

## NOTE

# SUCCESS AND MEDIOCRITY IN VOUCHER STATES FOR SPECIAL EDUCATION OUTCOMES

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*In this Note, I offer an analysis of data on “success” in special education in each state offering disability-targeted vouchers versus national averages for those same metrics. On the whole, states providing disability-targeted vouchers are statistically more likely to succeed on the metrics I analyze. This is likely not an indication of the success in voucher schools specifically, but rather an indication that states who offer an alternative route for parents to find free and appropriate education for their students also tend to be more likely to do better in special education programs on the whole (that is to say, it is a correlative relationship, rather than causal). While voucher systems often fail students in special education, states who offer them, perhaps ironically, do better on the whole.*

## INTRODUCTION

Special education and school choice have a history marked by paradox. Conventional knowledge would lead one to believe the two are positively related: students with disabilities are the only group legally entitled to school choice in every state and jurisdiction, even in those states without effective school choice programs related to income or voucher eligibility. However, studies reported by the National Council on Disability show that voucher choice programs have a history marked by racism, a present that mis- and under-informs parents, and a future that continues to poorly serve disabled students.<sup>1</sup> It should be shown, however, how standards in states with voucher systems compare to na-

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<sup>1</sup> NAT'L COUNCIL ON DISABILITY, CHOICE & VOUCHERS—IMPLICATIONS FOR STUDENTS WITH DISABILITIES 40–45 (2018).

tional standards for special education on the whole. State-wide attitudes towards choice and education may bear on special education policy execution and success, as is shown by trends mentioned in this Note.

In *Endrew v. Board of Education*, the Supreme Court decided that special education students deserve more from their education than just passing through.<sup>2</sup> Progress is necessary. Just what this progress entails, and how it may manifest, was left ambiguous.<sup>3</sup> Some believe that true progress for special education students rests on the shoulders of the option for school choice, paid for by a state or locality—in *Endrew*, tuition to a private school was the requested remedy to an unaccommodating public school environment.<sup>4</sup> In this way, school choice in its various forms has been seen as the savior for disabled students in failing public institutions. However, recent case studies from some districts with choice programs outside of that provided by the Individuals with Disabilities Education Act (“IDEA”) show issues within the school choice system, particularly for students with disabilities—and of those, students of color—in states with voucher systems.<sup>5</sup>

The Americans with Disabilities Act requires that reasonable accommodations be made for students with disabilities.<sup>6</sup> If these accommodations are not made, districts must then fund the student’s education at an institution better situated to provide care.<sup>7</sup> This bargain, although it must be applied for or determined by the State, is analogous to what is offered by many school choice programs. However, in areas where school choice policies exist, low income parents of disabled children may bypass the requirements for petitioning the IDEA for better care, opting instead for direct choice programs offering choice to disabled students. This is because, in spite of decisions like that in *Endrew*, determining that disability care in public education is “unreasonable” for students is often a prohibitively difficult task.<sup>8</sup> For families who cannot afford to contest determinations that they are not deserving of funding for external education, school choice programs could provide a chance at a better system.

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<sup>2</sup> See *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 997.

<sup>5</sup> Anya Kamenetz, *For Families With Special Needs, Vouchers Bring Choices, Not Guarantees*, NPR (May 17, 2017, 5:02 AM), <https://www.npr.org/sections/ed/2017/05/17/527938057/for-families-with-special-needs-vouchers-bring-choices-not-guarantees>; see also David Card, *Students with Disabilities in Voucher Programs Losing Rights, Government Study Says*, NAT’L DISABILITY RTS. (Dec. 12, 2017), <https://www.ndrn.org/resource/students-with-disabilities-in-voucher-programs-losing-rights-government-study-says/>.

<sup>6</sup> Americans with Disabilities Act of 1990, 29 U.S.C. § 794(a) (2018).

<sup>7</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d)(2)(C)(i)(I) (2018).

<sup>8</sup> NAT’L COUNCIL ON DISABILITY, *supra* note 1, at 11.

Choice programs, however, may not be the answer for many. Parents report that when their children use school choice programs, they are less likely to be included in Individualized Education Program (“IEP”) determinations; and that their children are less likely to be accepted to schools, more likely to be segregated, less likely to have an inclusive education, and less likely to make meaningful progress.<sup>9</sup> The purpose of this Note is to examine whether these worries are borne out state-wide in states that offer choice programs.

In the following sections, I will provide background on the relationship between Choice and Special Education, then look to data comparing learning environments of disabled students in states with traditional voucher programs with provisions for disabled students. I will compare these figures to national standards. After analyzing data on integration in classroom environments, racial representation, and private school use, I will offer policy suggestions related to the results in line with the legislature’s goals regarding Special Education.

