

No. 18-1195

In the Supreme Court of the United States

KENDRA ESPINOZA, ET AL., PETITIONERS

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.

ON WRIT OF CERTIORARI
TO THE MONTANA SUPREME COURT

**BRIEF FOR AMICI CURIAE NATIONAL DISABILITY
RIGHTS NETWORK, THE ARC OF THE UNITED STATES,
COUNCIL OF PARENT ATTORNEYS AND
ADVOCATES, ET AL. SUPPORTING RESPONDENT**

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INTERESTS OF AMICI CURIAE

Amici are advocacy and legal-services organizations committed to promoting opportunity for and protecting the rights of people with disabilities.*

The National Disability Rights Network is the non-profit membership association of protection and advocacy (P&A) agencies located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories; it

* As required by Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

also has a P&A agency affiliated with the Native American Consortium. The P&A system is the nation's largest provider of legal advocacy for persons with disabilities. In the most recent year for which data is available, P&A agencies handled close to 14,000 matters involving educational rights.

The Arc of the United States (The Arc) is the nation's largest community-based organization of and for people with intellectual and developmental disabilities; it consists of over 600 state and local chapters across the country. The Arc promotes and protects the human and civil rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes.

The Council of Parent Attorneys and Advocates (COPAA) is a nonprofit organization for parents of children with disabilities, their attorneys, and their advocates. COPAA believes that effective educational programs for children with disabilities can be developed and implemented only with collaboration between parents and educators. To make this happen, COPAA provides resources, training, and information to help parents, advocates, and attorneys secure the free appropriate public education to which the law guarantees children with disabilities.

The Advocacy Institute is a nonprofit organization dedicated to developing products, projects, and services that improve the lives of children and adults with disabilities. The Advocacy Institute believes that effective educational programs for children with disabilities can be developed and implemented only with collaboration between parents and educators as equal parties. For two decades, the Institute has developed products, implemented pro-

jects, and provided services to support the free appropriate public education of the nation's 7 million children and youth with disabilities.

The American Association of People with Disabilities (AAPD) works to increase the political and economic power of people with disabilities. A national cross-disability organization, AAPD advocates for full recognition of the rights of over 56 million Americans with disabilities.

The American Diabetes Association is a nationwide, nonprofit, voluntary health organization founded in 1940 and made up of persons with diabetes, healthcare professionals who treat persons with diabetes, research scientists, and other concerned individuals. The Association's mission is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

The Association of University Centers on Disabilities (AUCD) is a nonprofit membership association of 130 university centers and programs in each of the fifty states and six territories. AUCD members conduct research, create innovative programs, prepare individuals to serve and support people with disabilities and their families, and disseminate information about best practices in disability programming, including best practices to effectively serve and support the learning needs of all students within integrated schools and communities.

The Autistic Self Advocacy Network (ASAN) is a national, private, nonprofit organization, run by and for individuals on the autism spectrum. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to

health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people.

The Autism Society of America is the nation's largest and oldest grassroots organization dedicated to improving the lives of people with autism and their families and communities.

The Center for Public Representation (CPR) is a national, nonprofit legal advocacy organization that has worked to advance the rights of people with disabilities for more than 40 years. CPR has litigated systemic cases in more than 20 states and written amicus briefs in numerous cases in this Court and the courts of appeals. CPR's work includes both litigation and policy advocacy to vindicate the rights of students with disabilities to receive a quality education alongside their peers without disabilities.

The Civil Rights Education and Enforcement Center (CREEC) is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability, especially in programs as fundamental as education. CREEC lawyers have extensive experience in the enforcement of the Rehabilitation Act and Title II of the Americans with Disabilities Act.

The Council for Exceptional Children (CEC) is a professional association consisting of educators dedicated to advancing the success of students with exceptionalities. CEC accomplishes its mission through advocacy, standards, and professional development. CEC advocates for evidence-based best practices in special education and supports at all levels, from early intervention through higher education.

The Disability Rights Education & Defense Fund (DREDF) is a national nonprofit disability civil rights law

and policy organization dedicated to protecting and advancing the civil rights of people with disabilities. DREDF is led by members of the disability and parent communities that it represents. A significant portion of DREDF's work is directed at securing and advancing the educational entitlements of children with disabilities, under laws including the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and Section 504 of the Rehabilitation Act.

The Education Law Center-PA (ELC) is a nonprofit legal advocacy organization dedicated to ensuring access to a quality public education for all children in Pennsylvania. ELC undertakes impact litigation and provides direct representation on behalf of students with disabilities, and for many years ELC functioned as the protection and advocacy agency for children with disabilities across the state. ELC seeks to ensure that all students have equal access to safe and supportive schools and the full range of services and programs they need to succeed.

The Learning Disabilities Association of America (LDA) is made up of individuals with learning disabilities, their families, and the educators and researchers who support them. LDA supports keeping public funds in public education to ensure that students with learning disabilities receive appropriate services in the least restrictive environment and the rights and protections of the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act.

The National Association of Councils on Developmental Disabilities is the national nonprofit membership association for the Councils on Developmental Disabilities located in every state and territory. The Councils are authorized under federal law to engage advocate, build ca-

capacity, and pursue systemic change to ensure that individuals with developmental disabilities and their families have access to needed community services, individualized supports, and other assistance that promotes self-determination, independence, productivity, and integration and inclusion in community life.

The National Association of School Psychologists (NASP) is a professional association representing more than 25,000 school psychologists, graduate students, and related professionals. As the world's largest organization of school psychologists, NASP works to advance effective practices to improve student's learning, behavior, and mental health. NASP is committed to advocating for the rights, education, mental health, and behavioral needs of all students, and believes that all students, including those with disabilities, are entitled to a free and appropriate public education in a positive and inclusive environment.

