choice, consistent with state law. Further, it requires that students from poor families attending schools that fail to make AYP for 3 consecutive years be provided the option of obtaining supplementary or tutorial services from providers of their choice.⁶ Additionally, the ESEA provides that public school choice must be made available to pupils who are victims of violent crimes or who attend unsafe schools. The ESEA also authorizes federal funding for the Public Charter Schools Program to assist charter school start-up and for facilities; the use of Innovative Programs funds for activities to promote, implement, or expand public school choice; Voluntary Public School Choice Programs, which provide competitive grants for transportation in support of public school choice and tuition transfer payments and school enhancements in schools receiving transfer students; and the Magnet Schools Assistance program, under which grants are provided to LEAs to create special curriculums designed to attract students from different racial backgrounds. Previously, during floor debates of H.R. 1, both the House and the Senate rejected amendments that would have authorized federal aid to support **private school** choice programs.

On June 7, 2001, the President signed into law P.L. 107-16 (H.R. 1836), the Economic Growth and Tax Relief Reconciliation Act of 2001. Among other provisions, this legislation modified the Education Individual Retirement Account authority to increase the annual contribution limit to \$2,000 and to permit these accounts to support qualified elementary and secondary school expenses. Qualified expenses include “expenses for tuition, fees, academic tutoring, special needs services in the case of a special needs beneficiary, books, supplies, and other equipment” for attendance at public, private, or religious schools.⁷ Subsequently, these accounts have been renamed Coverdell Education Savings Accounts.⁸

⁴ For further information on current education choice programs and proposals, see CRS Issue Brief IB98035, *School Choice: Current Legislation*, by David P. Smole. For a discussion of IDEA and NCLB see CRS Report RL31838, *The Individuals with Disabilities Education Act (IDEA): Implications of Selected Provisions of the No Child Left Behind Act (NCLB)*, by Nancy Lee Jones and Richard N. Apling.

⁵ Note that IDEA (20 U.S.C. 1400 et seq.) is not part of ESEA, although children with disabilities may participate in ESEA programs.

⁶ For further information on supplemental educational services, see CRS Report RL31329, *Supplemental Educational Services for Children from Low-Income Families Under ESEA Title I-A*, by David P. Smole.

⁷ Internal Revenue Code, Section 530(b)(4)(A)(i).

⁸ For further information on Coverdell Education Savings Accounts, see CRS Report (continued...)

On February 3, 2003, in his FY2004 budget request, the President proposed two new initiatives supportive of school choice: a refundable tax credit for 50% of up to the first \$5,000 in costs associated with attending a different public or private school, and paid by the taxpayer, for families whose children are assigned to a public school that has failed to make AYP according to ESEA requirements; and a choice incentive fund. Sundry bills have been introduced during the 108th Congress that would provide increased federal support for school choice.⁹

Florida's McKay Scholarship Program

In 2000, the Florida legislature established the John M. McKay Scholarships for Students with Disabilities Program. The program was substantially revised in 2001.¹⁰ The program allows parents of disabled children who are dissatisfied with their child's progress to request that their child be placed in another Florida public school or be provided with a scholarship to support the child's attendance at a participating private school in the state. The program is open to K-12 students with disabilities¹¹ who attended a Florida public school in the prior school year. Students with disabilities who are already enrolled in private schools are not eligible.

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

Both sectarian and non-sectarian schools may participate in the program. However, all schools must meet certain state requirements in order to be eligible:

- "Demonstrate fiscal soundness,"

⁸ (...continued)

RL20289, *Education Savings Accounts for Elementary and Secondary Education*, by Bob Lyke and James B. Stedman.

⁹ For further information on the administration's school choice proposals, and legislation on school choice in general introduced during the 108th Congress, see CRS Issue Brief IB98035.

¹⁰ Fla. Stat. Ann. §229.05371.

¹¹ The statute defines students with disabilities as those "who are mentally handicapped, speech and language impaired, deaf or hard of hearing, visually impaired, dual sensory impaired, physically impaired, emotionally handicapped, specific learning disabled, hospitalized or homebound, or autistic." (229.05371 (1)) Note that this definition differs somewhat from the IDEA definition of a child with a disability (Section 602 (3)).