## I. SPECIAL EDUCATION BACKGROUND

Under the IDEA, children and youth with disabilities are entitled to receive free public education that adequately addresses their needs.<sup>10</sup> In 2016, the Supreme Court of the United States of America decided to hear what is already heralded as a groundbreaking case in special education: *Andrew F. v. Douglas County School District*.<sup>11</sup>

In this case, a couple from Douglas County brought a suit against the school district, accusing it of not providing adequate education under the IDEA for their son.<sup>12</sup> Their son, who was in the fifth grade, began exhibiting severe behavioral problems in his public-school classroom.<sup>13</sup> Thus, his parents had to transfer him to a private school for individuals with disabilities.<sup>14</sup> Tuition at this school was prohibitively expensive, and the couple took the school district to court, arguing that it should be required to cover the cost of the private school education because the public school had failed to “adequately” educate their son.<sup>15</sup>

By arguing this case in the Supreme Court, an issue that was once a specter haunting special education policy in America has been moved to the forefront of education policy issues: What constitutes special education that is “good enough” for students in public schools, how do we

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<sup>9</sup> *Id.* at 40–46.

<sup>10</sup> 20 U.S.C. §§ 1401(9)(D), 1412(a)(1)–(4).

<sup>11</sup> 137 S. Ct. 988 (2017).

<sup>12</sup> *Id.* at 997.

<sup>13</sup> *Id.* at 996.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 997.

maintain it under the vague language within the IDEA, and when is someone deserving of private school instead?

The lower court decided that a moderate amount of education was appropriate for the school district to give, and that they provided just that for Endrew before his family pulled him out of the public institution.<sup>16</sup> These rulings in themselves did not resolve the issue of vagueness in defining or understanding the phrase “adequate education.”<sup>17</sup> The decision did not impact policy or implementation, but rather only temporarily resolved the uncomfortable and ethically challenging situation at hand.<sup>18</sup>

When the Court heard Endrew’s case, a new era dawned for special education. Reversing the precedent set by *Board of Education v. Rowley*,<sup>19</sup> the Court decided in favor of the family, 8-0, that sufficient education should at minimum allow for more than what the lower courts had held, regardless of cost.<sup>20</sup> The Court found through this case that the education “must be appropriate in light of the child’s circumstances,” and that therefore, states must ensure “children with disabilities receive education in the regular classroom whenever possible.”<sup>21</sup>

Although the ruling did give justice to the family involved, no real definitions were provided, thrusting us again into ambiguity and interpretation for terms like “more than *de minimis*.”<sup>22</sup> The ruling also set a precedent for adequacy in special education to involve not only academic benchmarks, but to ensure behavioral benchmarks as well.<sup>23</sup> It thus lowered the bar for families seeking school choice via the IDEA.<sup>24</sup>

We have yet to see the wide-spread ramifications of this decision, but it’s easy to be unhopeful: Has the issue of “good enough” in the face of vagueness been resolved for students with disabilities, not to mention for teachers and administrations? To what extent can choice actually resolve these issues, if at all?

Long before any policy began to be written about special education and the right of disabled students to an education (just after the Second

<sup>16</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1342–43 (10th Cir. 2015).

<sup>17</sup> *Id.* at 1341 (applying a “some educational benefit” standard to measure whether Plaintiff’s education was adequate without much elaboration on what adequate education means in practice).

<sup>18</sup> *Id.* at 1342–43 (limiting analysis to Plaintiff’s specific facts).

<sup>19</sup> *Board of Educ. v. Rowley*, 458 U.S. 176 (1982). In this case, the Court decided that school administrators could sufficiently determine what constituted adequate education for the purposes of accommodating disability.

<sup>20</sup> *Endrew F.*, 137 S. Ct. at 1001.

<sup>21</sup> *Id.* at 999 (internal quotations omitted).

<sup>22</sup> *Id.* at 1000 (holding that the new individualized standard is more demanding than the Tenth Circuit’s “more than *de minimis*” standard without “describe[ing] . . . a formula”).

<sup>23</sup> *Id.* (holding that school districts must provide “specialized instruction and services” to advance grade to grade).

<sup>24</sup> *Id.* at 1000–01.

World War), American policy makers discussed the concept of inclusion and exclusion of the disabled.<sup>25</sup> Debates about inclusion at this time related primarily to personhood and citizenship.<sup>26</sup> These discussions are reminiscent of civil rights struggles of the same time. The United States government and its people had to decide whether a disabled person could be considered a citizen, or even a part of a functioning society (no less capable of contributing to a public learning environment, or of choosing which environment best serves their needs).

