No FAPE for Children with Disabilities in the Milwaukee Parental Choice Program: Time to Redefine a Free Appropriate Public Education

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INTRODUCTION

School choice is at the center of the twenty-first century educational debate. School choice (or voucher) programs, especially those privately funded, have grown dramatically over the last decade. As an experienced special educator in the public school system, I long have feared no good coming to the most needy public schools and children as limited state dollars made an exodus under publicly funded choice programs. Moreover, I questioned what harm might arise to students with disabilities if choice-program schools compromise the special services these children require. If choice programs are here to stay, however, it is essential that choice schools open their doors to all children and provide effective special education services to all children with disabilities.

Wisconsin’s school choice program, the Milwaukee Parental Choice Program (MPCP), effectively denies children with disabilities admission to, or the services and opportunities of, participating private choice schools. A Wisconsin court in 1990 held that the MPCP was not required to provide children with disabilities their federally mandated rights to a free appropriate public education (FAPE) when attending participating private schools, in spite of the state’s obligation, as a recipient of federal education funding, to do so pursuant to the Individuals with Disabilities Education Act (IDEA). The court’s reasoning emphasized that private schools are not subject to the IDEA, and if parents choose to send their child with a disability to a private school, they forgo the FAPE offered by their local public school.

The court, however, did not address whether Milwaukee public schools actually provide a FAPE (a complex set of legal requirements); the court was not required to address the issue by virtue of a legal presumption that the public schools’ services meet the requirements of a FAPE. Case and statutory law, however, provide a remedy to families when the public school’s services are shown to be inadequate for a child’s needs (i.e., do not meet the legal requirements of a FAPE), obligating the public school to provide the necessary services by alternative means—in many cases paying a private school to do so.* This Note will argue that some Milwaukee public

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1. See discussion infra Part I.A (detailing reasons for this growth).
3. The terms “students with disabilities” and “children with disabilities” are used synonymously throughout the Note, and are the preferred terms of the author. They are widely recognized in contemporary special education research, employing person-first language. These phrases encompass such terms as “exceptional children,” “disabled children,” “handicapped children,” “children with special needs,” and “special education students.”
4. See discussion infra Part III.B (explaining that public schools need not continue providing services because putting a child in a choice school is a “unilateral parental placement”).
5. See infra note 44 and accompanying text.
6. See discussion infra Part I.B.1 (describing the requirements of a FAPE).
schools, by virtue of their gross underachievement (i.e., systemic failings), are not able to meet the requirements of a FAPE and, furthermore, that a presumption of a FAPE in favor of such a school is inappropriate.

Naturally, as a public educator, I am ill at ease with this argument, the potential outcomes of which are to: (1) place the burden of proof on a public school undergoing serious failure to demonstrate that it does indeed provide a FAPE; and (2) require the public education system to ensure that a child with a disability, who wishes to leave her failing public school and seek the services of a choice school, can both access and receive a FAPE in the choice school at the public expense. In no way do I intend to put the blame for school failure on public educators—by-and-large, an intensely dedicated group of professionals. Many variables are likely to play a role in school failure, such as community involvement, staff cooperation, the availability of resources, neighborhood crime and safety, and the fact that many good teachers would rather teach elsewhere.

But do children attending these failing schools deserve nothing better than the decaying local school that society has chosen to give them? What choice have they? The ultimate outcome sought by this argument is to ensure that children with disabilities in failing public schools have a real choice of educational opportunity—one that is meaningful to them.

Should the law take the turn this Note proposes—putting the ultimate burden on public education, in the context of failing schools, to prove that it does indeed offer children with disabilities a FAPE—the fallout may be devastating to public education. Will the children, funds, and teachers abandon failing public schools? How far from home will the children have to travel each day to get to a choice educational environment? Do meaningful alternatives really exist for these children?—A question the No Child Left Behind Act has brought to the forefront of the educational debate. And what happens to a neighborhood that loses its school? These are among many looming, unanswered questions, far beyond the reach of this Note, that implicate national educational and social policy.

This Note, in Part I, commences with an overview of the rights of children with disabilities in acquiring an appropriate education. Part II presents an overview of school choice programs with a particular focus on the MPCP. Part III discusses troubling developments that may arise when children with disabilities seek the opportunities of school choice programs.

Thereafter, in Part IV, this Note begins an analysis of the ability of a failing public school to provide a FAPE to children with disabilities.

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7. This Note uses the terms “failure” and “failing” in reference to public schools with particularity, i.e., these terms are used only to refer to schools in the worst of circumstances. See discussion infra Part IV.C (detailing the statistics of truly failing schools in Milwaukee).

8. See discussion infra Part III.A (explaining that even if children with disabilities qualify for tuition scholarships, private schools may not admit them, or if the private schools admit these children, they may not provide adequate education at the schools).
Additionally, the analysis questions the appropriateness, in light of case law and public policy, of the presumption that such a school provides a FAPE. Finally, Part V recommends the necessity of reinterpreting what constitutes a FAPE to reflect the realities of failing public schools, discusses the potential fallout of the proposed legal changes, and presents considerations for best serving children with disabilities in school choice programs.

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

A. ORIGINS OF THE IDEA

Historically, schools in the United States afforded no educational rights to children with disabilities.9 Even following the landmark case of Brown v. Board of Education,10 discrimination based on disability remained the everyday reality for millions of schoolchildren.11 By 1975, more than half of all children with disabilities were denied equality of educational opportunity,12 unidentified disabilities prevented children from having successful educational experiences,13 families were often forced to seek private help at considerable personal inconvenience and expense,14 and one million children with disabilities were entirely excluded from the public school system.15

This bleak landscape began to change in the late 1960s with federal courts finding disability discrimination in the provision of public education services.16 In particular, Mills v. Board of Education of District of Columbia laid the groundwork for what would soon be pioneering statutory entitlements for children with disabilities. The Mills Court held that: (1) insufficient funding is not a persuasive reason to deny a public education to children with disabilities; (2) children with disabilities cannot be excluded from public education unless adequate alternative services are provided that are

12. Id.
13. Id.
14. Id.
15. Id.
suited to the children’s needs; and (3) all children with disabilities are entitled to a free and “suitable” public education regardless of the degree of disability.\textsuperscript{17}

In 1973, Congress passed the Rehabilitation Act,\textsuperscript{18} reminiscent of the 1964 Civil Rights Act.\textsuperscript{19} In pertinent part, Section 504 provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”\textsuperscript{20} Consequently, schools that receive federal funds must assess the needs of, and provide a free appropriate education for, each student with a disability; failure to do so constitutes illegal discrimination.\textsuperscript{21}

Finally in 1975, Congress enacted the Education for All Handicapped Children Act, later renamed the Individuals with Disabilities Education Act (IDEA) in 1990.\textsuperscript{22} The IDEA guarantees special education services to more than six million schoolchildren each year.\textsuperscript{23} Federal law now recognizes that disability:

is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.\textsuperscript{24}

For states to be eligible to receive federal IDEA funds, the Act, in part, requires that public schools provide each child identified with a disability and served in a public school with the following: a FAPE, procedural

\begin{enumerate}
\item 29 U.S.C. § 794(a).
\item 20 U.S.C. § 1400(c)(3) (2000); \textit{id.} § 1400(a)–(c). The IDEA codified \textit{Mills} and \textit{PARC}.
\item \textit{YUDOF ET AL., supra} note 19, at 703.
\item In the 1999–2000 school year, 588,300 preschoolers and 5,683,707 students aged six to twenty-one received services under the IDEA. \textit{OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP’T OF EDUC., EXECUTIVE SUMMARY OSERS 23RD ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE IDEA (2001), available at http://www.ed.gov/about/reports/annual/osep/2001/execsumm.html (on file with the Iowa Law Review).}
\item 20 U.S.C. § 1400(c)(1). The IDEA defines “child with a disability” as including children with mental retardation; hearing, speech, language, visual, or orthopedic impairments; emotional disturbances; autism; traumatic brain injuries; specific learning disabilities; or other health impairments. \textit{id.} § 1401(3)(A).
\end{enumerate}
safeguards, services in the least restrictive environment (LRE), and an individualized education plan (IEP) reasonably calculated to convey educational benefits. While all of these requirements are essential, the following section presents a more thorough discussion of a FAPE, central to the analysis of this Note.

B. A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

1. The Provisions of a FAPE

The Supreme Court has interpreted a FAPE to require: (1) personalized instruction with sufficient support for the child to benefit educationally; (2) at the public expense; (3) meeting state educational standards; (4) approximating the grade levels of the regular education classrooms; (5) comporting with the IEP; and (6) being “reasonably calculated to enable the child to receive educational benefits.” The IEP is the primary vehicle to ensure that a child receives a FAPE. The principal components of the IEP are statements and explanations of the following: (1) “the child’s present levels of educational performance” (competencies and needs); (2) “measurable annual goals [and] short-term objectives”; (3) “the special education and related services . . . supplementary aids and services . . . [and] modifications or supports . . . that will be provided for the child”; and (4) “the extent, if any, to which the child will not participate with nondisabled children in the regular class and [programs].”

25. Procedural safeguards under the IDEA provide the family and child with significant rights and protections regarding their entitlement to a FAPE. SPECIAL EDUCATION LAW AND PRACTICE: A MANUAL FOR THE SPECIAL EDUCATION PRACTITIONER 1:7 (Gary M. Ruesch ed., 1996). The IEP specifies all of the services that the school will provide the child. See infra notes 29–30 and accompanying text for further details. The LRE, a significant component of the IEP, requires the most integrated school setting(s) best suited to the child’s learning needs. SPECIAL EDUCATION LAW AND PRACTICE, supra, at 6:1–3.


27. Rowley, 458 U.S. at 188–189; see id., at 187–204 (describing the Court’s interpretation of each requirement). The IDEA further requires that “special education and related services . . . have [to be] provided . . . under public supervision and direction” for students whether in “an appropriate preschool, elementary, or secondary school . . . .” 20 U.S.C. § 1401(8) (2000).

28. Rowley, 458 U.S. at 207. The Court articulated the reasonably calculated standard to require “personalized instruction . . . with sufficient supportive services to permit the child to benefit [educationally] from the instruction.” Id. at 189.

29. Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 620 (6th Cir. 1990); KENNETH SHORE, THE SPECIAL EDUCATION HANDBOOK: A COMPREHENSIVE GUIDE FOR PARENTS AND EDUCATORS 78 (1986); YUDOF ET AL., supra note 19, at 703; see 20 U.S.C. § 1414(d)(1)(A) (2000) (detailing the requirements of an IEP in order to provide a FAPE).

30. 20 U.S.C. § 1414(d)(1)(A). The IEP is developed by a multidisciplinary team consisting of the parents or guardians of the student; individuals representing the school administration, special education department, general education departments and any
The purpose of a FAPE is to supply “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” Moreover, a reasonable calculation to enable educational benefit must be followed with actual benefit. The Supreme Court has explicitly cautioned that meaningful progress is not demonstrated by minimal improvements on tests and will not qualify as a showing that an IEP has been reasonably calculated to convey an educational benefit.

2. Challenges Under the IDEA

A court, in theory, may determine that a school has failed to provide a FAPE when it does not comply with any of the Rowley or Title 20, Section 1401(8) requirements. These violations would include circumstances when: (1) the services are not free or are not appropriate; (2) the school’s services do not meet state educational standards; (3) the education provided does not approximate the grade levels of the regular education classrooms; (4) the services provided are not in conformity with the IEP; and (5) the services are not provided under public supervision and direction. This Note states “in theory” because only a few of these grounds have been employed to challenge a FAPE. Non-compliance with the IDEA’s procedural safeguards and failing to ensure that services are projected or provided related services under IDEA (such as speech language services, occupational therapy, physical therapy, counseling, and assistive technology); and when appropriate, the student. VICKI M. PITASKY, THE COMPLETE OSEP HANDBOOK 5:3 (2000); see id. at 2:3–14 (presenting relevant rulings pertaining to the related services). For detailed discussions of the variety of related services available to students with special needs, see id. at 7:9–27.

32. Cf. Rowley, 458 U.S. at 200–01 (affirming that “[i]t would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education”).
33. Evans, 930 F. Supp. at 100 (citing Rowley, 458 U.S. at 200–01).
35. 20 U.S.C. § 1401(8)(B); Rowley, 458 U.S. at 187–204. For example, the public school does not comply with state procedural requirements, see infra text accompanying note 110, or the public school does not provide an appropriate preschool, elementary, or secondary school education as defined by the state. 20 U.S.C. § 1401(8)(C).
37. 20 U.S.C. § 1401(8)(D); Rowley, 458 U.S. at 187–204. This includes, at least in part, the situation when there is no personalized instruction with sufficient support for the child to benefit educationally, or the services (via the IEP) are not reasonably calculated to enable the child to achieve and pass from grade to grade. Id.
39. See generally discussion infra Part IV.A.1.
provided to the student in the LRE, nonetheless, are additional violations of the IDEA. \[^{40}\]

Following exhaustion of administrative remedies, the IDEA permits any party "to bring a civil action" in “any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy."\[^{41}\] Pursuant to statute, the *Rowley* Court emphasized that "[t]he complaint, and therefore the civil action, may concern 'any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.'"\[^{42}\]

Lawsuits brought under the IDEA present a two-fold inquiry. First, the court needs to determine if the state has complied with IDEA procedurally. Second, the court needs to determine if the IEP was "reasonably calculated to enable the child to receive educational benefits."\[^{43}\] When the adequacy of the special education services is challenged, however, courts have afforded the public schools a favorable presumption that their services do provide a FAPE, thereby placing the burden on the plaintiff to rebut this presumption.\[^{44}\]

\[^{40}\] 20 U.S.C. § 1412(a); Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985) (concluding that the failure to inform the parents of their procedural rights was "adequate grounds . . . for holding that the school failed to provide . . . a FAPE"); Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261, 272, 278 (D. Conn. 2002) (holding that the school board failed to provide the student with services in the LRE, in this case a mainstream placement).

\[^{41}\] 20 U.S.C. § 1439(a)(1) (2000). Since the 1997 amendments, if the parents and school officials cannot reach consensus over the child’s educational program, the parties are entitled to utilize mediation. \[*\]supra\[\] note 30, at 14:4. Regardless of whether mediation is used, the initial administrative course of action is the impartial due process hearing. Proper matters for this hearing include disagreements over “identification, evaluation, placement or provision of FAPE.” Id. at 14:5. Problems strictly associated with a school’s noncompliance, such as not implementing the IEP, may be handled through the state educational agency’s complaint system. Id. at 14:6. Civil actions are not permitted until the due process review system is exhausted. Id. at 14:38.


\[^{43}\] Id. at 206–07 (citations omitted).

3. In the Absence of a FAPE

When the plaintiff rebuts the school’s favorable presumption, the public school is obliged to designate at the public’s expense an alternate provider of the services for the child.\textsuperscript{45} What such alternate services may look like, i.e., whether and what services private and religious schools can provide, has been one of the most hotly contested areas of the IDEA. Nonetheless, the Supreme Court has made clear that the obligation to provide special education services does extend to children placed in a private or religious school.\textsuperscript{46}

In enacting the IDEA, Congress did not intend, however, to require that public schools provide benefits to all students with disabilities who are “voluntarily placed in private schools” comparable with those of their public school counterparts.\textsuperscript{47} The extent of the public obligation to fund all or part of these costs depends upon the reason for placement.\textsuperscript{48} Public schools are responsible for the full cost of a child’s education when the IEP team has determined that a private school placement offers necessary services that the public school cannot.\textsuperscript{49} In contrast, a student with a disability placed by her parents in a private school is loosely entitled to special education services limited to the proportional amount the public school would have spent under the IDEA.\textsuperscript{50}


\textsuperscript{46} Under specified conditions, the provision of special education services in a private, religious-based school using public monies is not a violation of the Establishment Clause. Zelman v. Simmons-Harris, 536 U.S. 639, 651–63 (2002); 20 U.S.C. § 1412(a)(10)(A) (2000); 34 C.F.R. §§ 300.451–.462; see also Zobrest, 509 U.S. at 13 (holding the public school responsible for providing a sign-language interpreter at a private Catholic high school). As will prove more relevant, infra Part II.B, the Wisconsin Supreme Court came to the same conclusion as to its Establishment Clause in 1998. See Jackson v. Benson, 578 N.W.2d 602, 611–22 (Wis. 1998). Additionally, children with disabilities attending private schools may be eligible for reimbursements of transportation, textbooks, and other expenses. Mueller v. Allen, 463 U.S. 388, 393 (1983).


\textsuperscript{49} When a local public school is unable to provide the necessary special education services for a child, and thus refers the student to a private school—in many cases because of the student’s disability involving drug, alcohol, or severe psychological problems; autism; or visual or hearing impairments—the public school then must pay for all the necessary services, at no cost to the parents. Laura F. Rothstein, School Choice and Students with Disabilities, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 336 (Stephen D. Sugarman & Frank R. Kemper eds., 1999); see also 20 U.S.C. § 1412(a)(10)(B)(i).

NO FAPE FOR CHILDREN WITH DISABILITIES

The 1997 IDEA amendments clarified that when parents unilaterally choose to pull their child out of the public school, without the support of the IEP committee, and when the FAPE is not at issue, the child is not entitled to special education services at the expense of the public. However, following a unilateral withdrawal, if the parents are able to show that their child was not receiving a FAPE in the public school, courts may order the public school system to bear part of or the entire cost. This Note now turns to previewing the issues of school choice programs as a basis for understanding whether such programs stand to meet the needs of children with disabilities.

II. SCHOOL CHOICE PROGRAMS

A. WHY SCHOOL CHOICE?

Research, case law, and legislation illustrate concern for the effectiveness of public schools in educating all children. Public education systems, especially in our inner cities, are widely criticized for failing to keep children off the streets, not to mention preparing them for a productive and

111, 114–15 (D.N.H. 2003); 34 C.F.R. § 300.453(a) (2003)). This proportional amount is calculated by multiplying the IDEA per child allowance with the number of school age children having disabilities that are identified by the local education agency within that agency’s jurisdiction (typically that of a school district’s boundaries). See generally Dep’t of Pub. Instruction, State of Wis., Parentally-Placed Private School Children with Disabilities, Bulletin No. 99.07, #6 (Sept. 1999) [hereinafter Bulletin No. 99.07], http://www.dpi.state.wi.us/een/bul99-07.html (on file with the Iowa Law Review). In effect, there is no true guarantee that the student will receive any special education services because “[o]nce the [local school] has satisfied the minimum expenditure requirements, consistent with the IDEA regulations, it is not required to serve other private school children, including newly-identified children.” Id. at #9.


52. 34 C.F.R. § 300.403(c); Kenneth R. Warlick, U.S. Dep’t of Educ., Memorandum: Questions and Answers on Obligations of Public Agencies in Serving Children with Disabilities Placed by Their Parents at Private Schools (May 4, 2000), at http://www.nichcy.org/private.htm (on file with the Iowa Law Review). For example, “a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment” if it is found “that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.” 20 U.S.C. § 1412(a)(10)(C)(ii); see also Sch. Comm. v. Dep’t of Educ., 471 U.S. 359, 369–70 (1985) (holding that when parents have placed their child in a private school due to the inadequacy of the IEP, the public school must cover the expenses).

healthy life that contributes to society.\textsuperscript{54} High percentages of school dropouts correlate with the ineffectiveness of schools, and a large population of adults who do not have high school diplomas produces grave social and economic consequences.\textsuperscript{55}

Research has proposed many remedies, and presently school choice programs, commonly known as school vouchers or tuition scholarships, are drawing increasing popular attention.\textsuperscript{56} School choice ideally provides an opportunity for parents unhappy with their child’s present educational opportunities to transfer the child to an alternative (usually private) school perceived better able to meet their child’s needs.\textsuperscript{57} Generally, public monies are allocated or diverted from public school programs to finance this endeavor when the transferees lack the resources to pay private school tuition.\textsuperscript{58}