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

In addition, the parent and the student accepting a scholarship must fulfill certain obligations and accept certain responsibilities. For example, the student must attend the school throughout the school year unless excused for good cause, such as illness, and must comply with the school’s rules of conduct. The parent must participate in the school’s parent involvement activities, unless excused. Perhaps of greatest importance, the statute notes that, in accepting a scholarship, the parent “is exercising his or her parental option to place his or her child in a private school.” The U.S. Department of Education (ED) has concluded that if the state of Florida and local educational agencies (LEAs) in the state have made a free appropriate public education (FAPE) available to eligible children with disabilities, as IDEA requires, “but their parents elect to place them in private schools through the Scholarship Program, then such children are considered ‘private school children with disabilities’ enrolled by their parents Under IDEA, such parentally placed private school students with disabilities have no individual entitlement to ... special education and related services in connection with those placements.”¹² ED also points out that federal nondiscrimination laws with respect to individuals with disabilities do not apply directly to participating private schools because Title II of the Americans with Disabilities Act (ADA) does not apply to private schools¹³ and Section 504 of the Rehabilitation Act of 1973 depends on the acceptance of federal funds.¹⁴

The amount of the scholarship is the lesser of the private school’s tuition and fees or the amount of state funds the student would have generated if attending a Florida public school. If the value of the scholarship is insufficient to cover the full cost of the tuition of the private school, the shortfall must be covered such as by

¹² U.S. Department of Education letter to John W. Brown, School Board Attorney, Pinellas County School Board, Largo, Florida, March 30, 2001. For a more detailed discussion of IDEA and private schools see CRS Report 98-854, *Individuals with Disabilities Education Act: Services in Private Schools under P.L. 105-17*, by Nancy Lee Jones.

¹³ Title II of the ADA, 42 U.S.C. §12131 *et seq.*, prohibits discrimination against individuals with disabilities by a public entity. A public entity is defined in relevant part as a state or local government or any department, agency, special purpose district, or other instrumentality of a state or states or local government.

¹⁴ Section 504, 29 U.S.C. §794, in relevant part prohibits discrimination against individuals with disabilities in any program or activity that receives federal financial assistance.

students' parents, outside scholarships, or tuition reduction.¹⁵ Payments of the scholarships are made quarterly in the form of an individual warrant to the parent, which the parent then endorses over to the private school for deposit into its account. In school year 2000-2001, the first year of the program, an estimated 1,000 students and 139 schools participated. In the second year, increased numbers of both students (5,000) and schools (400) participated.¹⁶ In school year 2002-2003, over 8,000 students participate in the McKay Scholarship program. The median scholarship amount is \$6,808 and total expenditures for the program will exceed \$54 million in school year 2002-2003.¹⁷

The McKay Scholarship program is considered by some as a model program for providing greater school choice to parents of children with disabilities and by others as one under which parents sometimes unwittingly give up rights afforded by the IDEA. Some supporters of school choice would like to see the Congress turn to the McKay Scholarship program as an example of school choice provisions that could be incorporated into the IDEA during reauthorization.¹⁸ Some suggest that the Congress amend the IDEA to allow states to opt out of IDEA requirements if they implement school choice programs similar to Florida's.¹⁹ Others see school choice programs modeled after Florida's as having the potential to undermine the protections and educational benefits currently afforded under the IDEA and as not holding private schools accountable.²⁰ Supporters counter that private schools are directly accountable to parents and should not be burdened with excessive regulatory accountability requirements.

¹⁵ This is unlike the Florida Opportunity Scholarship program in which schools cannot charge tuition greater than the value of the scholarship.

¹⁶ Testimony by Ms. Diane McCain before the House Subcommittee on Education Reform, May 8, 2002. (Referred to hereafter as McCain Testimony). Some have attributed the substantial growth in the number of participating students and schools to changes made in the program in 2001. One significant change allows private schools to charge parents the difference between the amount of the school's tuition and fees and the amount of the scholarship. Apparently in the first year of the program, schools could only charge parents the amount of the scholarship. See "McKay Scholarships: Florida's Special Vouchers." Draft paper by Carolyn D. Herrington and Virginia R. Weidner, College of Education, Florida State University, January 2002. (Referred to hereafter as Herrington and Weidner.)

¹⁷ David F. Salisbury. "Lessons From Florida: School Choice Gives Increased Opportunities to Children with Special Needs," *Cato Institute Briefing Papers*, no. 81, March 20, 2003, p. 5.

¹⁸ Krista Kafer, "Florida McKay Scholarship Program Provides Model for Federal Legislation," The Heritage Foundation, WebMemo #234, March 25, 2003.