The fight for least restrictive environments was held in the courts and settled on the precedent established in *Brown v. Board of Education of Topeka, Kansas*.<sup>27</sup> Leading up to the Rehabilitation Act and the IDEA were several landmark protests and cases. *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*<sup>28</sup> and *Mills v. Board of Education of the District of Columbia*<sup>29</sup> were two such cases. In them, the courts ruled that the state was required to provide full education opportunities for all, including those with special needs, and that no student should ever be fully excluded from the ability to have a free and suitable public education.<sup>30</sup> These cases, along with several others, preceded the Rehabilitation Act of 1973 and what would become the Individuals with Disabilities Education Act, originally written in 1975 as the Education for All Handicapped Children Act.<sup>31</sup>

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination in federally funded programs (such as public education) based upon disability or impairment.<sup>32</sup> Section 504 mandates that reasonable accommodations be made in the public-school classroom for students with disabilities.<sup>33</sup> Impaired persons under section 504 are guaranteed a “free appropriate public education” in which a student identified as handicapped will be provided aid appropriate to their needs.<sup>34</sup> Furthermore, schools under this provision “shall educate, or shall provide for the edu-

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<sup>25</sup> RICHARD A. VILLA & JACQUELINE S. THOUSAND, *RESTRUCTURING FOR CARING AND EFFECTIVE EDUCATION: PIECING THE PUZZLE TOGETHER xvii–xxix* (2nd ed., 2000).

<sup>26</sup> *Id.*

<sup>27</sup> 347 U.S. 483 (1954). *Brown* established the principle that segregation in schools was not to be tolerated. While this was decided on account of race, the principle made waves in the fight for least restrictive environments, since disability, like race, was used to create a class of separate and unequal students often intentionally separated from their classmates (or even their local schools).

<sup>28</sup> 334 F. Supp. 1257 (E.D. Pa. 1971).

<sup>29</sup> 348 F. Supp. 866 (D.D.C. 1972).

<sup>30</sup> *Pa. Ass’n Retarded Children*, 334 F. Supp. at 1258; *Mills*, 348 F. Supp. at 875–77.

<sup>31</sup> Kitty Cone, *Short History of the Section 504 Sit in*, *DISABILITY RIGHTS EDUCATION DEFENSE FUND*, <https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/> (last visited Dec. 10, 2020).

<sup>32</sup> Rehabilitation Act of 1973, 34 C.F.R. §§ 104.1–2 (2020).

<sup>33</sup> *Id.* § 104.33(a)–(b).

<sup>34</sup> *Id.* § 104.33(a).

cation of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person.”<sup>35</sup> This policy paves the way for greater strides towards fully inclusive classrooms. It also, however, shows an awareness of the idea that the best thing for all children in education is to become part of a larger community, learning alongside a diverse classroom in terms of ability.<sup>36</sup>

Section 504 was and is important to the discussion of how policy frustrates and enables inclusive practices in public schools, but the IDEA—ratified after section 504, and dealing more specifically with pragmatic elements of special education requirements—offers a more directed light on these aforementioned portions of § 104.33 and § 104.34. The IDEA mentions least restrictive environments, stating:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>37</sup>

This section of the IDEA attempts to eliminate complete segregation of education between special education students and general education students. In so doing, however, it makes no specific claims about the extent to which integration should be made manifest in schools (about the appropriateness of various levels of restriction for students). This ambiguity is generally seen as appropriate:<sup>38</sup> it reflects the diversity of challenges and abilities within the disabled community and allows for greater care and separation to be given where necessary. It also, however, opens the door for administrators and states to determine restrictiveness, sometimes at the sacrifice of inclusion.<sup>39</sup>

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<sup>35</sup> *Id.* § 104.34(a).

<sup>36</sup> JEANNE L. REID & SHARON LYNN KAGAN WITH MICHAEL HILTON & HALLEY POTTER, *A BETTER START: WHY CLASSROOM DIVERSITY MATTERS IN EARLY EDUCATION* 19 (2015), [https://production-tcf.imgix.net/app/uploads/2015/04/29222920/A\\_Better\\_Start-11.pdf](https://production-tcf.imgix.net/app/uploads/2015/04/29222920/A_Better_Start-11.pdf).

<sup>37</sup> 20 U.S.C. § 1412(a)(5)(A) (2018).

<sup>38</sup> See ROBERT L. OSGOOD, *THE HISTORY OF INCLUSION IN THE UNITED STATES* 166 (2005); Phil Smith, *Have We Made Any Progress? Including Students With Intellectual Disabilities in Regular Education Classrooms*, 45 *INTELL. & DEVELOPMENTAL DISABILITIES* 297, 299–304 (2007).

<sup>39</sup> See OSGOOD, *supra* note 38, at 53–54.

