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THE IDEA AMENDMENTS OF 1997 AND THE PRIVATE SCHOOLS PROVISION: SEEKING IMPROVED SPECIAL EDUCATION, BUT SERVING ONLY A SELECT FEW

Jennifer A. Knox

Public education derives from the societal purpose of educating "all the children of all the people." Yet, in the nineteenth and early twentieth centuries, public schools excluded children with disabilities. This exclusion was due in part to the belief that disabled children's special needs created anxiety for the teachers. In later years, schools attempted to placate parents and children by suggesting that segregation of disabled children would reduce stress on the children themselves, when, in fact, it


3. See LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 11 (2d ed. 1995); see also Timothy M. Huskey, Note, Teaching the Children " Appropriately: " Publicly Financed Private Education Under the Individuals with Disabilities Education Act, 60 MO. L. REV. 167, 167 (1995) (explaining that funding a public educational program for a disabled student often occurs at the expense of non-disabled children in the same classroom, who may not reach their own potential due to the teacher's diverted attention). See generally Kotler, supra note 2, at 344-45 (discussing public schools' tendencies to classify disruptive children and racial and ethnic minorities as "special" because doing so eliminated troublemakers and continued segregation, presumably also reducing teachers' stress).
failed to garner such results. Entrepreneurs and parent associations thus established private schools to educate disabled children. Public schools funded private schools, considering it a way to meet their social responsibility.

Despite this arrangement, parents of the disabled still wanted their children to learn with their non-disabled peers, so they joined forces to secure public education rights for all disabled children. As early as 1910, public schools designed remedial programs for these children. The students, however, were still segregated in special classes, and during the 1930s, their education declined considerably.

The rights of disabled children received greater recognition in the second half of the twentieth century. In Brown v. Board of Education,10 the United States Supreme Court determined that segregation of black...
schoolchildren violated the Equal Protection Clause of the Fourteenth Amendment. This ruling had a profound impact on the rights of disabled children; Brown’s achievement of equal educational opportunities for all schoolchildren was imputed to disabled children as well. Two federal district court cases, Pennsylvania Ass’n for Retarded Children v. Pennsylvania and Mills v. Board of Education further paved the road for equal education for the disabled by requiring all states to provide disabled children with a free public education.

In 1975, Congress enacted the Education for All Handicapped Children Act (EAHCA) after determining that the states were not providing disabled children full opportunities for public education. Although EAHCA has been hailed as the “single most important piece of federal

11. See id. at 493, 495 (holding that segregation of black students in separate schools violated their right to equal protection and an equal educational opportunity under the Fourteenth Amendment); see also ROTHSTEIN, supra note 3, at 12 (analyzing the Court’s conclusion that if black children were educated in separate but equal facilities, the segregation was inherently unequal, because, otherwise, there would exist no reason to be educated separately).

12. See YELL, supra note 2, at 55 (stating that under Brown the constitutional right to equal protection under the law applies to educational rights also, so education provided to the public must be provided to all children); Boeckman, supra note 2, at 859 (calling Brown’s decision the “first giant step” toward inclusion of disabled children); Robert Caperton Hannon, Special Project, Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency, 50 VAND. L. REV. 715, 718 (1997) (noting how Brown’s broad language covers children with mental disabilities); Christine Moyles Kovvan, Disability Law. Issues in the Third Circuit, 42 VILL. L. REV. 1867, 1872 (1997) (attesting that Brown laid the foundation for parents’ and educators’ battles for inclusion of disabled children in the public school system).


15. See Mills, 348 F. Supp. at 876 (holding that students who were denied public education due to their disabilities deserve the right to attend public school as part of due process); Pennsylvania Ass’n for Retarded Children, 343 F. Supp. at 297 (holding that a state must provide a free public education to disabled students, as guided by the Fourteenth Amendment’s Equal Protection Clause).

education legislation enacted during the 1970s,"17 Congress proposed to amend EAHCA in the late 1980s after findings showed that EAHCA's programs were not fulfilling all of its educational goals.18 Specifically, a shortage of special education teachers forced public schools to hire faculty who did not meet school standards.19 Class size also increased, in addition to teachers' workloads, which hindered teachers' abilities to provide appropriate education.20 Moreover, Congress found that disabled children were not being reached—few programs provided direct services, and only small numbers of children received these services through the aid of research and demonstration projects.21

As a solution to these problems, Congress amended EAHCA 1990 and renamed it the Individuals with Disabilities Education Act (IDEA).22 IDEA aims to improve early intervention, special education, and related services provided to infants, toddlers, children, and youths with disabilities.23 To this end, it endeavors to ensure an appropriate education for all disabled students in the nation.24 It also strengthens parental involve-

19. See id. (explaining that the teachers hired by public schools to fill special education positions did not possess the recommended skills for teaching special education students).
20. See id.
21. See id. at 2 (explaining that EAHCA authorized discretionary programs on a regular basis, and that the purpose of the 1990 Amendments was to reauthorize more and better developed programs).
23. See 20 U.S.C. § 1400(d)(2) (Supp. III 1998); LEGISLATIVE HISTORY, supra note 18, at 2. Other goals include greater emphasis on student performance, as well as greater expectations of students, and implementation of different funding formulas. See YELL, supra note 2, at 54.
24. See 20 U.S.C. § 1400(d)(1)(A) (Supp. III 1998). IDEA accomplishes this goal by providing every disabled student with a free appropriate public education (FAPE). See infra note 40 (discussing the elements of FAPE). The Supreme Court's viewpoint concerning FAPE is that it entitles disabled children to a "basic floor of opportunity," but no more than what is "reasonably calculated" to achieve an "educational benefit." See Board of Educ. v. Rowley, 458 U.S. 176, 201, 206-07 (1982) (holding that a hearing-impaired student whose parents requested a sign language interpreter in the classroom was not entitled to this service because the public school's provision of speech therapy and a hearing tutor was reasonably calculated to achieve an educational benefit for the student). The Court found that the student received an educational benefit because she passed kindergarten and entered the first grade, and that this goal was all that the program required. See id. at 209-10 (quoting Rowley v. Board of Educ., 483 F. Supp. 528, 534 (S.D.N.Y. 1980)).
ment in disabled children’s education, facilitates access to information about student assessments, and improves opportunities for children from diverse backgrounds.

As a method of remedying long-term neglect of the special needs of disabled children, IDEA includes a mainstreaming provision entitling all disabled children to learn in a public school with their non-disabled peers. Only children whose disabilities interfere with their opportunity according to one commentator, the educational benefit standard will not achieve favorable results for either the public school or the student. See Tara L. Eyer, Comment, Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities, 126 Educ. L. Rep. (West) 1, 16 (1998) (suggesting that the 1997 Amendments are designed to achieve measurable goals of progress for the students). Eyer believes “that the ‘basic floor of opportunity’ has been elevated from access to meaningful progress.” Id. at 17. Thus, courts today should raise the educational benefit standard to one that will aid students in meeting and surpassing their schools’ expectations, in addition to their own. See id. at 19.

25. See LEGISLATIVE HISTORY, supra note 18, at 5 (discussing parents’ needs to understand their children’s disabilities, to work with teachers, and to know legal information concerning their children’s education).

26. See Notice of Proposed Rulemaking, 62 Fed. Reg. 55,026, 55,028 (1997); LEGISLATIVE HISTORY, supra note 18, at 6-7 (mentioning that student assessments will provide information about appropriate services for students). Student assessments are an integral component of the individualized education program (the IEP), the written program designed uniquely for each child, and planned by the parents, special education teacher, general educational teacher, and agency representative. See 34 C.F.R. §§ 300.340(a), 300.344(a) (1998); see also YELL, supra note 2, at 169 (describing the IEP as the item that requires the public school to act in good faith to implement the necessary related services, but warning that the IEP does not guarantee that the child will receive those services). The IEP must be put into effect before the child receives the services; it is reviewed annually. See 34 C.F.R. §§ 300.342(b)(1), 300.343(d).


28. See 20 U.S.C. § 1412(5)(A) (Supp. III 1998). This provision mandates that each state educational agency shall ensure that

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

Id. The 1997 Amendments refer to this provision as the “least restrictive environment” provision. See 20 U.S.C. § 1412(a)(5)(A) (Supp. III 1998). The provision also requires that the child be educated at the public school closest to his home. See 34 C.F.R. § 300.552(a)(3) (1998). The term “least restrictive environment” appears only in the 1997 Amendments, and it is not specifically defined. See Julie F. Mead, Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA, 127 Educ. L. Rep. (West) 511, 513, 516 (1998) (explaining that legislative history for the 1997 Amendments presumed that disabled children should be educated in public classrooms). In Oberti v. Board of Educ., the court discerned this legislative intent, holding that a school district must jus-
to learn in a public classroom are excluded. Although this least restrictive environment preference intends to benefit disabled children, it may not be appropriate for all disabled children, regardless of the severity of their disabilities. Some parents believe that their children require more individualized attention in a tailored setting. Others want their children to attend parochial schools as a matter of religious choice.

Choosing private schools for their disabled children, however, poses different problems for these parents. A major issue concerns possible violations of the First Amendment Establishment Clause; placing children in private parochial schools and expecting IDEA to provide special education services may inadvertently result in the public funding of religious education. Another critical issue involves IDEA's stance on desegregation (imputed as "least restrictive environment") of disabled children is a liberty interest vested in the child; an interest in avoiding the stigma of having special needs. Melvin believes that the desegregation (imputed as "least restrictive environment") of disabled children is a liberty interest vested in the child; an interest in avoiding the stigma of having special needs. Melvin applies the First Amendment right of freedom of association to this concept, and notes that disabled children must receive due process protection under IDEA. He further explains Congress' intent in mainstreaming as a means of showing non-disabled children that their disabled peers are non-threatening.


30. For some disabled children and their parents, religious considerations make private education appropriate. See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 4 (1993) (noting that parents of a deaf student chose to enroll their child in a Catholic high school for religious purposes); see also Russman v. Sobol, 85 F.3d 1050, 1052-53 (2nd Cir. 1996) (explaining that parents enrolled their mentally retarded daughter in Catholic school so that she could attend the same school as her sisters, and implying that religion motivated the parents' decision), vacated and remanded sub nom. Board of Educ. v. Russman, 521 U.S. 1114 (1997), rev'd, Russman v. Board of Educ., 150 F.3d 219, 220 (2nd Cir. 1998); K.R. v. Anderson Community Sch. Corp., 81 F.3d 673, 676 (7th Cir. 1996) (stating that mother of disabled student attended parochial school with her daughter to provide instructional aid because the school district denied the service at the parochial school, which suggests that religious education influenced the choice of a private school), aff'd, 125 F.3d 1017, 1019 (7th Cir. 1997).

31. See Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1433 (10th Cir. 1997) (reasoning that parents enrolled their hearing-impaired son in private school because the public school clustered deaf children, and they thought that a private setting would better address his intellectual needs).

32. See Zobrest, 509 U.S. at 4 (discussing the importance of religious values as factors in choosing private schools); Russman, 85 F.3d at 1052 (same); Anderson, 81 F.3d at 676 (same).

33. See Zobrest, 509 U.S. at 13-14 (determining whether a private school's provision of IDEA services would create an excessive entanglement with religion and violate the Establishment Clause). See generally Steven K. Green, The Legal Argument Against Private School Choice, 62 U. Cin. L. Rev. 37, 56 (1993). Green discusses the origin of "private school choice," which hinges on the child benefit theory as the means of avoiding a
abled children voluntarily enrolled in private schools by their parents, a concern that EAHCA did not cover.\textsuperscript{34} 

In an attempt to decrease costs, Congress has recently narrowed this provision further.\textsuperscript{35} The IDEA Amendments of 1997 state that public schools do not have to provide special education and related services to voluntarily enrolled private school children with disabilities,\textsuperscript{36} and even if they do, these services need not be offered at the children's private schools.\textsuperscript{37} Thus, IDEA often leaves parents with no alternative but to en-

constitutional violation for publicly funded parochial school programs. \textit{See id.} at 54-57. Under the child benefit theory, the true recipient of the funds is the child, not the school. \textit{See id.} at 56. Green believes that if only the children could be beneficiaries, then most aid, including tuition payments and repair costs, would be denied to parochial schools. \textit{See id.} at 56-57. He recognizes, however, that Chief Justice Rehnquist focused on the irrelevance of the sectarian environment to the student's service in \textit{Zobrest}, an interpretation that supports the child benefit theory. \textit{See id.} at 67.

\textsuperscript{34} \textit{See} 20 U.S.C. § 1413(a)(4)(A) (1994) (stating that disabled children enrolled in private elementary and secondary schools may receive special education and related services, and providing that children enrolled in private schools by the local educational agency (LEA) should receive services at no cost, but failing to discuss services for voluntarily enrolled private school children).