Proponents of school choice programs suggest that a graduated or calibrated voucher system, diverting funds complementary to the income needs of the family, “would create an incentive for private schools and high-quality suburban public schools to recruit low-income students.”\textsuperscript{59} In

\begin{itemize}
\item \textsuperscript{59} Greenberger, supra note 57; see also Theresa E. Cudahy, \textit{Comment, Federal Statutory Requirements for Accommodating Handicapped Students in School Choice Programs}, 1991 U. CHI. LEGAL F. 293, 296 (1991) (discussing the practices necessary to ensure equal access to school choice programs for all children, especially those with more expensive needs).
\end{itemize}
addition, some commentators suggest that school choice programs remedy inadequate public services for children with disabilities.\(^60\)

In the United States today, large-scale, publicly funded school choice programs operate pursuant to state legislation in Wisconsin (the MPCP), Ohio (the Cleveland Scholarship and Tutoring Program), and Florida (the McKay Scholarship Program).\(^61\) Maine and Vermont each have had school choice options available for students living in rural areas for over a hundred years.\(^62\) Furthermore, most urban centers have intra- or inter-district school choice programs that tailor educational opportunities to the interests of individual students.\(^63\) A number of privately funded choice programs sprung up in the 1990s, including the Charitable Choice Trust in Indianapolis (1991), Children First America (1994), the Children’s Educational Opportunity Foundation of America, and the Children’s Scholarship Fund (1998).\(^64\) These programs, “[u]nhindered by the debates on the use of public funds,” have grown rapidly “to operate dozens of affiliated voucher and scholarship programs around the country and [to] provide[] tens of thousands of students with money for private school education.”\(^65\)


\(^{65}\) Sailor & Stowe, supra note 64, at 14.
B. THE MILWAUKEE PARENTAL CHOICE PROGRAM (MPCP)

The Wisconsin Legislature established the Milwaukee Parental Choice Program in March 1990. The program, as amended in 1995, permits low-income, K–12 students to attend both private and parochial schools and pays the full tuition to such schools directly out of the funds that ordinarily are allotted to public schools. The maximum family income for a child’s eligibility is 1.75 times the poverty level, as set by the federal Office of Management and Budget. In the first five years of the program, the average household income of participating families was $11,630, and 72% of participating students were African-American. Families opt to send their children to MPCP private schools primarily for the perceived higher quality of education.

The MPCP is the largest program of its type in the nation, having tripled in enrollment after it passed constitutional muster in the Wisconsin Supreme Court in 1998. In January 2002, 10,789 participating students attended 103 private schools, which received approximately $39 million a year for their services. One study found that students in the choice schools show steady gains in math scores compared to a steady decline for their peers that were left behind.

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68. WIS. STAT. ANN. § 119.23(2)(a)(1).

69. Michael E. Hartmann, Spitting Distance: Tents Full of Religious Schools in Choice Programs, The Camel’s Nose of State Labor-Law Application to Their Relations with Lay Faculty Members, and the First Amendment’s Tether, 6 CORNELL J.L. & PUB. POL’Y 553, 604 (1997).


71. Id. The MPCP withstood attacks that it violated: (1) the public purpose doctrine in providing public funds to private schools; (2) the constitutional prohibition against local bills (WIS. CONST. art. IV, §§ 18, 31); (3) the Uniformity Clause (WIS. CONST. art. X, § 3), requiring the educational services in all school districts to be “as nearly uniform as practicable”; (4) the Establishment Clause (U.S. CONST. amend. I; WIS. CONST. art. I, § 18); and (5) the Equal Protection Clause (U.S. CONST. amend. XIV, § 1; WIS. CONST. art. I, § 1). Jackson v. Benson, 578 N.W.2d 602, 620–32 (Wis. 1998).


73. AUDIT BUREAU, supra note 70.

74. The mention of students “left behind” does specifically refer to the former classmates of the students who chose to enter a private choice school. The students left behind were either not selected in the random selection process or chose not to partake. Cecilia Elena Rouse, Schools and Student Achievement: More Evidence from the Milwaukee Parental Choice Program, 4(1) FED. RESERVE BANK N.Y. ECON. POL’Y REV. 61, 66 (1998).
C. CRITICISMS OF SCHOOL CHOICE

School choice programs, however, are not everyone’s panacea, and spark fear that they will drain the public schools of money. According to a State of Wisconsin analysis, the MPCP, the nation’s longest-running, large-scale tuition scholarship system, has not produced any discernible differences in reading scores between program participants and those left behind. Similarly, the Cleveland Scholarship Program (CSTP) has produced insignificant differences in academic performance between its participants and similarly situated students remaining in the public schools.

Moreover, according to the National Council on Disability, “[w]here school choice is at issue, the literature is long on strongly felt rhetoric on both sides, but woefully short on evidence with which to either advance or retire particular choice models.” For example, in a review of the research on the Milwaukee and Cleveland programs, a 2001 report of the U.S. General Accounting Office noted that while studies of the MPCP and CSTP satisfy “most of the basic criteria for research quality, such as using study designs and data analysis methods that isolate the program’s effect, . . . they suffer from missing test score data, low survey response rates, and the loss of students from program groups and comparison groups over time.”

75. A survey conducted by the National School Boards Association and Zogby International Poll found that the following combined to account for 85% of “Adult” preferred, 84% of “Voter” preferred, and 93% of “African-American” preferred tax-dollar use toward educational improvement: (1) class size reduction; (2) increased teacher and principal training and quality; and (3) building renovations. NAT’L SCH. BDS. ASS’N & ZOGBY INT’L POLL, SCHOOL VOUCHERS: WHAT THE PUBLIC THINKS AND WHY (2001), http://www.nsba.org/novouchers/vsc_docs/zogby_results.pdf (on file with the Iowa Law Review).


77. KAVA, supra note 58, at 7 (stating that students in the MPCP program do neither better nor worse than their Milwaukee public school peers on state achievement tests); see also AUDIT BUREAU, supra note 70 (noting that the MPCP is the largest school choice program in the nation); Rouse, supra note 74, at 61, 68 (noting that “Wisconsin became the first state in the nation to implement a publicly funded school voucher program”).

78. See INDIANA TECH REPORT, supra note 56, at 43–47 (noting that while positive educational gains were made over two and three year periods in reading, math, and language arts for participants attending choice private schools for their K–2 school years, these gains were no greater than their peers who either chose to stay in Cleveland public schools or who were not selected for scholarships).

79. SAILOR & STOWE, supra note 64, at 40 (emphasis added) (citations omitted).

Finally, researchers have yet to conclude that a competitive schooling market promoted by school choice programs can cause public schools to become more efficient.\textsuperscript{81} Moreover, empirical studies of the comparative effectiveness of public and private schools, hypothesizing the superiority of private schools, are inconclusive.\textsuperscript{82} Discussion now turns to the promises and day-to-day realities of school choice programs for children with disabilities as a basis for the necessity of the change in law that this Note proposes.

III. THE INTERACTION OF CHILDREN WITH DISABILITIES AND SCHOOL CHOICE PROGRAMS

The following discussion begins with an overview of the common exclusion of children with disabilities from private schools participating in school choice programs, and the question of educational benefit in such schools. As a springboard to this Note's primary analysis, this Part concludes with a discussion of the particular basis for Milwaukee's denial of a FAPE to children with disabilities who wish to participate in the MPCP.

A. INITIAL CONCERNS

1. School Admissions

Although children with disabilities may be entitled to tuition scholarships, there are no guarantees that private choice schools will admit them.\textsuperscript{83} A 1998 U.S. Department of Education survey found 70\% to 85\% of inner-city private schools “definitely or probably” unwilling to participate in a school choice program if required to accept students with disabilities, limited English proficiency, or low academic achievement.\textsuperscript{84} As of June 2003, 90\% of Florida’s private schools did not participate in the McKay Scholarship program, which offers tuition assistance specifically to children with disabilities to attend private schools.\textsuperscript{85} Moreover, in 1999, a citizens' group filed a complaint against one-third of the MPCP private schools for engaging in selective admissions practices,\textsuperscript{86} in defiance of the Wisconsin statutory and administrative requirements that selection be random.\textsuperscript{87}

\begin{footnotesize}
\begin{itemize}
\item[82.] McEwan, supra note 81, at 135.
\item[83.] Markell, supra note 76.
\item[85.] Id.
\item[86.] Nicholas Confessore, Runaway Vouchers, AM. PROSPECT, Dec. 20, 1999, at 25, 1999 WL 3720485. The Wisconsin Department of Public Instruction responded by sending letters to thirty-five schools, noting “serious, apparent violations” and reiterating selection criteria. Letter from Charlie Toulmin, Department of Public Instruction, State of Wisconsin, to Administrators
\item[87.] Id.
\end{itemize}
\end{footnotesize}
NO FAPE FOR CHILDREN WITH DISABILITIES

Public schools, in contrast, accept all children regardless of “academic readiness, race, socio-economic status, limited English proficiency or special education needs.”

Academic requirements, inflexible admissions policies, and over-reliance upon standardized test scores may disparately screen out children with learning disabilities and mental retardation. Private schools may be reluctant to admit students with psychological or behavioral problems or life-threatening illnesses because of liability concerns. Furthermore, if a child with expensive special education needs seeks admission to a choice private school, the school may choose not to admit the child—claiming an “undue burden”—to avoid paying costs above the per-child, special education allotment. Consequently, as a condition to admission, parents may have to foot the extra costs or return to public school. Finally, for those students who are admitted to a private school of choice, they may face physically inaccessible facilities.