¹⁹ David F. Salisbury. "Lessons From Florida: School Choice Gives Increased Opportunities to Children with Special Needs," *Cato Institute Briefing Papers*, no. 81, March 20, 2003, p. 9.

²⁰ "Jeopardizing a Legacy: A Closer Look at IDEA and Florida's Disability Voucher Program," People for the American Way Foundation and Disability Rights Education & Defense Fund, March 6, 2003.

Legislation in the 108th Congress

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

Selected Issues for Choice Programs

This section begins with a brief overview of general issues sometimes raised regarding school choice programs. It next provides a summary of IDEA requirements and then a discussion of additional issues that could arise with respect to a federal special education voucher program.

Background on School Choice Programs. In general, school choice proposals have been made with an intent to increase the range and quality of educational opportunities available to pupils, such as those from low-income families, those who attend low-performing schools, and those whose families seek an education provided by an entity other than their local public school. Some proponents also have suggested that the availability of school choice will improve public schools through market competition. Some opponents have expressed concern about potential negative effects on public schools and their pupils, including the redirection of public education resources and an erosion of the ideal of a common public education for all. Additionally, some aspects of school choice have raised constitutional questions, especially when involving religiously affiliated schools.²² Although a detailed discussion of this issue is beyond the scope of this report, the Supreme Court recently held that a government educational assistance program does not run afoul of the establishment clause if it is neutral with respect to religion and provides assistance to a broad class of citizens who in turn direct the aid to schools of their choice, which may include religiously affiliated schools.²³

²¹ As noted *supra*, note 1, H.R. 1350, to bill to amend IDEA, has been introduced in the House.

²² For a detailed discussion of these constitutional issues see CRS Report RL30165, *Education Vouchers: Constitutional Issues and Cases*, by David M. Ackerman.

²³ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). For an overview of *Zelman* see CRS Report RS21254, *Education Vouchers: An Overview of the Supreme Court's Decision in* (continued...)

Overview of IDEA. School choice proposals could raise additional issues for children with disabilities and their parents. To understand some of these issues, it is necessary to have some understanding of the IDEA, the central federal statute dealing with children with disabilities and special education. The IDEA both authorizes federal funding for special education and related services²⁴ and, for states that accept these funds,²⁵ sets out principles under which special education and related services are to be provided. The requirements are detailed, especially when the regulatory interpretations are considered. The major principles include requiring that:

- States and school districts make available a **free appropriate public education (FAPE)**²⁶ to all children with disabilities, generally between the ages of 3 and 21; States and school districts **identify, locate, and evaluate** all children with disabilities, regardless of the severity of their disability, to determine which children are eligible for special education and related services;
- Each child receiving services has an **individual education program (IEP)** spelling out the specific special education and related services to be provided to meet his or her needs; the parent must be a partner in planning and overseeing the child’s special education and related services as a member of the **IEP team**;
- “To the maximum extent appropriate,” children with disabilities must be **educated with children who are not disabled**; and states and school districts provide **procedural safeguards** to children with disabilities and their parents, including a right to a due process hearing, the right to appeal to federal district court and, in some cases, the right to receive attorneys’ fees.²⁷

²³ (...continued)

Zelman v. Simmons-Harris. For a discussion of the impact of *Zelman* on the use of vouchers see Andrew J. Rotherham, “Putting Vouchers in Perspective: Thinking About School Choice After *Zelman v. Simmons-Harris*,” Progressive Policy Institute Policy Brief, July 2002.

²⁴ Related services (for example, physical therapy) assist children with disabilities to benefit from special education (20 U.S.C. §1401(22)).

²⁵ Currently all states receive IDEA funding.

²⁶ It should be emphasized that what is required under IDEA is the provision of a free appropriate public education. The Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 177 (1982), held that this requirement is satisfied when the state provides personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction and that this instruction should be reasonably calculated to enable the child to advance from grade to grade. IDEA does not require that a state provide sufficient resources and services to maximize the potential of children with disabilities.

²⁷ For additional information on IDEA requirements, see CRS Report RL31259, *Individuals with Disabilities Education Act: Statutory Provisions and Selected Issues*, by Nancy Lee Jones and Richard N. Apling.

