

PRIVATE SCHOOL PLACEMENT FOR THE TWICE  
EXCEPTIONAL CHILD UNDER THE INDIVIDUALS  
WITH DISABILITIES EDUCATION ACT

*Matthew Alessandri*

**Table of Contents**

I.	INTRODUCTION.....	489
II.	THE TWICE EXCEPTIONAL (2E) CHILD .....	496
III.	THE PROBLEM: IDEA’S BROAD LANGUAGE ON PRIVATE SCHOOL PLACEMENT.....	505
IV.	HOW THIS PROBLEM IMPACTS STATE SPECIAL EDUCATION LAW AND HOW THIS EFFECTS THE 2E CHILD .....	507
V.	WHY THE FEDERAL GOVERNMENT SHOULD PRESCRIBE PROCEDURES FOR PRIVATE SCHOOL PLACEMENT IN LIEU OF THE STATES .....	514
VI.	HOW TO CHANGE IDEA TO BETTER GUIDE STATES IN DETERMINING ACCEPTABLE PRIVATE SCHOOL PLACEMENT FOR DISABLED CHILDREN .....	518
VII.	CONCLUSION.....	520

I. INTRODUCTION

Equality is a fundamental principle protected by the United States Constitution and in the more than 200 years of jurisprudence of the U.S. Judicial System<sup>1</sup>. Despite this, mentally and physically disabled children

---

<sup>1</sup> U.S. Const. amend. XIV, § 1. (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of

490 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:1

constituted a class of individuals under-protected by the U.S. legal system for the better part of the nation's history<sup>2</sup>. Before 1975, disabled children had been entirely excluded from the United States public school system<sup>3</sup>. In that year however, Congress passed the Education for All Handicapped Children Act (EHA) as the first major piece of legislation aimed at ensuring equal educational opportunities for disabled children<sup>4</sup>. This Act was reauthorized and retitled The Individuals with Disabilities Education Act (IDEA) in 1990<sup>5</sup>. As noted by the U.S. Department of Education, "IDEA is a federal statute that makes available a free appropriate public education to eligible children with disabilities throughout the nation and ensures special education and related services to those children"<sup>6</sup>. This goal of the IDEA, the United States' most comprehensive and impactful federal statute concerning disabled children's education, is predicated upon ensuring disabled children educational opportunities that are equal to that of non-disabled children<sup>7</sup>. Congress states within the Findings Subsection of the statute itself:

"Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities<sup>8</sup>."

The later 20th and now 21st century have seen a revolution in rights

---

the laws.").

<sup>2</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1400-1482 (2004) (Referring to the congressional findings cited within the Individuals with Disabilities Education Act noting that in up until the mid-to-late 20<sup>th</sup> Century, "[disabled]children were excluded entirely from the public-school system and from being educated with their peers".)

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

<sup>4</sup> Education for All Handicapped Children Act, Pub. L. 94-142 (1975) is the predecessor to the Individuals with Disabilities Education Act. This act required all public schools accepting federal funds to provide equal access to education and one free meal a day for children with physical and mental disabilities. Public schools were required to evaluate disabled children and create an educational plan with parent input that would emulate as closely as possible the educational experience of non-disabled students.

<sup>5</sup> Individuals with Disabilities Education Act, 20 U.S.C. (2004).

<sup>6</sup> About IDEA, U.S. DEPT. OF EDU., <https://sites.ed.gov/idea/about-idea/>. (This is an excerpt from the governments webpage on IDEA. The "About Page", where this excerpt comes from, contains this pseudo mission statement of what the law is and what the law is designed to do.)

<sup>7</sup> *Id.*

<sup>8</sup> Every Student Succeeds Act, Pub.L. 114-95 (2015) (Excerpt from the 2015 Every Child Succeeds Act. The law is primarily concerned with public education as it pertains students in general, with provisions benefiting both non-disabled and disabled students. The act does go on to specifically address special education in part. Along with this sited language, the law also looks to address the disproportionate amount of bullying done to disabled students. Most importantly, the Act shows forward progress in the quest for obtaining the greatest results possible from disabled students. The federal government has more than a *de minimis* view of what disabled children are capable of and what they should be able to achieve with legal support.)

for disabled children<sup>9</sup>. IDEA is essential to this movement and is hopefully just one piece of what will be a long line of legislation aimed at protecting disabled children's right to an equal education. However, this law still needs refinement to ensure protection and further success for every disabled child in the United States<sup>10</sup>. Like other pieces of U.S. Congressional Legislation, such as the Civil Rights Act of 1964, continued revisions and amendments have done and would continue to do well in building on the foundational strength that IDEA provides to the class it is tasked with protecting<sup>11</sup>.

One such change that must occur for IDEA to ensure its goals are nationally met is to more clearly define the scope of what constitutes "private school placements by public agencies"<sup>12</sup>. Private school placement procedures are designed to give public schools the ability to enroll disabled children eligible for IDEA protection who cannot succeed in public school at a private school that meets his or her needs<sup>13</sup>. Unlike many of IDEA's comprehensive provisions, the statute is not sufficiently comprehensive to properly guide state law-makers to utilize and incorporate "private school placements by public agencies" to best benefit disabled children<sup>14</sup>. The statute in fact doesn't provide a definition or much supporting language for how "Private School Placement" should be utilized<sup>15</sup>.

Private school placement for a child unable to function in the public-school system is an essential tool under IDEA to ensure that a student in need of an alternate learning environment has his or her needs met and

---

<sup>9</sup> A 25 Year History of the IDEA, US Department of Education, (July 19, 2007), <https://www2.ed.gov/policy/speced/leg/idea/history.html>. (This article covers the first 25 years of IDEA, but looks back to the time before the law was enacted. It recounts the early to mid-1900's as a time of little to no understanding of disabled people by anecdotally introducing the story of a disabled man named Alan who was misunderstood and misdiagnosed for the better part of his life. It then addresses the initial federal response to the identified problem of how to handle disabled people, and homes in on the first 25 years of IDEA. The article recounts how these first 25 years of the Statute started with a national concern for young children with disabilities and their families, and has progressed to a point where there is a desire to help the disabled even more. The article takes an optimistic view about what the next 25 years has in store for disabled person's rights, especially in the context of education.). See also Every Student Succeeds Act cite 5.

<sup>10</sup> *Id.* (In its forecast for the next 25 years of IDEA, the US Department of Education acknowledges not only a need to further refine and properly implement IDEA, but to also focus on success for disabled children. The department goes as far as to point out that "our nation's ability to compete successfully in the global community depends on the inclusion of all citizens. We cannot afford to leave anyone out of our efforts.").

<sup>11</sup> See Civil Rights Act of 1964, Pub.L. 88-352 (1964). (The legislative history of the Civil Rights Act of 1964 includes four major amendments, the most recent being the Lilly Ledbetter Fair Pay Act of 2009. The history of the Civil Rights Act of 1964 is an example of legislation which has been amended to grow and strengthen since its inception.)

<sup>12</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1412 (2004).

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

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

<sup>15</sup> *Id.* § 1401.

492 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:1

receives a Free and Appropriate Public Education (FAPE) at state expense<sup>16</sup>. The term FAPE refers to special education and related services that have been provided at public expense which meet the standards of the State educational agency<sup>17</sup>. This includes an appropriate preschool, elementary school, and secondary school education in the State involved; and are provided in conformity with the Individualized Education Plan (IEP) required under Section 1414(d) of IDEA<sup>18</sup>. However, the lack of specificity regarding private school placement in the statute leaves the onus of determining private school placement procedures on the state<sup>19</sup>. This unfortunately has led some states to only allow a narrowed selection of private programs for disabled children to attend under IDEA that will also be funded by the state as opposed to the child's parent or guardian<sup>20</sup>. On the contrary, other states have broader selections of private schools available for disabled students under IDEA as a result of having in place less restrictive criteria for approving private schools<sup>21</sup>. The result of the inadequate selection of private schools in some states can result in disabled children attending a private school that is ill-equipped to provide

<sup>16</sup> *Id.* Definition of a FAPE can be found in § 1401 and is as follows:

“The term ‘free appropriate public education’ means special education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.”

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* § 1414 (d)(1) (“In general the term “individualized education program” or “IEP” means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes— (I) a statement of the child’s present levels of academic achievement and functional performance, (II) a statement of measurable annual goals, including academic and functional goals, (III) a description of how the child’s progress toward meeting the annual goals described in sub clause (IV) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals . . .”).

<sup>19</sup> Coleman Tucker, Geri, 6 Things to Know About Private Schools and Special Education, Understood.org, <https://www.understood.org/en/school-learning/choosing-starting-school/finding-right-school/6-things-to-know-about-private-schools-and-special-education>. (Understood.org is a nonprofit organization comprised of “15 founding nonprofit organizations, diverse in their specialties, but united by a common desire to help parents help children.” Their goal was and still is to bring parents a comprehensive resource that no single organization could provide on its own. This particular article covers six important topics concerning private school placements for disabled students. In its sixth point, the article addresses the decision of private school placement and how that decision is made by local public schools pursuant to guidance from state law. The piece actually points out how the public school may only place a child in a private school “approved by the state to educate students with a certain range of disabilities.”

<sup>20</sup> See Regulations of the Commissioner of Education, NY, part 200-201 (2016).