The National Center for Learning Disabilities (NCLD) is a parent-founded and parent-led nonprofit organization that works to improve the lives of the 1 in 5 children and adults nationwide with learning and attention issues. NCLD empowers parents and young adults and advocates for equal rights and opportunities. It also provides essential information to parents, professionals, and individuals with learning disabilities and attention issues; promotes research and programs to foster effective learning; and advocates for policies to protect and strengthen educational rights and opportunities.

The National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE) is a national organization that works to strengthen the voice of families and family-led organizations in decisions affecting the nation's children, youth, and families. National PLACE's more than sixty local, state, and national members represent family-led, family-run organizations

committed to ensuring the highest quality and most effective services and supports for diverse children and families, including those with disabilities and who face the greatest challenges to success.

The National Center for Youth Law (NCYL) is a non-profit organization that works to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities necessary for healthy and productive lives. NCYL represents many children with disabilities in litigation and administrative proceedings, advocates before legislatures and administrative agencies, and pilots collaborative reforms with state and local jurisdictions to improve educational outcomes for system-involved children with disabilities.

The School Social Work Association of America (SSWAA) is the professional organization for school social workers in school districts across the country. The organization supports linking school social workers in schools, families, and communities to address barriers to student success. SSWAA believes that students with disabilities are best served in the public schools and supports keeping public funds in public education.

Amici seek to ensure that children with disabilities receive the educational support and services guaranteed to them by federal law, and which they need to become productive members of society and participate fully in their communities. Because private schools offer few if any protections for students with disabilities, amici are concerned about the effects of private-school voucher and tax-credit programs at issue in this case, and with decisions that would prevent states from enforcing their own constitutional provisions that bar such programs.

SUMMARY OF ARGUMENT

For nearly fifty years, children with disabilities have relied on key federal laws to ensure that they receive the education to which they are entitled and are protected from discrimination and segregation in public schools. School voucher and tax-credit programs, including the Montana program at issue in this case, risk eroding these decades of progress. They redirect public money to private schools, which often fail to offer appropriate or integrated education to students with disabilities and commonly exclude them outright. And they deplete funding for public schools, which remain bound to comply with the comprehensive federal laws ensuring that students with disabilities are properly served. In the process, more and more students with disabilities will be excluded, neglected, and segregated—precisely the harms that Congress has repeatedly acted to stop.

Before Congress passed critical federal disability rights laws, students with disabilities were too often left behind. Some were excluded from schools and confined to institutions; others were stuck in segregated classes or neglected until aged and dropped out. As a result, lost education and wasted potential were “grim and depressing” facts of life. Nancy Lee Jones, Cong. Research. Serv., 95-669A, *The Individuals with Disabilities Education Act: Congressional Intent* CRS-2 (1995), <https://tinyurl.com/u54uyfy> (quoting 121 Cong. Rec. 25537 (1975)).

In response, and beginning in the 1970s, Congress enacted landmark laws—including the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and the Americans with Disabilities Act (ADA). These laws ensure that public-school programs meet each child’s unique needs, that children with disabilities are educated alongside peers without disabilities, and that parents are meaningful partners in

their child's education. Perhaps most importantly, the IDEA gives students with disabilities a real chance to experience the mainstream curriculum and to meet the same academic standards demanded of every other student.

Since enacting the IDEA in 1975, Congress has repeatedly enhanced it. But private-school voucher and tax-credit programs, including the Montana program at issue in this case, risk arresting that progress and restoring the earlier era—during which millions of students with disabilities were barely educated, deprived of support and services, and segregated from their peers.

First, most federal laws protecting students with disabilities do not apply to participating private schools. Even when their private-school education is funded by public funds or forgone public revenue, those students lose nearly all the protection and services that they would have received in public school. In most cases, they give up the individual right to an appropriate education; the right to be educated in the least restrictive environment; many anti-discrimination protections; and safeguards against disability-based discipline. Their parents lose rights, too, including the right to be kept informed about their children's education and the right to protect their children before agencies and courts.

Second, and as a result, private schools paid for by public funds routinely fail to serve students with disabilities adequately—and often refuse to serve these students at all. Many participating schools categorically exclude some or all students with disabilities. Others charge higher tuition and fees, essentially erasing (and then some) the value of the public voucher or credit. A surprising number employ few or no teachers or aides licensed to educate students with disabilities, and otherwise do not

offer the support and services that students with disabilities need to succeed. Some are quick to discipline or expel students for behavior caused by their disabilities. And too many are segregated, disability-only schools. Indeed, Petitioners themselves trumpet such a segregated, disability-only Montana school.

On the other hand, students with disabilities who are not excluded from these programs suffer a different problem: The promise of government subsidies or tax credits may encourage their parents to transfer them from public school to private school, but their parents rarely are told, and seldom are otherwise aware, that their children will lose their statutory rights and services if they use vouchers or tax credits to attend private schools. Too often, parents learn this lesson only after enrolling their children in private schools and watching them flounder.

In short, voucher and tax-credit programs like Montana's redirect public funds to private entities largely unbound by the federal laws that for generations have guarded these students' rights and futures. While Petitioners suggest that Montana's program would aid students with disabilities, it is the Montana Supreme Court's decision that shields many students with disabilities from an earlier era's harms.

ARGUMENT

I. Private-school voucher and tax-credit programs strip away essential protections and services that students with disabilities would receive in public schools.

Every year, about 7 million students—one in seven children and young adults who attend public school—receive disability-related services. See Nat'l Ctr. for Educ. Statistics, *Children and Youth with Disabilities* (May 2019), <https://tinyurl.com/psjs74q>. Until the 1970s, how-

ever, most of these students were denied access to appropriate education, segregated from other students, and ultimately left behind from their peers.