\textsuperscript{36} \textit{See id.}

\textsuperscript{37} \textit{See id.} § 1412(a)(10)(A)(i)(II). The provision states that "services may be provided . . . on the premises of private, including parochial, schools, to the extent consistent with law." \textit{Id.} (emphasis added); \textit{see also} The Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 612(a)(10)(A)(i)(II), 111 Stat. 37, 62 (1997); H.R. REP. NO. 105-95, at 91 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 89 (maintaining that states have discretion to provide on-site services, and thus implying that children who require a sign language interpreter in the classroom in order to learn their lessons now may be denied that aid); 34 C.F.R. § 300.451(a) (1998) (requiring state educational and local educational agencies to provide special education and related services to voluntarily enrolled private school children with disabilities "[t]o the extent consistent with their number and location in the State"). Scholarly interpretation of this provision is divided. \textit{Compare} Larry Bartlett, \textit{Post-Zobrest: Where are We on the Issue of Special Education Programs and Services to Parent Placed Private School Students?}, 108 Educ. L. Rep. (West) 1039, 1062 (1996) with Kathryn Browning Hendrickson, \textit{The IDEA: Conferring Rights on Disabled Children in Unilateral Private School Placements}, 4 KY. CHILDREN'S RTS. J. 1, 2 (1996). Professor Bartlett agrees with the statutory language that IDEA does not "expressly require" related services to be provided on-site at private schools. \textit{See} Bartlett, \textit{supra}, at 1053. Discussing IDEA in the context of religious education, he finds that private school students need only receive "a genuine opportunity for equitable participation," and that IDEA does not mandate that such an equal participation be provided at the private school. \textit{Id.} (quoting 34 C.F.R. § 76.651 (1995)). Bartlett also emphasizes that courts should defer to the Department of Education's (DOE's) interpretations of IDEA. \textit{See} Bartlett, \textit{supra}, at 1055.

In direct contrast, Hendrickson argues that while DOE regulations seem to empower the public schools with great discretion over which services to provide, a court must "honor the clear meaning of a statute." Hendrickson, \textit{supra}, at 3. Thus, she interprets IDEA as clearly requiring LEAs to provide disabled children voluntarily placed in private schools the same benefits as those offered to disabled children in public schools. \textit{See} Hen-
roll their children in a public school, knowing that the children will not receive the education they need or the parents desire. Unfortunately, failure to provide services at private schools forces parents to choose between a free, but perhaps inappropriate, public education, and a possibly expensive, but most likely individualized, private education.

This Comment first describes IDEA prior to the Amendments and IDEA pursuant to the Amendments, explaining Congress' motivations for the Amendments, and detailing the legislative history of IDEA. This Comment next examines three circuit court decisions vacated and remanded by the Supreme Court in light of the 1997 Amendments. This Comment also analyzes Establishment Clause issues and IDEA's implications for parochial schools. Finally, it recommends a limited discretion approach for considering the Amendments; an approach that should help voluntarily-enrolled private school students who require special education and related services without depleting the states' resources.

I. LEGISLATIVE HISTORY AND JUDICIAL INTERPRETATION OF IDEA

A. An Intent to Reform Special Education, but at the Expense of Voluntarily-Enrolled Private School Students with Disabilities

In 1975, Congress enacted the Education for All Handicapped Children Act (now the Individuals with Disabilities Education Act) in order to provide disabled children the opportunity to learn in a regular classroom with their non-disabled peers. IDEA requires that disabled students receive a free appropriate public education (FAPE), as well as special education and related services. Congress based IDEA on findings...
that disabled children's educational needs have not been fully met.\textsuperscript{41} For example, the findings state that more than one million children did not receive the necessary services to give them an equal opportunity for education, and that families had to send their disabled children outside of the public school system at a distance and at their own expense in order to find adequate services.\textsuperscript{42} 

In order to motivate states to implement its provisions, IDEA grants federal funds to all states that offer disabled children a \textit{FAPE}.\textsuperscript{43} The special education and related services included in FAPE are provided at public expense, and must meet the standards of the state educational agency.\textsuperscript{44} The local educational agency (LEA) works with the disabled child's parents and teacher to form an individualized education program (IEP) for each child.\textsuperscript{45}

Parents who are dissatisfied with their disabled child's public education and enroll their child in a private school may receive reimbursement for tuition if a court or hearing officer determines that the public education was inappropriate under \textit{IDEA}.\textsuperscript{46} This standard stems from Congress'
desire to reduce the amount of taxes paid for private school students' education, thereby promoting free and appropriate public education. Yet, parents who voluntarily enroll their disabled children in private schools rarely receive reimbursement. order to receive reimbursement, the public school must fail to offer the FAPE "in a timely manner" prior to the private school enrollment. See id. This means that the public school failed to provide an appropriate education and the parents subsequently chose a private school. See id.; see also School Comm. of Burlington, Mass. v. Department of Educ., 471 U.S. 359, 369 (1985) (holding that the Education of the Handicapped Act (EAHCA's original title) allows reimbursement of private school expenses when such placement is more appropriate to the child's education than a public school education). See generally Allan G. Osborne, Jr., Remedies for a School District's Failure to Provide Services Under IDEA, 112 Educ. L. Rep. (West) 1, 7 (1996) (noting that parents may only be partially reimbursed if the private school education greatly exceeds the requirements of an appropriate education).

47. See 143 CONG. REC. H2536 (daily ed. May 13, 1997) (statement of Rep. Castle) (supporting the Amendments by stating that they would reduce public school costs by making it more difficult for parents to enroll their children in elite private schools at taxpayers' expenses). This financial concern arises from the debate on whether IDEA is an unfunded mandate. See id. at S4356 (statement of Sen. Gorton) (arguing that the IDEA is an unfunded mandate, as the government only pays between seven and eight percent of the statute's 1998 estimated 35 billion dollar expense). Counterbalancing this discussion is Senator Harkin's belief that IDEA is not an unfunded mandate, but a constitutional one that is implementing the Equal Protection Clause of the Fourteenth Amendment. See id. at S4361 (statement of Sen. Harkin). Senator Harkin maintains that it costs 14 percent more to educate a disabled student in the public school than it does to educate a non-disabled student, but that this is less expensive than placing the disabled student in an institution. See id. at S4361-62. Legal commentators have also broached the topic of the IDEA as an unfunded mandate. See Edward A. Zelinsky, The Unsolved Problem of the Unfunded Mandate, 23 OHIO N.U. L. REV. 741, 760 (1997) (suggesting that as a statute supported by strong constituencies of parents and educators, a fact that motivates states to accept the decree, the IDEA obligates states to redirect education budgets in order to provide FAPEs under a mandate only partially funded); Theresa M. Willard, Note, Economics and the Individuals with Disabilities Education Act: The Influence of Funding Formulas on the Identification and Placement of Disabled Students, 31 IND. L. REV. 1167, 1181 (1998) (arguing that as each disabled child requires unique, tailored education, funding formulas must be balanced against appropriate placement decisions for disabled students).

48. See Russman v. Board of Educ., 150 F.3d 219, 220 (2nd Cir. 1998) (referring to facts set forth in Russman v. Sobol, 85 F.3d 1050 (2nd Cir. 1996)) (holding that public schools need not pay for a consultant teacher and aide at a Catholic school even though the student requires this aid to understand math and English); K.R. v. Anderson Community Sch. Corp., 125 F.3d 1017, 1019 (7th Cir. 1997) (holding that public schools are not required to pay for an instructional aide at a parochial school, even though the student needs the aide to help her learn the curriculum); Cefalu v. East Baton Rouge Parish Sch. Bd., 117 F.3d. 231, 233 (5th Cir. 1997) (holding that public schools are not required to pay for a sign language interpreter at a Catholic school even though the student cannot understand his teacher without the interpreter). These cases suggest that if the parents were to seek reimbursement, they would not be entitled to it because the public education was found to be appropriate in each case. See Russman, 150 F.3d at 222 (noting that the issue concerned location, not appropriateness, but suggesting that the court's decision that services need not be provided at a private school means that the student will receive an appropriate education at the public school); Anderson, 125 F.3d at 1019; Cefalu, 117 F.3d
Most parents of disabled students want their children to receive instruction best suited to their children’s needs, which may only be achieved through individual attention at a private school. Parents also have religious reasons for choosing private schools. IDEA, however, restricts its FAPE requirement when considering voluntarily enrolled private school students. For parents who choose a private institution despite the offer of FAPE, the public school system does not have to pay the full cost of the disabled child’s education. The LEA must, nevertheless, make services available, in proportion to the number and location of disabled children in the state who are enrolled in private schools. Thus, public school systems do not have to pay for the cost of the child’s education, but they should incur the cost of special education services for disabled private school students that are comparable in quality to the same services given to disabled public school students. The public

at 233. See generally Osborne, supra note 46, at 19 (commenting that the most common relief for disputes involves a court ordering the school district to provide the appropriate education or service).

49. See Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1433 (10th Cir. 1997) (explaining that a profoundly deaf student’s parents enrolled him in a private school because they felt that such a school would better meet his gifted intellectual capacity).

50. See supra note 30 and accompanying text (listing cases suggesting that religious education motivated parents’ decisions to choose private schools); Bryan M. Schwartz, Survey, Education, Balancing the Interests of Schools, Students, and the Community, 75 DENV. U. L. REV. 801, 807 (1998) (mentioning a number of reasons why parents choose private schools for their children, such as religious instruction).

One commentator observes that, although religious instruction is a worthwhile reason for choosing a private school, parents need to realize that this right “does not extend to any legal interest in public school funds for private education.” Green, supra note 33, at 52. Green suggests that religious education cannot serve as the parents’ argument for receipt of special education and related services. See id. at 52-53. He reiterates Chief Justice Burger’s words in Norwood v. Harrison, 413 U.S. 455, 462 (1973), that denial of state funds to private schools does not violate the Equal Protection Clause. See Green, supra note 33, at 52. Green further says that even if religious choice advocates assert Free Exercise claims, they, too, can be defeated because the federal government’s refusal to fund sectarian education does not rise to the level of a constitutional violation. See id. at 53. It is “rational policy decisionmaking” for the Government to deny religious schools support because limited financial resources and Establishment Clause concerns must be considered. See id.

51. See 20 U.S.C. § 1412(a)(10)(C)(i) (Supp. III 1998). This private school provision states that a local educational agency is not required to pay for the cost of education, including special education and related services, if it offered a FAPE to the parents and the parents elected instead to enroll their child in a private school. See id.

52. See id.; see also 34 C.F.R. § 300.403(a) (1998).

53. See 20 U.S.C. § 1412(a)(10)(A)(i). This provision signals that states will receive funds depending on how many disabled children are enrolled in private schools. See id. It suggests that some states will receive less funds than others, but that all children should receive some amount of services. See id.

54. See 34 C.F.R. § 76.654. This provision clarifies that “comparable in quality” does
school must also grant disabled private school students a genuine opportunity for equitable participation in all programs.  
55 Consistent with the law, services may be provided on-site at private schools, including parochial schools.  

B. The 1997 Amendments: Clarifying IDEA's Purpose

IDEA has encountered numerous judicial challenges because it does not clarify whether the services are to be held in a public or private setting, and to what extent the LEA must provide the services.  
57 Congress appears to have resolved this ambiguity with the IDEA Amendments of 1997.  
58 Specifically, the Amendments state that no LEA is required to pay for the cost of education, including special education and related programs.  
59 See § 76.654(c). Interpretations of the DOE Office of Special Programs (OSEP) reinforce this provision.  See Bartlett, supra note 37, at 1057 (explaining that OSEP interprets the provision not as providing an individual entitlement to services, but only as affording the class of students as a whole an equitable opportunity for participation).

55 See 34 C.F.R. § 76.654(a)-(b). This provision mandates that public schools must provide private school students with a genuine opportunity for equitable participation in school programs, if they offer similar programs for public students in the same age group. See § 76.654(b). The program benefits enjoyed by private school students must be "comparable in quality, scope, and opportunity for participation" to the benefits enjoyed by public school students. § 76.654(a).

56 See 20 U.S.C. § 1412(a)(10)(A)(i)(II). This provision must satisfy the Establishment Clause of the First Amendment, which allows programs in religious settings as long as they maintain a secular purpose, neither advance nor inhibit religion, and do not cause an excessive government entanglement with religion. See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). In Lemon, the Supreme Court held that Pennsylvania and Rhode Island statutes violated the Establishment Clause because they gave state aid to parochial elementary and secondary schools. See id. at 606-07. Specifically, it ruled that both statutes created "excessive entanglement[s]" with religion. See id. at 613-14. The Court found that the nature of the state aid, which supplemented Pennsylvania and Rhode Island teacher salaries and reimbursed the Pennsylvania schools for textbooks, created an impermissible relationship between government and religious institutions. See id. at 615. Particularly, the Court determined that checking school financial records, which is necessary to ascertain the amount of money spent on secular education versus religious activities, would directly involve the state in religious educational purposes. See id. at 620. It also noted that state surveillance would be necessary to ensure maintenance of the schools' secular purposes. See id. at 619.