2. Uncertain Benefit

Children with disabilities may not stand to benefit from private choice schools. A nationwide shortage of special educators makes it difficult to staff sufficiently both public and private schools. In 2000, only 8% of the MPCP schools offered any form of special education services. Charter schools in Ohio have been cited for failing to develop and implement IEPs, using a “one size fits all” approach to services and instruction, failing to provide families with IDEA-mandated notice of their procedural rights and responsibilities, and failing to provide due process hearings prior to
disciplinary-based school suspensions.\textsuperscript{96} Also, as private schools do not always maintain the same teacher licensing standards as public schools,\textsuperscript{97} the concern arises that private school educators are not adequately trained or experienced to serve children with disabilities.\textsuperscript{98}

Additionally, private schools may encounter significant financial difficulty providing special education services for high-need children.\textsuperscript{99} Finally, commentators suggest that opening private school doors to all children—including low-achieving children with little parental involvement, the behaviorally challenged, children with disabilities, and children with limited English proficiency—would take away the private school "edge" sought by families exercising school choice.\textsuperscript{100}

B. DAVIS V. GROVER AND THE KOMER MEMO

In 1990, a Wisconsin state court considered whether the State Superintendent of Schools could require private schools seeking to participate in the MPCP to comply with provisions other than those specified in the parental choice law, such as the IDEA.\textsuperscript{101} The court, relying upon the legal memorandum of Richard D. Komer, the Deputy Assistant Secretary for Policy in the Office of Civil Rights,\textsuperscript{102} held in part that when the parents of a child with disabilities (served under the IDEA) choose to take their child out of the Milwaukee Public Schools to attend a participating

\begin{itemize}
\item \textsuperscript{96} OHIO LEGAL RIGHTS SERV., supra note 93. Charter schools, known as "community schools" in Ohio, are semi-private, legislatively mandated alternative programs. Id.
\item \textsuperscript{97} Fellowship Baptist Church v. Benton, 815 F.2d 485, 490, 493 (8th Cir. 1987).
\item \textsuperscript{98} Specialized training is necessary for instructing children with sensory impairments, learning disabilities, attention deficit-hyperactivity disorder, severe health impairments, and mental retardation. Rothstein, supra note 49, at 341–53; see Ward, supra note 84 (noting the Ohio Department of Education’s recognition that many of Cleveland’s Roman Catholic schools "[were] not equipped to handle handicapped children").
\item \textsuperscript{99} Rothstein, supra note 49, at 341–42. Where all tuition scholarships offered are of uniform value, private schools may be disinclined to admit students with disabilities because of the potential increased cost of providing services. Cudahy, supra note 59, at 295.
\item \textsuperscript{100} Angela Slate Rawls, Comment, Eliminating Options Through Choice: Another Look at Private School Vouchers, 50 EMORY L.J. 363, 383–84 (2001).
\item \textsuperscript{101} KAVA, supra note 58, at 1; see Mead, supra note 67, at 476 (stating the argument that the Department of Instruction, as a recipient of federal funds and the primary source of funds for the MPCP, was obliged to ensure that children with disabilities would receive a free appropriate public education).
\item \textsuperscript{102} Davis v. Grover, No. 90 CV 2576, slip op. at 23 (Dane County Cir. Ct. Wis. Aug. 6, 1990) (on file with the Iowa Law Review). The court, in fact, only cites the "cautious opinion letter" of Ted Saunders, Under-Secretary of the U.S. Department of Education; it is the opinion letter that relies upon the Komer Memo. See Email from Robert Paul, Chief Legal Counsel, Wisconsin Department of Instruction, to William Myhill, Author (Nov. 25, 2003, 15:53:53 CST) (on file with the Iowa Law Review).
private school of their choice, the child is not entitled to a continuation of special education services.\textsuperscript{103}

The reasoning behind this decision arises from the legal presumption that the child was already receiving a FAPE in the public school.\textsuperscript{104} Komer characterized the choice to enter a private school through the MPCP as a unilateral parental placement, not a public agency placement made to provide a FAPE.\textsuperscript{105} As of the 1998–99 school year, only 7 of the 103 choice schools offered special education services.\textsuperscript{106} Moreover, present statistics do not indicate how many students with disabilities participate in the MPCP because the choice schools have not been required to identify, serve, or report their numbers.\textsuperscript{107}

Given the bleak outcomes for children with disabilities to acquire a sound education from failing public schools, this Note now turns to the legal basis for the proposed changes in special education law.

IV. ANALYSIS

Children with disabilities who opt to leave a failing public school for a seat in a private school under a state-created school choice program should not forfeit their entitlement to special education (i.e., IDEA) services. The following analysis argues that: (a) schools failing state standards for academic achievement raise serious doubt that they can and do provide a FAPE to students entitled to special education services; (b) there are compelling reasons of fairness, law, and policy to place the burden of proof upon a failing school to demonstrate that it provides a FAPE; and (c) consistently low-performing Milwaukee public schools, by definition, that fail

\textsuperscript{103} Davis, No. 90 CV 2576 at 23–24; see Memorandum from Richard D. Komer, Deputy Assistant Secretary for Policy, Office of Civil Rights, 22 Individuals with Disabilities Educ. L. Rep. (LRP Pub’ns) 669 (July 27, 1990) [hereinafter Komer Memo].

\textsuperscript{104} See discussion supra Part I.B.2 (“[w]hen the adequacy of special education services is challenged, courts have afforded the public schools a favorable presumption that their services do provide a FAPE.”).

\textsuperscript{105} Komer notes:

If [a] FAPE was otherwise available to the children and the parents elected to place the child in the Milwaukee Choice Program, then the placement would be considered to be a parental placement, not a public agency placement for the purpose of providing FAPE. Therefore, the State would not be required to ensure that private schools chosen by the parents would provide FAPE. . . . Despite the fact that the State is partially subsidizing the placement in private school of any handicapped child who participates in the Program, the fact that it is the parent or parents who are making the unilateral decision to place their child in private school despite the availability of FAPE in the public schools renders these placements “parental placements.”

Komer Memo, supra note 103.

\textsuperscript{106} AUDIT BUREAU, supra note 70.

\textsuperscript{107} Id. However, the No Child Left Behind Act of 2001 will begin to require a full accounting of all children with disabilities. 34 C.F.R. § 300.451 (2003).
to meet the standards of the state education agency, also fail to meet the *Rowley* test of a FAPE.

This Part concludes that all children with disabilities receiving special education services, who choose to transfer from a public school that consistently fails to meet minimum state educational standards to a private school participating in a school choice program, continue to be entitled to receive special education services. Additionally, this analysis concludes that courts should not afford a failing public school the presumption that it provides a FAPE.

**A. QUESTIONING THE FAPE**

1. **The Grounds for a FAPE Violation**

Violations of the IDEA’s FAPE mandate are commonly associated with breach of the procedural safeguards afforded to the family of a student with a disability or substantive shortcomings of the IEP, resulting in inadequate educational services. The circuit courts of appeals are split as to whether a procedural violation alone is sufficient to find the school has failed to provide a FAPE. Successful challenges to procedural violations have included the following: (1) the untimely convening of a due process hearing; (2) not having a prepared IEP ready for implementation at the beginning of the school year; (3) inaccurate statements of present levels of functioning; (4) the absence of objective strategies for evaluating IEP progress; and (5) the lack of a summary report explaining the basis for determining the presence of disability.

Substantive violations of the FAPE mandate have arisen from a dyslexia expert’s testimony that the IEP was more likely to cause harm than benefit and from the student’s failure in all major academic subjects for the school

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108. *See infra* notes 110–18 and accompanying text. A public school is required to provide the parent with a copy of the IDEA’s procedural safeguards and an opportunity to review and discuss them, at a minimum: “(1) [u]pon initial referral for evaluation; (2) [u]pon each notification of an IEP meeting; (3) [u]pon reevaluation of the child; and (4) [u]pon receipt of a request for due process.” 34 C.F.R. § 300.504(a) (2003). The very fact that these safeguards are under everyone’s noses—educators’, administrators’, parents’—so frequently, and that they present requirements for objective conduct—such as providing notice, acquiring consent, accessing records—leaves little excuse for error. *See id.* § 300.504(b).


Frequent violations of the FAPE requirement via the “not reasonably calculated” standard include: (1) multiple repetitions of a single grade; (2) the failure of a student of average intelligence to make academic progress through five years of instruction; (3) de minimus benefits; and (4) not changing the IEP “in the face of insufficient progress.” Recently, substantive violations have arisen from special education and related services being “improperly and haphazardly executed,” and from an “IEP’s failure to provide for [special education and related] services should [the student] fail to return to school on a regular basis” after a traumatic incident with the special education teacher. These examples, however, demonstrate considerable overlap and the absence of a bright line between procedural and substantive errors.

From this point forward, the analysis will largely address one specific cause for the inadequacy of a FAPE: when a school is unable to meet state educational standards. Alabama offers such an illustration, quite unlike any previously discussed, because the failure occurs not in the provision of services to an individual child, but in school after school across the state.

111. Evans, 930 F. Supp. at 98–101. “When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit.” Bd. of Educ. v. Rowley, 458 U.S. 176, 207 n.28 (1982); see also Sunman-Dearborn Cnty. Sch. Corp., No. 849-95, 23 Individuals with Disabilities Educ. L. Rep. (LRP Publ’ns) 497 (M.D. Pa. 1995) (finding that “failing grades clearly indicated his need for a program which addressed his attention problems and academic deficits”).

112. SPECIAL EDUCATION LAW AND PRACTICE, supra note 25, at 8:5–9.


114. A student with a hearing impairment by age ten had made virtually no progress in reading and mathematics, demonstrating a sign language vocabulary of “approximately 50–75 words receptively and 50 words expressively.” Fayetteville-Perry Local Sch. Dist., 20 Individuals with Disabilities Educ. L. Rep. (LRP Publ’ns) 1289 (1994).


119. See discussion supra note 35 and accompanying text.
2. When the School Fails, Children with Disabilities Fail: 

*Alabama Coalition for Equity, Inc. v. Hunt*

In 1993, the Alabama public school system was a portrait of systemic failure. Confined neither to a major urban center nor to a blighted rural region, the plaintiffs in *Alabama Coalition for Equity, Inc. v. Hunt* sought to alleviate the desperate circumstances of public education by forcing the state legislature to create an equitable funding scheme. The Alabama Circuit Court issued a declaratory judgment that “the system of public schools fails to provide equitable and adequate educational opportunities to all schoolchildren and, with respect to children with disabilities ages three through twenty-one, fails to provide appropriate instruction and special services.”

Additionally, the court cataloged deficiencies in the provision of general instruction and services, noted the shortage of trained special education teachers, and acknowledged that the system of funding special education penalized schools that tried to serve children with disabilities. Ultimately, the court concluded that “Alabama’s system of special education does not and cannot provide an appropriate education to children with disabilities”—a holding unanimously affirmed in an advisory opinion by the Alabama Supreme Court.

*Alabama Coalition* unambiguously demonstrates how the systemic failings of a public school system engender a fundamentally inadequate and inappropriate education for children with disabilities. In doing so, the —

120. See *Ala. Coalition for Equity, Inc. v. Hunt*, Nos. CV-90-883-R, CV-91-0117-R, 1993 WL 204083, at *12–32 (Ala. Cir. Ct. Apr. 1, 1993) (detailing the deplorable condition of facilities, the failure to accommodate the needs of children with disabilities, the inability to meet standards of accreditation, the absence of opportunities for students to receive advanced coursework, serious staff shortages, high rates of school drop-out, and a concern in the business community about an inadequately prepared workforce in more poorly funded schools).