Moreover, IDEA categorizes classroom environments from least restrictive to most restrictive based on the level of integration between exceptional students and neuro- and physio-typical students. For example, housing special education students in a separate building with no overlap of students or instructors for classroom or non-classroom experiences would be considered a most restrictive environment.<sup>40</sup> It is within the most restrictive environments that exclusion and segregation occur.<sup>41</sup> Within a least restrictive environment, students are present within general education classrooms among other students and are provided for within the general education classroom.<sup>42</sup>

## II. SCHOOL CHOICE BACKGROUND

School Choice's theoretical grounding gives primacy to the individualistic model of education policy in which ideal educational authority maximizes future choice without prejudicing children towards any controversial conception of the "good life."<sup>43</sup> This responds to the weaknesses of a "State of Families" conception of education policy by championing dual goals of opportunity for choice and neutrality among conceptions of the good life which education is, in theory, training its students to inhabit and reify.<sup>44</sup> The fullest form of choice is unrealizable, but can be closely approached through a democratic state of education. Choice is appealing through this lens as a democratic counterbalance to the compulsory nature of education: if everyone *must* be educated, the thought goes, then we should have some agency in deciding *how* that education is administered to our children.<sup>45</sup>

Choice's past goes back to *Pierce v. Society of Sisters*, in which the "Pierce Compromise" was struck in Oregon in the mid-1920s. The Society of Sisters, a sectarian school for young girls, was threatened by a 1922 act (taking effect 1926) that made public education mandatory in Oregon.<sup>46</sup> They did not contest Oregon's authority to compel education; they just wanted Oregon's mandate to be additionally satisfied by private institutions and schools.<sup>47</sup> The court determined that state governments are free to establish public schools and to make education compulsory

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<sup>40</sup> Fred Spooner & Fredda Brown, *Educating Students with Significant Cognitive Disabilities: Historical Overview and Future Projections*, in HANDBOOK OF SPECIAL EDUCATION 503, 504 (James M. Kauffman & Daniel P. Hallahan eds., Routledge 2011).

<sup>41</sup> Adelle Renzaglia, *Instructional Issues for Students with Low Incidence Cognitive Disabilities*, in HANDBOOK OF SPECIAL EDUCATION, *supra* note 40, at 501.

<sup>42</sup> *See id.*

<sup>43</sup> AMY GUTMANN, DEMOCRATIC EDUCATION 44 (1987).

<sup>44</sup> *Id.* at 44–45.

<sup>45</sup> *Id.* at 45.

<sup>46</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 531–32 (1925).

<sup>47</sup> *Id.* at 533.

for certain age groups, but they are not free to eliminate competing private sector institutions that promote heterogeneity in education, and regulators cannot mandate curricula that completely displaces private instruction.<sup>48</sup> However, non-public schools must still reflect the state's goals.<sup>49</sup> This compromise reflects what is still, almost 100 years later, a core principle of choice: in a democratic system of education, the interests of the state and of the individual must be balanced.<sup>50</sup>

Since *Pierce*, choice has evolved considerably. Although choice was initially only an option for the wealthy or religious, it began to expand toward the middle of the century into the middle class.<sup>51</sup> This expansion was, in part, a reaction against desegregation mandates: some districts, such as that in *Green v. County School Board*, implemented choice plans as passive strategy for integration.<sup>52</sup> After three years of a "free choice" desegregation plan, only 15% of Black children chose to go to a historically White school, and no White children chose to go to a historically Black school in a completely residentially desegregated area.<sup>53</sup> The Supreme Court held this was neither permissible nor in line with the requirements of *Brown II*.<sup>54</sup> The Court ordered that schools strive toward a unitary, not a dual, form of education, and to develop plans that reasonably will work, and reasonably will work *now*.<sup>55</sup>

Choice was again expanded by the development of special education policy and the mandate that, post-*Brown*, a public school could neither segregate nor turn away students with a disability.<sup>56</sup> However, at the time of the policy's creation, separate schools for the disabled had been developed across the United States.<sup>57</sup> Before the passing of the Education for All Handicapped Children Act of 1975, only one in five disabled children attended a public school.<sup>58</sup> Several states had statutes stating that children who were deaf, blind, or those with "emotional disabilities" were explicitly forbidden from attending public schools.<sup>59</sup> To the extent that, for example, a deaf student's family could afford a deaf

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<sup>48</sup> *Id.* at 534–36.

<sup>49</sup> *Id.* at 535.

<sup>50</sup> GUTMANN, *supra* note 43, at 23.

<sup>51</sup> WILLIAM G. HOWELL & PAUL E. PETERSON WITH PATRICK J. WOLF AND DAVID E. CAMPBELL, *THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS*, at 11–12, 14 (Brookings Inst. Press 2002) (ebook).

<sup>52</sup> *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 433 (1968).

<sup>53</sup> *Id.* at 433, 441.

<sup>54</sup> *Id.* at 435–38.

<sup>55</sup> *Id.* at 441–42.

<sup>56</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954).

<sup>57</sup> OSGOOD, *supra* note 38, at 172–73, 175.

<sup>58</sup> Louis Danielson, *Forty Years Later, IDEA Still Seeks Success for Students with Disabilities*, AM. INST. FOR RES. (Dec. 11, 2015), <https://www.air.org/resource/forty-years-later-idea-still-seeks-success-students-disabilities>.