<sup>21</sup> See 603 CMR 23.00, MA (2014)

them with the FAPE that IDEA promises because they are forced to attend in the best school the state will approve for disabled children, not necessarily the school that will best facilitate their success<sup>22</sup>. This can cause some children to not receive the FAPE that they were removed from public school to receive and that they are legally entitled to<sup>23</sup>. Another result of this problem is that the varying standards in different U.S. States for seeking private school placement for disabled students results in unequal protection of disabled children under the law based on state of residence<sup>24</sup>.

These problematic results are highlighted by Twice Exceptional (2e) Students, a select group of disabled students who also happen to be highly gifted in one or more academic, artistic, or other areas<sup>25</sup>. These students are in fact part of a group which, to their detriment, is helping to expose this particular deficiency in IDEA<sup>26</sup>. The 2e child is a complex student with incredible skills and intelligence who is often held back by some unique disability or combination of disabilities<sup>27</sup>. The list of potential disabilities is long and highly inclusive<sup>28</sup>. The child's disability may be an anxiety disorder, AD/HD, dysgraphia, or slow processing speed<sup>29</sup>.

---

<sup>22</sup> *Andrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017) (In this most recent US Supreme Court special education case, the child, Andrew F., was experiencing major setbacks in public school due to his autism diagnoses. The public school didn't determine that there was any private school placement acceptable under Colorado law that could be provided to accommodate Andrew F. They instead recommended he stay in the public school that he was failing at. Andrew F.'s parents instead placed him unilaterally in a private school which they felt could, and eventually did, meet his needs. They then needed to seek reimbursement for tuition costs via the legal process because the school didn't place him at the private school themselves and therefore wouldn't pay for it.)

<sup>23</sup> *Id.*

<sup>24</sup> See Regulations of the Commissioner of Education (2016). See also 603 CMR 23.00 (2014). See also N.J.A.C. 6A:14, Special Education.

<sup>25</sup> Jennifer Job, Understanding Twice Exceptional Students, Learnnc.org. <http://www.learnnc.org/lp/pages/6960>.

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

<sup>27</sup> Bracamonte, Micaela, Twice-exceptional Students: Who Are They and What Do They Need, 2enewsletter.com, [http://www.2enewsletter.com/article\\_2e\\_what\\_are\\_they.html](http://www.2enewsletter.com/article_2e_what_are_they.html).

<sup>28</sup> *Id.* (The article discusses the 2e child in a variety of areas, but specifically recounts four cases of 2e children. Each of the four anecdotes, discussing students Julien, Simon, Cameron, and Alex, identifies the plight of a child with his own unique set of disabilities. Julien has AD/HD, generalized anxiety disorder, and a disorder of written expression. Simon has AD/HD and weaknesses in processing speed, visual/spatial reasoning, and math skills, plus low frustration tolerance. Cameron possesses dysgraphia and AD/HD. Alex has Executive Dysfunction and AD/HD, and also suffers from diabetes. These four accounts exemplify the range of disabilities which 2e children may have and exemplify how these children often have a collection of these issues.)

<sup>29</sup> *Id.* See also Kelly, Kate, Processing Speed: What You Need to Know, understood.org, <https://www.understood.org/en/learning-attention-issues/child-learning-disabilities/information-processing-issues/processing-speed-what-you-need-to-know> (Explanation of Processing Speed: "Processing speed is the pace at which you take in information, make sense of it and begin to respond. This information can be visual, such as letters and numbers. It can also be auditory, such as spoken language. Having slow processing speed has nothing to do with how smart kids are—

494 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:1

Other disabilities are listed in IDEA itself and include disorders such as Tourette Syndrome or Autism<sup>30</sup>. These students often need non-traditional educational environments, which can often be provided by niche private schools<sup>31</sup>. However, the codification of IDEA in some state's legislation provides a narrowed scope of allowable private schools for placement at state expense that often excludes these niche private schools<sup>32</sup>. For example, in New York, a disabled student can only be placed at a private school that meets the state's specific criteria set for private schools educating disabled children<sup>33</sup>. If a private school is well-equipped to handle a 2e child's particular conditions but the school doesn't meet New York's criteria for an approved private school under IDEA, the child won't be placed there at state expense. As a result, these niche schools which can handle 2e children are often not viable options for disabled students to attend unless their parent or guardian can pay the tuition cost (which often exceeds college tuition costs) because under New York State Education law, the public school district responsible for the child is only required to pay tuition for "state-approved" private schools<sup>34</sup>. This can make provision of a FAPE to 2e students much more difficult than provision to other disabled students<sup>35</sup>. This is in part due to the fact that a FAPE is intended to account for the child's abilities.<sup>36</sup> It also requires the child's education to enable forward progress in light of his or her capabilities<sup>37</sup>. The benchmark for progress is therefore not fixed, as it varies with the individual student, making FAPE provision a task of no small order, yet essential<sup>38</sup>.

As noted earlier, states design their own criteria to determine which private schools within their borders will be eligible for state-financed placement for children under IDEA<sup>39</sup>. For example, New York State

---

just how fast they can take in and use information.”).

<sup>30</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1401 (2004). Definition (3)(A) of section 1401 defines a child with a disability as a child “(1) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (2) who, by reason thereof, needs special education and related services.” This definition not only includes a wide range of specifically described disabilities, but also includes catch all language such as “other health impairments” to ensure a flexible and inclusive definition.

<sup>31</sup> Bracamonte, *supra* note 27.

<sup>32</sup> See Regulations of the Commissioner of Education, NY (2016).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Bracamonte, Micaela, Twice-exceptional Students: Who Are They and What Do They Need, 2enewsletter.com, [http://www.2enewsletter.com/article\\_2e\\_what\\_are\\_they.html](http://www.2enewsletter.com/article_2e_what_are_they.html).

<sup>36</sup> *Endrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Regulations of the Commissioner of Education, NY, *supra* note 33.

private school placements under federal special education law are governed under the state's own framework which includes rigid criteria for a school to be deemed "state approved" for children with disabilities<sup>40</sup>. Criteria include program information of the private school conforming with other New York State educational regulations and documentation of the school's ability to perform behavioral interventions on students which must be approved by the state's Department of Education.<sup>41</sup> All criteria must be met if the state is to "approve" and reimburse tuition for a particular private school<sup>42</sup>. This framework leaves many New York private schools outside the scope of schools for which the state will reimburse tuition<sup>43</sup>. If a child is sent to one of these schools (in New York or a similar school in another U.S. State), the placement must then be made by his or her parents, and the parents must bear the burden of tuition payments unless they can successfully utilize federally-mandated administrative resolution procedures known as Due Process Proceedings<sup>44</sup>. This is an issue that the Federal Legislature must overcome because IDEA wasn't passed to provide most disabled children with a FAPE but rather to provide all children with a FAPE<sup>45</sup>. State by state discrepancy in the enactment of special education law is problematic because disabled children's disabilities pose the same challenges to them regardless of the state in which they reside<sup>46</sup>. It's difficult to imagine how the plight of two children—one living in CA and the other in NY—would have dissimilar experiences. The symptoms the child experiences are just as severe, and major hurdles in the child's life will be present all the same<sup>47</sup>. Why then should the laws protecting these children be noticeably different in different states?

The IDEA is the parent document that fosters state-based special

---

<sup>40</sup> Regulations of the Commissioner of Education, NY, part 200.6 and 200.7 (2016) (New York State Special Education Law allows placement of disabled children into state approved private schools under part 200.6. The types of programs this encompasses is governed by part 200.7 which lists the requirements for private schools to meet so that they may gain "approved" status. Public schools may then receive state funding to place a disabled child at one of those schools.)

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Individuals with Disabilities Education Act, 20 U.S.C. § 1415 (b)(6), (2004) (Provides "an opportunity for any party to present a complaint: (A)with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and (B)which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint . . ."). See also 20 U.S.C. § 1415 (f)(1)(A) ("Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.").

<sup>45</sup> *Id.* § 1400 (d)(1)(A).

<sup>46</sup> Bracamonte, *supra* note 28.

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

education laws, so the more absolute and comprehensive it is, the better it guides the fifty states<sup>48</sup>. Though this parent document unfortunately fails to provide adequate guidance to the fifty states, it is responsible for establishing some private school placement procedures which guide them<sup>49</sup>. However, if the IDEA itself was clearer on how to utilize the asset of the private school for providing FAPE to disabled students, the federal legislature could eliminate the discrepancy that exists between states enforcing IDEA and ensure that all children IDEA intends to protect are protected. This would especially help better account for 2e children.

This Note will utilize the plight of the Twice-Exceptional student as a lens from which to analyze the issue. Next, the focus will shift to the IDEA itself, and its ill-advised, hands-off approach to guiding state legislatures on private school placement. Analysis of three Northeastern states' codification of Private School Placements under IDEA, New York, New Jersey, and Massachusetts, will put on display the state-to-state discrepancy in special education law resulting from an absence of adequate language on private school placement procedure in the federal statute<sup>50</sup>. Finally, I will propose an amendment to IDEA which will provide better Federal guidance to the states regarding private school placements in special education law. The amendment will: (1) set broader guidelines for which private schools will be approved by the state for disabled children; (2) address how and when a public school can recommend placement of a disabled child at one of these schools; and (3) establish a federal exception which allows a public school to place a child in an unapproved private school if it is in the child's best interest and reflected in the child's IEP. This will help eliminate the high degree of discrepancy in codified special education law amongst the states and help ensure that a child with disabilities, especially a 2e child, isn't at a disadvantage as a result of residing in one particular state as opposed to another<sup>51</sup>.