121. Id. at *2–18.

122. Id. at *1.

123. See id. at *60 (explaining that federal IDEA (formerly EHA) monies were lumped directly into the state education fund and then divided among the schools on the basis of each school’s total enrollment, ignoring the purpose of the funds and the necessity of providing extra funds for students with the disabilities).

124. Id.


126. In accord with the Alabama Constitution, the court ordered the state legislature to “maintain a liberal system of public schools throughout the state for the benefit of the children thereof . . . .” *Ala. Coalition for Equity, Inc. v. Hunt*, Nos. CV-90-883-R, CV-91-0117-R, 1993 WL 204083, at *43 (Ala. Cir. Ct. Apr. 1, 1993) (quoting Ala. Const. art. XIV, § 256). The court stated that Ala. Const. art. XIV, § 256 guarantees “equitable and adequate educational opportunities,” which are “free and open to all school children on equal terms,” including opportunities to develop sufficient skill in all academic areas and sufficient preparation for advanced vocational or educational endeavors. Id. at *62–63. However, before the legislature complied with the court’s order, it requested an advisory opinion from the Alabama Supreme Court.
court found violations of the Alabama Constitution and of an Alabama special education law requiring a FAPE for all children with disabilities.\textsuperscript{127} A question, thus, remains whether the failure to meet state educational standards will constitute the denial of a FAPE under the federal Act.

3. State Educational Standards and an Adequate Public Education

Providing a FAPE for a child with a disability requires that the educational services of the local public school meet the standards of the state educational agency.\textsuperscript{128}

[\text{E}ntitlement to a . . . FAPE, by its terms, encompasses an appropriate educational program that is individually-designed for each student in accordance with the requirements . . . [of IDEA] and the educational standards of the State in which the student’s parents reside. In addition, under 34 C.F.R. § 300.600, each State must exercise a general supervision over all programs in the State that provide educational services to disabled students, and must ensure that all such programs meet State education standards and . . . [IDEA] requirements.\textsuperscript{129}]

Moreover, state educational standards, whether “substantive or procedural, that exceed the federal basic floor of meaningful, beneficial educational opportunity”\textsuperscript{130} are consistently incorporated by reference into the IDEA.\textsuperscript{131}

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\textsuperscript{130} Township of Burlington v. Dep’t of Educ., 736 F.2d 773, 789 (1st Cir. 1984).

\textsuperscript{131} “In this, and other circuits, it is settled that ‘even if a school district complies with federal law, it may still violate the [federal] Act if it fails to satisfy more extensive state protections that may also be in place.’” Doe ex rel. Doe v. Bd. of Educ., 9 F.3d 455, 457 (6th Cir. 1993) (quoting Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 620 (6th Cir. 1990)). "Under the [IDEA], each state is given the power to enunciate its own procedural and substantive protections for its handicapped, provided it meets the federal minimum standard. Any other construction of the statute effectively supplants the states’ historic command of education.” Pink ex rel. Crider v. Mt. Diablo Unified Sch. Dist., 738 F. Supp. 345, 347 (N.D. Cal. 1990); accord Burke County Bd. of Educ. v. Denton ex rel. Denton, 895 F.2d 973, 982-83 (4th Cir. 1990) (indicating that state requirements for habilitation services, which are not required under the IDEA, are nonetheless required of the public schools where necessary to provide a FAPE—though in this case, such services were not deemed necessary); David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 418 (1st Cir. 1985); Geis v. Bd. of Educ., 774 F.2d 575, 581 (3d Cir. 1985); Harrell v. Wilson County Sch., 293 S.E.2d 687, 692-94 (N.C. App. 1982) (demonstrating how the public school was and did comply with the procedural requirements of state law, including more demanding screening, evaluation, and IEP requirements).
Standards that operate to diminish the federal right to an education in the LRE, however, are not incorporated.\textsuperscript{132}

State educational standards set higher than the federal floor arise at the prerogative of the respective states to define an adequate education for their children.\textsuperscript{133} For example, the Ninth Circuit in \textit{Students of California School for the Blind v. Honig} affirmed an injunction requiring that the school comply with California’s seismic safety regulations.\textsuperscript{134} Additionally, in \textit{Nelson v. Southfield Public Schools}, the Michigan Court of Appeals incorporated by reference "the more rigorous Michigan standards requiring that the special education program maximize the potential of the handicapped person."\textsuperscript{135}

It flows logically that a given state’s standards for student achievement constitute higher state standards deserving of incorporation by reference into the IDEA. Seemingly absent from the IDEA case law, however, is a clearly articulated holding that a state’s substantive \textit{achievement} requirements for school performance are so incorporated; and thus, the failure of a school to meet \textit{these} state educational standards amounts to a breach of the FAPE. Yet, when a school utterly fails year after year to rise above a state’s "academic emergency" roster—a determination based on the failure to meet state achievement standards\textsuperscript{136}—is not the education provided in such a school clearly inadequate?

4. Substantive Achievement Standards Qualify as \textit{Rowley} State Educational Standards

Thus far, in light of \textit{Alabama Coalition} and the incorporation doctrine, this analysis has presented compelling reasons to treat state achievement standards as requirements of a FAPE. This Note recognizes three arguments that may have operated to prevent such incorporation and will argue that none is so compelling as to justify any further treatment of state achievement standards as beyond the realm of the FAPE requirements.

\textsuperscript{132} Township of Burlington, 736 F.2d at 789 n.19.

\textsuperscript{133} This is largely a historical matter of federalism. \textit{Id.} at 786 ("Our resolution of these issues follows the spirit of ‘cooperative federalism.’ We must strive for an interpretation of the federal Act that does not limit the states to the federal floor, but allows them to achieve greater aspirations by higher commitments.").

\textsuperscript{134} 736 F.2d 538, 545–46 (9th Cir. 1984); \textit{see id.} at 545 ("California knew when it accepted federal monies for programs funded under [IDEA] that it would have to meet the standards established by its educational agency, and that those standards encompassed seismic safety of school sites.").

\textsuperscript{135} 384 N.W.2d 423, 425 (Mich. App. 1986) (citation omitted). This stands in contrast to the less stringent \textit{Rowley} requirement that the educational program must be “reasonably calculated to enable the child to receive educational benefits.” Bd. of Educ. \textit{v. Rowley}, 458 U.S. 176, 207 (1982).

\textsuperscript{136} See \textit{infra} note 196 (discussing “academic emergency” in Ohio); \textit{infra} note 156 (presenting the astonishing statistics of failure in Cleveland public schools).
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First, not all state educational standards are created equal. That is, some are so procedural as to have virtually no bearing on whether a school does or is able to provide a free appropriate public education. For example, school bus transportation commonly requires “adequate insurance protection,” likely to have very little bearing on the provision of a FAPE. Other standards may be such that noncompliance with them is not in all cases fatal. For example, in Edwin K. v. Jackson, the school failed to develop and include a behavior intervention plan (BIP) in the child’s IEP—“strongly encourage[d]” when the child’s behavior interferes with his or others’ learning. The court held that this did not violate the FAPE requirement because the “the District was aware of Edwin’s behavioral difficulties, was actively implementing different accommodations and modifications, and was trying to address Edwin’s challenges through a number of both positive strategies as well as other disciplinary strategies.”

State educational achievement standards, however, are created to provide the foundation for a rich learning experience—one that nurtures the minds and bodies of our children in a safe and healthy atmosphere and instills fundamental skills for successful futures. Ultimately, the critical goal of educational standards is to define the parameters of educational services that when complied with, guarantee our children, at minimum, a sufficient education. Certainly, this is the basis for the IDEA’s demand that schools meet state educational standards in the course of providing children with disabilities a FAPE.

Second, one commentator has suggested that in the era of Rowley (1982), the “state educational standards” prong had a different meaning. In contrast to the substantive, achievement-based outcomes of today’s state standards, the state education standards contemporary to Rowley may have

137. See, e.g., ILL. ADMIN. CODE tit. 23, § 275.100(d) (2003).
138. BIPs are only expressly required when students are expelled or suspended long-term for their behavior. PITASKY, supra note 30, at 5:38.
141. The purposes of the IDEA include “ensur[ing] that all children with disabilities have available to them a free appropriate public education . . . designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. § 1400(d)(1)(A) (2000).
142. State educational standards in the twenty-first century, typified by the requirements placed on states under the No Child Left Behind Act, are known as “standards-based education reform.” Scott F. Johnson, Reexamining Rowley: A New Focus in Special Education Law, 2003 BYU EDUC. & L.J. 561, 573 (2003). These requirements elaborate proficiency standards by grade
been heavily administrative or procedural in nature, such as simply
designating the number and type of required graduation credits, class-size
limits, and teaching credentials. 143 Professor Johnson suggests that the Rowley
Court did not contemplate the achievement-based standards of today, and
only those more procedural in nature—guaranteeing access to educational
services for children with disabilities—were intended to be incorporated by
reference into the requirements of a FAPE. 144

There is no question that both the legislative history of the IDEA and
Rowley emphasize access to educational services for children with
disabilities; 145 however, the focus on student achievement, which state
educational agencies today regularly address, does not contradict the IDEA’s
emphasis of access, but concurs with it. A student’s substantive performance
has long been recognized as a factor in measuring the provision of a FAPE
and an indicator of individual progress. 146 Whether a student makes progress
on her IEP objectives is another time-honored factor for measuring the
FAPE, 147 and IEP objectives are regularly substantively intensive. 148 The
legislative history says nothing more than the Act is not intended to require
special educators to guarantee a specific outcome. 149

Moreover, modern state educational achievement standards do not
target individual students alone. The state imposes achievement standards
directly upon the schools. Schools, pursuant to the No Child Left Behind
(NCLB) Act, are not sanctioned for an individual’s low performance. The
schools are sanctioned when they fail in their charge to meet state

level in all academic areas and apply standardized assessments to determine progress. Id.; see 19
TEX. ADMIN. CODE § 110 (2003) (providing an example of the detailed achievement criteria for
each elementary grade in “English Language Arts and Reading”); TEX. EDUC. AGENCY, TEXAS
ASSESSMENT OF KNOWLEDGE AND SKILLS: GRADE 3 READING (Mar. 2003) (providing an example
of a quantitative achievement test), http://www.tea.state.tx.us/student.assessment/resources/

143. See Johnson, supra note 142, at 573 & n.52 (2003).

144. Professor Johnson argues that “[t]he focus on student achievement contradicts
Rowley’s finding that the purpose of the IDEA is to provide access to education and not to
address the substance or quality of services students receive once they have access.” Id. at 576
was more to open the door of public education to handicapped children on appropriate terms
than to guarantee any particular level of education once inside”)).