<sup>59</sup> *Id.*



school, the child could have attended one; to the extent that such an institution was unavailable, the child would have likely gone uneducated.<sup>60</sup> Such “choice” had been the only option for disabled children. The benefits and protections of the Education for All Handicapped Children Act extended to private institutions that served to educate the disabled. Most significantly, though, was its inclusion of a provision allowing “choice”:

(i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this part) *at no cost to their parents or guardian*, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and

(ii) in all such instances the State educational agency shall determine *whether such schools and facilities meet standards that apply to State and local educational agencies* and that children so served have all the rights they would have if served by such agencies.<sup>61</sup>

This law codified the modern conception of School Choice (using funding provided by the state to either remain in public schools or attend private schools) for students with disabilities on a national level, though the first state *voucher* system for disabled students outside of the above provision was not introduced until 2000 in Florida.<sup>62</sup> This was a remarkable step, especially given the hurdles Choice programs have faced on district-wide levels from 1989 (with Wisconsin’s passing of the nation’s first modern voucher program) up to today.<sup>63</sup> It was the above provision’s descendent in the IDEA on which *Andrew* was argued.

Today, as noted above, voucher systems are the archetype of school choice programs, though they are not the only kind of “choice” program a state may provide. Town tutoring programs, tax credits, and education funds are some other examples that may exist outside of a voucher pro-

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<sup>60</sup> *Id.*

<sup>61</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 613(a)(4)(B)(i)–(ii), 89 Stat. 773, 783 (emphasis added).

<sup>62</sup> *School Vouchers and Students with Disabilities*, NAT’L COUNCIL ON DISABILITY (2003), <https://nccd.gov/publications/2003/April152003>.

<sup>63</sup> *Id.*

gram.<sup>64</sup> States sometimes offer several kinds of “choice” programs to citizens, some district-specific.<sup>65</sup> Voucher systems provide opportunities for choice specifically for students with disabilities, as well as low-income families.

Generally, voucher systems extend choice to low-income students or students in underperforming schools within target districts, offering state-funded scholarships to attend private schools, or offer tax credits, or “education savings accounts.”<sup>66</sup> Currently, sixteen states and the District of Columbia function under a traditional voucher system of offering state-sponsored scholarships.<sup>67</sup>

### III. VOUCHER STATES

Of the eighteen states (including Puerto Rico and Washington, DC) with traditional voucher systems, eleven have programs offering vouchers targeted toward students with disabilities.<sup>68</sup> These states are Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Utah, and Wisconsin.<sup>69</sup> Ohio has five separate voucher programs, two of which are specifically designed for students with disabilities: one for Autism-specific vouchers and one for special needs vouchers.<sup>70</sup> The states’ disability-eligible voucher programs have varying degrees of associated eligibility and use, displayed below.<sup>71</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> *School Choice in America Dashboard*, EdCHOICE, <https://www.edchoice.org/school-choice/school-choice-in-america/> (last modified Feb. 4, 2020).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* It should be noted that the data in the tables provided are from 2019, at the time this Note was written. While on the whole participating non-public schools have increased, the rates have remained roughly the same at the time of this Note’s publication. Calculations are my own.

<i>State</i>	<i>Participation Rate of Those Eligible</i>	<i>Eligibility Rate across All Students</i>	<i>Participating Non-Public Schools</i>
Arkansas	<1%	14%	34
Florida	8%	12%	1,525
Georgia	2%	10%	249
Indiana	5%	50%	329
Louisiana	1%	10%	20
Mississippi	<1%	3%	1
North Carolina	1%	11%	230
Ohio (Autism)	15%	1%	256
Ohio (Special Needs)	2%	13%	377
Oklahoma	1%	16%	16
Utah	1%	12%	55
Wisconsin	<1%	13%	59

From this data, it is apparent that these states, with the exception of Ohio's Autism program and Florida's voucher program, have relatively low participation rates of those eligible for the voucher programs. In some states, such as Mississippi, Oklahoma, and Louisiana, this may be due to a limited number of participating schools (1, 20, and 16, respectively, at the time of writing). If too few schools decide to accept students from other public institutions via the voucher program, it may prove geographically or administratively impossible for families to send their children to another district. This limited acceptance is a barrier to the accessibility of such voucher programs.

Low participation may also be due to a lack of information to parents about the process of applying.<sup>72</sup> Moreover, low participation may also be due to the time required to apply, presenting a burden on families already consumed with getting through day-to-day practices of living with childhood disability. However, one hopes that low participation relates to satisfaction with public schools and the extent to which disabled students are included, challenged, and see progress. This hope is bolstered by recent surveys showing high parental satisfaction with their child(ren)'s school.<sup>73</sup>

#### IV. PROJECT AND METHOD

It remains to be seen whether, on a state-wide level, states offering these voucher systems for students with disabilities are better at inclu-

<sup>72</sup> See, e.g., NAT'L COUNCIL ON DISABILITY, *supra* note 1, at 24.