## II. THE TWICE EXCEPTIONAL (2E) CHILD

To develop an understanding of the 2e child, this Note will pose and answer the following five questions. These answers will help to put into perspective the 2e child, since it's through the perspective of how that child interacts with the special education system and the special education laws that the Note critiques IDEA. The questions will help define the 2e child and explain who that child is by providing a baseline example to

---

<sup>48</sup> Individuals with Disabilities Education Act, *supra* note 5.

<sup>49</sup> Individuals with Disabilities Education Act, *supra* note 12.

<sup>50</sup> See footnote 25.

<sup>51</sup> *Id.*

personalize this concept. Then, they will explain what it means to be a 2e child and what a 2e child needs. Finally, an answer will be posed to a key question tying together this note; why is private school beneficial to these children and how is the current legal structure of the special education system failing some of them? It is the answer to this final question that supports the main proposition this note makes regarding the need for a wider breadth of viable private school placements under IDEA.

*A. What is a 2e Child?*

A 2e child doesn't often fit the cookie cutter mold of a "disabled child" as set forth in IDEA<sup>52</sup>. Likewise, there is no cookie cutter mold for 2e children because despite having the same 2e label, they are all unique<sup>53</sup>. Each 2e child is noticeably different in terms of what exactly he or she possesses, but what these children generally have in common is two types of characteristics<sup>54</sup>. First, they possess one or more intellectual, creative, perceptual, or motor gifts<sup>55</sup>. These gifts may include exceptional problem solving and critical thinking skills, artistic ability, musical ability, reading comprehension skills such as reading speed and retention, and various others, which all may coincide with exceptional intelligence<sup>56</sup>. The other basic characteristic that all 2e children have in common is that they possess some type of learning disability or disability which, while not traditionally considered a learning disability, results in a difficulty learning<sup>57</sup>. This can be a diagnosed learning disability such as AD/HD, dyslexia, and dysgraphia, or be a consequence of another type of physical, mental, or emotional disability<sup>58</sup>. These other types of disabilities that can manifest themselves as learning impediments include

---

<sup>52</sup> Jennifer Job, Understanding Twice Exceptional Students, Learnnc.org, <http://www.learnnc.org/lp/pages/6960>. (Defining the twice exceptional student by anecdotally recounting the story of Jesse, a second-grader struggling in school and at least a year behind his peers in reading ability. "...Jesse's mom would watch him with his building blocks — his favorite toy — and she could not believe this was the same boy who was failing math and reading. He built complex structures and designed intricate cities, creating stories about them that were incredibly sophisticated. His creativity did not end with the blocks; Jesse was able to make three-dimensional sculptures out of clay that were better than middle-school children could do. How could such a skilled child be having so much trouble in school? Jesse is an example of a twice-exceptional child — a child with both gifts and a learning disability. Twice-exceptional children face many challenges academically. On one hand, they have difficulties in the classroom, perhaps in one subject, such as math, or across the board. On the other, they have gifts that may make them exceptional readers, artists, or critical thinkers.")

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Bracamonte, Micaela, Twice-exceptional Students: Who Are They and What Do They Need, 2enewsletter.com, [http://www.2enewsletter.com/article\\_2e\\_what\\_are\\_they.html](http://www.2enewsletter.com/article_2e_what_are_they.html).

but are not limited to anxiety disorders, Obsessive Compulsive Disorder, Autism, or Tourette Syndrome<sup>59</sup>. The 2e child will generally present with novel combinations of both gifts and disabilities<sup>60</sup>. For example, a 4th grade student may read at a 12th grade level but suffer from dysgraphia and be nearly incapable of writing, or a sixteen-year-old may have a brilliant political mind and be an exceptional writer yet lack the ability to do simple addition without a calculator and had only learned to tie his shoes at age thirteen<sup>61</sup>. Or in another case, a child may possess superior-level intelligence, a knack for higher-level science and abstract thinking, and high math aptitude but suffer from Attention Deficit Hyperactivity Disorder (ADHD)<sup>62</sup>. These are but some of many potential gift/disability combinations 2e children may possess and they exemplify just how unique these children are<sup>63</sup>.

### *B. Who is the 2e child?*

Before discussing a baseline case of a 2e child as an example from which to proceed in this note, it is worth noting that there are a variety of well-known, often revolutionary, human beings who themselves appear to fit into the 2e category<sup>64</sup>. 2e children do grow up, and 2e characteristics do not diminish with adulthood, and in fact, many successful 2e people

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

<sup>60</sup> *Id.* (“While 2e students have characteristics of both gifted and learning-disabled students, they also have their own unique characteristics.”).

<sup>61</sup> Rosen, Peg, Gifted Children’s Challenges With Learning and Attention Issues, Understood.org, <https://www.understood.org/en/friends-feelings/empowering-your-child/building-on-strengths/gifted-childrens-challenges-with-learning-and-attention-issues>.

(Discussing an example of a 2e student, the author offers an anecdote on Tessa, a fourth grader with both gifts and disabilities, “She’s a bright, insightful and enthusiastic fourth grader who is reading at a 12th-grade level. At the same time, she can’t pass her spelling tests, and writing is a huge struggle.” Also discussing the example of Jaime, a 16-year-old 2e student, “At 16, he knows everything about the Civil War, writes beautifully, and can talk endlessly about politics. Yet he needs a calculator to help him with even the most basic math. And he couldn’t tie his shoes until he was in seventh grade.”).

<sup>62</sup> Bracamonte, Micaela, Twice-exceptional Students: Who Are They and What Do They Need, 2enewsletter.com, [http://www.2enewsletter.com/article\\_2e\\_what\\_are\\_they.html](http://www.2enewsletter.com/article_2e_what_are_they.html). (Recounting the story of Cameron, a ten-year old with AD/HD. “Cameron’s AD/HD (hyperactive type) made it extremely difficult for him to sit still at a desk all day. Despite his challenges, Cameron’s superior-level intelligence, knack for higher-level science and abstract thinking, and high math aptitude helped him keep up and, at times, even exceed grade-level expectations. But because he was using all his mental and physical energy just to survive the school day, his gifts went unnoticed and unencouraged. When Cameron got home from school, he would fall apart, tell himself he was stupid, fear leaving home again, and cry himself to sleep.”)

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

<sup>64</sup> *See* Steven Spielberg Is Dyslexic: Director Discusses Managing Learning Disability, Huffington Post, September 25, 2012, [https://www.huffingtonpost.com/2012/09/25/steven-spielberg-dyslexic\\_n\\_1914316.html](https://www.huffingtonpost.com/2012/09/25/steven-spielberg-dyslexic_n_1914316.html).

have had a profound impact on society<sup>65</sup>. For example, Steven Spielberg, the amazingly gifted visual artist who has directed movies including *Indiana Jones* and *Jurassic Park*, has dyslexia.<sup>66</sup> Diagnosed only five years ago, Spielberg has been discussing his disability with the public confidently as of late<sup>67</sup>. He recalls being years behind other students in reading ability as he was growing up in school, and he attributes his love and work in the film industry to the bullying he endured growing up because of his dyslexia<sup>68</sup>. Spielberg is not only an example of a famous innovator with a disability but also an example of a product of the adversity of those individuals with disabilities. He is proof that disabilities can be traversed and can, believe it or not, be driving forces behind success<sup>69</sup>. In addition to Spielberg, famous scientist Albert Einstein, who is credited with developing the theory of relativity, and Sir Isaac Newton, who discovered the laws of gravity, are also believed to have been what we would now call 2e persons<sup>70</sup>. Researchers at both Cambridge and Oxford universities believe these scientists displayed signs of Asperger's Syndrome along with their gifted intellect.<sup>71</sup> As demonstrated by the success of these influential figures, 2e children possess tremendous potential to grow up to become revolutionary scientists or amazing artists in various fields of self-expression and entertainment, and the possibilities likely don't stop there<sup>72</sup>. Although

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* ("Steven Spielberg keeps his personal life under wraps, but the director recently opened up about his battle with dyslexia. Spielberg, who was diagnosed with the learning disability just five years ago, told Quinn Bradlee from the website Friends of Quinn (via LAT) that filmmaking helped him deal with the ailment.")

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

<sup>68</sup> Steven Spielberg Cites Bullying at School For Dyslexia As Catalyst For Movie Career, Contactmusic.com, September 27, 2012, [http://www.contactmusic.com/steven-spielberg/news/steven-spielberg-cites-bullying-at-school-for-dyslexia-as-catalyst-for-movie-career\\_3303158](http://www.contactmusic.com/steven-spielberg/news/steven-spielberg-cites-bullying-at-school-for-dyslexia-as-catalyst-for-movie-career_3303158). ("Five years ago, I was diagnosed as having been dyslexic for my entire life, which explained a lot of things - it was like the last puzzle part in a tremendous mystery that I've kept to myself all these years. In my case, I was actually unable to read for at least two years (in school). I was two years behind the rest of my class. I went through what everybody goes through: teasing. I had to go through that for a long time. The teasing led to a lot of other problems I was having in school. It all stemmed from the fact that I was embarrassed to stand up in front of the class and read." It was this, he said, that led him to film: "I got bullied, I dealt with it by making movies. Making movies was my cover-up . . . Movies really helped me, kind of saved me from shame, from guilt. Making movies was my great escape, that's really how I was able to get away from all of that. When I felt like an outsider, movies made me feel inside my own skill set.")