146. See supra note 111.

(S.D. Tex. 1993) (finding that the student’s IEP “was reasonably calculated to enable her to
receive educational benefits” when the evidence demonstrated that the student “had made, and
was continuing to make, significant progress in her speech and auditory skills as a result of . . .
[the] individualized instruction provided”).

148. I know from having served hundreds of students identified with learning disabilities
that for the major population of children in special education programs, specific objectives
addressing reading, writing, and mathematical skills are regularly the bulk of all IEP objectives.

achievement requirements for providing successful core academic instruction.\textsuperscript{150}

Third, state educational standards, based on subject matter and skill achievement criteria, assessed as they commonly are with multiple-choice questions and imposed as a means of demonstrating school performance, may not always be the best measures of children’s abilities, nor fair measures of a school’s efforts.\textsuperscript{151} The NCLB, however, requires the state education agencies to develop such testing and to set the standards for achievement.\textsuperscript{152} Furthermore, educational scholars, professional educators, parents, children, and the public at large collaborate in defining what children need to be successful in the world ahead and in developing standards\textsuperscript{153} targeting the best interests of children.\textsuperscript{154}

It is not fitting to generalize to the extent of portraying every school that is unable to meet state minimum standards as incapable of providing an appropriate education for every child.\textsuperscript{155} However, the statistics of failure of many public schools in our nation’s urban centers, serving tens of thousands of students, paint a dim picture for the educational hopes of these children

\begin{itemize}
\item \textsuperscript{150} U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON NO CHILD LEFT BEHIND (requiring high standards for reading/language arts and mathematics), \textit{at} \url{http://www.ed.gov/print/nclb/accountability/schools/accountability.html} (last visited Nov. 24, 2003) (on file with the Iowa Law Review).
\item \textsuperscript{151} See Monty Neill, Leaving Children Behind: How No Child Left Behind Will Fail Our Children, 85 PHI DELTA KAPPAN 225, 225 (2003) (suggesting that “much of what is important is not tested and much of what is tested is not of major importance”); FAIRTEST: NAT’L CTR. FOR FAIR & OPEN TESTING, ACHIEVEMENT TESTS FOR YOUNG CHILDREN (arguing that achievement tests are an inadequate method for showing how and what students are learning), \textit{at} \url{http://www.fairtest.org/facts/ACHIEVE.html} (last visited Nov. 24, 2003) (on file with the Iowa Law Review). See generally George Ingebo, Be Fair With Achievement Testing, 3 RASCH MEASUREMENT TRANSACTIONS 66 (Autumn 1989) (offering suggestions on how to correct the consequences of unfair testing), \textit{at} \url{http://www.rasch.org/rmt/rmt83b.htm} (on file with the Iowa Law Review).
\item \textsuperscript{152} See infra Part IV.B.2 (discussing the requirements of the NCLB).
\item \textsuperscript{153} DEP’T OF PUB. INSTRUCTION, STATE OF WIS., POLICYMAKER’S GUIDE TO ASSESSMENT 5 (1999), \textit{available at} \url{http://www.dpi.state.wi.us/dpi/oca/pdf/wsasguid.pdf} (on file with the Iowa Law Review).
\item \textsuperscript{155} Michael Winerip, Superior School Fails a Crucial Federal Test, N.Y. TIMES, Nov. 19, 2003, at B9 (discussing a national Blue Ribbon School of Excellence that fell 1% below the NCLB’s mandate that 95% of the students take state achievements test); see infra Part V.B (discussing the implications of inconsistent state-to-state standards and the fallout from “unrealistic, unachievable, or inappropriate standards”).
\end{itemize}
This part of the analysis establishes the necessity of incorporating the higher educational achievement standards of a state into the requirements in providing a FAPE. Thus, a school clearly failing such standards, as the analysis will now proceed to demonstrate, must not be afforded a legal presumption that it offers a FAPE to children with disabilities. Accordingly, this Note now turns to shifting the burden of proof away from this presumption.

**B. SHIFTING THE BURDEN OF PROOF AWAY FROM A PRESUMPTION**

The holding of *Davis v. Grover* and the Komer Memo deny children with disabilities the right to receive their special education services in a private school of choice in Milwaukee. This denial is based upon a presumption in a school’s favor that it provides a FAPE to these children, and that the family is making an informed, unilateral decision to reject that FAPE in favor of a private choice school.  

The basis for the presumption is that the child’s IEP was “jointly developed by the school district and the parents;” that is, the parents had

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NO FAPE FOR CHILDREN WITH DISABILITIES

their say and approved of the plan. In application, this presumption places the burden of proving the inadequacy of a FAPE on the family challenging it; yet, the provisions of the IDEA are silent as to such a burden, leaving its designation to state law and the discretion of the courts. Moreover, the presumption has not gained broad use, having only been applied in four federal circuits.

The U.S. Supreme Court in Keyes v. School District No. 1, quoting Professor Wigmore, stated that “[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, ‘is merely a question of policy and fairness based on experience in the different situations.’” In light of policy and fairness, not to mention law, there are many compelling reasons to shift the burden of proof, that a FAPE is provided, onto the school.

1. Fairness

Requiring parents to prove at the district court level that the school has failed to comply with the [IDEA] would undermine the Act’s express purpose “to assure that the rights of children with disabilities and their parents are protected” . . . and would diminish the effect of the provision that enables parents and guardians to obtain judicial enforcement of the Act’s substantive and procedural requirements . . . .

A number of federal circuit courts of appeal have consistently placed the burden of proof on the school district in administrative hearings under the IDEA. The Third Circuit, in Oberti ex rel. Oberti v. Board of Education, extended this burden in cases before federal district courts. Reasoning that such a burden is best placed on the party most able to meet it, Oberti emphasized the school’s advantages in such disputes: “In practical terms . . . the school has . . . greater control over the potentially more persuasive witnesses (those who have been directly involved with the child’s

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158. Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001).
160. See supra note 44 (noting that only the Fifth, Sixth, Tenth, and Eleventh Circuits have implemented the presumption).
164. Oberti, 995 F.2d at 1219 (citing Lascari v. Bd. of Educ., 560 A.2d 1180, 1188 (N.J. 1989)).
Additionally, a public school is better able to meet the burden of proof because it has ready access to the necessary records and assessments used in the development of the child’s IEP. School personnel, “as educational experts . . . in proceedings brought pursuant to the IDEA,” have the advantage of knowing the complex inner workings and the continuum of special education services. Parents, in contrast, do not usually possess the expertise to formulate an appropriate IEP.

Furthermore, the public school has the overarching obligations of identifying students with disabilities and developing the individualized education programs. Finally, underlying the IDEA “is an abiding [congressional] concern for the welfare of handicapped children and their parents.” This abiding concern is evident in the extensive procedural safeguards afforded to the family of a child with a disability. In addition to fairness, the NCLB implicitly affords no such presumption to a failing public school.

2. The No Child Left Behind Act

While the NCLB is not short on controversy, it places significant new responsibilities on state and local public education agencies. These agencies are now “accountable for improving the academic achievement of all students” by: (1) identifying all low-performing schools that have not

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165. Id.
167. Osborne, supra note 159, at 369.
168. Id. at 368. In contrast, school personnel are generally conversant with the federal and state requirements of the IDEA. Lascari v. Bd. of Educ., 560 A.2d 1180, 1188 (N.J. 1989).
169. Osborne, supra note 159, at 368.
170. Lascari, 560 A.2d at 1188.
171. Id.
173. See, e.g., Maureen Feighan & Christine MacDonald, Demand to Prove Skills Enrages Veteran Teachers, DETROIT NEWS, Jan. 12, 2004, at A1, 2004 WL 57346596 (“[D]espite nearly two decades in the classroom and a master’s degree . . . [Joanne] Peurach isn’t considered highly qualified to teach language arts under . . . the No Child Left Behind Act. However, a 23-year-old teacher Peurach mentors is qualified.”); Kate N. Grossman, Schools Pressured to Dump Bad Students, Critics Say, CHI. SUN-TIMES, Jan. 9, 2004, at 8, 2004 WL 63125317 (naming the NCLB as the culprit pressuring districts to not “hang on to students [struggling with school] and help them go the extra mile to stay in school” (quoting state Senator Miguel del Valle from Chicago)); Jim VandeHei, Education Law May Hurt Bush; No Child Left Behind’s Funding Problems Could Be ’04 Liability, WASH. POST, Oct. 13, 2003, at A1, 2003 WL 62222601 (“Democrats blame Bush and congressional Republicans for shortchanging the [NCLB] by billions of dollars.”); Winerip, supra note 155 (discussing a case of unfounded failure pursuant to the NCLB).
175. Id. § 6301(4).
made adequate yearly progress, \(^{176}\) establishing a plan of remediation for each such school; \(^{177}\) sanctioning and taking corrective action against schools that continue to fail to make adequate yearly progress; \(^{178}\) and (4) offering families the choice to attend a suitable alternative public school that is passing state standards until such remediation is achieved. \(^{179}\) The Act further requires states to develop reporting requirements and guidelines "for identifying schools [that are] persistently dangerous so that a school choice option can be extended for students who wish to transfer to a ‘safe’ public school."