<sup>73</sup> *Id.* at 40.

sion, better at racial representation, and have more parents choosing private over public schools. These metrics indicate not only success in special education policy administration, but also the extent to which parents feel private school are necessary. Though not private-specific, a state-level analysis captures the experience of students with disabilities who have the voucher system available to them, but choose to remain in their public institutions, as well as students in private institutions themselves.

Of the 11 states identified above, all but Wisconsin keep regular data on the learning environments of students with disabilities served in the state.<sup>74</sup> The remaining ten will be compared to national standards in the following metrics: inclusion, racial representation, and private school selection. To compare these, I took national data on each state and created proportions relative to all special education students in that state. These proportions are compared to national standards on the same metrics.

#### A. *Inclusion*

Levels of inclusion and participation in the general learning environment have been central to measuring the progress of special education in the United States since disabled Americans were first given the right to be educated.<sup>75</sup> The ten voucher states are shown below with percentages of students and the extent to which they are included in non-specialized education environments. Because no data exists on inclusion in private schools participating in disability voucher systems, state-wide data alone is considered below. This data is meant to reflect inclusion, a goal of the IDEA.<sup>76</sup> The “least restrictive environment” represented below relates to the percentage of students in the classroom more than 80% of their day; the “most restrictive environment” represented below relates

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<sup>74</sup> NAT’L CTR. FOR EDUC. STAT., IDEA SECTION 618 DATA PRODUCTS: STATE LEVEL DATA FILES: 2016 REPORT ON CHILD COUNT AND EDUCATIONAL ENVIRONMENT (2020), <https://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#bcc> [hereinafter NCES]. The data included in the tables affiliated with this source is from the 2017–18 school year, the latest available at the time of writing.

<sup>75</sup> Nora Gordon, *Race, Poverty, and Interpreting Overrepresentation in Special Education*, BROOKINGS (Sept. 20, 2017), <https://www.brookings.edu/research/race-poverty-and-interpreting-overrepresentation-in-special-education/>; see also Curt Dudley-Marling & Mary Bridget Burns, *Two Perspectives on Inclusion in the United States*, 1 GLOB. EDUC. REV. 14, 15–18 (discussing the history of the integration of disabled students into the “regular education settings”).

<sup>76</sup> U.S. DEP’T OF EDUC., ABOUT IDEA, <https://sites.ed.gov/idea/about-idea/> (last visited Dec. 10, 2020).

to students spending less than 40% of their time in the classroom, as well as the use of a separate school or classroom.<sup>77</sup>

<i>State</i>	<i>Percentage of students in the classroom &lt;40% of time</i>	<i>Percentage of students in the classroom between 40% and 79% of time</i>	<i>Percentage of students in the classroom &gt;80% of time</i>	<i>Separate school or Classroom</i>
Arkansas	13%	30% <sup>†</sup>	53%	0.8%
Florida	14%	9% <sup>†</sup>	73%	3%
Georgia	15%	18%	64%	1%
Indiana	10%	11% <sup>†</sup>	73%	0.8%
Louisiana	15%	23%	61%	0.4%
Mississippi	15%	19%	63%	0.7%
North Carolina	14%	17%	67%	1%
Ohio	12%	17%	63%	3%
Oklahoma	8%	20%	71%	0.03%
Utah	11%	25% <sup>†</sup>	62%	2%
<b>Average</b>	<b>13%</b>	<b>19%</b>	<b>65%</b>	<b>1.3%</b>
<b>National Average</b>	<b>14%</b>	<b>19%</b>	<b>63%</b>	<b>3%</b>

<sup>†</sup>Indicates figures that are outliers in the set.

Proportions do not meet 100, due to students in necessary hospice during the school day.

The averages above show that generally, the states that offer vouchers have very similar inclusion levels as the national average with some notable exceptions. Florida, whose disability voucher program is the oldest,<sup>78</sup> and Indiana both have relatively low proportions of students in regular classrooms between 40% and 79% of the day, accompanied by higher proportions of students in the classroom more than 80%. On the other end of the spectrum, Utah and Arkansas have markedly high proportions of students in regular classrooms between 40% and 79%. In Arkansas, this was paired with a lower percentage of students in the least restrictive environment.

<sup>77</sup> NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS, 2017 (NCES 2018-070) (2019), <https://nces.ed.gov/fastfacts/display.asp?id=59>; NCES, *supra* note 74.

<sup>78</sup> Marcus A. Winters, *The Promise of Special Education Vouchers*, NATIONAL AFF. (Fall 2011), <https://www.nationalaffairs.com/publications/detail/the-promise-of-special-education-vouchers>; SCHOOL CHOICE FLORIDA, EdCHOICE, <https://www.edchoice.org/school-choice/state/florida/> (last visited Dec. 10, 2020).

Perhaps the most positive indicator of a tendency toward lesser restrictive environments, however, is the proportion of students put in separate schools or classrooms. The average rate at which this is done in voucher schools is less than half the national average. This indicates a correlation between states offering vouchers to students and states offering, regardless, meaningful alternatives to most restrictive environments.