57 See Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1433 (10th Cir. 1997) (stating that the pre-Amendments IDEA does not clarify the extent of the LEA's obligation to provide services to voluntarily enrolled private school students). This question has produced much litigation, which, in turn, prompted the passage of the Amendments. See id. at 1434-35.

services, if it offered FAPE to the disabled child and the parents chose to place their disabled child in a private school. Still, LEAs must allot a proportionate amount of federal funds for special education and related services for disabled children in private schools based on the number and location of disabled students residing in their jurisdiction. LEAs need not exceed this obligation; they are not required to utilize local and state funding for special education and related services. LEAs may, but are not required to, provide services “on the premises of private, including parochial, schools, to the extent consistent with the law.” This provision is problematic, however, because LEAs must first decide if a disabled student is entitled to federal funding before determining whether services will be offered on-site. Essentially, the Amendments give public schools the flexibility to decrease their IDEA funding so that they may focus their education budget on other areas.

The Department of Education (DOE) has promulgated rules that clarify the 1997 Amendments. The final rules state that no disabled child who attends private school has an individual right to receive the same services he would receive if he attended a public school. Accordingly, the LEAs can determine which disabled children who are attending private school receive services, which services they are entitled to, and how those services are delivered. Although this discretion given to the LEAs may cause them to decrease available services, Congress main-

60. See id. § 1412(a)(10)(A)(i)(I). These federal funds are mandatory, see id. § 1411(a)(1), provided that the state meets the eligibility requirements, see id. § 1412.
61. See Fowler, 128 F.3d at 1437 (explaining that states need only allot a proportionate amount of their federal funds).
63. See Russman v. Board of Educ., 150 F.3d 219, 221 n.1 (2nd Cir. 1998) (asserting that unless a student is entitled to services, the determination of where the services will be provided is a moot point).
64. See 143 CONG. REC. H2531 (daily ed. May 13, 1997) (statement of Rep. Goodling). Congressman Goodling, the Amendments’ sponsor, explains that the private school provision gives states and schools the flexibility to “reduce their own IDEA funding levels.” Id. He describes this action as one “unprecedented in Federal law,” suggesting that this is the first time that states and schools have been able to choose IDEA funding at their discretion. Id.
66. See id. at 12,445 (to be codified at 34 C.F.R. § 300.454(a)).
67. See id. (to be codified at 34 C.F.R. § 300.454(b)).
tains that the federal funds will supplement local spending by the LEAs so that disabled students' services will not be reduced.68

Another hope for disabled children enrolled in private schools is found in the final DOE regulations, issued pursuant to the Amendments, which include a provision that LEAs may provide greater funds than required, if they so choose.69 As encouraging as this provision seems, special education services previously provided to voluntarily enrolled private school students will be severely limited, and in certain circumstances, will be reduced to no services at all.70

C. Judicial Perspective and the Amendments: Narrow Interpretations with Little Room for Leeway

Case law prior to, and in the wake of, the 1997 Amendments illustrates that courts have narrowly construed IDEA.71 Many pre-Amendments

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68. See 143 CONG. REC. H2537 (daily ed. May 13, 1997) (statement of Rep. Barrett). But see 143 CONG. REC. S4356-57 (statement of Sen. Gorton) (arguing that the federal government only funds between seven and eight percent of the IDEA to states, which begs the question of where the states will procure the remainder of the cost).

69. See 64 Fed. Reg. 12,406, 12,410 (to be codified at 34 C.F.R. § 300.453).

70. See Russman v. Board of Educ., 150 F.3d 219, 220 (2nd Cir. 1998) (finding that the state need not provide related services to a private school student, which suggests that on-site services now will be limited in that jurisdiction); Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1437 n.5 (10th Cir. 1997) (recognizing that IDEA "does not evidently contemplate that some voluntarily placed private school students will receive no services"); K.R. v. Anderson Community Sch. Corp., 125 F.3d 1017, 1019 (7th Cir. 1997) (denying an on-site service to a private school student because IDEA does not require provision of such a service); Cefalu v. East Baton Rouge Sch. Bd., 117 F.3d 231, 233 (5th Cir. 1997) (same).

71. See Foley v. Special Sch. Dist., 153 F.3d 863, 864-65 (8th Cir. 1998) (holding that a public school does not have to provide occupational and physical therapy and language services at a student's Catholic school because services cost more at the private school); Russman, 150 F.3d at 220 (denying on-site help for a disabled child at a private school because the public school had fulfilled IDEA's requirements); Fowler, 128 F.3d at 1436 (10th Cir. 1997) (deciding that although a school district must provide a sign language interpreter until the Amendments become effective, once the Amendments apply, the school district has no further obligation to pay for the interpreter); Anderson, 125 F.3d at 1019 (holding that the school board is not required to pay for an instructional assistant on-site at a private school because IDEA imposes no obligation on the states to provide services at a private school that are comparable to those provided at a public school); Cefalu, 117 F.3d. at 233 (holding that a public school need not pay for a sign language interpreter at a Catholic school because all parties agreed that the public education provided was appropriate and satisfied IDEA); see also McNair v. Cardimone, 676 F. Supp. 1361, 1363 (S.D. Ohio 1987) (denying a disabled student transportation from her private school to a public school for after-school services because this service is not required by the "nature of the [handicap]," but only for convenience); Work v. McKenzie, 661 F. Supp. 225, 229-30 (D.D.C. 1987) (holding that a disabled student enrolled in a private school does not require transportation to public school for services because then the Education of the
cases ratify the statute's provision that LEAs need not pay for the cost of private education, including related services, once a FAPE has been awarded. The majority of post-Amendments cases also favor a strict interpretation of IDEA. Thus, courts generally hold that public school systems do not have to pay for the special education and related services of voluntarily enrolled private school students with disabilities if the system has offered a FAPE and the parents still have chosen to place the child in a private institution.

The Second, Seventh, and Tenth Circuits have decided that the IDEA Amendments should be strictly applied. Three of these cases are particularly significant because the Supreme Court vacated and remanded them in light of the 1997 Amendments. Even though these cases signaled a broad interpretation of IDEA in the lower courts, their outcomes demonstrate that appeals courts are not extending the measure of the IDEA. Moreover, these rulings show that the courts, in addition to the legislatures, are determining who will receive services and who will be denied services. Thus, certain disabled children who require services necessary to their learning will not receive an appropriate education.

1. Russman v. Board of Education: Without Entitlement, Location of Services Makes No Difference

In Russman v. Board of Education, the Second Circuit held that the IDEA Amendments do not require states to provide a consultant teacher

Handicapped Act would have no limits).

72. See McNair, 676 F. Supp. at 1363; Work, 661 F. Supp. at 229.
73. See Foley, 153 F.3d at 863; Russman, 150 F.3d at 221-22; Fowler, 128 F.3d at 1436-37; Anderson, 125 F.3d at 1019; Cefalu, 117 F.3d at 232-33.
74. See Russman, 150 F.3d at 221-22; Fowler, 128 F.3d at 1433; Anderson, 125 F.3d at 1019; Cefalu, 117 F.3d at 233.
75. See Russman, 150 F.3d at 221-22 (Second Circuit); Anderson, 125 F.3d at 1019 (Seventh Circuit); Fowler, 128 F.3d at 1433 (Tenth Circuit).
77. See Russman, 150 F.3d at 222 (construing the Amendments to be the final word on the student's situation); Fowler, 128 F.3d at 1438 (suggesting that the student's parents will receive a lesser reimbursement for services once the Amendments apply to the student's situation); Anderson, 125 F.3d at 1019 (explaining that the Amendments clearly show that public schools need not ensure that private school students receive federally funded services comparable to services provided to public school students).
78. See Russman, 150 F.3d at 222 (determining that the student is not entitled to a consultant teacher, and that even if she were, she would not receive this service because it is provided at the state's discretion).
and teacher's aide to a disabled student at the student's Catholic school.\textsuperscript{79} The court of appeals affirmed the district court's grant of summary judgment in favor of the student's parents,\textsuperscript{80} but, on certiorari, the Supreme Court vacated and remanded the case for consideration per the Amendments.\textsuperscript{81} The appeals court subsequently reversed its original opinion, finding the school district's argument that IDEA does not require public schools to provide on-site services to voluntarily enrolled private school students with disabilities unconvincing.\textsuperscript{82} The statute, according to the court, is silent as to the location of services.\textsuperscript{83} Nevertheless, the court employed legislative history to determine that the state has the discretion to provide on-site services.\textsuperscript{84} Applying this reasoning, the court held that the state need not provide the disabled student with a consultant teacher and aide at her parochial school.\textsuperscript{85}

2. K.R. v. Anderson Community School Corp.: The Amendments Are the Final Word

In K.R. v. Anderson Community School Corp., the Seventh Circuit considered the entitlement issue.\textsuperscript{86} Reversing the district court's holding that a school district must provide full-time instructional services on-site to a private parochial school student with severe disabilities,\textsuperscript{87} the court of appeals determined that pre-Amendments IDEA did not entitle the student to the same services as public school students.\textsuperscript{88} The Supreme Court granted certiorari, and vacated and remanded the case for consideration in light of the Amendments.\textsuperscript{89} The appeals court affirmed its prior holding and maintained its interpretation of IDEA, declaring that

\textsuperscript{79} See id.
\textsuperscript{80} See Russman v. Sobol, 85 F.3d 1050, 1052, 1057 (2nd Cir. 1996).
\textsuperscript{81} See Russman v. Board of Educ., 521 U.S. 1114 (1997) (mem.).
\textsuperscript{82} See Russman, 150 F.3d at 222.
\textsuperscript{83} See id. (reasoning that LEAs are required to spend a proportionate amount of federal funds for voluntarily enrolled private school children, but observing that IDEA never mentions where the services must be provided).
\textsuperscript{84} See id. (finding that IDEA mandates states to provide services at private schools "to the extent consistent with law, at State's discretion") (emphasis added). Thus, the court concluded, states need not provide services on-site if they choose not to do so. See id., see also H.R. REP. NO. 105-95, at 91 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 89.
\textsuperscript{85} See Russman, 150 F.3d at 222.
\textsuperscript{86} 81 F.3d 673, 678 (7th Cir. 1996).
\textsuperscript{88} See Anderson, 81 F.3d at 678, 680.
\textsuperscript{89} See Anderson, 521 U.S. at 1114.
the Amendments do not require the school district to provide the student with an instructional aide in her parochial school.\textsuperscript{90} The court decided that the Amendments show that LEAs are not required to spend their own funds to ensure that the special education services of voluntarily enrolled private school children with disabilities are "comparable" to those of public school children with disabilities.\textsuperscript{91} Furthermore, the court stated that, if inconsistent, any of the parents' arguments based on DOE regulations must be regarded as superseded by the Amendments.\textsuperscript{92} The unequivocal decisions in \textit{Russman} and \textit{Anderson} illustrate that voluntarily enrolled disabled private school children will not receive special education and services in the Second and Seventh circuits unless their school districts choose not to align with the Amendments.\textsuperscript{93} The districts, however, may operate at their own discretion, pursuant to the Amendments.\textsuperscript{94} As public schools favor a decrease in local spending,\textsuperscript{95} it seems unlikely that the courts or the schools will revise their restrictive approach toward voluntarily enrolled private school students.

3. Fowler v. Unified School District No. 259: A Different Approach to the Amendments Suggests Some Leniency

The Tenth Circuit adopts a different position than \textit{Russman} and \textit{Anderson}, interpreting the IDEA as prospective rather than retroactive.\textsuperscript{96}

\textsuperscript{90} \textit{See Anderson}, 125 F.3d at 1019 (finding that all parties, including the student, the school corporation, and the United States, agreed that the Amendments do not "impugn" the appeals court's holding).

\textsuperscript{91} \textit{See id.} (quoting Congress' explanation of this section of IDEA and determining that this "legislative clarification" required a reversal of the district court's holding that had required the school district to pay for the student's instructional aide at her Catholic school).

\textsuperscript{92} \textit{See id.} (noting that DOE is preparing new regulations that will reflect the provisions of the Amendments).

\textsuperscript{93} \textit{See Russman v. Board of Educ.}, 150 F.3d 219, 222 (2nd Cir. 1998); \textit{Anderson}, 125 F.3d at 1019.

\textsuperscript{94} \textit{See H.R. REP. NO. 105-95}, at 91 (1997), \textit{reprinted in} 1997 U.S.C.C.A.N. 78, 89 (interpreting the Amendments as granting states the discretion to require the provision of on-site related services at private or parochial schools); \textit{see also Russman}, 150 F.3d at 222; \textit{Anderson} 125 F.3d at 1019 (considering legislative history in determining that related services need not be provided on-site).