Congress responded by enacting three statutes providing rights, protections, and remedies to children with disabilities who attend public schools. The Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* (IDEA), guarantees students with disabilities the right to a free and appropriate public education, including an individualized education program, in the least restrictive environment, and it offers many other important rights and protections. Two other laws—Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 (Section 504); and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.* (ADA Title II)—prohibit public schools from discriminating against students based on their disability.

These laws have enabled millions of students to be educated at neighborhood schools, with adequate support and services, among their peers without disabilities. But when students with disabilities use vouchers or tax-credit programs to attend private schools, most of these protections evaporate—again leaving these students and their parents by the wayside.

A. Students with disabilities depend on legal protections to ensure that they are properly educated.

The federal statutes protecting students with disabilities reflect what has been recognized by Congress, the courts, and educational experts: Students with disabilities face unique challenges and have unique needs. As a result, many require additional support and services at school, and they benefit from attending integrated neighborhood schools in classrooms alongside their peers without disabilities. With the right protections and services, even students with the most significant disabilities can achieve a

great deal. Without them, these same students have been excluded, neglected, and unable to approach or achieve their potential.

In fact, before Congress enacted the IDEA and Section 504, “the educational needs of millions of children with disabilities were not being fully met.” 20 U.S.C. 1400(c)(2). Many states allowed public-school districts to exclude children with disabilities. Dep’t of Educ., *Thirty-Five Years of Progress in Educating Children with Disabilities Through IDEA* 3 (2010), <https://tinyurl.com/y42u7qqz>; see also Mitchell L. Yell et al., *The Legal History of Special Education: What a Long, Strange Trip It’s Been!*, 19 Remedial & Special Educ. 219, 220 (1998), <https://tinyurl.com/vlu9qs5> (collecting cases). As a result, “one out of every eight of these children [with disabilities] was excluded from the public school system altogether”; “many others were simply ‘warehoused’ in special classes or were neglectfully shepherded through the system until they were old enough to drop out.” *Honig v. Doe*, 484 U.S. 305, 309 (1988) (citing H.R. Rep. No. 94-332, p. 2 (1975)). Parents, in turn, were told that their children would never live “meaningful lives.” S. Rep. No. 94-168, p. 9 (1975).

By the early 1970s, 2.5 million children with disabilities were receiving an inappropriate education, and “1.75 million were receiving *no* educational services at all.” H.R. Rep. No. 94-332, p. 11 (1975). After being neglected by or excluded from their schools, many of these children were committed to state institutions and housed in “subhuman conditions.” S. Rep. No. 94-168, p. 9 (1975).

To fight this discrimination and segregation, parents and advocates fought to ensure that children with disabilities gained a meaningful, enforceable educational right. And as Congress investigated and prepared to legislate, it learned from educational experts that all children—even

those with the most significant disabilities—“are educable.” Extension of the Educ. for the Handicapped Act: Hearings Before the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor, 94th Cong., 1st Sess. 40 (1975) (testimony of Frederick Weintraub). Given an appropriate education, students with disabilities can be “ensur[ed] equality of opportunity, full participation, independent living, and economic self-sufficiency.” 20 U.S.C. 1400(c)(1).

As lawmakers began to better appreciate the needs and potential of people with disabilities, Congress enacted the IDEA, Section 504 of the Rehabilitation Act, and Title II of the ADA. The IDEA ensures that public-school students receive a free appropriate public education in the least-restrictive setting. 20 U.S.C. 1412(a)(1) and (a)(5). Section 504 prohibits disability-based discrimination in programs or activities that receive money from the U.S. Department of Education. 34 C.F.R. 104.4(a). And Title II of the ADA bans disability-based discrimination by state and local governments. 42 U.S.C. 12131(1); *id.* 12132; 28 C.F.R. 35.130(a).

B. Private-school voucher and tax-credit programs provide few if any of these essential federal rights and protections to students with disabilities.

Despite the rights that Congress has repeatedly strengthened over the last four decades, students with disabilities who use vouchers or tax credits to attend private schools lose most of these statutory services and protections—the very services and protections designed to ensure that children with disabilities receive a meaningful education and a chance to participate in their own communities.

1. No right to an appropriate education tailored to the student’s needs.

As one of Petitioner’s *amici* acknowledges, “there is no such thing as an ‘average’ brain; every person’s brain operates differently.” Ctr. for Educ. Reform Amicus Br. 13. Because students have unique abilities and unique disabilities, the IDEA requires public schools to provide a “free appropriate public education,” 20 U.S.C. 1412(a)(1), including a detailed, written “individualized education program,” *id.* 1412(a)(4), 1414(d). Given their unique circumstances, students with disabilities must be educated by certified special-education teachers. 20 U.S.C. 1412(a)(14)(C). And they must receive services tailored to their unique needs. See 20 U.S.C. 1401(26)(A) (listing potential services). These and other IDEA provisions ensure that a diverse set of students with disabilities can “make progress appropriate in light of [their] circumstances.” *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

But when students with disabilities use vouchers or tax credits to attend a private school, typically they forfeit their rights under the IDEA—including the right to an appropriate, individualized education—because the statute’s key provisions do not apply to private schools. See generally 20 U.S.C. 1412(a)(10); U.S. Gov’t Accountability Office, GAO-18-94, *Private School Choice: Federal Actions Needed To Ensure Parents Are Notified About Changes in Rights for Students with Disabilities* 8 (2017), <https://tinyurl.com/ye5v5vzd> (GAO, *Parental Notification*); Nat’l Council on Disability, *Choice & Vouchers—Implications for Students with Disabilities* 60–66 (2018), <https://tinyurl.com/y6tqe8r7> (NCD, *Implications for Students with Disabilities*). In fact, many voucher and tax-credit programs require parents to explicitly waive their children’s IDEA rights. See, *e.g.*, Dana Goldstein, *Special*

Ed School Vouchers May Come With Hidden Costs, N.Y. Times (April 11, 2017), <https://tinyurl.com/y89cnvzq> (Goldstein, *Hidden Costs*) (Arizona, Colorado, Florida, Georgia, Oklahoma, Tennessee, and Wisconsin all have or had voucher programs requiring parents to waive all or most IDEA rights to participate in the programs).