### B. Racial Representation

Racial representation in special education in the United States is painted by a history of segregation and different treatment. Historically, African American students were more frequently identified as having learning disabilities and emotional disturbance than their White classmates—this trend, however, has likely been reversed recently, with studies adjusting for income showing that Black students are *underrepresented* in special education.<sup>79</sup> In addition, choice programs also have a troubling racial past, as White families used the guise of choice to avoid desegregation.<sup>80</sup> Although voucher proponents argue that social justice is at the core of the programs, the recipients and users of vouchers are increasingly White, middle-class families rather than low-income, minority families.<sup>81</sup> On state-wide public and private levels, racial representation in special education may reflect broader trends in disability diagnosis and racial disparities.<sup>82</sup> Although these proportions are more complicated considering socioeconomic factors, it is important to consider, outside of the district and in the state as a whole, how racial representation is executed in special education.<sup>83</sup>

The following data depicts more clearly the extent to which racial representation in special education mirrors racial representation of the relevant geographic area, using the examples of Black and White proportions in school and general populations.<sup>84</sup>

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<sup>79</sup> Paul L. Morgan, et al., *Minorities are Disproportionately Underrepresented in Special Education*, 44 EDUC. RESEARCHER 278, 280 (2015). In this Note, I refer to the classification that education data by-in-large categorizes as “Black or African American” as “Black” to better reflect the inclusiveness the former term attempts to embody in the field, which the latter term embodies in popular lexicon.

<sup>80</sup> Chris Ford, Stephanie Johnson, & Lisette Partelow, *The Racist Origins of Private School Vouchers*, CTR. FOR AM. PROGRESS 1, 4–6 (July 12, 2017), <https://www.americanprogress.org/issues/education-k-12/reports/2017/07/12/435629/racist-origins-private-school-vouchers/>.

<sup>81</sup> Kimberly Quick, *School Vouchers and Race: It’s Complicated*, THE CENTURY FOUNDATION (July 20, 2017), <https://tcf.org/content/commentary/school-vouchers-race-complicated/?agreed=1>.

<sup>82</sup> Gordon, *supra* note 75.

<sup>83</sup> See Quick, *supra* note 81 (suggesting that race is an important lens for analysis of special education programs).

<sup>84</sup> NCES, *supra* note 74.

<i>State</i>	<i>Percentage of White students in special education</i>	<i>Percentage of White people in the population</i>	<i>Percentage of Black students in special education</i>	<i>Percentage of Black people in the population</i>
Arkansas	62%	79%	26%	16%
Florida	39% <sup>†</sup>	77% <sup>†</sup>	23%	17%
Georgia	41% <sup>†</sup>	61% <sup>†</sup>	40%	32%
Indiana	74%	85%	9%	10%
Louisiana	88%	63%	41%	33%
Mississippi	53%	59%	41%	38%
North Carolina	50%	71%	24%	22%
Ohio	76%	82%	22%	13%
Oklahoma	53%	74%	6%	8%
Utah	77%	91%	1%	1%
<b>Average</b>	<b>62%</b>	<b>74%</b>	<b>23%</b>	<b>19%</b>
<b>National Average</b>	<b>47%</b>	<b>72%</b>	<b>18%</b>	<b>13%</b>

<sup>†</sup>Indicates significant differences in representation in special education programs and the general population.

Compared to the national average, the states represented serve significantly more White students and, to a lesser extent, more Black students than are served at the national average. This is despite a similar average of White students in the general population of the voucher states as the national average. This may show either a lower diversity in voucher states than is present in special education nationally or a greater likelihood for abuse of accommodations by White families that seek more favorable treatment. However, looking at racial representation in special education programs compared to state-wide representation, it is clear that states providing disability voucher systems more closely mirror actual racial representation than the national average.<sup>85</sup> Although student makeup is less diverse in these states, it is also less likely by the numbers that special education is used to segregate out students of color in a class setting.

This comes with the exceptions of Florida and Georgia, whose percentages of racial representation of White students are significantly lower than their state-wide averages, which may be the result of lingering

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<sup>85</sup> This is before accounting for socioeconomic diversity, which may impact interpretations of the data.

vestiges of more systemic racist practices in the states' educational history.<sup>86</sup> Similarly, Louisiana is an outlier: it is the only voucher state in which White representation in special education programs is *higher* than in the general population. Overall, however, voucher states follow the trend of lower relative White representation and higher relative Black representation. They complicate this trend, however, by being more accurate to their respective populations. Although this trend may not follow in those who *use* vouchers, the state-wide trend is striking.