The NCLB dictates that each state identify its low-performing schools through student performances on statewide assessments. \(^{181}\) These assessments must contain challenging performance and content standards, and each state must administer its assessments annually to evaluate the educational progress of children in mathematics, reading or language arts, and science. \(^{182}\) The state is obligated to test all children, and schools are required to provide reasonable adaptations and accommodations for those children with disabilities or limited English proficiency. \(^{183}\)

The Act imposes an affirmative duty upon all public school systems to offer the students of low-performing schools an alternate appropriate education. \(^{184}\) "Under Title I, section 1116(b)(E) of the NCLB, schools, beginning with the 2002–2003 school year must offer public school choice to their students if those schools are in their first or second year of school improvement, undergoing corrective action, or in a planning year for restructuring." \(^{185}\) Public schools owe this duty to all students, including those with disabilities. \(^{186}\) In essence, this requirement implicitly acknowledges that

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176. See id. § 6317(a)(1) (requiring the states to establish statewide systems for school improvement and support); id. § 6316(b)(1)(A) (requiring local education agencies to identify for improvement schools that have failed to make adequate yearly progress for two consecutive years).

177. Id. § 6317(a)(5)(B)(ii).

178. See 20 U.S.C.A. § 6316(b)(7)(A) (defining "corrective action"); id. § 6316(b)(3)(A) (explaining the course of corrective action to be taken).

179. Id. § 6316(b)(1)(E); see also DEPT OF PUB. INSTRUCTION, STATE OF WIS., ESEA INFORMATION UPDATE, BULLETIN NO. 02.07 (noting that "[i]f there is no [alternative public] school available within the district," which has not been identified to be in need of improvement, then the "district may establish cooperative agreements with nearby districts"), at http://www.dpi.state.wi.us/dpi/esa/bul_0207.html (Mar. 21, 2003) (on file with the Iowa Law Review).

180. SAILOR & STOWE, supra note 64, at 14 (citing Title IX section 9532 of the Act); see Eric W. Robelen, Unsafe Label Will Trigger School Choice, EDUC. WK., Oct. 23, 2002, at 23.


182. Id. § 6311(b)(1), (b)(3).

183. Id. § 6311(b)(3)(C)(ix).


185. SAILOR & STOWE, supra note 64, at 14.

186. Id. at 15.
a failing school is not able to provide an adequate (or free appropriate public) education to its students.

Furthermore, in June of 2002, Secretary of Education Rod Paige sent a guidance letter to state and local education agencies on “meeting the choice provisions in NCLB with respect to students with disabilities.” The letter indicated that eligible choice schools “must be accessible,” and they must “be able to implement the IEP drawn up by the previous school” or “conven[e] a new IEP team [to] construct[,] a new IEP.” In February of 2003, Secretary Paige indicated that “[o]ur goal is to align IDEA with the principles of [the NCLB] by ensuring accountability, more flexibility, more options for parents, and an emphasis on doing what works to improve student achievement.”

Once more, the 2002 report of the President’s Commission on Excellence in Special Education (PCESE) emphasized an “[i]ncrease [in] Parental Empowerment and School Choice.” Specifically, the

IDEA should increase opportunities for parents to make choices informed about their children’s education. Consistent with the No Child Left Behind Act, IDEA funds should be available for parents to choose services or schools, particularly for parents whose children are in schools that have not made adequate yearly progress under IDEA for three consecutive years.

The PCESE report further recommended that states have flexibility to define and implement charter school programs “in ways that maximize the capacity of such schools to meet the needs of children with disabilities.” For example, charter school options should be available to “students with disabilities, even if these offer relatively restrictive environments, as long as those programs can appropriately serve the student.” Finally, the PCESE made it clear that it intended private schools serving students with

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187. Id.
188. Id. The letter further indicated that “[i]n offering choice to students with disabilities, school districts may match the abilities and needs of a student with disabilities to the possible schools that have the ability to provide the student (a full and appropriate public education).” Eric W. Robelen, Department Releases Guidelines on Choice, EDUC. WK., Dec. 11, 2002, at 21.
disabilities to be held to the same standards of accountability that apply to
public schools.”

The NCLB is proving to be a highly contentious mandate. Nonetheless, it clearly articulates a national educational policy emphasizing the necessity of providing effective alternatives to failing public schools for all children. As such, the NCLB manifestly bolsters the focal argument of this Note: Seriously failing public schools, those that consistently fall far below the standards of the state education agency, provide a very questionable educational benefit, if any, to children with disabilities, such that the families of these children are both deserving and entitled to the choice of something better.

C. QUESTIONING THE FAPE IN MILWAUKEE

1. School Performance

The State of Wisconsin maintains some of the highest levels of educational achievement in the nation. However, when a Wisconsin public school falls significantly below the state-mandated minimum expectations for achievement, the Wisconsin Department of Public Instruction (DPI) designates that school (somewhat euphemistically) as a school “in need of improvement.”

The determination that a school is “in need of improvement” arises from sub-standard student performance on the Wisconsin Knowledge and Concepts Examinations (WKCE) and the

193.  See supra note 173.
194.  See supra note 173.
Wisconsin Reading Comprehension Test (WRCT). Wisconsin uses these standards to measure achievement for its compliance with the NCLB.

In the 2002–2003 school year, the DPI designated fifty-six Milwaukee public schools “in need of improvement,” including thirty-three elementary schools. Among Milwaukee third grade students, only 54.9% demonstrated proficiency on the 2001 WRCT in comparison to 76.5% for third graders statewide. As fourth graders the following year, only 55% demonstrated reading proficiency on the WKCE.

The levels of student proficiency on the WKCE assessments in reading, math, and science for students in Milwaukee public schools all suggest a decline over time in proficiency as students move from grade to grade. The most serious declines among Milwaukee eighth and tenth graders appear on the WKCE assessments in science and reading. For example, while 23% of eighth graders demonstrated proficiency in science in 2000, two years later the tenth graders showed only 11% proficiency. Similarly, while 38% of eighth graders demonstrated proficiency in reading in 2000, two years later as tenth graders, they showed only 20% proficiency. Additionally, daily 2000–2001 attendance in Milwaukee public schools was 87.21% per day compared with a statewide average of 94.19%. These data indicate that Milwaukee schools in general overwhelmingly fail the state educational standards and present good reason not to presume that every child with a disability attending one of “fifty-six” schools received a FAPE.


199. DEPT OF PUB. INSTRUCTION, STATE OF WIS., TITLE I SCHOOLS IDENTIFIED FOR IMPROVEMENT: SCHOOL YEAR 2002–03 (Sept. 30, 2002) [hereinafter IDENTIFIED SCHOOLS] (received via e-mail on Nov. 6, 2002, from Karen Nowakowski, Executive Staff Assistant, Department of Public Instruction, State of Wisconsin) (on file with the Iowa Law Review).

200. DEPT OF PUB. INSTRUCTION, STATE OF WIS., 2001 WISCONSIN READING COMPREHENSION TEST: GRADE THREE COMPREHENSION PERFORMANCE REPORT SUMMARY BY DISTRICT AND BY SCHOOL WITHIN DISTRICT (2001) (totaling “proficient” and “advanced” readers in row 0000 statewide and totaling the same for row 3619 for Milwaukee), http://www.dpi.state.wi.us/spr/xls/wrct01.xls (on file with the Iowa Law Review).


202. Id. (extrapolating from rows 3275–3289).

203. Id. (extrapolating from rows 3282 and 3289).

2. Students Opting for Choice Schools

Many of the students newly opting for private choice schools are leaving failing public schools. In the 2001–2002 school year, 10,739 students were granted scholarships to MPCP private schools. The vast majority of these students had attended an MPCP school in the previous year. In fact, only 1,993 of these students had come directly from Milwaukee public schools. Yet of this former population, 714 came from schools then identified as “in need of improvement.”

One week after the 2002–2003 school year began in Milwaukee, thousands of families throughout the district began receiving letters informing them that their children were attending schools “in need of improvement.” Six hundred forty-one families immediately sought to transfer their children out of these schools, yet public monies at the time only permitted transfers for 163 students.

3. Students with Disabilities Denied a Real Choice

For many of the children with disabilities seeking a seat in an MPCP school, there is no real choice. Under the Komer analysis, if a private choice school offers admission to a child with a disability and he accepts, he loses his provision of special education services. For children with moderate speech, vision, or hearing impairments, special education services are indispensable. Similarly, for the child with a severe reading disability, or the child with cerebral palsy, parting with specialized reading instruction or physical therapy services, respectively, is not an option.


206. Eight thousand seven hundred forty-six students who received MPCP scholarships in 2001–2002 attended an MPCP school the previous year. This figure results from subtracting the 1993 Milwaukee Public School attendees in 2000–2001 who accepted scholarships to an MPCP school the following year, see DEP’T OF PUB. INSTRUCTION, STATE OF WIS., NAME OF MPS SCHOOL ATTENDED LAST YEAR: 2000–01 [hereinafter WIS. LAST SCHOOL] (received via fax on Nov. 5, 2002, from Tricia Collins, MPCP Administrator), from the total 10,739 MPCP attendees in 2001–2002.

207. WIS. LAST SCHOOL, supra note 206.

208. These figures were extrapolated from a comparison of id. with IDENTIFIED SCHOOLS, supra note 199.


211. Komer Memo, supra note 103.
The Komer Memo characterized the denial of special education services in MPCP private schools as consequent to a family freely exercising its right to choose a specific educational program, notwithstanding the FAPE available in the local public school. However, when a family seeks to escape a failing public school environment, the choice is not in spite of, but rather precisely about the FAPE. It is the commonsense prerogative of every parent to seek a demonstrably successful educational environment to nurture his or her child’s mental, physical, and emotional development. Indeed, this is the very prerogative driving families away from failing public schools and toward school choice.

This Note’s preceding analysis concludes that state educational achievement standards are an appropriate fit for incorporation into FAPE requirements and that there are compelling reasons to deny a public school that fails to meet state educational achievement standards, the presumption that it offers its students with disabilities a FAPE. The analysis finally turns to a brief discussion of intra- and inter-district school choice programs. This discussion bolsters the argument for requiring special education services to follow a child into a choice school.

D. Special Education Services in Intra- and Inter-District School Choice Programs

Intra- and inter-district school choice programs involve the transfer of students between and within school districts. Numerous intra- and inter-district school choice programs operate around the country. Intra-district programs, for example magnet school programs, allow students the choice of attending a school within the district that has a unique academic specialty, such as science, foreign language, or computer science. School districts are prohibited from denying special education services to students who choose to attend such specialized programs.