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

<sup>70</sup> Einstein and Newton 'had autism', BBC News, April 30, 2003, <http://news.bbc.co.uk/2/hi/health/2988647.stm>. (Discussing research done at Oxford and Cambridge indicating that both Einstein and Newton possessed fundamental qualities of Asperger's Syndrome, a lifelong brain development disorder that leads to problems with social skills, behavior, and coordination.)

<sup>71</sup> *Id.*

<sup>72</sup> *See Id.* *See also* Steven Spielberg Is Dyslexic: Director Discusses Managing Learning Disability, Huffington Post, September 25, 2012,

500 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:1

they are disabled in one way, they can grow up to thrive and be successful. However, this potential is often predicated on the support they receive from parents, teachers, and other important figures they interact with as they grow up.<sup>73</sup> This provides a compelling justification as to why it is essential IDEA serves these children in the best way possible.

For purposes of further analysis, consider the following hypothetical child. Call this hypothetical child X. X is a fourteen-year-old 8th grader who was born in and lives in New York. In most ways, he is just like all other kids. He likes computers, playing drums, and most of all, learning. He is incredibly smart with an IQ of 140 and often impresses adults with his ability to communicate and have meaningful discussion way beyond his years. He reads at a level beyond most college-educated adults, finishing novels at a rapid rate. This profile would seem to reflect a child with top grades who is on the fast track to a top college. However, this is not the case for Child X, because this is only half of his profile. Difficult to detect on the surface, Child X has a collection of disabilities which interfere with his gifts. He suffers from an anxiety disorder, Obsessive Compulsive Disorder, dysgraphia, and Tourette Syndrome<sup>74</sup>. These disabilities combine to pose a challenge to X far beyond anything school could ever impose. He is missing school often because of his poor mental and physical state brought on by such a vicious combination of disabilities. Despite X's intelligence, his grades in public school are declining. Attempts by the school's Special Education Department to accommodate X by providing an Individualized Education Plan pursuant to IDEA have proven ineffective, for the school is just not equipped to provide X with an educational environment in which he can succeed. One of the smartest kids in the 8th grade, X is failing. His gifts are being overlooked swallowed up by the black hole that is the combination of his disabilities and an unaccommodating school environment. All X wants is to learn and feel comfortable at a school. The public school has reached the conclusion that X needs private school placement. However, the next step of finding the right school to meet X's unique needs is the most difficult. To do this properly, the scope of private schools for his public-school district to consider needs to be at its broadest. As mentioned, this is not something all states have made possible in their codification of IDEA at the present time, and unfortunately for X, he lives in New York, a state where this issue of narrowed private school selection for state-expensed education of a disabled child is on display<sup>75</sup>.

---

[https://www.huffingtonpost.com/2012/09/25/steven-spielberg-dyslexic\\_n\\_1914316.html](https://www.huffingtonpost.com/2012/09/25/steven-spielberg-dyslexic_n_1914316.html).

<sup>73</sup> Job, *supra* note 52.

<sup>75</sup> See Regulations of the Commissioner of Education, NY (2016).

*C. What does it mean to be a 2e child?*

Unfortunately, to be a 2e child often means to be misunderstood<sup>76</sup>. This misunderstanding is a result of the challenge that exists in identifying these students<sup>77</sup>. Schools, teachers, parents, and peers all must step up to this challenge of recognizing and accepting 2e students<sup>78</sup>. They are often noticed for their disability and the resulting behavior that comes with it instead of for their giftedness<sup>79</sup>. Inversely, they may be noticed for their gifts while the disabilities they need addressed remain undetected<sup>80</sup>. Either scenario likely results in a situation where teachers, peers, and even parents see half of the picture of what these children experience in life<sup>81</sup>. Misunderstanding carries many other implications for 2e students<sup>82</sup>. Aside from their gifts going unnoticed or their disabilities unmanaged, 2e students often encounter social issues<sup>83</sup>. These children often have trouble exhibiting the appropriate social skills when with their peers and need support from parents and teachers in order to maintain social relationships<sup>84</sup>. Positive social interaction with peers plays an important role in intellectual growth of school-aged children, and 2e children are no exception<sup>85</sup>.

A key characteristic of a 2e student is one that if properly accounted for by educators and parents is essential for overcoming the hurdles of disability<sup>86</sup>. This characteristic is that these students have unique environmental needs<sup>87</sup>. 2e children also need a comfortable and safe

<sup>76</sup> Jennifer Job, Understanding Twice Exceptional Students, Learnnc.org, <http://www.learnnc.org/lp/pages/6960>.

<sup>77</sup> *Id.* (“Identifying twice-exceptional children is more of a challenge than identifying students with one exceptionality, especially in the occurrence of children whose abilities and disabilities mask one another.”).

<sup>78</sup> See Rosen, Peg, Gifted Children’s Challenges with Learning and Attention Issues, Understood.org, <https://www.understood.org/en/friends-feelings/empowering-your-child/building-on-strengths/gifted-childrens-challenges-with-learning-and-attention-issues>.

(Discussing students whose giftedness masks their disabilities and students whose disabilities mask their giftedness.).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (“Twice-exceptional kids often feel like they don’t fit into one world or another. They may not have the social skills to be comfortable with the students in their gifted classes. They may also have trouble relating to students in their remedial classes.”)

<sup>84</sup> Jennifer Job, Understanding Twice Exceptional Students, Learnnc.org, <http://www.learnnc.org/lp/pages/6960> (“Twice-exceptional children need support maintaining social relationships. While these children can display the appropriate social skills and are more sensitive to nonverbal cues than other children with learning disabilities, they still may have trouble exhibiting the appropriate social skills when with their peers.”).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See Bracamonte, Micaela, Twice-exceptional Students: Who Are They and What Do They

502 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:1

environment inside and outside school where their disabilities are understood, their methods of coping with those disabilities are supported, and where they are made to feel as if they are defined by their personalities and gifts, not by their disabilities<sup>88</sup>. However, their unique environmental needs and the misunderstanding that surrounds these children make meeting their needs difficult<sup>89</sup>.

*D. What do 2e children need?*

2e children need the same things that all children need, mainly to be in an environment where they are understood and feel comfortable to express their talents and interests while not hiding or feeling ashamed of their disabilities<sup>90</sup>. However, providing this environment for 2e children is more complicated and requires more individualization in curriculum and educational accommodations and support than for non-disabled children<sup>91</sup>. The school educating a 2e child must understand the following: (1) what the child's gifts and disabilities are; (2) the type of environment the child is comfortable in and needs to succeed; and (3) how to utilize the child's gifts and school's environment in the most effective way as to teach this particular child.<sup>92</sup>

To provide a school environment that will best allow a 2e child with a unique set of gifts and disabilities to thrive first requires identification of these particular gifts and disabilities<sup>93</sup>. This can be done by diagnosing the child's disabilities and noticing and acknowledging his or her particular talents<sup>94</sup>. This diagnosis may be done when the child is young, and he or she may enter school with his or her parents capable of pointing this out to teachers<sup>95</sup>. However, early pre-school detection is often not the case, so the identification process of twice exceptionality during early school years is vital.<sup>96</sup> This process leading up to the initiation of a formal diagnosis can be initiated by anyone who knows the child, including parents, teachers, or doctors<sup>97</sup>. The longer a child remains in an environment in which he or she is unsuccessful academically and feels uncomfortable, the more he or she may fall behind both academically and

---

Need, 2enewsletter.com, [http://www.2enewsletter.com/article\\_2e\\_what\\_are\\_they.html](http://www.2enewsletter.com/article_2e_what_are_they.html).

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

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

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See Id.* *See also* Jennifer Job, Understanding Twice Exceptional Students, Learnnc.org, <http://www.learnnc.org/lp/pages/6960>.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

socially in school, and this is obviously something those around the child, specifically parents, doctors, and teachers, should avoid<sup>98</sup>.

Once twice exceptionality is identified, a child should be classified as needing special education services, and an IEP should be created with the caveat that it will need to be amended until it is as effective and sufficiently tailored to the particular child. Once these exceptionalities are identified and IEP created, a school must understand how to make the environment comfortable for the child and accommodate that child to the best of its abilities by implementing accommodations and strategies into the child's IEP<sup>99</sup>. These IEP strategies are crucial for helping the child fit into the school's environment and potentially even alter aspects of the school's environment to better fit around the disabled child<sup>100</sup>. A thorough IEP that is adhered to by teachers and administrators can ensure that a 2e child is well-suited to succeed<sup>101</sup>. Finally, teachers must learn how to best convey information and stimulate the child so he or she may learn effectively and incorporate this into the IEP so that these strategies will remain on record as the child grows older and has new teachers and moves through grades. These steps are essential to the success of disabled children, but none are easy<sup>102</sup>.

*E. Why is private school often a place for these children?*

The precise combination of accommodations, understanding, and support 2e children need from their school, teachers, and peers may be incredibly challenging to thoroughly understand<sup>103</sup>. Public schools and teachers may actually develop this full understanding of a 2e child yet lack the skills or resources, such as teachers with training, skills and experience required for educating students who have certain disabilities<sup>104</sup>. Private school placement becomes a necessary alternative for these children when the public school fails to provide an environment that is sufficiently adequate to facilitate the learning of the particular child by fully accounting for his or her unique learning style and academic abilities.<sup>105</sup> While finding the proper private school is a challenging task

---

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See *Andrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017) (“...the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.”).