Although children may still receive, from their school districts, limited “equitable services,” these students may receive “a different amount of services”—fewer services, that is—than they would get at a public school. 34 C.F.R. 300.137, 300.138(a)(2). “Related services” may be limited to supplemental services, not the student’s primary educational services, and the school district need not serve all eligible students. 20 U.S.C. 1412(a)(10)(A)(iii)(IV). Teachers providing equitable services, moreover, need not meet “special education teacher qualification requirements.” 34 C.F.R. 300.138(a)(1); GAO, *Parental Notification, supra*, at 8.

2. Limited protection against discrimination or segregation.

For too long, students with disabilities (and other people with disabilities) were kept in institutions away from their communities and their peers. In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Court recognized that “institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable of or unworthy of participating in community life.” *Id.* at 600. This principle—people with disabilities should receive services in the “most integrated setting appropriate to their needs”—transcends the residential context and applies to schools. See, e.g., Complaint, *United States v. Georgia*, No. 1:16-CV-03088 (N.D. Ga. Aug. 23, 2016) (challenging segregated education for students with disabilities).

Indeed, public schools may not overtly discriminate against students with disabilities. Section 504 details the requirements of equal treatment with respect to services and fees. 34 C.F.R. 104.33(b)(1) and (c)(1). Title II of the ADA likewise prohibits state and local governments, including schools, from discriminating against people with disabilities, see 42 U.S.C. 12132, and requires schools to be physically accessible as well, see 28 C.F.R. 35.130(b).

Both the IDEA and Section 504 guard against intra-school segregation as well. Under the IDEA, students with disabilities must be educated in the least-restrictive environment: Non-integrated education is the exception, not the rule. 20 U.S.C. 1412(a)(5)(A). Likewise, under Section 504 students with disabilities must, to the extent possible, be educated “in the regular educational environment.” 34 C.F.R. 104.34.

Conversely, when students with disabilities attend private schools, they receive few if any of these protections against discrimination and segregation.

First, the IDEA’s least-restrictive-environment rule does not apply to private schools. See 20 U.S.C. 1412(a)(10); GAO, *Parental Notification, supra*, at 8. States in theory could impose a similar requirement; Montana purports to do so in its program. See Mont. Code 20-7-411(1). But the Montana program, like most of these programs, still permit segregated, disability-only schools. See Pet. App. 142–144 (affidavit from employee of Cottonwood Day School, a participating school that admits only students with learning disabilities). By definition, in these segregated schools the “least restrictive environment” offers zero chance for students with disabilities to learn alongside students without disabilities.

Second, Section 504 likely does not apply either, because virtually all voucher and tax-credit programs (including Montana’s program, Mont. Code. 15-30-3101) are

funded without money from the U.S. Department of Education. See 29 U.S.C. 794(b)(1). If and when Section 504 does apply, it allows private schools to reject students who require more than “minor adjustments.” 34 C.F.R. 104.39; see also, *e.g.*, *St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 167–173 (2d Cir. 2001) (allowing private school to exclude student with disabilities because student did not perform at or above grade level). Private schools may also charge higher prices—beyond the value of the voucher or tax credit—to students with disabilities, so long as the surcharge can be “justified by a substantial increase in cost to the recipient.” 34 C.F.R. 104.39. In practice, then, private schools often refuse to serve students who need robust accommodations, or they raise the prices for those students. See Selene Almazan & Denise S. Marshall, Council of Parent Att’ys & Advocates, *School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice* 3, 16 (2016), <https://tinyurl.com/y22evcg8> (COPAA, *School Vouchers*).

Third, Title II of the ADA does not apply. Although private schools are covered by Title III of the ADA, which prohibits discrimination by public accommodations (including private schools), Title III does not require schools to provide an appropriate education or related services, plans, and procedures. 42 U.S.C. 12181–12189. As under Section 504, Title III may not prevent private schools from limiting admission of students with disabilities. See Claire Raj, *Coerced Choice: School Vouchers and Students with Disabilities*, 68 Emory L.J. 1037, 1052–1053 (2019), <https://tinyurl.com/vfd4loa> (Raj, *Coerced Choice*).

Meanwhile, private religious schools are not covered even by Title III. 42 U.S.C. 12187. In the United States, four in five private schools are religious schools, and in voucher and tax-credit programs the percentage is usually even higher. See Halley Potter, *Do Private School*

Vouchers Pose a Threat to Integration?, Century Foundation (Mar. 21, 2017), <https://tinyurl.com/u3anmbj> (citing, e.g., Stephen P. Broughman & Nancy L. Swaim, Nat'l Ctr. for Educ. Statistics, *Characteristics of Private Schools in the United States: Results from the 2013–14 Private School Universe Survey* 7 tbl. 2 (2016), <https://tinyurl.com/yfxr3qth>). Unless protected by a state-law ADA analogue that also applies to religious schools, children at these schools have no right even to the basic accommodations—like accessible entrances, desks, and toilets—that most people now take for granted.

3. Little if any protection against disability-related discipline.

In public schools, IDEA also protects students with disabilities from discipline for conduct resulting from their disabilities. See 20 U.S.C. 1415(k)(1)(E)–(G); 34 C.F.R. 300.530–300.536. Before a student with disabilities is expelled or suspended at length, the school must determine whether those disabilities caused the behavior at issue. 20 U.S.C. 1415(k)(1)(E)(i)(1)–(2). If the behavior is a “manifestation” of those disabilities, 20 U.S.C. 1415(k)(1)(E)–(F), the school must try to address those issues without imposing long-term discipline, 20 U.S.C. 1415(k)(1)(F).