212. Id.
213. See supra note 63 (noting the broad availability of intra- and inter-district school choice programs).
215. The court in San Francisco (CA) Unified School District found that:

The district . . . required all parents to sign a form stating their understanding that no remedial or special education services would be provided at the school. . . .

The district’s policy discriminated against disabled children by excluding them from the alternative high school or by requiring them to attend without the benefit of special education services . . . [and] therefore, constituted a violation of Reg. 104.33(b).

Inter-district programs, which may also offer specialized programs, operate to allow a child to attend a specific school in another public school district. Again, when a child with a disability chooses to attend a school outside his district under an inter-district choice plan, the receiving school cannot deny the student his rightful FAPE. Once accepting the child, the new school assumes all responsibilities for providing the special education services. The Florida McKay Scholarship Program operates similarly by paying for children with disabilities to attend any of the participating private schools located around the state.

The Milwaukee Parental Choice Program effectively is a quasi-inter- and quasi-intra-district school choice program. The participating private schools are intermingled with the Milwaukee public schools throughout the community, resembling other intra-district programs. At the same time, the participating private schools are by their very nature independent of the Milwaukee public schools, resembling mini-districts in an inter-district relationship with the public school system. Moreover, state funds are going to the private choice schools under the MPCP every day, just as they do to the public schools. Participating private schools are functionally an annex to the state education system. Conceiving a theory that private schools participating in the MPCP are state actors, a court could find them

the district’s admissions criteria for two of its magnet programs, which limited enrollment to students who could function without special education services other than speech, hearing, and vision services, denied and limited the opportunity of qualified students with disabilities to participate in these programs in violation of Section 504 . . . [of the Rehabilitation Act of 1973] and Title II . . . [of the Americans with Disabilities Act of 1990]. The district also violated 34 CFR 104.33(a) and (b) by requiring qualified students with disabilities who were eligible for enrollment in these programs to waive their rights to an IEP.


216. McKinney, supra note 63, at 668.


218. Id.


221. Annually, 38.9 million public dollars funnel into MPCP private schools. AUDIT BUREAU, supra note 70.
responsible for carrying out the full mandate of IDEA.\textsuperscript{222} Alternately, the similarities of intra- and inter-school district choice programs with the MPCP, lend support to the argument that special education services must follow the child when she opts for a choice private school in Milwaukee.

\section*{V. Implications and Conclusions}

Discriminatory denials of access, services, and benefits to children with disabilities seeking the educational opportunities that society has denied them in their neighborhood schools are real problems.\textsuperscript{223} Part V briefly presents a discussion of this Note’s legal conclusions, the immense implications that accordingly arise, and considerations for best practices in meeting the needs of children with disabilities under school choice programs.

\subsection*{A. Redefining a Free Appropriate Public Education}

Several federal circuit courts of appeal interpret the IDEA to impose the presumption that a child with a disability is receiving a FAPE, even in the most ineffective public schools.\textsuperscript{224} Consequently, choice programs permissibly discriminate against these children, denying them a way out of failing and hopeless schools. In this context, this Note urges the necessity of broadening the requirements of a FAPE by incorporating state educational achievement standards, and shifting the burden of proof onto the school.

In the true spirit of \textit{Mills} and the IDEA, “adequate alternative educational services” must be made available to children with disabilities “at [the] public expense” when the public system can or will not meet their needs.\textsuperscript{225} The requirements of a FAPE incorporate by reference more demanding state educational achievement standards,\textsuperscript{226} and the circumstances of a failing public school warrant an objective determination that the school truly offers a child a FAPE, to prevent the wrongful denial of a child’s rights to special education services under the IDEA.

\subsection*{B. Fallout}

As a professional educator, I do not naively proceed imagining an endless supply of fully-staffed model schools, highly experienced in providing special education services, waiting excitedly just down the road with doors open. It is no surprise that there simply are not enough schools meeting state educational standards (i.e., making adequate yearly progress

\begin{footnotesize}
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\item \textsuperscript{222} Cf. Riester v. Riverside Cnty. Sch., 257 F. Supp. 2d 968, 973 (S.D. Ohio 2002) (finding a state established charter school subject to federal law via an entanglement analysis).
\item \textsuperscript{223} See discussion \textit{supra} Part III.
\item \textsuperscript{224} See \textit{supra} note 44.
\item \textsuperscript{226} See \textit{supra} Part IV.A.3–4.
\end{itemize}
\end{footnotesize}
under the NCLB) to serve a mass exodus of children with disabilities from failing public schools, let alone all of those children that do not have disabilities. Sailor and Stowe note that "urban districts are likely to have limited space for transfer students in safe, high performing schools. Since the NCLB calls only for transfer within a district, small or rural districts may face serious challenges due to a small number of available schools." Furthermore, serious concern surrounds the NCLB as but another underfunded educational mandate. And many public educators see the NCLB as imposing unrealistic, unachievable, or inappropriate standards on public education.

Perhaps my greatest concern with the outcomes of this analysis is the practical reality of placing the burden of proof on a public school to show it provides a FAPE, let alone a school struggling to meet state standards. Shifting the burden of proof in the context of a failing school imposes considerable transaction costs precisely on that school. Attorneys’ fees are likely, as is more paperwork, and administrator and educator time spent away from primary duties in order to participate in the evaluation of the school’s ability to provide a FAPE is certain. Moreover, shifting the burden may further erode public opinion of the professionalism of public education. The insufficient financing of teachers’ salaries already marginalizes educator professionalism.

227. SAILOR & STOWE, supra note 64, at 14–15.
229. For example,
a majority of schools in Montana cannot meet [the] requirement . . . . [to] provide a “highly qualified” teacher in every core academic classroom . . . . because teachers in smaller schools almost always teach multiple courses, and sometimes multiple grades. Failing those schools simply because of their size, or forcing schools to hire extra employees, isn’t realistic and wouldn’t necessarily improve the quality of the schools . . . .

Alan Richard, Rural States Concerned About Federal Law, EDUC. WK., Oct. 22, 2003, at 25 (quoting the educational advisor to the governor of Montana); see also Bess Keller, Rigor Disputed in Standards for Teachers, EDUC. WK., Jan. 14, 2004, at 1 (providing Arkansas and New Mexico as an example of divergent standards for the “highly qualified” teacher label); Alan Richard, States Unable to Help All Struggling Schools, EDUC. WK., Jan. 7, 2004, at 19 (“Budget limitations are hindering the ways states can help their most struggling public schools . . . . as the federal No Child Left Behind Act is set to demand more interventions in schools that fail to make progress on test scores.”).
The inconsistency of standards from state to state that results from the NCLB requiring each state to develop its own system of assessment (likely so designed to accommodate states’ rights) undermines the national goal of improving education for all children. For example, comparatively low standards in State A will benefit no one, while ensuring that not a single child in an undetected failing school receives the opportunity to exercise real choice or obtain effective educational services. Comparatively high standards in State B will unnecessarily label, sanction, and dismantle working, improving, beneficial schools that fall a few percentage points short of an unrealistically high standard.

And what happens to a public school that falls below the standards, loses students and money, and teachers? Is this really an efficient means of encouraging and supporting improvement in that school? If the school is forced to close its doors, what opportunities and resources are also lost? Meeting places for the Boy Scouts? The local voting precinct? Playgrounds and facilities that bring people together for sporting events? Volunteer opportunities for the elderly? The town hall? A portion of the glue that still holds the community together?

The problems of quality education, meaningful choice, and appropriate services for children with disabilities are real in failing public schools; so, likely, is the fallout—an indication of the shortsighted educational policies thrown at this nation’s most needy families and children. Something, much larger than this Note, must give.

C. CONSIDERATIONS FOR SCHOOL CHOICE PROGRAMS SERVING CHILDREN WITH DISABILITIES

School choice programs appear here to stay. They will more likely avoid denying equal access and ensuring quality services for students with disabilities if implemented with: (1) truly sufficient funding; (2) uniform teacher credentialing; (3) true opportunity of school choice; (4) admission by lottery; (5) the capacity for expert programs; and (6) uniform student and school assessment methodologies.

Essentially, excluding children with disabilities from full access to choice programs is a financial decision, because providing for special education needs is more costly than providing general education services. And rarely would it appear in the local school district’s best interest to put the financial burden of school choice on a public education system already

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11530811 (finding that the difficulty of attracting and keeping good teachers in the profession is notably related to low salaries).

231. See supra text accompanying notes 181–183.

232. Large-scale school choice programs have grown rapidly in the last decade. See supra text accompanying notes 61–65.

strapped for cash. Ultimately, if states are going to mandate choice programs on the state level, the public fisc must open its pocketbook.

Uniform credentialing will require consistent standards of demonstrated expertise in subject areas, regardless of public or private teaching status. Opportunity of choice could include all local public, private, charter, and parochial schools. Admission by lottery is necessary where demand for specific alternate schools is greater than the enrollment capacity. Lottery also will serve to avoid skimming the “cream” and denying access to students with greater educational needs or fewer financial resources. Expert programs, akin to magnet programs, dedicated to serving specific disability needs can be highly effective and cost efficient because of their ability to group specialized resources and services. Although contrary to the concept of the LRE, IEP teams make such placements with the family’s full accord when a specific program can offer better services than the local school. Finally, uniform school and student assessment will facilitate meaningful comparison and choice across schools, districts, and states.

Research cautions that school choice “in and of itself is unlikely to be the panacea that revolutionizes urban school systems.” School choice, however, is an empowering proposition for tens of thousands of families that do not have true choice of educational opportunity. These families, by virtue of their low socio-economic status, are relegated to live in the most socially, educationally, and financially impoverished communities. Perhaps this alone is sufficient reason to ensure that school choice programs do not deny access to children with disabilities.

234. See id. at 846 (noting the shortage of financial resources in public education).
235. See PITASKY, supra note 30, at 6:46 (discussing the benefits of serving deaf or hearing impaired and blind or visually impaired students in specialized schools); BREHM PREPARATORY SCH., ABOUT BREHM (providing a specialized school for students with complex learning disabilities), at http://www.brehm.org/about_brehm.htm (2003) (on file with the Iowa Law Review).
236. See SPECIAL EDUCATION LAW AND PRACTICE, supra note 25, at 6:12–14 (discussing the appropriate use of residential placements).
237. Goldhaber & Eide, supra note 63, at 172.