\textsuperscript{95} \textit{See 143 CONG. REC. H2537} (daily ed. May 13, 1997) (statement of Rep. Barrett) (explaining that schools will cut back on special education funding once federal appropriations reach $4.1 billion); \textit{see also} Tobin P. Richer, County of San Diego v. California Special Education Hearing Office: A Misapplication and Drastic Expansion of IDEA Coverage, 26 J.L. & EDUC. 1, 2 (1997) (recognizing that school districts desire a restricted interpretation of the IDEA due to their budgetary concerns).

\textsuperscript{96} \textit{See Fowler v. Unified Sch. Dist. No. 259}, 128 F.3d 1431, 1435 (10th Cir. 1997) (ex-
This view offers a glimmer of hope for parents who want their children to receive special education services in private schools. In *Fowler v. Unified School District No. 259*, a student's parents filed an action to compel their son's school district to provide him with a sign language interpreter at his private school. Although the district court granted an injunction in favor of the parents, the court of appeals reversed, concluding that the school district must pay only partially for the interpreter's services. The Supreme Court granted certiorari, but, as in *Russman* and *Anderson*, later vacated and remanded the case in the wake of the Amendments.

On remand, the court of appeals held that the prior IDEA provision was applicable until the Amendments' effective date, June 4, 1997, but that the case would be remanded to the district court to determine payment of services after June 4, 1997. The court adhered to its previous interpretation that pre-Amendments IDEA requires that the public school pay for a private school interpreter as long as the cost would not exceed the average cost of a public school interpreter. The court also

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97. 128 F.3d 1431 (10th Cir. 1997).
98. See id. at 1433. The parents felt that a private nonsectarian school could provide best for their son's intellectual gifts, and asked that a sign language interpreter be provided on-site. See id.
100. See Fowler v. Unified Sch. Dist. No. 259, 107 F.3d 797, 808, 810 (10th Cir. 1997).
102. See Fowler, 128 F.3d at 1436-40 (noting that the Amendments do not require states to spend any funds beyond their federal obligation, but also stating that the IDEA is prospective only, and so the Amendments will not apply to the student until June 4, 1997).
103. See id. at 1436. In support of its position, the court cites *Amos v. Maryland De-
noted that the prior regulations left unclear the amount of services available to voluntarily enrolled private school students with disabilities, and affirmed that the Amendments have clarified that states are not obligated to use their own state funds for provision of such services. It recognized, too, that the Amendments may leave some disabled students without federal funding; moreover, IDEA "does not evidently contemplate that some voluntarily placed private school students [with disabilities] will receive no services." Although Fowler suggests that the school district will not need to pay for the disabled student's services after the Amendments' effective date, its recognition of IDEA's possible harmful effects heightens concern that the Amendments may ultimately deny more disabled children necessary services than the previous regulations.

D. Establishment Clause Cases: Parochial Students Can Receive On-Site Services

There is concern that implementation of a federal program such as IDEA in a parochial school may directly or indirectly affect a service provider's religious values. The Establishment Clause provides that the federal government cannot favor or disfavor religion or encourage participation or denial of religion. Although the Supreme Court has yet to decide an IDEA case involving the issue of payment of services, it determined in Zobrest v. Catalina Foothills School District that receipt of such services does not violate the Establishment Clause of the First

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104. See Fowler, 128 F.3d at 1434 (noting that DOE's regulations do not explain states' obligations to make special education services available to students).
105. See id. at 1437 (stating that only federal funds are necessary).
106. Id. at 1437 n.5 (explaining that DOE's proposed regulations grant LEAs discretion to determine which disabled children receive which services, and this power may result in some children receiving no services at all).
107. See id.
108. See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 5 (1993) (explaining that the court of appeals employed the Lemon factors to find that providing a sign language interpreter at a sectarian high school constituted a violation of the Establishment Clause). The Lemon factors are whether the program has a secular purpose, neither advances nor inhibits religion, and does not create an excessive government entanglement with religion. See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
109. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"); see also Lemon, 403 U.S. at 612-13 (applying a three-prong test to determine Establishment Clause violations).
1. Zobrest: Interpreter Services neither Aid nor Harm Religious Values

In Zobrest, an Arizona school district refused to provide a student with a sign language interpreter at his sectarian high school because it believed that doing so was unconstitutional. The student's parents sought injunctive relief against the district. The Ninth Circuit held that provision of a sign language interpreter would advance religion, thereby causing an unconstitutional entanglement between church and state. Reversing the Ninth Circuit, the Supreme Court found that no violation of the Establishment Clause existed. Chief Justice Rehnquist reasoned that IDEA provides services in a neutral manner without regard to the religious or nonpublic nature of the school. The statute allows parents the choice of schools; thus, the interpreter's presence results from a private decision. Furthermore, Chief Justice Rehnquist noted that

110. See Zobrest, 509 U.S. at 10-11 (relying on the "child benefit" theory to determine that the disabled child, not the religious school, was benefiting from the interpreter services, and thus, the instruction did not add or subtract from the religious environment). Zobrest has been cited as creating "fresh law" concerning judicial interpretation of governmental ties to religion. See Agostini v. Felton, 521 U.S. 203, 225 (1997); see also Martha M. McCarthy, The Road to Agostini and Beyond, 124 Educ. L. Rep. (West) 791, 778 (1998) (analyzing Zobrest's impact on Agostini). Zobrest represents a departure from the Court's previous rulings on Establishment Clause violations in parochial schools, in which it adhered to a strict division between church and state. See McCarthy, supra, at 772-74 (referencing Aguilar v. Felton, 473 U.S. 402 (1985), School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), and Meek v. Pittinger, 421 U.S. 349 (1975), in which the Court ruled consistently that public school instruction on parochial school grounds violated the Establishment Clause).

111. See Zobrest, 509 U.S. at 4.

112. See id. at 4-5.

113. See Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190, 1198 (9th Cir. 1992).

114. See Zobrest, 509 U.S. at 8 (explaining that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion" do not violate the Establishment Clause merely because religious schools may gain an "attenuated financial benefit"). In support of this position, the Court cited Mueller v. Allen, 463 U.S. 388 (1983), which held that a Minnesota law allowing tax deductions of certain educational expenses did not violate the clause, even though most of the deductions went to parents of parochial schools students. See id. at 8-9.

115. See Zobrest, 509 U.S. at 10 (citing Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487-88 (1986). The Court in Witters held that Washington State's aid to a blind person studying at a private Christian school did not violate the Establishment Clause. See Witters, 474 U.S. at 489. The program did not create a financial benefit to the student, and it was made available without regard to the nature of the institution. See id. at 487 (quoting Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973)).

116. See Zobrest, 509 U.S. at 10 (noting that it is the parents' personal decision to request an interpreter at a private school); Hugh Baxter, Managing Legal Change: The
when parents choose a sectarian school there is no financial benefit to that school because the school's gain is secondary to the child's benefit. The Chief Justice also added that the interpreter will neither benefit nor harm the religious environment.

Although the majority held that the student should receive an interpreter, it did not discuss IDEA requirements of payment for voluntary parental placement. The dissent, however, addressed this issue by asserting that the majority's decision bypassed IDEA's provision that the furnishing of special education and related services at a private school is not mandatory as long as the services are made available at a public school. This contention indicates that the entitlement issue is regarded as an auxiliary issue to the Establishment Clause concern. It appears that the Zobrest Court merely chose not to consider this issue.

Transformation of Establishment Clause Law, 46 UCLA L. REV. 343, 381 (1998) (suggesting that the Court's emphasis on private decision making could open up the flood gates, rendering any aid constitutionally valid as long as a private decision is involved); Green, supra note 33, at 49 (explaining that the Court sometimes allows public aid in religious schools for "ideologically neutral" activities).

117. See Zobrest, 509 U.S. at 12-13 (asserting that the purpose of IDEA is not to support nonpublic, religious schools) (citing Witters, 474 U.S. at 488)).
118. See id. at 13.
119. See id. The majority did not discuss the entitlement issue because the parties did not press the federal statutory claim. See id. at 16.
120. See id. at 15 (Blackmun, J., dissenting). Justice Blackmun refers to a number of circuit court cases that have led to the same conclusion. See id.
121. See id. at 16 (Blackmun, J., dissenting) (criticizing the majority for reaching a constitutional question in a case that could be decided instead on the entitlement issue, although the parties did not raise it). The majority's decision not to consider the entitlement issue has been the subject of significant negative commentary. See Ralph D. Mawdsley, On-Site IDEA Services at Private Schools: The Emergence of Multiple Judicial Standards, 121 Educ. L. Rep. (West) 445, 446 (1998) (explaining that the majority's decision "virtually assured" future litigation, litigation which has resulted in a "confusing and discordant interpretation" of the requirement to provide on-site services). See generally Devora L. Lindeman, Comment, Zobrest v. Catalina Foothills School District: Private Choices and Public Funding Under the Establishment Clause, 47 RUTGERS L. REV. 839, 896-98 (1995) (arguing that, had the majority considered the IDEA issues, the IDEA would have precluded any discussion of Establishment Clause violations because the statute prevented the interpreter from providing services at a private parochial school). Ms. Lindeman also contends that the service of a sign language interpreter involves a federally funded function in the communication of religious messages, which in itself advances religion, and thus is unconstitutional under the Establishment Clause. See id. at 897-98. She contends that Chief Justice Rehnquist's child benefit theory cannot conceal the interpreter's indoctrination of religious values. See id. at 892.
122. See Zobrest, 509 U.S. at 7-8 (announcing that the majority did not consider the entitlement issue because it was not raised in the court of appeals, and "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970)).
2. Agostini v. Felton: A Recent View of the Establishment Clause's Effect upon Schools

Zobrest is not the only Supreme Court case that focuses on the tension between the Establishment Clause and parochial schools. Although not an IDEA case, *Agostini v. Felton* sheds some light on the issue of federally funded programs' roles in religious institutions. In *Agostini*, the Supreme Court held that New York City teachers could provide remedial instruction in parochial schools. The Court employed the oft cited *Lemon* test, which utilizes three prongs in deciding whether an Establishment Clause violation exists. The test requires that the statute have a secular purpose; its principal or primary effect cannot be one that advances or inhibits religion; and it cannot create an excessive entanglement between government and religion. Applying this test, the *Agostini* Court decided that federally funded programs, such as the one at issue, do not violate the Establishment Clause as long as the instruction enhances, but does not replace, regularly provided services; the funding is neutral; and the program ensures that the instruction is secular.


*Agostini*'s holding paved the road to victory for a young student in *Peck v. Lansing School District*, a case in which the school district denied physical and occupational therapy services to the student, who attended parochial school. Applying *Agostini* and *Zobrest*, the district
The court granted summary judgment for the student, finding that the provision of the services at the student's Lutheran school did not cause an excessive entanglement between government and religion.\textsuperscript{131} The court of appeals affirmed, holding that \textit{Agostini} governs and that IDEA fulfills all three prongs of the \textit{Lemon} test.\textsuperscript{132}

In support of their position, the student's parents based their reasoning on pre-Amendments IDEA, arguing that IDEA required that services to voluntarily enrolled private school students be comparable to those offered to public school students.\textsuperscript{133} Conversely, the school district asserted that the student would receive a FAPE if her services were provided off-site.\textsuperscript{134} Regardless of these arguments, the court did not consider the case in terms of the Amendments.\textsuperscript{135}

Though \textit{Zobrest} and \textit{Peck} demonstrate that the Establishment Clause does not bar receipt of special education and related services in parochial schools, they suggest that, if the Amendments were taken into consideration, the students would be denied the services,\textsuperscript{136} thereby substantially altering \textit{Zobrest}'s ruling.\textsuperscript{137} Although \textit{Zobrest} would not be overturned, it would become moot under the Amendments because the students would not receive the sign language interpreter services.\textsuperscript{138} Thus, the Establishment Clause would be only a secondary factor, or perhaps not even one at all, in future IDEA litigation.

\begin{itemize}
\item \textsuperscript{131} \textit{See id.} at 624 (explaining that the Lutheran school would be responsible for transporting the student to the school library for therapy, so that public school employees need not enter her classroom).
\item \textsuperscript{132} \textit{See id.} at 628-29 (recognizing that \textit{Agostini} is now precedent, and its determination that remedial instruction in parochial schools does not violate the Establishment Clause applies as well to IDEA and this case).
\item \textsuperscript{133} \textit{See id.} at 622.
\item \textsuperscript{134} \textit{See id.} at 623.
\item \textsuperscript{135} \textit{See id.} at 626 & n.8 (expressing an opinion concerning the student's entitlement to services per the Amendments).
\item \textsuperscript{136} \textit{See Zobrest v. Catalina Foothills Sch. Dist.}, 509 U.S. 1, 15 (Blackmun, J., dissenting) (remarking that a student will not receive an interpreter if IDEA does not require it); \textit{Peck}, 148 F.3d at 629 (Daughtrey, J., concurring) (emphasizing that \textit{Peck} does not discuss the possibilities of future IDEA services because the Amendments no longer require LEAs to pay for private school services if they have offered FAPE to the student).
\item \textsuperscript{137} \textit{See William L. Dowling, Comment, Special Education and the Private School Student: The Mistake of the IDEA Amendments Act}, 81 MARQ. L. REV. 79, 88 (Fall 1997) (concluding that the \textit{Zobrest} Court should have considered the case in light of the parental placement provisions, because its holding is "insignificant" in light of the Amendments); \textit{see also} Mawdsley, \textit{supra} note 121, at 446 (discussing the increasing litigation over this issue).
\item \textsuperscript{138} \textit{See Dowling, supra} note 137, at 86.
\end{itemize}
II. THE AMENDMENTS’ EFFECT ON THE EDUCATION OF DISABLED CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS

IDEA is a statute designed to ensure an appropriate education to all disabled children. This purpose, however, is thwarted by the statute’s limitations that affect disabled children voluntarily enrolled in private schools by their parents. Through the Amendments, Congress has restricted the amount of services available to these students.