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

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

Clearly, any legislative language on this issue would be key in making the determination of what rights would apply. However, it should be noted that the student and parental rights at issue would include not only those delineated in IDEA but also those contained in other civil rights statutes, notably Section 504 and the Americans with Disabilities Act, as well as constitutional rights. Although ED states that Section 504 and Title II of the ADA are not directly applicable to the Florida McKay program, the rationale for that conclusion is that the McKay program receives no federal funds. If federal IDEA funds were involved, that rationale would no longer apply. In addition, private schools are covered under Title III of the ADA.²⁸ However, Title III specifically exempts entities controlled by religious organizations from coverage²⁹ thus limiting ADA coverage of religiously affiliated schools. H.R. 1373 provides that the authorization of a parent to exercise private school choice would fulfill the state's obligation to provide a free appropriate public education. The bill also would deem private schools accepting vouchers to be providing a free appropriate education and to be in compliance with Section 504. H.R. 1373 does not discuss compliance with Title III of the ADA.

Would State and Local Funding Be Included? Regardless of the receipt of federal funds, certain constitutional rights regarding an education for children with disabilities may apply. The constitutional rights of children with disabilities to receive an education if education is being provided to children without disabilities were examined in two seminal cases: *PARC v. State of Pennsylvania*³⁰ and *Mills v. Board of Education of the District of Columbia*.³¹ In essence, these cases found constitutional due process and equal protection violations when children with disabilities were denied education and were the impetus to the enactment of P.L. 94-

²⁸ See 42 U.S.C. §12181 which defines public accommodation in part as “a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education.”

²⁹ 42 U.S.C. §12187.

³⁰ 343 F.Supp. 279 (E.D. Pa. 1972).

³¹ 348 F.Supp. 866 (D.D.C. 1972).

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

How Would Voucher Funding Be Structured? Other issues could arise with respect to the mechanism for providing vouchers and the amount of the voucher. Would states continue to receive their full IDEA formula allocation and then distribute some portion of that allocation to parents via vouchers; or would the federal government establish a separate source of funding to provide vouchers directly to parents? What would be the amount of the voucher? For example, would each child receive a voucher for the same amount, or would the amount of the voucher be related to the type of disability? What could the voucher be used for? For example, the voucher could be limited to tuition, or it could be used for other expenses, such as transportation. Could private schools charge more than the amount of the voucher (with parents making up the difference), or would tuition be limited to the amount of the voucher? H.R. 1373 would allow federal funds allocated to states under Section 611 of the IDEA to be used to supplement state voucher funds.

Could Least Restrictive Environments Be Provided? To the extent that IDEA guarantees continued to be provided under an IDEA voucher program, another set of issues could involve the student make-up of participating private schools. As noted above, a basic principle of IDEA is that children with disabilities are to receive services in the “least restrictive environment” (LRE). This means that “to the maximum extent appropriate” children with disabilities are to be educated with their nondisabled peers in regular classrooms. “Only when the nature or severity of the disability ... is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily” can the child be placed in a separate classroom or in a special school.³² “Inclusion” or “mainstreaming” with children who are not disabled is not a problem for public schools, at least in one sense, since children with disabilities usually account for 10% or 12% of the overall enrollment.

In considering the effects of a voucher program, one might look to the experience of public charter schools in serving students with disabilities. According to the ED’s Evaluation of the Public Charter Schools Program, in many instances, students with disabilities are attracted to charter schools, which often offer programs

³² See 20 U.S.C. 1412(a)(5)(A).

targeted to such students.³³ However one also could imagine, under a voucher system, private schools that specialize in serving children with certain disabilities. (Such schools exist now for serving certain relatively severely disabled children.) These specialized private schools might attract few, if any, nondisabled children. Thus children in such schools might not be educated with their nondisabled peers, even if those children's disabilities were mild enough to permit their being educated full time in regular public classrooms.³⁴

Who Would Be Eligible for Vouchers? Another set of issues involves the criteria under which parents and students could participate in an IDEA voucher program. As discussed above, some federal public choice programs are linked to evidence over time of school failure. For example, the No Child Left Behind Act would only authorize intradistrict public school choice for students attending schools that had been identified for school improvement after not making adequate yearly progress for 2 consecutive years. On the other hand, the Florida McKay Scholarships are available to parents who express dissatisfaction with their **child's** educational progress.³⁵ The nature of participation criteria could significantly influence the popularity of an IDEA voucher program. For example, some could argue that the popularity of the Florida program can be attributed, in part, to the ease with which parents can demonstrate eligibility. Eligibility for Florida's other voucher program — Opportunity Scholarships — is based on school performance. To be eligible to transfer to a high performing public school or receive a voucher to attend a private school, a student must be attending a school that has failed, i.e., it is rated as an "F" school for 2 years in a 4-year period. Perhaps because an entire school must fail, rather than just a parent being dissatisfied, participation in this program, according to at least one report, is more modest: during its first year, only two schools were judged as "failures" and only about 140 students either transferred to a higher performing public school or took advantage of the voucher to attend a private