<sup>102</sup> *Id.*

<sup>103</sup> Rosen, Peg, Gifted Children's Challenges With Learning and Attention Issues, Understood.org, <https://www.understood.org/en/friends-feelings/empowering-your-child/building-on-strengths/gifted-childrens-challenges-with-learning-and-attention-issues>.

<sup>104</sup> *Id.*

<sup>105</sup> Coleman Tucker, Geri, 6 Things to Know About Private Schools and Special Education, Understood.org,

504 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:1

in itself, private schools often have vastly different structures than public schools and immerse students in non-traditional (traditional being the common public school model) environments unlike that of the public school.<sup>106</sup> A non-traditional private school environment, such as a school with small class sizes and specially trained teachers, is often exactly what a 2e child needs because the public school environment doesn't always result in success for the 2e child.<sup>107</sup> Another benefit of choosing a private school is that many of these institutions have significantly lower student-teacher ratios than public school special education classes, thereby providing less congested classrooms in which teachers can focus more attention on individual 2e students<sup>108</sup>. There are many types of private schools in the United States<sup>109</sup>. Take New York for example. It has private schools for children with specific disabilities such as autism or hearing impairments, small private programs featuring single digit student to teacher ratios, and even schools with one-on-one instruction that simultaneously still provide well-developed social structures where students can make and spend time with friends and engage in after school activities like clubs.<sup>110</sup> Private schools often have unique systems of learning and the skills to accommodate a wide breadth of students<sup>111</sup>. While the perfect private school may not exist for each of these individual

---

right-school/6-things-to-know-about-private-schools-and-special-education (“When a school district determines that a child is eligible for special education, the district will also decide which learning environment and special services are appropriate for him . . . For many students with learning and attention issues, the most appropriate placement is in a general education classroom in their local public school. But in some cases the district will agree to what’s called an out-of-district placement. That’s when the district you reside in agrees to pay for the cost of sending your child to a school that is approved by the state to educate students with a certain range of disabilities.”).

<sup>106</sup> See New York School for the Deaf website, “About” page, <http://www.nysd.net/about.html> (“Founded in 1817, the New York School for the Deaf, the second oldest school for the deaf in the United States, is a private non-profit charitable 501(c)3 organization operated in cooperation with the New York State Education Department.”). See also Rebecca School website, <https://www.rebeccaschool.org/> (Rebecca School is a therapeutic day school for children ages 3 to 21, promoting the education and development of children with neurodevelopmental delays of relating and communicating, including autism spectrum disorders.”). See also The Seal Program Great Neck website, <http://sealprogram.weebly.com/>, (“This alternative program offers support and encouragement changing struggle into success. SEAL provides differentiated instruction in a small student-to-teacher ratio in an effort to assist with credit recovery. This allows students to graduate with their peers, on time.”)See also Fusion Academy Woodbury website, <https://www.fusionacademy.com/fusion-campus-location/woodbury/welcome/> (“Fusion Woodbury is much more than an accredited private middle and high school for grades 6-12 – it’s a revolutionary community of learning where positive relationships and one-to-one classrooms unlock the academic potential in every student – and create opportunities for emotional and social growth.”).

<sup>107</sup> Coleman Tucker, *supra* note 105.

<sup>108</sup> Bracamonte, *supra* note 87.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

students, it seems likely that an effective option will almost always be available if the scope of private schools to choose from is at its broadest. However, the major legislative problem of overly broad language within IDEA concerning private school placement often gets in the way of joining the 2e student with that great or even perfect option because it results in a narrowing of that scope of schools<sup>112</sup>.

### III. THE PROBLEM: IDEA'S BROAD LANGUAGE ON PRIVATE SCHOOL PLACEMENT

Disabled children entitled to IDEA protection cover a wide spectrum<sup>113</sup>. This is seen in IDEA itself, which provides an expansive definition of a "Child with a Disability"<sup>114</sup>. While a disability under IDEA may be obvious to those around a child, like blindness, deafness, or autism, other disabilities still covered by IDEA, such as emotional disturbances, severe learning disabilities, or anxiety disorders may not be as obvious<sup>115</sup>. Unfortunately, 2e children commonly experience the latter type of disability<sup>116</sup>. The existence of this wide spectrum of children with disabilities has been reiterated in recent United States Supreme Court decisions concerning special education, most recently in *Andrew F. v. Douglas County*<sup>117</sup>. Chief Justice Roberts's opinion consistently refers to the "unique needs" of a child and how the IDEA is designed to account for the wide spectrum on which students with disabilities exist<sup>118</sup>. With the wide range of disabilities children experience, it would only make sense for the law to ensure a broad range of potential solutions for these children to obtain a better education. This is certainly of relevant interest for the government, as a recent study analyzing the 2014-2015 school year identified 13% of all students as being classified as qualifying for

---

<sup>112</sup> See footnote.

<sup>113</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1401 (2004) (Definition (3)(A) defines a child with a disability as "a child (i)with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii)who, by reason thereof, needs special education and related services.).

<sup>114</sup> *Id.*

<sup>115</sup> Bracamonte, *supra* note 87.

<sup>116</sup> *Id.*

<sup>117</sup> *Andrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017).

<sup>118</sup> *Id.* at 994, 999. ("The individual education plan (IEP) is the means by which special education and related services are tailored to the unique needs of a particular child under the IDEA." Chief Justice Roberts citing 20 U.S.C.A. § 1414(d)(1)(A)(i)(I-IV). "The IDEA requires participating States to educate a wide spectrum of handicapped children, and the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." Chief Justice Roberts citing 20 U.S.C.A. § 1400 et seq.).

506 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:1

IDEA protection<sup>119</sup>. An effective means of ensuring a higher quality education for these children protected under IDEA may be to make placement in private school more readily available as an option where a child's performance and success fails to reflect his or her true potential due to a poor fit between the public school setting and the child's unique needs and talents<sup>120</sup>.

However, as noted earlier, IDEA doesn't proscribe much in the way of federal regulation as to how the private school system as applied to students with disabilities should be utilized, and this is a problem<sup>121</sup>. The IDEA predominantly focuses on the goals of the Act and how the federal government will help the states reach these goals, but with regard to private school placement, IDEA takes a hands-off approach<sup>122</sup>. Although the federal government provides financial support to the states for educational purposes, state-funded private school placement for students with disabilities in which the state utilizes these federal funds is a process left for the states to determine<sup>123</sup>.

Essentially, the federal government diagnosed the problem, which is that disability is a national issue, and educating disabled children is of great importance, but a daunting task. They acknowledge that part of the solution is that a child may need private school placement paid for by the state for a disabled child to receive a proper education under IDEA. Nevertheless, the federal government leaves the determination of an appropriate solution to the discretion of fifty different state legislative bodies, and that's all before the decision-making process of what the child

---

<sup>119</sup> Children and Youth with Disabilities, National Center for Education Statistics, (May 2017) [https://nces.ed.gov/programs/coe/indicator\\_cgg.asp](https://nces.ed.gov/programs/coe/indicator_cgg.asp). (By 2014–15, the number of children and youth served under IDEA was 6.6 million, or 13 percent of total public-school enrollment. Data for these students was collected from all 50 States and the District of Columbia.)

<sup>120</sup> Coleman Tucker, Geri, 6 Things to Know About Private Schools and Special Education, Understood.org, <https://www.understood.org/en/school-learning/choosing-starting-school/finding-right-school/6-things-to-know-about-private-schools-and-special-education>. (“But in some cases the district will agree to what’s called an out-of-district placement. That’s when the district you reside in agrees to pay for the cost of sending your child to a school that is approved by the state to educate students with a certain range of disabilities. This happens when the district agrees that your child’s local public school can’t meet his needs.”)

<sup>121</sup> *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(2), (2004) (Stating the purpose of the act is “to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families.”) *See also* Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a) (“A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions . . .”). (Note that the act, and specifically this subsection sets out that states must provide “FAPE” to disabled students, but the act allows full flexibility for state enforcement, including guidelines for private school placement).

<sup>122</sup> *Id.* at § 1412.

<sup>123</sup> *Id.* at § 1412(a).

needs occurs within a disabled child's actual home school district<sup>124</sup>. There is one issue, ensuring all disabled children in this country, regardless of race, sex, IQ, or disability, are properly educated. Why then does this country have fifty different solutions to that one national issue? This number of different solutions is in itself a problem as it situates students with disabilities differently under the U.S. federal law based upon the state in which a child happens to reside with his family.

#### IV. HOW THIS PROBLEM IMPACTS STATE SPECIAL EDUCATION LAW AND HOW THIS EFFECTS THE 2E CHILD

IDEA grants the states flexibility to implement procedures, including those on private school placement, which will allow them to comply with federal law<sup>125</sup>. Subchapter II of the statute provides the pertinent language that establishes how states go about doing this<sup>126</sup>. Section 1411 of Subchapter II provides that federal funding from the Secretary of the Interior will be made available as grants to all states to help ensure compliance with IDEA<sup>127</sup>. Any state will receive this grant once they submit "a plan that provides assurances to the Secretary that the State has in effect policies and procedures" which ensure that the state's policies and procedures meets the conditions of Section 1412<sup>128</sup>. Key to these conditions are FAPE provision and "Child Find," a term related to identifying and evaluating all potential children in need of IDEA protection<sup>129</sup>. After the state itself receives funding from the Secretary of the Interior, local educational agencies within the state, in other words public school districts, must submit a plan to the state's educational agency of its own compliance pursuant to Section 1413 of

---

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at § 1411(a)(1) ("The Secretary shall make grants to States, outlying areas, and freely associated States, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with this subchapter.").