A. The Amendments’ Toll on the Children: Congress’ Role in the Education of the Disabled

When implementing IDEA more than twenty years ago, Congress set limits upon the special education offered by public schools to voluntarily enrolled private school students. Congress stated that if parents choose to enroll their children in a private school, and the public school has awarded a FAPE, the public school does not have to pay for the cost of the education. Public schools would still, however, provide special education and related services. This provision makes sense, because taxpayers should not have to bear the cost of private school tuition. Nevertheless, public policy suggests that public school payment of services is logical because regardless of the parents’ choice, some students cannot learn without the aid of related services such as sign language interpreters and instructional aides.

140. See 20 U.S.C. § 1412(a)(10)(C)(i) (providing that states need not pay for the full cost of education at a private school, including special education and related services, if the public school has awarded a FAPE to the student).
141. See id.
143. See 34 C.F.R. § 300.403 (1998).
145. See id.
146. See 143 CONG. REC. H2536 (daily ed. May 13, 1997) (statement of Rep. Castle) (explaining that the Amendments will lower costs to taxpayers by discouraging parents from choosing elite private schools for their children).
147. See Allan G. Osborne, Jr., Special Education and Related Services for Parochial School Students, 81 Educ. L. Rep. (West) 1, 2 (1993) (stating that some related services, such as sign language interpreters, cannot be provided off-site); Dowling, supra note 137, at 82 (noting that a hearing-impaired child would find an interpreter useless unless the interpreter was present in the classroom, regardless whether in a public or private school).
IDEA states that public schools must provide disabled private school students with services comparable in quality to those offered to public school students. A deaf student needs a sign language interpreter or a hearing aid regardless of the type of school he attends. Such a service will be the same in the public school and in the private school because the interpreter will be performing the same role in both schools, and therefore, these services are comparable in quality. Yet, the provision regarding the extent to which LEAs must provide related services, along with the question of where services would be provided, encounter many diverse judicial interpretations.

The 1997 Amendments resolved these ambiguities. Congress achieved its goal of clarification, but also restricted severely the services to which voluntarily enrolled private school children with disabilities are now entitled. The Amendments revise the private school provision by

149. See Dowling, supra note 137, at 82.
151. Compare Cefalu v. East Baton Rouge Parish Sch. Bd., 907 F. Supp. 966 (D. La. 1995) (holding, pre-Amendments, that a hearing-impaired student should receive interpreter services at his Catholic school because the student demonstrated a genuine need for the services), rev'd 117 F.3d 231 (5th Cir. 1997), with K.R. v. Anderson Community Sch. Corp., 81 F.3d 673, 676 (7th Cir. 1996) (finding that even pre-Amendments IDEA did not require LEAs to provide services for voluntarily enrolled private school students), vacated and remanded, 521 U.S. 1114 (1997) (mem.).
153. See Dowling, supra note 137, at 80 (stating that Congress “delivered a major blow to the disabled” by passing the Amendments, and that the Amendments “essentially destroy[] a court's ability” to order a public school to pay for services at private schools). See generally James D. Oegema, Note, Individuals with Disabilities Education Act: Ensuring an Education for Individuals or Ensuring an Education for Individuals Who Attend Public Schools?, 2 Mich. L. & Pol'y Rev. 97, 97 (1997) (considering circuit courts' conflicting interpretations of the relevant IDEA provisions and comparing a discretionary approach with a limited discretion approach, although not discussing the Amendments). Under a discretionary approach, schools have no requirement to provide children voluntarily enrolled in private schools with related services. See id. at 117-18. It is entirely at the school's discretion; services at the private school are comparable to those at the public school only if and when the state provides services at the private school. See id. Under the limited discretion approach, favored by Oegema, entitlement to services exists for private school children. See id. at 119. It is a limited entitlement, however, dictated by the number and the location of the private school students. See id. Thus, public schools
stating explicitly that a LEA is not required to pay for the cost of education, including special education and related services, once it has offered a FAPE to the disabled child. Voluntarily enrolled private school children with disabilities are entitled to some federal funding, proportionate to the number and location of all disabled children located within the jurisdiction, but LEAs need only provide, at their discretion, special education services for these students. One court notes that the Amendments seem to include all disabled private school students, but that they do not seem to consider that not every disabled student will receive services.

These restrictions will likely have a negative impact on the appropriateness of education provided to voluntarily enrolled disabled students, as well as potentially life-long effects on the learning capabilities of these students. Although Congress' motives for the Amendments are understandable, decreasing public school spending should be secondary to ensuring an appropriate education to disabled students. Congress does not realize that there are disabled students who depend on related services to learn their curricula. Furthermore, even if the students could receive an appropriate education in a public school, there are other reasons, such as religion, why parents would choose to enroll their disabled children in private schools. IDEA's provision that LEAs need not exercise discretion only when economies of scale direct. See id. at 123. This approach, according to Oegema, does not juxtapose the plain meaning of IDEA. He notes that both approaches limit parental choices, but that the limited discretion approach "essentially eliminates the disability as a factor in choosing a school." Id. at 124. On the other hand, if a discretionary approach is taken, disabled private school students will have to attend public schools to receive support services such as sign language interpreters. See id. at 97.

156. See id. § 1412(a)(10)(A); Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1437 (10th Cir. 1997).
157. See Fowler, 128 F.3d at 1437 n.5.
158. See Dowling, supra note 137, at 80 (concluding that denial of necessary services will harm disabled students for life, especially in their rights to be treated equally as citizens).
159. See 143 CONG. REC. H2537 (daily ed. May 13, 1997) (statement of Rep. Barrett) (advocating the idea that education is Congress' priority by stating that disabled students should not experience a decrease in their services because federal funds will supplement local monies).
160. See Dowling, supra note 137, at 82 (calling attention to the fact that a child is denied a genuine opportunity for equitable participation in related services if the only way he can benefit from the service is during classroom instruction, but the service is only offered outside of classroom instruction, especially if the service is a sign language interpreter).
161. See supra notes 49-50 and accompanying text.
ceed their federal funding obligation\textsuperscript{162} validates public schools' choice to spend only that amount, and nothing at all from LEAs' state and local funds. It certainly does not provide an incentive for public schools to extend their resources to aid disabled private school students.\textsuperscript{163}

The DOE has issued final rules that elaborate on the revised provisions of the IDEA.\textsuperscript{164} These rules correspond to the Amendments and affirm that the IDEA provisions regarding voluntarily enrolled private school students have been constricted.\textsuperscript{165} The rules clarify that the LEA need not collectively allot funds to all disabled private school students, but instead the LEA can determine which students will receive services and what services the LEA will provide.\textsuperscript{166} The regulation makes clear that the provision of services is discretionary.\textsuperscript{167} Thus, it is solely within the power of the LEA to determine whether a disabled child is entitled to services, whether the services should be provided on-site at the private school, how the services should be provided, and even how the services should be evaluated.\textsuperscript{168}

Congress has determined that the states can decide where related services will be offered to private school students.\textsuperscript{169} It seems pointless, however, to find that a disabled child is entitled to federal funding, and

\begin{quote}
\textsuperscript{162} See 20 U.S.C. § 1412(a)(10)(A)(i)(I) (Supp. III 1998); Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1437 (10th Cir. 1997); see also Zelinsky, supra note 47, at 760 (discussing how IDEA's status as an unfunded mandate leaves less than a desirable amount of money for free and appropriate education).

\textsuperscript{163} See Assistance to States for the Education of Children with Disabilities, 64 Fed. Reg. 12,406, 12,410 (1999) (to be codified at 34 C.F.R. § 300.453) (stating that "LEAs are not prohibited" from spending money on disabled students at private school, which hardly puts pressure on LEAs to do so) (emphasis added).

\textsuperscript{164} See id. at 12,445-47 (publishing the final DOE regulations).

\textsuperscript{165} See id. at 12,445 (to be codified at 34 C.F.R. § 300.454(b)) (giving a significant amount of discretion to LEAs to decide how many disabled private school students will receive services and what those services will be); see also Oegema, supra note 153, at 109-10, 118 (pointing out that as long as FAPE is provided in public school, a state has little obligation to a disabled private school student under the new Amendments as clarified by DOE's regulations).

\textsuperscript{166} See 64 Fed. Reg. at 12,445.

\textsuperscript{167} See id. See generally Oegema, supra note 153, at 105 (explaining that the circuit courts that have adopted the discretionary approach have ruled that public schools are not required to provide on-site services at private schools, as long as a FAPE has been provided at a public school).

\textsuperscript{168} See 64 Fed. Reg. at 12,445.

\textsuperscript{169} See H.R. REP. No. 105-95, at 91 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 89 (stating that IDEA "includes an obligation on a State . . . to provide a proportionate amount of IDEA funds to private schools in which children with disabilities are enrolled, and, to the extent consistent with law, at [state discretion, to provide services on the premises of private . . . schools") (emphasis added).
\end{quote}
then to declare that the services cannot be provided at the child’s private school—the best place for the student to benefit from the services.\footnote{170} If a private school child has a hearing impairment and cannot learn effectively without an interpreter’s assistance, there is no purpose in providing the funds and subsequently denying the student the interpreter at his or her own school.\footnote{171} Therefore, the two regulations—determination of a student’s entitlement to funds and determination of location of services—work in tandem.\footnote{172} The regulations are completely ineffective if one grants funding, but the other denies on-site services. The ultimate result of this ineffectiveness is that fewer voluntarily enrolled disabled private school children will receive services if states decide that services should only be provided at public schools.\footnote{173}

Congress enacted these provisions for a number of reasons.\footnote{174} For example, Congress wants to save public schools and taxpayers money, so that the states can use funds for other educational purposes.\footnote{175} According to one member of Congress, the Amendments alleviate school district costs by discouraging parents from placing their child in a prestigious private school at public expense.\footnote{176} While a school district incurs a significant cost in paying for a private school child’s special education services,\footnote{177} it does not necessarily experience this cost because parents want

\begin{itemize}
  \item \footnote{170}{See Dowling, supra note 137, at 82 (maintaining that a child who needs a sign language interpreter or hearing device to learn requires this service \textit{in the classroom}, where it is most helpful to the child, in order to reap the benefits of federal funding); see also Osborne, supra note 147, at 2.}
  \item \footnote{171}{See Russman v. Board of Educ., 150 F.3d 219, 222 (2nd Cir. 1998) (holding that even if the student is entitled to federal funding, the state has discretion to deny her services on-site). The \textit{Russman} court explains in a footnote that location of services also depends upon entitlement, i.e., whether the state has determined under IDEA that the student is entitled to the funds. See id. at 221 n.1.}
  \item \footnote{172}{See id. at 221 n.1. If the court or the LEA determines that there is no entitlement, then the issue of location of services need not be decided. See id.}
  \item \footnote{173}{See supra notes 171-72 and accompanying text.}
  \item \footnote{174}{See Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1435 n.2 (10th Cir. 1997) (observing that Congress raised several issues, with little discussion, including making it more difficult to place children in private schools, requiring states to spend federal funds for private school children, and states needing only to provide FAPE in a public school in order to refrain from providing state funds for private school children); see also 143 CONG. REC. H2536 (daily ed. May 13, 1997) (statement of Rep. Castle); 143 CONG. REC. S4300 (daily ed. May 13, 1997) (statement of Sen. Jeffords).}
  \item \footnote{175}{See 143 CONG. REC. H2536 (daily ed. May 13, 1997) (statement of Sen. Castle).}
  \item \footnote{176}{See id.}
  \item \footnote{177}{See Dowling, supra note 137, at 94 (explaining that, in light of \textit{Russman v. Sobol}, which granted on-site services, school boards in the Second Circuit face great costs if they have to pay for every disabled child’s service at a private school). Thus, it would be difficult to determine economies of scale. See id. For example, if the school hires three occu-}
\end{itemize}
to send their child to an expensive private school.\footnote{178}