In private schools, students lose those protections. GAO, *Parental Notification*, *supra*, at 8. As a result, private schools have more leeway to suspend or expel a child with disabilities—even when the underlying conduct results from them. See Raj, *Coerced Choice*, *supra*, at 1059.

4. Few procedures to keep parents informed.

In public schools, parents of children with disabilities have the right to participate in the development of an individualized education program to meet their child's needs. 20 U.S.C. 1414(d)(1)(B). Perhaps most im-

portantly, parents may examine records relating to administration of a free appropriate public education and obtain independent educational evaluation of the child, 20 U.S.C. 1415(b)(1), and parents must receive prior written notice about any changes to identification, placement, or provision of a free appropriate public education to their child, *id.* 1415(b)(3)–(4).

But in voucher and tax-credit programs, parents typically lose these enforceable federal rights. Private schools need not solicit parents' input on decisions affecting their children's education and services. And little recourse is available to parents who disagree with a school's decision, even if it is unreasonable or capricious. See Raj, *Coerced Choice*, *supra*, at 1058–59.

5. Abridged administrative or judicial remedies.

More generally, if a public school violates the rights of a student with disabilities, the student and his parents may seek relief in agencies and courts. Students with disabilities who go to private schools lose most of these options.

If, for instance, a public school improperly changes or fails to provide a free appropriate public education, parents may pursue administrative remedies, including due-process hearings under IDEA. See 20 U.S.C. 1415(b)–(g). Parents may also request a hearing to challenge a disciplinary removal. 34 C.F.R. 300.532(a). Hearings and other administrative remedies are likewise available under Section 504 and Title II of the ADA. 34 C.F.R. 100.7(b), 104.36 and 104.61; 28 C.F.R. 170-173 and 176. After exhausting their administrative remedies, parents may seek relief in court. 20 U.S.C. 1415(i)(2); 42 U.S.C. 12133. Under Section 504 and Title II, parents can also seek damages. See Mark C. Weber, *Procedures and Remedies Under Section 504 and the ADA for Public School Children with*

Disabilities, 32 J. Nat'l Ass'n Admin. L. Judiciary 611, 643 (2012), <https://tinyurl.com/umcq8mu>.

And if a public school is not providing an IDEA-compliant education but a particular private school would actually do so, then parents do not need a voucher or tax credit. IDEA already allows parents in those specific circumstances to enroll their child in that private school and recover the cost from the school district. See 20 U.S.C. 1412(a)(10)(C)(ii); *Sch. Comm. of Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 360 (1985); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 13–16 (1993).

Again, however, the full set of administrative and judicial remedies is unavailable to students with disabilities using vouchers or tax credits to attend private schools. Parents lose due process rights to challenge decisions about service plans or discipline. 34 C.F.R. 300.140(a); see also GAO, *Parental Notification*, *supra*, at 8; Dep't of Educ., *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools* 30 (April 2011), <https://tinyurl.com/y45hcnc>. Parents may challenge only the modest “child find” or evaluation requirements. 34 C.F.R. 300.131(a) and (c); GAO, *Parental Notification*, *supra*, at 8. Finally, if a public school violates ADA Title II, the student may sue for financial compensation; if a private school violates ADA Title III, compensation may be requested only by the Attorney General. See 42 U.S.C. 12188(a)(2) and (b)(2)(B).

* * *

Students with disabilities depend on these federal statutes to protect their basic rights—to an adequate education, individualized support and services, and the chance to attend school in a more integrated setting alongside their peers without disabilities. Redeeming a

private-school voucher or tax credit often means forfeiting in exchange for what may well be an illusory education in a segregated setting.

II. By shifting public funds to private schools that are not required to offer these crucial protections, private-school voucher and tax-credit programs often harm students with disabilities.

When not protected by statutes like IDEA, Section 504, and the ADA, students with disabilities face real harm. Although financed with public funds (or forgone public funds), many vouchers and tax credits pay for schools that exclude students with disabilities or certain types of disabilities. Private schools willing to admit these students are likely not required to provide an appropriate education tailored to their unique needs. Even worse, parents who enroll their children in voucher or tax-credit schools often do not learn in advance that their children will lose important services and protections—finding out only after their child has left the public school and lost access to its services. When they do fail to meet the needs of students with disabilities, voucher and tax-credit schools are rarely held accountable. And without protections against discrimination and efforts to ensure that students are educated in the least-restrictive environment, voucher and tax-credit programs may lead to resegregation.

A. Private schools often exclude students with disabilities and rarely educate them adequately.

Many private voucher schools either refuse to admit students with disabilities or admit those students but fail to educate them properly. Some private schools have admissions criteria that effectively preclude students with disabilities from attending. Other programs deny students with specific disabilities or refuse to accommodate special needs. See Nat'l Council on Disability, *National*

Disability Policy: A Progress Report 60 (2012), <https://tinyurl.com/y4wbxfh6> (NCD, *National Disability Policy*).