### C. *Private Schooling*

The National Center for Special Education tracks how many students attend private institutions by choice.<sup>87</sup> This includes students attending on voucher programs, as well as students whose families pay independently for private school with publicly funded accommodation services.<sup>88</sup> Because it is difficult to fully capture the use of these programs and compare them to national use, below, voucher states are listed with percentage values of use of private institutions, alongside exact numbers of students who attended in 2016.<sup>89,90</sup>

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<sup>86</sup> Brittany A. Aronson & Mildred Boveda, *The Intersection of White Supremacy and the Education Industrial Complex: An Analysis of #BlackLivesMatter and the Criminalization of People with Disabilities*, 12 J. EDUC. CONTROVERSY 1, 7 (2017); Michael J. Dumas, *Against the Dark: AntiBlackness in Education Policy and Discourse*, 55 THEORY INTO PRACTICE 11, 12 (2016); Joseph Monardo, *Race, Segregation, and Education in Georgia*, BERKELEY PUB. POL'Y J. 41, 43–44 (2019).

<sup>87</sup> NCES, *supra* note 74.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> These numbers are taken from the 2016 survey for education, and do not necessarily reflect the eligibility and participation rates displayed earlier in this Note, which represent figures from 2018. Utah's figures have been the only ones to experience a significant increase.



<i>State</i>	<i>Parents chose Private School</i>	<i>Number of Students Sent to Private Schools</i>
Arkansas	1%	379
Florida	1%	3,169
Georgia	0.3%	538
Indiana	4%	6,268
Louisiana	<0.1% <sup>†</sup>	2 <sup>†</sup>
Mississippi	1%	768
North Carolina	0.3%	519
Ohio	5%	10,694
Oklahoma	0.2%	188
Utah	0% <sup>†</sup>	0 <sup>†</sup>
<b>Average</b>	1.5%	--
<b>National Average</b>	1.4%	--

<sup>†</sup>Indicates figures that are outliers in the set.

On average, voucher state parents are no more likely to send their children to private institutions. Even without the outliers in the set of states (Utah and Louisiana), the voucher state average remains within 0.2% of the national average.

This is surprising. These results likely reflect low participation in voucher programs, even with increasing eligibility. Recent data supports the conclusion that parents in voucher states still often choose public schools, even when given the option to choose private schools.<sup>91</sup> Low participation may also relate to private schools rejecting voucher applicants.<sup>92</sup> It does beg the question, however: if parents admit disabled students to private schools at a similar rate in non-voucher states as they do in voucher states (likely through either personal wealth or the avenues present within the IDEA for choice), then what is the point of offering vouchers for disabled students in these states in the first place?

## V. POLICY CONSIDERATIONS

Participation in disability voucher systems is low, but the states that issue them do better, in general, in regionally accurate racial representation and inclusion in general classrooms. Perhaps because of low participation and eligibility (caused by many factors, such as transportation, availability, and information available), parents in these states are not

<sup>91</sup> Tiffany Danitz Pache, *Data Report: Parents Choose Public over Private Schools for Special Education*, VTDIGGER (Feb. 19, 2017), <https://vtdigger.org/2017/02/19/data-report-parents-choose-public-over-private-schools-for-special-education/>.

<sup>92</sup> NAT'L COUNCIL ON DISABILITY, *supra* note 1, at 35.

more likely to send their children to private institutions. Low participation, however, does not indicate state-wide failure of the policies.

Though causation cannot be implied from correlation in the numbers presented, states that offer voucher systems outside of the choice provision of the IDEA seem to, on the whole, serve students with disabilities well in not segregating by classroom/building and in not grossly over-diagnosing students of color with disabilities. It is unlikely that vouchers themselves create these outcomes; it is more likely that states which choose to provide other avenues for a more appropriate education for students with disabilities care about disabled student outcomes in an intentional, unique way.

Moreover, it is unlikely that a national policy providing choice would be either reasonable or have a similar effect on national averages. The IDEA *already* sets a national standard for school choice, ambiguous as it may be. Decisions such as that in *Ender* provide hope for continued progress towards inclusion and meaningful progress in students, but state interpretations of the decision in concert with state-wide disability policy are likely the best avenues for improvement. Other policies—such as increasing inclusion, mandating co-teaching between special education and general education teachers for some courses to facilitate more classroom participation, or funding more and better collaborative after-school programs for disabled and neuro- and physio-typical students—may have just as impressive effects on rates of inclusion and representation within special education programs. However, not all voucher states have passed national IDEA standards for special education for the 2017-2018 school year, indicating that more progress is yet required to do justice to disabled students.<sup>93</sup>

#### CONCLUSION

School choice by voucher is likely not the saviour for disabled students that some advocates make it out to be. It is indicative, however, of broader efforts to improve the environment of special education. To improve special education outcomes, voucher states convey an important lesson: states should do *something* in response to decisions like *Andrew*, rather than nothing at all.

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<sup>93</sup> Michelle Diament, *Most States Failing to Meet Requirements under IDEA*, DISABILITY SCOOP (July 12, 2019), <https://www.disabilityscoop.com/2019/07/12/most-states-failing-requirements-idea/26887/>.