When parents send their child to private school, they have their child's best interests in mind, and they seek to ensure an appropriate education for him or her.\footnote{179} Parents can have a variety of reasons for choosing private schools over public ones. As previously mentioned, some parents choose private schools for religious reasons;\footnote{180} others choose them because they believe a smaller setting will address their child's special needs better.\footnote{181} Some parents remove their child from public school because they feel that the FAPE is not appropriate and they want those schools to pay for the child's services at a private institution.\footnote{182} These parents may be able to afford the private school tuition, but cannot pay for the related services.\footnote{183} Others ask that the services be offered at the private school so that their child's education and daily activities are not interrupted by transportation to a public school.\footnote{184}

Perhaps to thwart criticism of the restrictions placed on disabled students attending private school, Congress explains that the Amendments intend to improve the appropriateness of the public education offered to disabled students.\footnote{185} The Amendments provide for better programs and

\footnote{178. See id.; supra notes 49-50 and accompanying text.}
\footnote{179. See Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1433 (10th Cir. 1997).}
\footnote{180. See supra note 50.}
\footnote{181. See Fowler, 128 F.3d at 1433.}
\footnote{182. See id. (explaining that the student's parents chose a private school because they believed that his intellectual gifts would be "better met" at a private school than at a public school); Russman v. Board of Educ., 150 F.3d 219, 220 (2nd Cir. 1997) (recognizing that the parties agree on the need for services, but disagree as to the location of services); Cefalu v. East Baton Rouge Parish Sch. Bd., 117 F.3d 231, 232 (5th Cir. 1997); see also Florence County Sch. Dist. v. Carter, 510 U.S. 7, 14 (1993) (holding that parents may be reimbursed for removing their child from an inappropriate IEP and placing her in an appropriate private program, even though the private school does not meet IDEA standards).}
\footnote{183. See Russman v. Sobol, 85 F.3d 1050, 1052 (2nd Cir. 1996), cert. granted and judgment vacated, 521 U.S. 114 (1997) (mem.), rev'd 150 F.3d 219 (2nd Cir. 1998).}
\footnote{184. See Peck v. Lansing Sch. Dist., 148 F.3d 619, 622 (6th Cir. 1998) (noting that the student's parents wanted the services offered on-site so that they would not interfere with her daily activities).}
\footnote{185. See Assistance to States for the Education of Children with Disabilities, 62 Fed. Reg. 55,026, 55,028 (1997) (detailing Congress' intent to improve results for children with disabilities by ensuring these children's access to the general public curriculum, strengthening the role of parents, and fostering partnerships between parents and schools).}
better-trained teachers, and ensure that schools will keep parents well-informed. Congress has a benevolent motive, but it has not considered that the Amendments limit parents in their choice of their disabled child's education. Although it is true that some parents may elect to keep their disabled child in public school because that school meets their child's needs, it does not follow that parents opting out of this school should arbitrarily be denied related services. Prior to requiring parents to prioritize among educational choices, schools should at least determine the actual cost of providing on-site services.

It is evident that Congress does not realize the impact the Amendments have on disabled private school students and their parents. Although the parents have an important concern in the matters of entitlement and their disabled child's individual needs, the child has an even greater stake—the location of services. Many children who require services need them in the classroom because the services facilitate the children's learning. Under the Amendments, however, the possibility of on-site services in private schools is remote. Hence, the DOE regulations addressing entitlement and location may limit students' entire education, not merely their related services, especially if these regulations preclude debate on location by cutting off entitlement. In other words, why even consider location of services, when courts will deny the requisite entitlement?

Of utmost concern is that without an appropriate education, disabled children will not become functional adults. The Amendments' narrow provisions can potentially stunt voluntarily-enrolled disabled children's development. If related services cost the same at public and private schools, and provision of services at the private school does not violate

186. See id.
188. See Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1435 n.2 (10th Cir. 1997).
189. See Dowling, supra note 137, at 80 (insisting that the Amendments, as they now stand, will have devastating long-term effects on the rights of disabled students because they will limit the services the students receive, hamper parental educational rights, and potentially deny the student's rights to receive services as adults); see also Osborne, supra note 147, at 2 (recognizing that pre-Amendments IDEA reduces disabled children's (and their parents') freedom of religious choice because if they require a related service in the classroom, then they have no option but to enroll in a public school).
190. See supra notes 169-72 and accompanying text.
191. See supra notes 171-72 and accompanying text.
192. See Dowling, supra note 137, at 80.
any other statute or regulation, there is no valid reason for not offering the services at the private school. Furthermore, the regulations provide that public schools can choose to exceed their funding obligation in order to provide services at private schools. If the public schools would contemplate the negative effects the Amendments may have on disabled private school students voluntarily placed by their parents, perhaps they would extend their local and state money. The cases decided in light of the Amendments, however, demonstrate that schools have yet to take this approach.

B. Russman, Anderson, and Fowler: *Missing the Point of On-site Services*

Across the Second, Seventh, and Tenth Circuit courts, the cases decided in consideration of the Amendments illustrate a restrictive interpretation of the private school provisions. Through their narrow constructions of IDEA provisions, the courts emphasize that they base their rulings on IDEA's legislative history and DOE's regulations. The particular facts of each child's situation appear to have little or no bearing on the decisions. Furthermore, even though they rationalize that the LEA has discretion in determining provision of services, the courts fail to consider that these particular students have disabilities that require on-site services for the progression and appropriateness of their education.

193. *See id.* at 99 (suggesting that courts should determine whether the cost of the service would be more expensive at a private school than a public school, and if it costs the same, to provide the service at the private school, if that is what the parents wish); *see also* Oegema, *supra* note 153, at 123 (arguing for a limited discretion approach granting a public school discretion only in providing on-site services when economies of scale so require).


196. *See Russman, 150 F.3d at 222; Anderson, 125 F.3d at 1019; Cefalu, 117 F.3d at 232; see also* Fowler v. Unified Sch. Dist. No. 259, 128 F.3d at 1431, 1436-37 (10th Cir. 1997) (explaining that while the court is not as restrictive as IDEA, the statute probably will be interpreted strictly).

197. *See Russman, 150 F.3d at 222 (citing a House Report); Anderson, 125 F.3d at 1019 (citing section 101 of the IDEA Amendments Act); Cefalu, 117 F.3d at 232; Fowler, 128 F.3d at 1435 (citing a House Report).*

198. *But cf.* Willard, *supra* note 47, at 1169 (asserting the importance of each disabled child's individual needs, and noting that IDEA does not establish universal principles for each child, but requires that an IEP be developed as a guideline for each child's education).

199. *See Russman, 150 F.3d at 222 (denying a consultant teacher and teacher's aide on-site at a private school); Anderson, 125 F.3d at 1019 (denying an instructional assistant on-
All three courts advocate the discretionary approach toward voluntarily enrolled private school children, although Fowler leans toward the limited discretion theory.\textsuperscript{200}

1. Russman v. Board of Education

The key issue in Russman concerned the location of services.\textsuperscript{201} In determining whether the student should have a consultant teacher and teacher's aide at her private Catholic school, the court discussed in a footnote that the Amendments do not clarify whether federal funds must be proportionately spent on all disabled students or whether the LEA determines who receives services.\textsuperscript{202} The court did not consider the DOE's proposed regulations, but assumed for present purposes that the student was entitled to her proportionate funds.\textsuperscript{203} Despite the entitlement, the court held that it is within the state's discretion to provide on-site services; the state is not \textit{required} to provide the services at the Catholic school.\textsuperscript{204} Given IDEA's silence on the location of services, the court found that state discretion is the determining factor.\textsuperscript{205} Thus, according to the court, the state need not provide the consultant teacher and aide at the Catholic school.\textsuperscript{206}

In deciding that the student was entitled to federal funding, the court should have analyzed the reasons for entitlement.\textsuperscript{207} It should have con-

\textsuperscript{200} See Russman, 150 F.3d at 222 (referring to Congress' interpretation that it is at the states' discretion to provide on-site services); Fowler, 128 F.3d at 1439 (noting that states can choose to provide more funding than the mandatory proportionate federal amount, and forecasting that although the student will not receive full funding, he will probably receive some amount of aid in the private school); \textit{Anderson}, 125 F.3d at 1019 (holding that a LEA need not provide related services to a voluntarily enrolled private school student if a LEA offers FAPE to that student); Cefalu, 117 F.3d at 233 (finding that, having offered FAPE, LEA did not have to provide an on-site interpreter to a private school student); Schwartz, \textit{supra} note 50, at 807 (interpreting \textit{Fowler} as reinforcing a limited discretion approach and criticizing this theory as full of public policy problems, one of which is to encourage parents to remove their disabled children from public schools for any reason); \textit{supra} note 153 (discussing the differences between the discretionary and the limited discretion approaches).

\textsuperscript{201} See Russman, 150 F.3d at 220.

\textsuperscript{202} See \textit{id.} at 221 n.1 (quoting \textit{Fowler}, 128 F.3d at 1437).

\textsuperscript{203} See \textit{id.} at 221.

\textsuperscript{204} See \textit{id.} at 222.

\textsuperscript{205} See \textit{id.} (exploring legislative history to find that states may choose whether or not to provide related services on-site).

\textsuperscript{206} See \textit{id.}

\textsuperscript{207} See \textit{id.} at 221 \& n.2. Instead of analyzing the reasons for entitlement, the court
sidered the student's specific needs, which require a teacher to help her understand the academic subjects of English and math. It should have also determined whether the service would cost the same at the public school as at the private school. Finally, the court should have also recognized that the parents' reason for enrolling the student at a Catholic school was so she could attend school with her two sisters. In disregarding these logical reasons, the court suggests that disabled private school students will not be receiving services, even if the services are crucial to their education. If a child is entitled to funding, there is a likelihood that he will still be denied services on-site at his private school.

Hence, the parents' choice in Russman is necessarily defeated. The student's services must be provided at the school she attends, while she is in the classroom. For the parents, their only option is to enroll their daughter in a public school because it is the only location where the consultant teacher can help her. Consequently, the court leaves parents and children with no meaningful choice; instead, it leaves the matter entirely up to state discretion.

2. K.R. v. Anderson Community School Corp.

The Anderson court arrived at a similar decision regarding provision of services. It did not, however, consider the issue of federal funding. Instead, the court relied on a statement of position filed by the United States, asserting that the Amendments do not change the court's prior holding that the student is not entitled to an instructional aide at her parochial school. The court further found that the Amendments rein-

merely stated that either the student would be entitled or not. See id.

208. See Russman v. Sobol, 85 F.3d 1050, 1053 (2nd Cir. 1996) (stating that the parents wanted the teacher to help the student with core subjects, such as English and math), vacated and remanded sub nom. Board of Educ. v. Russman, 521 U.S. 1114 (1997) (mem.).

209. See supra note 193 and accompanying text.

210. See Russman, 85 F.3d at 1052.

211. See Russman, 150 F.3d at 222 (explaining that despite entitlement, a student may not receive services if the state decides not to provide them on-site at the private school).

212. See Dowling, supra note 137, at 82 (noting that the service would be "useless" unless provided in the setting where the student learns); Osborne, supra note 147, at 2.

213. See Russman, 150 F.3d at 222. When the court refuses to provide the teacher at the private school, and the student cannot be educated without the teacher, she must enter a public school. See id.

214. See id.


216. See id. Nowhere in the opinion is the federal funding obligation mentioned. See id. The court does rule, however, that states and localities have no obligation to use their own monies for private school services. See id.

217. See id.
force the premise that states and local agencies need not spend their own money to ensure that voluntarily enrolled private school children with disabilities receive services comparable to those given to public school children with disabilities.218 It also denied the student's Free Exercise claim, holding that the school district provided speech and physical therapy at a public school during the student's enrollment at the parochial school, and this service did not interfere with religious choice.219

The court also dismissed the student's request that the Amendments not apply to the time period during which the prior case was remanded and vacated by the Supreme Court.220 In doing so, the court held that the Amendments did not change IDEA, and that even if they did, IDEA is not retroactive.221 The Anderson court takes the opposite view of retroactivity than the court in Fowler; whereas the retroactive issue helps the student in Fowler, it harms the student in Anderson.222 The discussion of retroactivity is the most illuminating of the Anderson court's views; the rest of the opinion is wholly dependent on the Government's position and text of the Amendments.223

Employing a seemingly arbitrary rationale, the court fails to consider the student's needs.224 The student cannot learn without an instructional

218. See id. at 1018-19 (referring to the court's earlier opinion, which held that states have discretion and only need to provide voluntarily enrolled private school students who are disabled a genuine opportunity for equitable participation under the IDEA).

219. See id. at 1019 (noting that provision of the related services at a public school was wholly neutral, illustrating that the government neither favored nor disproved of the student's religious preference).

220. See id. at 1019 n.1.

221. See id. (opining that were the court to regard the Amendments as changing, rather than clarifying, the existing IDEA, any change would not apply to the period before the Amendments because the IDEA is not retroactive).