Examples persist across the country. A Michigan private school denied admission to an eighth-grade student diagnosed with moderate dyslexia, dyscalculia, and ADD, despite previously assuring her that she would be admitted, because the school could not “provide the curriculum necessary to assure [the student’s] successful transition” to the school. Brief for Pet’r at 5, *Winkler v. Marist Fathers of Detroit*, No. 323511 (Mich. Ct. App. Nov. 12, 2015). A North Carolina religious school will admit only those with an “I.Q. score of at least 90.” Record p. 330, *Richardson v. State*, 774 S.E. 2d 304 (N.C. 2015). In Texas, a child with disabilities was rejected by thirteen different private schools. See Jill Ament, *Proposed Vouchers Wouldn’t Reach Most Special Needs Students*, KUT 90.5 (Jul. 4, 2017), <https://tinyurl.com/y6lzvhw4>. And a parent in Florida could not find a private school within driving distance willing to accept her son, who has autism, ADHD, and a seizure disorder. Anya Kamenetz, *For Families with Special Needs, Vouchers Bring Choices, Not Guarantees*, NPR (May 17, 2017), <https://tinyurl.com/y554h985> (Kamenetz, *No Guarantees*). Schools would exclude her child even before meeting him: “[A]s soon as I say ‘behavioral issues,’ they’ll tell [me] they can’t accommodate him.” *Ibid.*

Consider, too, what has happened in Indiana. Its voucher program gives wide leeway to private-school admissions offices because (according to the law’s chief sponsor) the legislature “did not want to change the very fiber of those schools.” Cory Turner, *The Promise and Peril of School Vouchers*, NPR (May 12, 2017), <https://tinyurl.com/yyd8j6dp>. Much of that fiber does not cover students with disabilities:

- One school, which received \$1.5 million in voucher money for a single school year, wrote in its admissions policy that it “may not possess the resources” to educate students with learning or physical disabilities and that serving students in the latter group “would impair the learning process under normal educational conditions.” *Ibid.*
- Another school admitted that in the 2016–2017 school year, it enrolled not a single student with a disability. *Ibid.*
- Yet another school rejected a 12-year-old girl on the autism spectrum and refused even to meet with her parents; after reviewing the girl’s public-school individualized education program, the private school said that it was “not equipped to handle her.” *Ibid.*

Indiana students with disabilities also have limited legal recourse. Because all but seven of the more-than-300 participating schools are religious, see Dylan Peers McCoy, *Almost all the Private Schools Getting Vouchers in Indiana Are Religious. Here’s How One School Ended up Bucking the Trend*, Chalkbeat (May 9, 2017), <https://tinyurl.com/yf3husow>, even Title III’s more modest anti-discrimination protection rarely applies, see Section I.B.2, *supra*.

Similar obstacles end up excluding students with physical and medical disabilities. Several private schools in Milwaukee’s voucher program do not serve children in wheelchairs or “who are unable to climb stairs.” Barbara Miner, *Vouchers: Special Ed Students Need Not Apply*, 33 *Rethinking Schools* 4 (Winter 2013), <https://tinyurl.com/wvuwoan>. Along similar lines, students with chronic medical disabilities—including epilepsy, asthma, and diabetes—often cannot attend private schools because they have no part-time or full-time nurse. While more than 80 percent of public schools employ a school

nurse, less than 35 percent of private schools do so. Nat'l Ass'n of School Nurses, *School Nurses in the U.S.* (2017), <https://tinyurl.com/qrse3c8>.

Petitioners' own example highlights this problem. They have invoked Cottonwood Day School, a participating private school comprised entirely of students with learning disabilities. Pet. App. 142–144 (affidavit from Cottonwood's "Assistant Head of School"). Although it admits students with learning disabilities, the school's policy allows disability discrimination and the school does not admit students "with autism or disabilities other than learning disabilities." Gail Schontzler, *New Bozeman Private School to Focus on Learning Disabilities*, *Bozeman Daily Chron.* (June 21, 2015), <https://tinyurl.com/yejy8dxu>. Cottonwood Day School is not alone: Many private schools serve only students with "lower-cost" disabilities (such as speech, language, and learning disabilities) and exclude other students (such as those with autism) whose education requires more significant services. Wisconsin Legislative Audit Bureau, *Milwaukee Parental Choice Program* 26 (2000), <https://tinyurl.com/s5nkupj>.

Needless to say, for students with disabilities and their parents, school-choice programs offer little actual choice. It is participating private schools, not students with disabilities, who get to choose.

Even if private schools will in theory admit students with disabilities, in practice many of these schools will charge extra fees and costs for special education. Vouchers or tax credits rarely suffice to cover the cost of this higher tuition or added fees, so parents must pay the difference. COPAA, *School Voucher*, *supra*, at 16; NCD, *National Disability Policy*, *supra*, at 60. For many students and their families, these added costs are prohibitive. In Florida, for example, the largest school voucher is worth

\$13,000, but annual tuition and fees for a student with disabilities ranges from \$40,000 to \$100,000. COPAA, *School Voucher*, *supra*, at 16; see also Goldstein, *Hidden Costs*, *supra*.

Other times, students are expelled from private schools because of behavior caused by their disabilities. See COPAA, *School Vouchers*, *supra*, at 16; see also, *e.g.*, Goldstein, *Hidden Costs*, *supra* (Florida seventh grader with autism was suspended and then asked not to return to the private school). These consequences, bad enough for any student with disabilities, are even more common and severe for students of color. Nat'l Disability Rights Network, Press Release, *Students with Disabilities in Voucher Programs Losing Rights, Government Study Says* (Dec. 12, 2017), <https://tinyurl.com/y2kpwft>.

When students with disabilities must repeatedly change schools—either because they are expelled or simply not receiving appropriate education and services from their private school—the delays and interruptions in their education make it even harder to succeed. For example, in Tennessee, a child with a disability who returns to public school may be treated as a “new” student who must start the 90-day special-education referral process from scratch. Tenn. Code 49-6-2607. A Florida child with disabilities, who was unable to find a private school that would accept him, ended up spending a year “home-bound”; each week he received just a few hours of one-on-one teaching from a public-school teacher; and he spent the rest of his time going to work with his parents. Kamenetz, *No Guarantees*, *supra*. Another Florida student, after waiting to become eligible to claim a voucher, spent a year in a private school that did not provide appropriate services, then tried to switch back to his original public school; but to do so, he needed to restart his eligibility and evaluation process. See NCD, *Implications for Students*

with Disabilities, supra, at 35. When the dust settled, he had lost four years of educational development. *Ibid.*

B. Even when paid for with public funds, private schools are rarely held accountable for failing to educate students with disabilities.