³³ Lee Anderson, et. al., *A Decade of Public Charter Schools: Evaluation of the Public Charter Schools Program: 2000-2001 Evaluation Report*, SRI International, November 2002, pp. 16-18.

³⁴ One exception to the LRE requirement in the statute involves a child with a disability who has been convicted as an adult and incarcerated in an adult prison. Based on a demonstrated "bona fide security or compelling penological interest that cannot otherwise be accommodated" the IEP team may modify this (and other) requirements of IDEA (20 U.S.C. 1414(d)((6)(B)).

³⁵ Apparently the original statutory language tied eligibility to a student's academic performance: scholarship availability required that "the student's academic progress in at least two areas has not met expected performance levels for the previous year as determined by the student's IEP — or, absent specific performance levels identified in the IEP, the student performed below grade level on state or local assessments and the parent believes that the student is not progressing adequately towards his/her IEP goals" Quoted in "The Little-Known Case of America's Largest School Choice Program" by Daniel McGroarty in *Rethinking Special Education for a New Century*, Thomas B. Fordham Foundation and Progressive Policy Institute. Chester E. Finn, Andrew J. Rotherham, and Charles R. Hokanson, Jr., eds., p. 303.

school.³⁶ Issues for a parental IDEA voucher program include whether eligibility will be based on individual or school performance or on parental dissatisfaction with the FAPE being provided. In addition, would children with disabilities previously placed in private schools by their parents be eligible? Under the McKay Scholarship program, such children are not eligible.

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

Is There an Incentive to Over-identify Children as Having Disabilities and Would the Provision of Vouchers Alleviate this Problem? A recent study by the Manhattan Institute for Policy Research has argued that the increase in the enrollment of children in special education programs is impacted by financial incentives created by special education funding.³⁷ This conclusion is not universally accepted and others have argued that the increase in the numbers of children enrolled in special education is due to the increased number of children with disabilities.³⁸ If this enrollment increase is seen as a significant issue, a related issue of whether the provision of vouchers would lead to greater or lesser

³⁶ Herrington and Weidner, p. 1. Students from 10 failing schools will be eligible for Opportunity Scholarships in school year 2002-2003. (For further information, see [<http://www.opportunityschools.org/Info/OSP/default.asp>].)

³⁷ Jay P. Greene and Greg Foster, "Effects of Funding Incentives on Special Education Enrollment," Manhattan Institute for Policy Research (Dec. 2002) [http://www.manhattan-institute.org/html/cr_32.htm]. This issue has been examined at the federal level. Because of concerns that a formula based on the number of children with disabilities could provide incentives for "over-identifying" such children, Congress, in the 1997 IDEA Amendments (P.L. 105-17), authorized a new funding formula for the grants-to-states program, which became effective in FY2000. Prior to that year, grants-to-states funds were distributed based on states' shares of children with disabilities. The 1997 Amendments changed the formula so that all "new" money (i.e., the amount above the FY1999 amount allocated to states) would be distributed based on states' share of the relevant overall population (85% of "new" money) and on states' shares of children living in poor families (15% of "new" money). For a more detailed discussion of the IDEA funding formula see CRS Report RL31480, *Individuals with Disabilities Education Act (IDEA): State Grant Formulas*, by Richard N. Apling.

³⁸ Sheldon Berman, Perry Davis, Ann Koufman-Frederick, and David Urion, "The Rising Cost of Special Education in Massachusetts: Causes and Effects," in *Rethinking Special Education for a New Century*, ed. Chester E. Finn, Jr., Andrew J. Rotherham, and Charles R. Hokanson, Jr., Fordham Foundation and Progressive Policy Institute, May 2001.

increases likely would arise. The Manhattan Institute study argued that a private school scholarship program similar to the Florida McKay Scholarship Program would “mitigate perverse incentives from state special education funding.”

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