222. Compare Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1435 (10th Cir. 1997) (noting that the Amendments are not retroactive, and thus mandating that the district pay for interpreter services at the private school only up to the average amount required to provide the services in the public school) with Anderson, 125 F.3d at 1019 n.1 (determining that the court does not need to consider the student's education between the earlier decision's vacation and the Supreme Court's remand, and finding the Amendments are not retroactive; so, even if the Amendments evinced a change, the court would not apply it to the student's situation). Fowler and Anderson arrived at different results because the courts took positions at the opposite ends of the same spectrum. The court of appeals in Fowler chose to grant on-site services to the student before the Supreme Court vacated the case. See Fowler, 128 F.3d at 1433. The court of appeals in Anderson chose to deny on-site services before the Supreme Court granted certiorari. See Anderson, 125 F.3d at 1018.

223. See Anderson, 125 F.3d at 1019.

224. See id. (stating only that the Amendments are unambiguous and thus, states need not spend their own money to fund comparable services for disabled private school students).
aide, for her disability is severe. Regardless of whether she can receive speech and physical therapy at a public school, she requires help in positioning, reaching, and expressing herself in the classroom. Also, the mother's function as her aide in the parochial school suggests that the parents wanted their daughter to attend a religious institution for the sake of religious instruction. The court should have also determined whether the aide would cost the same at the public school.

Significantly, by not mentioning the federal funding provision, the court indicated that it was not concerned with the individual's situation. By disregarding completely the states' obligation to allot federal funding for disabled private school students, the court suggests that all services operate at the states' discretion. Yet, it notes that neither the proposed nor the final regulations existed at the time of the case. Thus, there was no clarification that the LEA would determine which disabled children are entitled to which services. The court should have mentioned that federal funding is available and mandated, even if it later decided that the student was not entitled to such funding. By not doing this, it seems to ignore any possibility of a moderate interpretation of the Amendments. Such a restrictive construction demonstrates that the Anderson court is leading the way toward the potential destruction of the private school education of the disabled.

3. Fowler v. Unified School District

The most liberal interpretation of IDEA and the Amendments occurred in Fowler, even though the court eventually held in favor of the Amendments. Viewing IDEA as prospective, the court found that its

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225. See Anderson, 81 F.3d 673, 676 (7th Cir. 1996) (detailing the student's disabilities as spina bifida, myelomeningocele, and hydrocephalus with a shunt), vacated and remanded, 521 U.S. 1114 (1997) (mem.).
226. See id.
227. See id. at 676.
228. See id.
229. See supra note 193 and accompanying text.
231. See id. By not even discussing federal funding, the court implies that the states will decide who receives services. See id. Its determination that the Amendments clearly do not require states to pay for private school services also reinforces this notion. See id.
232. See id.
233. See id.
234. See id. (noting that the Amendments are the final determination of services and that they do not mandate that states pay for private school services to ensure that those services can be comparable to those given to public schools).
235. See Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1436 (10th Cir. 1997)
prior interpretation of IDEA should apply before the Amendments’ effective date of June 4, 1997.\textsuperscript{236} It had originally decided that the public school must provide a sign language interpreter to the hearing-impaired student at a cost not exceeding that provided to public school students.\textsuperscript{237} Therefore, this interpretation applied until June 4, 1997, and the district court has had to determine what, if any, services are offered since that date.\textsuperscript{238}

The court noted that IDEA did not clarify whether each disabled student is individually entitled to services or collectively entitled as a group.\textsuperscript{239} It also recognized that the proposed regulations give the LEA discretion in deciding which students get which services, and that this provision may result in some students receiving no services at all.\textsuperscript{240} The realization that the Amendments may have negative consequences, coupled with the acknowledgment of the parents’ desire to place the student in a school that serves his gifted capabilities,\textsuperscript{241} shows that the Fowler court considered the child’s needs more than the other courts.\textsuperscript{242}

The Tenth Circuit also mentioned that the Amendments provide a proportionate amount of federal funds for special education services.\textsuperscript{243} It noted, however, that voluntarily enrolled private school students with disabilities are not entitled to the full cost of their education, and that after June 4, 1997, public schools need only spend their obligated federal funds.\textsuperscript{244} The court’s approach suggests that it believes the Amendments should be more concerned with the students than with payments.\textsuperscript{245} Even though it also presumed that the parents would receive a lesser amount of funds after June 4, 1997, the court concluded that the parents would probably receive a sum greater than zero.\textsuperscript{246} Thus, Fowler has proven to be the only case of the three discussed that encourages public schools to go beyond the requisite amount of funding.\textsuperscript{247}

\textsuperscript{236} See id. at 1436.
\textsuperscript{237} See id.
\textsuperscript{238} See id. at 1439.
\textsuperscript{239} See id. at 1437.
\textsuperscript{240} See id. at 1437 n.5.
\textsuperscript{241} See id. at 1433.
\textsuperscript{242} See id. at 1433, 1437 n.5.
\textsuperscript{243} See id. at 1434.
\textsuperscript{244} See id. at 1437.
\textsuperscript{245} See id. at 1437 n.5 (noting that Congress does not realize the full implications of the Amendments, most importantly, the denial of services to some students).
\textsuperscript{246} See id. at 1439.
\textsuperscript{247} But cf. Schwartz, supra note 50, at 807 (asserting that Fowler grants too much dis-
C. Zobrest and Peck: Proving that IDEA Does Not Violate the Establishment Clause, but Foreshadowing More Denials of Services

The Establishment Clause cases demonstrate positive law for the provision of special education services to disabled students in parochial schools. In determining that IDEA does not violate the Establishment Clause because its provisions neither add nor subtract from the religious environment, the Supreme Court enabled students to receive services at their parochial schools. This ruling was followed in the circuit courts. Yet these cases miss a crucial point by not discussing the entitlement issue. The decisions would likely have been different if they had determined whether IDEA requires public schools to pay for services at parochial schools.

creation to the parents and, moreover, that the decision exhausts limited public school money in order to fund extra expenses associated with on-site related services. Schwartz finds that restricting private school costs to the average costs of public schools fails to serve its purpose. See id. at 807-08. He argues that defining “similarly situated students” creates a burden because different students need different services. See id. at 808, quoting Fowler v. Unified School District No. 259, 107 F.3d 797, 807-08 (10th Cir. 1997), vacated sub nom., 521 U.S. 1115 (1997) (mem.). Schwartz also contends that public schools are better equipped to provide related services because they have specialized staff and materials. See id.


249. See Zobrest, 509 U.S. at 13-14. Legal scholars view Zobrest as advocating the accommodation of religion, but doing so by directly ignoring previous Establishment Clause conventions. See Baxter, supra note 116, at 381, 384 (recognizing that Zobrest evinces a transformation in Establishment Clause principles, and that Lemon has endured significant critical scrutiny); Lindeman, supra note 121, at 892 (arguing that Zobrest’s holding “restructure[s] Establishment Clause jurisprudence”); Missy McJunkins, Note, 20 U. Ark. Little Rock L.J. 813, 825 (noting that Zobrest’s accommodationist approach abandons judicial precedent and leaves lower courts and Establishment Clause scholars wondering about Lemon’s viability).

250. See Peck, 148 F.3d at 629-29.

251. See Dowling, supra note 137, at 88 (commenting that Zobrest left unresolved the issue of entitlement, and suggesting that the decision is most likely insignificant due to the circuit court rulings against entitlement). Peck, too, should have discussed the issue, especially because the Amendments were in effect at the time of the case. See Peck, 148 F.3d at 626. If the Peck court had discussed the issue, it may have resolved future litigation concerning Establishment Clause and entitlement issues. See id. at 629 (Daughtrey, J., concurring) (acknowledging that the Amendments control all future entitlement issues).

252. See Zobrest, 509 U.S. at 15-16 (Blackmun, J., dissenting) (explaining that the majority should have considered the entitlement issue, for if it had, the decision likely would have been vacated and remanded to determine this issue); Peck, 148 F.3d at 629 (Daughtrey, J., concurring) (noting that the case does not concern future IDEA issues due to the Amendments, and suggesting that the Amendments will preclude any future issues of entitlement).
1. Zobrest v. Catalina Foothills School District

Chief Justice Rehnquist's opinion in Zobrest reinforced the notion that IDEA benefits students, not parochial schools, in providing on-site services. Rehnquist recognized that the parents of a hearing-impaired student enrolled their son in a Catholic school for religious reasons. Although these motives are important ones that support the education of disabled parochial school students, they are not the only ones the Court should have examined. The Court did not consider the public school's claim that IDEA does not require sign language interpreters to be provided at sectarian schools, because it found that the Establishment Clause was the only concern at the time. It rationalized this decision by stating that only First Amendment issues were brought in the appeals court, and the Supreme Court usually does not consider issues not raised in the court of appeals.

The dissent, however, took the entitlement issue into account, opining that the majority should have vacated to consider the non-constitutional questions of federal and statutory law. It also believed that the parents would not get the services they seek if a federal statute does not require a sign language interpreter in a sectarian school.


The Sixth Circuit in Peck followed Zobrest's route by not considering the entitlement issue at all. Although recognizing the Amendments' existence, the court held that the disabled student's entitlement to services was not at issue. Rather, it discussed the location of services, taking the opposite approach of most circuit courts, which do not con-

253. See Zobrest, 509 U.S. at 13-14. Scholars have attacked this theory as encouraging impermissible government subsidy of religious institutions. See Lindeman, supra note 121, at 891 (disputing the child benefit theory because it fails to realize that a sign language interpreter conveys religious doctrine through his work, which effectively promotes government inculcation of religion).


255. See id. at 17 (Blackmun, J., dissenting) (discussing the entitlement issue, and stating that the majority should have vacated to consider the non-constitutional questions).

256. See id. at 7.

257. See id. at 8 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 & n.2 (1970)).

258. See id. at 17 (Blackmun, J., dissenting).

259. See id. at 15-16.


261. See id. (stating that the court had no opinion concerning the Amendments' application to the student's entitlement).

262. See id. at 624 (quoting the district court).
sider location without entitlement.\textsuperscript{263}

In Peck, the parents of a student with brittle bone disease sought to have their daughter's physical and occupational therapy sessions provided at her Lutheran school during her physical education period.\textsuperscript{264} They explained that sessions at their home either disrupted her sleep schedule or interfered with her homework and afterschool activities.\textsuperscript{265}

As in Russman, Anderson, and Fowler, the court did not fully discuss the student’s needs, but it cited the Zobrest decision and applied the Agostini holding.\textsuperscript{266} Agostini found that as long as instruction enhances but does not replace regularly provided services, the program ensures a secular purpose and derives from neutral criteria, so it does not violate the Establishment Clause.\textsuperscript{267} The student’s services fit these factors; thus, they could be provided at the Lutheran school.\textsuperscript{268} Yet, in failing to consider whether IDEA entitled the student to these services, the court skipped an important step. If it had chosen to apply the Amendments, it probably would have determined that the student was not even entitled to special education and related services, and thus, the location of the services would have been moot.\textsuperscript{269}

3. Zobrest and Peck: Foreshadowing a Murky Future

The dissent in Zobrest is correct—the majority should have considered the entitlement issue.\textsuperscript{270} The Zobrest ruling, and Peck’s application of it,

\textsuperscript{263} See, e.g., Russman v. Board of Educ., 150 F.3d 219, 221 n.1 (2nd Cir. 1998) (explaining that if the student were not entitled to funding in the first place, the location issue would never arise).

\textsuperscript{264} See Peck, 148 F.3d at 622.

\textsuperscript{265} See id. (contending that these services should be provided at the school because the IDEA (pre-Amendments) necessitated that disabled private school students receive benefits comparable to disabled public school students).

\textsuperscript{266} See id. at 628-29 (reasoning that Zobrest demonstrated a shift from judicial preservation of the separation between church and state, and that Agostini's holding affirmed this shift and supported the parents' argument).


\textsuperscript{268} See Peck, 148 F.3d at 628-29 (summarizing the district court's analysis of the Establishment Clause in terms of Zobrest and Agostini and its specific finding that no excessive government entanglement with religion existed).

\textsuperscript{269} See Russman v. Board of Educ., 150 F.3d 219, 221 n.2 (2nd Cir. 1998). The Peck Court would have used an analysis similar to that in Russman. See Peck, 148 F.3d at 626 (considering how the court did not discuss the student's entitlement to related services); Peck, 148 F.3d at 629 (Daughtrey, J., concurring) (stating that the Amendments would preclude any entitlement).

\textsuperscript{270} See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 16 (1993) (Blackmun, J., dissenting) (arguing that the majority would have vacated and remanded the case, if it considered the entitlement issue).
will affect future litigation on the Establishment Clause question because public schools are likely to raise the entitlement issue in light of the Amendments. Thus, there will likely be a decrease in Establishment Clause claims, as parents will have virtually no law to support their allegations against the public schools. The public schools can also rely on circuit court decisions, which narrowly construe the Amendments, to support their positions. Peck is an anomaly that will probably not be sufficient to help parents, particularly because it stated that it chose not to apply the Amendments. In essence, regardless of these rulings, public school districts will not need to pay for services at parochial schools.