<sup>128</sup> *Id.* at § 1412(a) ("A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:").

<sup>129</sup> *Id.* at § 1412(a)(1) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school. *Id.* at § 1412 (a) (3) ("Child Find: All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.).

508 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:1

Subchapter II<sup>130</sup>. If the local educational agency meets these conditions, they then will receive portions of the federal grants given to the state by the Secretary to ensure education for all disabled children under the law<sup>131</sup>.

This structure of federal funding that states receive pursuant to Sections 1411-1413 of Subchapter II shrouds the provision on private school placement found in Section 1412(a)(10)(B)<sup>132</sup>. The subsection provides that children can be:

“...provided special education and related services, in accordance with an individualized education program (IEP), at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.<sup>133</sup>”

The following subchapter is the one that establishes standards to which these private schools must comply; however, the federal law totally defers to the states on providing substantive guidance<sup>134</sup>. IDEA simply provides that the state will “determine whether such schools and facilities meet standards that apply to State educational agencies”, these standards being established by the states<sup>135</sup>. Therefore, as state special education law is written, private school placement provisions are in the hands of state lawmakers<sup>136</sup>.

---

<sup>130</sup> *Id.* at § 1413(a) (“A local educational agency is eligible for assistance under this subchapter for a fiscal year if such agency submits a plan that provides assurances to the State educational agency that the local educational agency meets each of the following conditions . . .”).

<sup>131</sup> *Id.* (“Consistency with State policies the local educational agency, in providing for the education of children with disabilities within its jurisdiction, has in effect policies, procedures, and programs that are consistent with the State policies and procedures established under section 1412 of this title.”).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at § 1412 (a) (10) (B) (“(B)Children placed in, or referred to, private schools by public agencies (i) In general: Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State. (ii) Standards: In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies.”).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

*A. New York Special Education Law*

New York State has a 228-page codification of IDEA and other education laws for disabled children known as the “Regulations of the Commissioner on Education”<sup>137</sup>. These regulations are passed down from the State’s Education Department and are drafted pursuant to IDEA Section 1412 so that the state of New York can receive federal funding for provision of a FAPE to disabled children<sup>138</sup>. The regulations are split into two parts: Part 200: Students with Disabilities; and Part 201: Procedural Safeguards for Students with Disabilities Subject to Discipline<sup>139</sup>. Part 200 contains the relevant provisions on private school placement discussed in this note<sup>140</sup>. In early sections of the regulations, New York defines what will be an “Approved Private School” as “a private school which conforms with the requirements of Federal and State laws and regulations governing the education of students with disabilities, and which has been approved by the commissioner for the purpose of contracting with public schools for the instruction of students with disabilities.”<sup>141</sup> This definition emphasizes how the private school placement criteria are contingent upon the state’s discretion, which thereby permits the state to define for itself what constitutes an acceptable manner of complying with the federal law<sup>142</sup>. In the case of New York State, the Education Department has full control over the selection of schools it will approve and fund for purposes of providing potential placement options for students with disabilities.<sup>143</sup> However, when considering 2e children and the extent of the diversity of their student profiles, it is quite possible that this scheme may inadvertently fail to include the most beneficial schools for them.

New York State law dictates the schools in which students with disabilities can be placed for provision of a FAPE in compliance with IDEA. Section 200.6 of New York State’s Regulations of the Commissioner on Education contains more private school placement language<sup>144</sup>. The Section begins by outlining four concrete requirements to be included in documentation by local educational agencies seeking

---

<sup>137</sup> See generally Regulations of the Commissioner of Education, NY (2016).

<sup>138</sup> See Individuals with Disabilities Education Act, 20 U.S.C. § 1412.

<sup>139</sup> Regulations of the Commissioner of Education, NY, *supra* note 115.

<sup>140</sup> *Id.*

<sup>141</sup> Regulations of the Commissioner of Education, NY (2016) at § 200.1 (“Approved private school means a private school which conforms with the requirements of Federal and State laws and regulations governing the education of students with disabilities, and which has been approved by the commissioner for the purpose of contracting with public schools for the instruction of students with disabilities.”).

<sup>142</sup> See *Id.*

<sup>143</sup> See *Id.*

<sup>144</sup> *Id.* at § 200.6.

510 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:1]

state funds for use in placing disabled students at private schools under IDEA: (1) current individual evaluations done of the student; (2) a current IEP; (3) certification that the student is of school-age and has a disability or combination of disabilities, and has further documented that the nature or severity of the student's disability is such that appropriate public facilities for instruction are not available; (4) a statement that the placement is for the entire school year.<sup>145</sup> These provisions are acceptable and are like record-keeping items for public school administrations. Provisions 1-3 pertain to records kept for all disabled students who fall under IDEA's classification, and provision 4 is a declaration by administrators<sup>146</sup>. However, this Section contains provisions that are problematic in that they give the NYS Department of Education the ability to intervene and overrule a decision made by a local educational agency<sup>147</sup>.

The criteria New York State sets forth for approval of private schools for educating disabled children in compliance with IDEA are found in Section 200.7<sup>148</sup>. Subsection (a) sets out general provisions by which private schools may be eligible for approval by the Commissioner to receive public funds for the education of students with disabilities<sup>149</sup>. These general provisions require a private school in New York to meet all subsequent criteria in Section 200.7 if it is to be considered for state funding for purposes of providing an appropriate education for disabled students<sup>150</sup>. If a private school meets all of the criteria, its application may be approved by New York State and the school put on the list of state approved private schools for the teaching of disabled children under IDEA<sup>151</sup>. Key requirements for private schools to meet for approval under New York law include but are not limited to: (1) submission of program information forms and documentation of regional need, with sufficient evidence, to establish that the proposed program will serve only those students who, because of the nature or severity of their disability, would require a separate facility; (2) submission of budget or financial statement information, including evidence that the school has enough capital or other financial resources, other than State or local sources of revenue, to be able to operate for at least one year; (3) a fire safety check by the New York State Division of Fire Prevention; (4) at least one onsite program review visit by program or fiscal staff of the Education Department; and (5) submission for approval of the school's procedures regarding

---

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at § 200.7.

<sup>149</sup> *Id.* at § 200.7(a).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

behavioral interventions, including, if applicable, procedures for the use of aversive interventions.<sup>152</sup>

Beyond these five listed criteria, private schools seeking “approval” from New York State must also meet a host of other requirements<sup>153</sup>. For example, all professional instructional and supervisory personnel at private schools providing public placements for disabled children must have appropriate certification for teaching disabled children.<sup>154</sup> This may be an issue, as a private school may not be permitted “approval” if some of its staff members lack proper certification, regardless of whether those staff members are capable of handling the children<sup>155</sup>. Another requirement is that instruction given at the private school must be substantially equivalent in terms of content and quality of curriculum compared to the instruction given at the local public school<sup>156</sup>. While this is not a terribly challenging requirement, it presents yet another hurdle that can derail a private school in its search to obtain state approval.

If these criteria and others are met, a private school can be approved as a “State Approved Private School” designated for private school placement of disabled children by the discretion of the Commissioner of Education for the state.<sup>157</sup> However, the extensive list of requirements and the discretionary power given to the state’s Commissioner of Education has translated into only about 121 of 1780 private schools in New York receiving approval of the state’s Department of Education.<sup>158</sup> It seems likely that many well equipped private schools that in fact possess adequate resources to properly accommodate the unique needs and talents of 2e children despite unfortunately falling outside the scope of New York’s private school placement procedures.

#### *B. New Jersey State Special Education Law on Private School Placement*

To illustrate the extent of potential discrepancy between special education law of different states, this section will compare New Jersey law to New York law. These bordering states possess some similarities in their schemes for private school placement in their special education

---

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See Education Statistics for New York State 2016-2017, New York State Education Department, <http://www.p12.nysed.gov/irs/statistics/public/>. See also 853 Programs Serving Students with Disabilities, New York State Education Department, <http://www.p12.nysed.gov/specialed/privateschools/853-statewide.htm>.

512 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:1]

law<sup>159</sup>. New Jersey has approved private schools like New York except they are called “Receiving Schools”<sup>160</sup>. New Jersey sets out its own criteria for how a private school may become eligible to receive “Receiving School” status from the New Jersey Department of Education<sup>161</sup>. These criteria include similarities to New York law, such as providing the State Department of Education with their school program and facility information as well as a survey of need indicating the number, age range, and types of students with disabilities to be served by the program<sup>162</sup>. One noticeable divergence between the legislation of the two states is that New Jersey has less stringent requirements on staffing certification at private schools which will serve disabled children<sup>163</sup>. While New York requires all staff at the school to be certified with proper special education certifications and licenses, New Jersey’s regulations provide that such certification may not be required for certain staff members<sup>164</sup>.