Because the IDEA requires only modest oversight of private schools, some of these schools can feign expertise in educating students with disabilities but fail to actually meet their needs. In practice, most voucher programs are not subject to accountability mechanisms protecting students with disabilities. See Ctr. on Educ. Policy, *Little Evidence and Big Consequences: Understanding Special Education Voucher Programs* 5 (Oct. 2017), <https://tinyurl.com/y4yve56o> (as of 2017, only Ohio and Wisconsin require private voucher schools to plan for or implement a student with disabilities' individualized education program).

Private schools participating in voucher and tax-credit programs often face little to no oversight in the services they provide to students with disabilities. See, e.g., Mandy McLaren, *For Indiana Special-Education Students, Choice Comes at a Cost*, Wash. Post (Dec. 26, 2016), <https://tinyurl.com/zeq9lzt> (McLaren, *Indiana Special Education*) (in Indiana, no requirement that schools receiving special education voucher funding oversee the effectiveness of special education services). As a result, voucher schools “may not understand how to provide special education instruction and services or have the staff and professional capacity to serve all students with disabilities.” COPAA, *School Vouchers, supra*, at 16. Indeed, when asked (in a recent COPAA survey) whether voucher schools were capable of providing the necessary support and services to students with disabilities, 83% of respondents either were unsure or believed they could not. *Id.* at 15–16.

Further, the majority of private-school programs for students with disabilities require neither participation in standardized tests nor public reporting of results when students are tested. COPAA, *School Vouchers*, *supra*, at 14; see also Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & Educ. 291, 327 (2010), <https://tinyurl.com/vnyjfuv> (Hensel, *Special Education*); NCD, *National Disability Policy*, *supra*, at 61. Only half of these programs required academic testing or program accreditation, and only a third required teaching core subjects. *Id.* at 11.

One example is Florida's voucher scheme, including a pair of programs that offer scholarships to students with disabilities to attend private schools. The programs are a black box: Despite the programs' disability-themed branding, participating schools need not offer any individualized services to students with disabilities, administer state standardized tests to students, or disclose any data about student outcomes. See Sara Mead, *Information Underload: Florida's Flawed Special-Ed Voucher Program*, Am. Insts. for Research (June 25, 2007), <https://tinyurl.com/y2kfn8nq>. Plus, the state monitors neither the schools' curriculum nor their courses, and the program does not require students to take any particular classes. See COPAA, *School Vouchers*, *supra*, at 15. With no state requirements and no public data revealing how students are faring, how can parents decide whether to transfer their child from a public school to a private school?

As it turns out, parents have struggled to make informed decisions. For example, a mother of autistic five-year-old twin boys enrolled her sons in a Florida special-needs "learning center," which was part of a larger private-school academy, after the school specifically promised her specialized education and support. Leslie Postal, Beth Kassab and Annie Martin, *Florida Private Schools*

Get Nearly \$1 Billion in State Scholarships With Little Oversight, Orlando Sentinel (Oct. 17, 2017), <https://tinyurl.com/tn8xro7>. But nobody had told the state about this “learning center”—apparently for good reason. After her boys started attending this private school, their mother learned that one of their main teachers was just 21 years old and was not certified in special education. *Ibid.* The school lacked not only fire and building permits, but also basic safety features—including door locks and exit signs, which are crucial for students with autism. *Ibid.* Another school, purporting to serve students with autism, shut down abruptly after submitting more than \$4.5 million in false and inflated Medicaid charges for phantom one-on-one therapies that students never received. Annie Martin, *Parents Say Something Was Amiss at Closed School*, Orlando Sentinel (Feb. 15, 2017), <https://tinyurl.com/rwz2r93>.

Further, of the fifteen school voucher programs restricted to students with disabilities, 80% are not annually audited. GAO, *Parental Notification, supra*, at 15. For instance, Indiana’s \$1.3 million voucher program does not require oversight for the quality of education provided. McLaren, *Indiana Special-Education, supra*. Similarly, Mississippi’s voucher program “lacks the accountability structure needed to ensure that * * * students with disabilities are receiving the services they need and progressing toward their special needs goals.” Perf. Eval. & Expenditure Review, *Report to the Mississippi Legislature: A Statutory Review of Mississippi’s Education Scholarship Account Program v* (Dec. 2018), <https://tinyurl.com/y2gfw9b> (PEER, *Mississippi Program*); see also *id.* at 32–35. This is a problem: “The state does not know what special needs services [voucher] students receive and to what extent those services are provided by

the nonpublic school.” *Id.* at 31. Without elementary oversight, states and their taxpayers have “no clear picture” of how their money is being spent. NCD, *Implications for Students with Disabilities*, *supra*, at 55.

Yet even the fuzzy picture is plenty discouraging. Remarkably, fewer than half of private-school programs for students with disabilities have any requirements to employ teacher or staff who are special-education certified. GAO, *Parental Notification*, *supra*, at 13.

- Under Indiana’s voucher program, a private school may be designated as a provider of disability services—and qualify for accompanying school-voucher funding—without employing a single licensed special-education teacher. McLaren, *Indiana Special-Education*, *supra*.
- In Mississippi, a full third of voucher schools have no special-education teachers. PEER, *Mississippi Program*, *supra*, at 31.
- In Ohio, a private school claiming to serve students with autism abruptly closed after parents discovered that its teachers were not special-ed certified and its students were not receiving special-ed services. Lisa Reicosky, *Local School for Autistic Kids Abruptly Closes*, Canton Repository (May 4, 2012), <https://tinyurl.com/yykbzuar>.