Instead, parents should consider raising Free Exercise claims. Parents may argue that the Amendments restrict their religious freedom by arbitrarily denying their disabled children services necessary to their education, and leave them no choice but to enroll in public schools. But, unfortunately, the future will probably not be a promising one for private school parents of disabled children.

271. See Dowling, supra note 137, at 88 (observing that the Zobrest majority opinion left unresolved the issue of entitlement, and that this oversight will probably increase IDEA litigation); see also Mawdsley, supra note 121, at 445-46 (noting that the decision not to discuss the entitlement issue has resulted in conflicting circuit court interpretations of the provision).

272. See Zobrest, 509 U.S. at 16 (Blackmun, J., dissenting); Peck, 148 F.3d at 629 (Daughtrey, J., concurring) (recognizing the effect of the Amendments on public schools' need to pay for related services at private schools once FAPE has been awarded).


274. See Peck, 148 F.3d at 626.

275. See 20 U.S.C. § 1412(a)(10)(A)(i)(II) (Supp. III 1998); Zobrest, 509 U.S. at 16 (Blackmun, J., dissenting) (suggesting that students will not receive services due to the statute); Peck, 148 F.3d at 629 (Daughtrey, J., concurring) (remarking that the Amendments will eliminate the entitlement issue if it arises in the future); 34 C.F.R. § 300.403(a) (1998).

276. But see Anderson, 125 F.3d at 1019 (striking down the Free Exercise claim brought by parents, finding that the public school offered a genuine opportunity to receive services at the public school, where the student had been receiving services until her parochial school enrollment).

277. See id.; see also Osborne, supra note 147, at 2 (stressing that disabled children have little freedom of choice compared to their non-disabled peers, and suggesting that this freedom is restricted even more when the parents must choose between an education without related services at a parochial school and appropriate education at a less desirable public school).
III. A NEW APPROACH TO THE AMENDMENTS MAY SIGNAL A BETTER UNDERSTANDING OF DISABLED CHILDREN’S NEEDS

Courts must examine the entitlement and location of services issues in direct correlation to the particular student’s disability and the cost to maintain services on-site. As in Fowler, courts should consider that IDEA may deny services to some private school children with disabilities.\(^{278}\) They may also analyze whether parents have waived their rights to entitlement by choosing private schools.\(^{279}\) Courts may decide that parents should prioritize their goals—either enroll their children in private schools and possibly be denied services, or enroll them in public schools and receive at least some form of service.\(^{280}\) Courts should not, however, brush aside the federal funding obligation, and interpret the Amendments strictly. They should go one step further and grant services through a collective entitlement, and then, on a case by case approach, analyze the level of intensity of each particular service, as well as the cost to provide that service.

In choosing this limited discretion approach,\(^{281}\) courts should abide by

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278. See Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1437 (10th Cir. 1997); see also Schwartz, supra note 50, at 809 (opining that no disabled student should be denied equal access to an appropriate education, but supporting state discretion in deciding the components of an appropriate education). This viewpoint in effect refuses special education and related services to many voluntarily enrolled private schools students with disabilities.

279. See Schwartz, supra note 50, at 803. Schwartz notes that students who attend private schools do not waive their rights to FAPE at public expense because the public school may choose to place the students in a private setting. See id. Reading between the lines, however, those students voluntarily placed in private schools essentially lose their rights to publicly funded FAPE because the Amendments do not guarantee such rights. See id. at 803-04.

280. But cf. Wisconsin v. Yoder, 406 U.S. 205, 213, 234 (1972) (holding that the First and Fourteenth Amendments preclude states from mandating Amish parents to send their children to public schools, and finding that parents have the right to educate their children under a private system); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (holding that parents have a constitutional right to raise their children by their own values, including the choice of education); Stephen G. Gilles, On Educating Children: A Parentalist Manifesto, 63 U. CHI. L. REV. 937 (1996). Gilles promotes a liberal constitutional theory of parental educational rights, contending that parents have this constitutional right because they usually act with their children’s best interests in mind. See id. at 940. In determining whether the state or the parents should decide what educational matters are in the best interests of the child’s education, this theory favors the parents, because they are the “more faithful educational guardians.” Id. Gilles argues that the state educational requirements might undermine parental values. See id. at 946.

281. See Oegema, supra note 153, at 111 (explaining that Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431 (10th Cir. 1997), Cefalu v. East Baton Rouge Parish Sch. Bd., 103 F.3d 393 (5th Cir. 1997), and Russman v. Sobol, 81 F.3d 1050 (2nd Cir. 1996) all use a limited discretion approach by finding that a public school only has discretion in providing
certain standards. First, if the school is a parochial one, the program must not violate the Establishment Clause, as demonstrated by Zobrest, Agostini, and Peck. Second, LEAs must make special education and related services available to all disabled students. Unfortunately, states are allotted only a proportionate amount of federal funds for voluntarily-enrolled private school children. These funds must be divided in a manner that ensures the education of all disabled private school children. A collective entitlement to federal funding is necessary, but it should be apportioned according to whether disabled students can be provided a genuine opportunity for equitable participation if the services are provided on-site. If a student can receive a genuine opportunity off-site and the services cost less at the public school, the student must

282. See Agostini v. Felton, 521 U.S. 203, 234-35 (1997) (finding that federally funded remedial programs offered in a parochial school do not violate the Establishment Clause because they do not advance religion, create an excessive entanglement, or promote anything other than a secular purpose); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13-14 (1993) (holding that provision of a sign language interpreter to a parochial school student does not offend the Establishment Clause because the student, not the school, receives the benefit of the interpreter); Peck v. Lansing Sch. Dist., 148 F.3d 619, 628-29 (6th Cir. 1998) (determining that provision of physical therapy and occupational therapy to a parochial school student upholds the Establishment Clause because it does not advance religion by “‘impermissibl[y] supplanting’” services when they are offered on-site at the parochial school); see also Dowling, supra note 137, at 98 (explaining that the service should be analyzed in terms of the Lemon test’s second and third factors to determine if it is advancing religion or entangling government and religion). But cf. Lindeman, supra note 121, at 887 (suggesting that Zobrest in fact violates the Lemon prongs, because the Court ignored a genuine constitutional challenge in not applying the prongs, and encouraged an accommodationist approach toward government subsidy of religion).


286. See 34 C.F.R. § 76.654(a) (1998) (requiring programs provided for voluntarily-enrolled private school students with disabilities to “be comparable in quality, scope, and opportunity for participation” as the programs provided for public school students with disabilities).
receive the services at the public school.287

This determination requires a case-by-case analysis because courts will be better able to understand the importance of special education services provided on-site if they know the factual basis of each child's situation.288 If courts realize that a mentally retarded child will not receive a genuine opportunity for equitable participation in classroom instruction without the aid of a consultant teacher, they should award the child funds and provide that service at her private school.289

The second step of the analysis requires that the cost of on-site services should not exceed the cost of those in public schools.290 Thus, if it costs more to provide a consultant teacher in a private school than it does in a public school, the public school should not pay for the teacher in the private school. Although this recommendation will result in denial of on-site services, it is both logical and equitable. Public schools should not incur greater costs in providing services off-site that would cost less at their own school. Private school students will be treated as equals to public school students, as long as the costs are the same.291 If the costs are unequal, the public school should determine another means of providing a genuine opportunity for equitable participation for voluntarily enrolled private school children with disabilities.292

This approach balances a well-reasoned interpretation of the Amendments with economies of scale. Under this model, public schools should

287. See Schwartz, supra note 50, at 808 (recognizing that related services may cost more at a private school, and advocating public school provision of special education because public schools are better able to meet the many diverse needs of disabled children).

288. See Willard, supra note 47, at 1169 (emphasizing that each disabled student has unique needs); see also Dowling, supra note 137, at 97-98 (recommending that Congress rescind the Amendments in favor of a case-by-case approach). Dowling proposes a five-step analysis: (1) identify the nature of the necessary service; (2) analyze the service in light of the second and third prongs of the Lemon test (namely, if provision of the service will advance religion, then it will cause an excessive entanglement between government and religion); (3) determine whether the cost would be different at the private school than at the public school; (4) if there is a non-economic denial of service, decide whether it is irrational, arbitrary, or inconsistent with IDEA and DOE regulations; and (5) if there is an economic denial, determine if providing the service at the public school would be a genuine opportunity for equitable participation, given the nature of the disability. See id.

289. See Dowling, supra note 137, at 99 (arguing that the Supreme Court holds that services should be based on need, not location, so if the service costs the same at the public and private schools, it should be provided at the private school).

290. See id.

291. See id. at 94.

292. See id. at 99 (recommending that the public school find a way to ensure genuine opportunity for equitable participation of private school students, if the cost is excessive at the private school); see also 34 C.F.R. § 76.654(a) (1998) (guaranteeing a genuine opportunity for equitable participation to all private school students with disabilities).
only deny on-site services at private schools where dictated by economies of scale. When a disabled student requires a full-time instructional aide, the aide can help only that particular student; the services would cost the same at the public and the private school. When a student needs a part-time aide, however, the aide can help two or more students. The services would most likely be less expensive at the public school than the private school. In another scenario, if a disabled student attending private school requires physical therapy two afternoons a week, the service can be provided at a public school without much trouble. Therapy can probably be offered at a public school without taking away from the student’s academic curriculum. However, if the location of services creates the only genuine opportunity for equitable participation, and providing the services at a private school would incur no greater cost, they should be offered at the private school.

Hence, the limited discretion approach reflects IDEA’s goal of ensuring equitable participation for voluntarily enrolled private school students with disabilities. Courts should favor this approach because it is

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293. See Oegema, supra note 153, at 111.

294. See id. at 116 (explaining that a part-time aide at a public school could help two or more students simultaneously whereas, at a private school, he could help only one student at a time); see also Schwartz, supra note 50, at 808 (stating that public schools can serve two multi-disabled students simultaneously, whereas private schools usually cannot).


296. See Dowling, supra note 137, at 101 (noting that some services, such as physical, occupational, and speech therapy, can be provided off-site without greatly impeding the student’s education).

297. But see Fowler v. Unified Sch. Dist. No. 259, 128 F.3d 1431, 1433 (10th Cir. 1997); Russman v. Sobol, 85 F.3d 1050, 1053 (2nd Cir. 1996), vacated sub nom. Board of Educ. v. Russman, 521 U.S. 1114 (1997) (mem.), aff’d, Russman v. Board of Educ., 150 F.3d 219 (2nd Cir. 1998); K.R. v. Anderson Community Sch. Corp., 81 F.3d 673, 676 (7th Cir. 1996), vacated and remanded, 521 U.S. 1114 (1997) (mem.), aff’d 125 F.3d 1017 (7th Cir. 1997). In all three decisions, disabled students required related services in order to obtain an education; therefore, the services would be ineffective if provided off-site. See also Osborne, supra note 147, at 2 (emphasizing that some services cannot be provided anywhere but on-site at the private school).

298. See Dowling, supra note 137, at 97-98 (outlining a five-step analysis to determine whether services can be provided on-site).

299. See Oegema, supra note 153, at 123 (stating that the limited discretion approach better fulfills Congress’ public policy goals in IDEA, because it grants voluntarily enrolled private school children an education suited for their needs, and gives them the opportunity to choose a school based on factors other than their disability). Oegema believes that the discretionary approach limits voluntarily enrolled private school students’ entitlement to services because the students only receive services consistent with the number and location of disabled students in the state. See id. at 118. Although limited, the entitlement still exists. See id. at 119; cf. Schwartz, supra note 50, at 807-08 (arguing that the limited discretion approach suggests public policy problems, specifically, that granting parents too much
in the students' best interests. While this approach provides an appropriate education to all disabled children voluntarily enrolled in private schools, and it helps specifically those students who cannot learn without related services.

IV. CONCLUSION

The IDEA Amendments potentially undermine the statute's initial purpose of ensuring an appropriate education to all disabled students. Further, the circuit courts' affirmations of IDEA's restrictive private school provisions weaken parental arguments considerably. Rather than taking a wholly discretionary approach to voluntarily enrolled disabled private school students' entitlements to services, courts and Congress should adopt a limited discretion approach. While Congress' intention to decrease public school spending is admirable, it does not consider the most important participants in the situation—the disabled children themselves. In denying related services to children who require them for their education, courts and Congress are effectively limiting these children's rights to learn. For the sake of these children's futures, our lawmakers must reconsider their restrictive IDEA interpretations.

discretion in their disabled children's education will encourage them to remove children from the public system for any reason, and that defining similarly-situated students in public and private schools in order to determine average costs proves to be impossible).

300. See Oegema, supra note 153, at 123 (noting that the limited discretion approach affords voluntarily enrolled private school students an education suited to their needs "as well as an equality of opportunity in their education by enabling them to choose a school based on factors other than their disability"); cf. Schwartz, supra note 50, at 807 (suggesting that the approach is actually in the parents', not the students', best interests).

301. See Oegema, supra note 153, at 123.