Other differences between New York and New Jersey law on private school placement of children with disabilities makes New Jersey a more effective state in helping these children. The key difference in the two state’s laws is highlighted by a provision in the New Jersey law in section 6A:14-6.5<sup>165</sup>. This Section allows students with disabilities to be placed in private schools that are not specifically approved by the state for the education of students with disabilities.<sup>166</sup> “Receiving schools,” on the other hand, must be approved for educating students with disabilities, so this provision enables a child to be placed at one of numerous other private schools in the state which do not require approval to receive the “receiving school” designation.<sup>167</sup> To place a disabled child in one of these non-receiving private schools, the local school district that is responsible for developing the Individualized Education Plan for the student must petition the Commissioner of the New Jersey Department of Education<sup>168</sup>. The public school must attest to the fact that the particular non-receiving school is the most appropriate place for the child to have his or her IEP appropriately fulfilled<sup>169</sup>. This particular language in New Jersey law is effective for providing FAPE to 2e children because it gives the local school district the opportunity to identify a private

---

<sup>159</sup> *See generally* N.J.A.C. Special Education.

<sup>160</sup> *Id.* at 6A:14.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 6A:14-6.5.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

school which may best fit the student, for as previously mentioned, 2e children often don't need the types of schools for disabled children as those approved under state law.<sup>170</sup> Instead, 2e children often simply need an alternative environment school, which wouldn't qualify for "receiver" status in New Jersey or "approved" status in a state like New York.

### *C. Massachusetts State Special Education Law*

The framework of Massachusetts special education law is similar to that of New York and New Jersey in that the state approves private schools it designates as appropriate for the purpose of teaching of children with disabilities<sup>171</sup>. However, unlike New York law yet similar to that of New Jersey, Massachusetts law does have provisions that permit a public school special education department to place a child with a disability falling within IDEA's classification system in a private school that has not received formal approval by the state, provided that legitimate justification for the placement exists<sup>172</sup>. If the IEP team were to only find an unapproved school in the state that they believe capable of educating the disabled child in compliance with IDEA, the team need only include that school as the placement on the child's IEP and provide documentation regarding the program to the Massachusetts Department of Education; additionally, the team must include in the documentation an explanation regarding why the placement in the particular program is in the child's best interest<sup>173</sup>.

### *D. Why the New Jersey and Massachusetts Private School Placement Procedures Work Better for 2e Children*

The Massachusetts and New Jersey special education systems prefer state-approved private school placement for disabled children just like the New York system does. However, unlike New York, Massachusetts and New Jersey have explicit procedures for the placement of a student at unapproved private school, which will still be paid for by the state<sup>174</sup>. Since 2e children rarely fit the typical mold of a disabled child as defined by the federal law, the flexibility provided by New Jersey and Massachusetts law provides public schools seeking proper private school placement for 2e children with a wider array of potential programs at

---

<sup>170</sup> Bracamonte, *supra* note 31.

<sup>171</sup> See 603 CMR 23.00, MA (2014).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See Regulations of the Commissioner of Education, NY (2016). See also 603 CMR 23.00, MA (2014). See also N.J.A.C. 6A:14, Special Education.

which to place students with a wide array of abilities and learning styles<sup>175</sup>. Such flexibility is pivotal because even if a school is formally designated as appropriate for education of children with certain disabilities as a result of meeting state criteria, it is often the case that such school may nonetheless fall short of a 2e child's needs<sup>176</sup>. Having a scheme like New York's in which children are first placed out of public school into an "approved" private school incorrectly treats disabled children as though they are all the same, promoting the idea that the designated list of schools New York has made is presumably sufficient to account for the entire population of disabled children. However, as demonstrated, such a restricted list is arguably insufficient, especially given the diversity of 2e children<sup>177</sup>. Because of the clear need for flexibility in school placement options for 2e children, a change in the federal law that promotes a system like that of Massachusetts is necessary<sup>178</sup>.

#### V. WHY THE FEDERAL GOVERNMENT SHOULD PROSCRIBE PROCEDURES FOR PRIVATE SCHOOL PLACEMENT IN LIEU OF THE STATES

Allowing individual states to determine the absolute scope of private school placements that public schools can use for disabled children is a fundamental flaw in IDEA. While the law could set firm and effective guidelines maximizing the scope of schools allowable to ensure that disabled children and especially 2e children throughout the U.S. are bolstered by IDEA's private school placement procedures, it instead leaves fifty states to each develop their own system<sup>179</sup>. Stronger and more unified national special education law would grow from Congressional legislation that proscribes more efficient utilization of the private school system at state expense. A 2e child would be presented with more options such that he or she would have the opportunity to attend the school program that most appropriately accommodates his or her unique set of needs and abilities. This could change the entire narrative for the 2e student, taking him or her from a misunderstood underachiever to a top of the class student on track to attend college and have a successful future.

Nonetheless, despite the clear benefits that could be derived from implementing a system of uniformity of state education law, there may exist potential drawbacks to placing the decision regarding a system for private school placement in the federal government's discretion. One

---

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *See* 603 CMR 23.00, MA (2014).

<sup>179</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a).

potential problem is that in placing this decision in the federal government's discretion, Congress would be changing IDEA in a way that infringes upon the concept of Federalism<sup>180</sup>. By proscribing a federal system of private school placements, the states would be stripped of part of their power to manage the education of disabled children within their borders. For such a shift to be constitutional, the federal government must have a legitimate interest in the education of disabled children that can justify abrogating the state's power to control the system of private school placement for disabled children<sup>181</sup>. And the federal government arguably does have such a legitimate interest<sup>182</sup>. Equal protection of disabled people has historically been a prevailing government interest<sup>183</sup>. The stream of congressional legislation which has been implemented since the later 1900s to protect people with disabilities demonstrates the extent to which such interest has been and remains deeply embedded in the U.S.'s laws.<sup>184</sup> Protecting a historically burdened class is best left to the federal government because this task is one of a national scope<sup>185</sup>. This idea has been prevalent in the United States since the post-civil war Reconstruction Amendments enacted in the 1860's and has been a key federal focus in the century and a half since.<sup>186</sup> A plethora of Supreme Court cases assessing the constitutionality and effectiveness of Congressional Legislation has followed civil rights for over a century and

<sup>180</sup> U.S. Const. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This amendment gives rise to the principle of Federalism and states' rights.)

<sup>181</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997) (enumerating the "Congruence and proportionality test" to determine whether or not congressional action which may abrogate states' rights is justifiable under Congresses 14<sup>th</sup> Amendment powers). See also *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (note the courts emphasis on a decision binding all 50 states).

<sup>182</sup> See Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (c)(6), (2004). ("While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.").

<sup>183</sup> *Id.*

<sup>184</sup> See Education for All Handicapped Children Act, Pub. L. 94-142 (1975). See also Individuals with Disabilities Education Act, 20 U.S.C. § 1400-1482 (2004) and Title 34 CFR Parts 300 and 301 (2006) (additional IDEA Regulations). See also Every Student Succeeds Act, Pub.L. 114-95 (2015).

<sup>185</sup> See generally *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

<sup>186</sup> See U.S. Const. amend. XIII: ("§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction; § 2. Congress shall have power to enforce this article by appropriate legislation."). See also U.S. Const. amend. XIV § 1 cite 1. See also U.S. Const. amend. XV: § 1 9The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. § 2. The Congress shall have power to enforce this article by appropriate legislation.)

516 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:1

a half.<sup>187</sup> A more recent example can be seen in the area of gay rights<sup>188</sup>. In the 2015 decision of *Obergefell v. Hodges*, the United States Supreme Court ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>189</sup> Prior to *Obergefell*, the power to recognize same-sex marriages had been concentrated in individual state legislation<sup>190</sup>. Though many states have modified their laws to allow same-sex marriage in the preceding years, some states have declined to do so, causing a major national discrepancy on how homosexual people, a protected class according to the United States Supreme Court, were treated<sup>191</sup>. The Supreme Court's response was a necessary action by the Federal Government to ensure fundamental rights were protected regardless of the state in which a homosexual individual resided<sup>192</sup>. In the same light, if Congress were to take the power of establishing the private school placement system away from the states by an amendment to IDEA, such a change is arguably consistent with our government's historical use of its constitutional power<sup>193</sup>. Furthermore, it would help ensure equal treatment under the law for disabled children, especially 2e children, regardless of the state in which they reside. Thus, as demonstrated by the benefits arising from shift in

<sup>187</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding public accommodations that are segregated according to racial classifications must be "separate but equal.") See also *Shelley v. Kraemer*, 334 U.S. 1 (1948), holding State court enforcement of a racially restrictive housing covenant constitutes state action that violates the Equal Protection Clause of the Fourteenth Amendment. See also *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding separate educational facilities based on racial classifications to be inherently unequal and in violation of the Equal Protection Clause of the Fourteenth Amendment).

<sup>188</sup> See *Romer v. Evans*, 517 U.S. 620 (1996) (Regarding whether a state can enact a law that prohibits state and local governments from enacting anti-discriminatory legislation to protect homosexual persons without violating the Equal Protection Clause of the Fourteenth Amendment). See also *Lawrence v. Texas*, 539 U.S. 558 (2003) (Regarding whether the constitution protects the right of consenting adults to engage in intimate sexual contact in the privacy of their own homes, including homosexual activities). See also *United States v. Windsor*, 133 S. Ct. 2675 (2013) (Examining the constitutionality of a federal statute excluding same-sex couples from the definition of marriage for purposes of federal benefits). See also *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (Regarding whether states must issue marriage licenses and recognize lawful out-of-state marriages for same-sex couples).