Meanwhile, in Wisconsin, a private school assured a parent that her four children, all of whom had disabilities, would receive special-education services, including individualized education programs taught by certified special-education teachers. Robyn Powell, *New Report Shows How “School Choice” Puts Students with Disabilities at Risk*, Rewire (Dec. 13, 2017), <https://tinyurl.com/uolak94>. That was not the case: After the children enrolled, the

parent learned that the school would not adhere to an individualized education program and its teachers were not special-ed certified. *Ibid.*

C. Parents of students with disabilities are often not told and are otherwise unaware that their children will lose statutory protections in private schools.

Not only do parents struggle to learn how well or poorly participating private schools are educating students with disabilities, but too often parents are not told and otherwise do not learn that their children will be giving up many of their statutory rights, services, and support if they use a voucher or tax credit to enroll in a private school. Parents of students with disabilities commonly receive little information about what will change if their children enroll in private schools; instead, parents end up waiving their children’s most important rights unknowingly. See GAO, *Parental Notification*, *supra*, at 17–26; NCD, *Implications for Students with Disabilities*, *supra*, at 34, COPAA, *School Vouchers*, *supra*, at 4. Families with lower income or less education—the very families that private-school vouchers and tax credits purport to help the most—are especially likely to be caught off guard. See Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 *Notre Dame L. Rev.* 1413, 1437–1440 (2011), <https://tinyurl.com/tzczvqg>.

Unfortunately, no regulations require parents to be notified about any changes to rights or protections upon enrolling in a private school. GAO, *Parental Notification*, *supra*, at 24, 27–29; see Raj, *Coerced Choice*, *supra*, at 1056. As a result, states have failed to “fully inform” prospective private-school parents about the protections and services that their children would lose upon enrolling in a voucher or tax-credit program. Nat’l Ctr. for Learning

Disabilities, *Vouchers, Education Savings Accounts, and Tax Incentive Programs: Implications and Considerations for Students with Disabilities* 13–14 (2017), <https://tinyurl.com/yv54xzq> (NCLD, *Vouchers*). Parents are kept uninformed even about programs restricted to students with disabilities. See *id.* at 5. Despite the virtual guarantee that these students will lose significant rights under IDEA and other federal laws, 83% of students participating in a program restricted to students with disabilities still receive inaccurate information or no information about the inevitable loss of their IDEA rights. *Id.* at 25.

At best, disclosures to parents are haphazard. As one parent explained, “[p]arents find out the information that they need to make a choice * * * mostly [by] word-of-mouth” and from going “to advocates [and] to organizations.” NCD, *Implications for Students with Disabilities, supra*, at 51. Although some parents visit state and Department of Education websites, “most don’t know how to navigate” them or at most find limited information. *Ibid.*

Schools, for their part, often are cagey about what services they do and do not provide. One parent openly wished that private schools “would be upfront about which disabilities they serve.” *Id.* at 19. Another parent longed for a comprehensive list of participating private schools and “the type of disabilities” experienced by the students at each school. *Id.* at 21. Yet another parent warned that “[s]ome [private voucher schools] say they are flexible and willing to work with special needs students, but are not really, when it comes down to it.” *Id.* at 22.

There is even more that parents do not know and are not told. Parents have been surprised by extra charges: They “wish[] they had known that they would be charged for some of the special education services the private school was providing to their child.” *Id.* at 23. And by the teachers’ lack of training: Parents have been “surprised

to learn that teachers providing special education services to their child were not trained to provide those services.” *Ibid.* And, more generally, by their children’s loss of rights upon switching to private school: One parent said that “never in a million years” would she have thought “that in this private educational setting [her] child would not be protected by state and federal law.” Goldstein, *Hidden Costs*, *supra*.

Once enrolled in a private school that does not offer an appropriate education or otherwise protect their rights, students with disabilities have few good options. They can stay in the private school and continue to forfeit the right to a proper education. Or they can abruptly switch schools and disrupt their schooling further. GAO, *Parental Notification*, *supra*, at 23. Either way, the education and development of students with disabilities suffers.

D. Private-school voucher and tax-credit programs resegregate students with disabilities.

Because federal least-restrictive environment protections do not apply to private schools, voucher and tax-credit programs may lead to schools becoming resegregated on the basis of disability. See COPAA, *School Vouchers*, *supra*, at 17; Raj, *Coerced Choice*, *supra*, at 1062–1068. Although state education departments do not systematically collect data on where parents use their vouchers or tax credits, information gathered from families and advocates suggests that students with disabilities often use them to attend segregated schools. NCD, *Implications for Students with Disabilities*, *supra*, at 25, 51.

More generally, because private schools need not admit or support students with disabilities, private school is often not a real option for these students—especially those whose disabilities are more significant and thus require more expensive support. And as public-school funding is reassigned to private schools, public schools will

struggle to educate remaining students with disabilities in integrated, general-education classrooms. NCLD, *Vouchers, supra*, at 3. Among other problems: When public money follows a child from public school to private school, the public school's loss of that money is not fully offset by the need to educate one fewer student, because many of the public school's costs (such as salaries and training for special-education teachers and staff) are fixed. See Hensel, *Special Education, supra*, at 337. If these trends persist, then public schools will have fewer resources to ensure that students with disabilities receive a quality education alongside their peers.

* * *

In sum, public funds move from public schools to private schools, yet many if not most of these private schools need not admit or properly educate students with disabilities; those that do may segregate them. The countless students with disabilities who cannot participate in or will not benefit from these programs are left in depleted public schools unable to educate these students as effectively or in an environment as integrated. Ultimately, the growth of private-school voucher and tax-credit programs is "bringing us back to the days of excluding students with special needs from the mainstream; we are moving toward de facto segregation/separation." COPAA, *School Vouchers, supra*, at 17. And while Petitioners suggest that Montana's program would help students with disabilities, it is the Montana Supreme Court's decision that protects these students and safeguards decades of progress in recognizing, codifying, and enforcing their rights.

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted.

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