<sup>189</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (holding that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Also held that states must recognize lawful same-sex marriages performed in other States.).

<sup>190</sup> *Id.*

<sup>191</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding a federal statute excluding same-sex couples from the definition of marriage for purposes of federal benefits is unconstitutional. Establishes homosexuals as a protected class under United States Law. See also Merriam Webster Dictionary Definition of Protected Class ("a group of people intended by a legislature to benefit from the protection of a statute").

<sup>192</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

<sup>193</sup> *Id.*

decision-making power from the states to the federal government in the wake of *Obergefell*, it seems that eliminating the discrepancy between the ways in which states treat disabled children could be accomplished most efficiently through federal action<sup>194</sup>.

Another argument against giving federal lawmakers the power to dictate private school placement procedures is the notion that the states are better positioned to determine the proper system of private school placement for disabled children. This argument can be approached from two angles, the first being that the state has superior knowledge of the educational needs of its own citizens to that of the federal government, and the second being that it should be up to the states to delineate the criteria of private schools used for educating children under IDEA. The first approach is moot. A child impacted by disabilities is an issue of national prevalence.<sup>195</sup> No state is considerably more impacted by citizens with disabilities than any other, further proof that this is a national issue, rather than one that varies among the states.<sup>196</sup> Moreover, the states and the federal government are equally situated to make these decisions due to the fact that the education of disabled children is a national issue, and the dominant legislation and legal opinion already comes from the federal government<sup>197</sup>. An approach favoring the federal government as the decision maker in regard to private school placement of disabled children is essential to ensure a nationally standardized approach to special education because it consolidates fifty decisions on methods of private school placement into one. Education is an area that the federal government has shown extreme interest in, evidenced by its legislative history<sup>198</sup>. As a result, the legal body of protections for

---

<sup>194</sup> See *Id.* (note how prior jurisprudence and legislation failed to establish nation-wide recognition of gay marriage, and an affirmative ruling by the United States Supreme Court, a branch of U.S. Federal Government, was needed to finally assure the right to gay marriage to all people in all fifty states).

<sup>195</sup> See School-Aged Children with Disabilities in U.S. Metropolitan Statistical Areas: 2010, United States Census Bureau (November 2011). The census notes that out of 53.9 million school-aged children (aged 5 to 17) in the U.S. civilian noninstitutionalized population, about 2.8 million (5.2 percent) were reported to have a disability in 2010. "With a disability" according to the census means "having vision, hearing, cognitive, ambulatory, selfcare, or independent living difficulty." Note that classification under the census as having a disability is a considerably narrower than IDEA classification. See also *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176, 179 (1982). (referring to Congress's federal effort to enact legislation due to its perception that a majority of handicapped children in the United States were being totally excluded from schools or were dropping out early).

<sup>196</sup> *Id.* (2010 US Census data indicates that the percentage of disabled students in any given state ranges from a low of 3.6% in Utah and New Mexico and is as high 7.8% in West Virginia and 8.4% in the District of Columbia. Note this number is 9.8% in Puerto Rico.).

<sup>197</sup> See generally Individuals with Disabilities Education Act, 20 U.S.C. § 1400-1482 (2004). See also Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (c)(6). See also Every Student Succeeds Act, Pub.L. 114-95 (2015). See also *Endrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017).

<sup>198</sup> See Education for All Handicapped Children Act, Pub. L. 94-142 (1975). See also

children seeking education has steadily grown<sup>199</sup>. This steady stream of action in both education and disability law from the federal government cements the idea that these areas are of genuine national interest, not just of state interest<sup>200</sup>.

The second approach to the question of whether it should be up to the states to decide what types of private schools they provide in their states is not an actual issue with the proposed change to IDEA in this note. States should be granted discretion in regulating the private schools within their borders. However, at the same time, the states must not instill excessively rigid limitations as to criteria for determining whether a school is an appropriate placement option for a child with disabilities. Consider the discrepancy between the New York and New Jersey codification of the IDEA private school placement provisions analyzed earlier<sup>201</sup>. It's supported that allowing the states to dictate private school placement procedure causes a fundamental fracture in what should be a federally secure and robust special education system that is effective and uniform in all manners, private school placement of disabled children included. The change to private school placement within IDEA that I am proposing wouldn't prevent the states from having the freedom to select the private schools it sees fit; this proposed change would instead ensure that certain schools that could be the most appropriate option for children with particular learning needs remain accessible to disabled children and especially 2e children seeking to assert their legal right to a FAPE at the state's expense.

#### VI. HOW TO CHANGE IDEA TO BETTER GUIDE STATES IN DETERMINING ACCEPTABLE PRIVATE SCHOOL PLACEMENT FOR DISABLED CHILDREN

By proposing this amendment to IDEA, this Note two goals; (1) to provide a nationwide standard for private school placement procedure so that no one state treats disabled children differently in this regard than another, and (2) to ensure that the guidelines for placing a disabled student in a private school under IDEA maximizes the scope of private schools that a local educational agency can select. To accomplish these goals, the amendment must eliminate the current deference IDEA gives to the fifty states in delineating their own standards that a private school

---

Individuals with Disabilities Education Act, 20 U.S.C. § 1400-1482 (2004) and Title 34 CFR Parts 300 and 301 (2006) (additional IDEA Regulations). *See also* Every Student Succeeds Act, Pub.L. 114-95 (2015).

<sup>199</sup> *See Id.*

<sup>200</sup> *See Id.*

<sup>201</sup> *See* footnote 174.

must meet in order to become a designated placement for a disabled child by his or her local educational agency under the law and entitled to state funding.<sup>202</sup> The federal law must instead empower local educational agencies to choose the private school they feel is best capable to ensure the student's success if private school placement is necessary, even if the private school is unapproved by the State Department of Education as an official school for disabled children. Such a change would be monumental for 2e children since they are considered to be "disabled children" by legal definition, but often are not in need of the same academic environments and special education services that state approved private schools for handicapped students provide<sup>203</sup>. This change would also better empower the actual public school and its special education experts who educate and supervise the child on a day-to-day basis to make a placement decision without any barriers from a state education department, a body of decision makers who most likely have never interacted with the child.

The relevant language in the federal statute that should be amended can be found in §1412(a)(10)(B), titled "Children placed in, or referred to, private schools by public agencies".<sup>204</sup> Part 1 of this Section should remain the way it is currently.<sup>205</sup> However, part two on "Standards" for private schools used for placement by public agencies should be changed to the following:

In cases as described in clause (i), the State educational agency shall determine a list of schools and facilities that meet standards that apply to State educational agencies for placement of disabled children. This list of schools approved by the State educational agency shall serve as a guide for local educational agencies but will not be a finite list of placements for disabled children. Should a school not on the State educational agency's list be deemed the proper placement by the local educational agency and be noted in the child's IEP, nothing in this chapter or any other will prevent the child from being placed there at state expense.

This noted amendment will expand potential private school placements options under IDEA by making it so that specific schools "approved" by the state for disabled children are not the only placement choices local educational agencies can make without petitioning the state. With this amendment, local educational agencies seeking to place a disabled child in a private school at the state's expense can use the list of "approved" schools as a guideline in making their decision but can chose a private school not on that list if it is determined to be the best option for the child and is implemented into the IEP accordingly. Allowing local

---

<sup>202</sup> See footnote 14.

<sup>203</sup> Bracamonte, *supra* note 35.

<sup>204</sup> Individuals with Disabilities Education Act, 20 U.S.C. §1412(a)(10)(B).

<sup>205</sup> *Id.*

520 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 25:1

educational agencies to place a disabled child they are responsible for in unapproved private schools if necessary, without having to petition the state would help make the special education system more effective for disabled children and especially 2e children. Instead of a public school having to favor and attempt to exhaust the list of “approved” private schools for education of disabled children, the school can instead place a 2e child in a private school that most closely suits his or her unique needs immediately and as early on as possible in the child’s schooling.

VII. CONCLUSION

Disability is often a part of the human condition. It may have taken until the later 20th century for the United States to assert the rights of disabled people in this country, but the progress made in the past fifty years has created a brighter future for everyone struggling with a disability<sup>206</sup>. Particular emphasis over that time on disabled children and the role that the education system plays in their lives has been pivotal in ensuring that they receive equal protection of the law<sup>207</sup>. This emphasis has helped numerous children who in an earlier time may have been lost within an educational system that did not even account for them because of their disabilities.<sup>208</sup> However, as the United States has made great strides in this area, educational, legal, and medical professionals have all learned about the complexities of living with a disability along with the challenges associated with helping a disabled child find his or her place in the United States Educational System<sup>209</sup>.

Despite being a difficult task, IDEA makes clear that no disabled child is to be left behind as was the case before the Education for All Handicapped Children Act was passed.<sup>210</sup> Disabled or not, a child is entitled to the full protection that the law provides and deserves an equal education to that of any other child.<sup>211</sup> This is a challenge for the Federal, State, and local educational agencies throughout the United States, and as well as this challenge is met regarding some disabled children, it isn’t met in all cases<sup>212</sup>. 2e children are a particular and identifiable group within the class of disabled children who are unfortunately still not accounted for properly by IDEA.

---

<sup>206</sup> US Department of Education, *supra* note 9.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Individuals with Disabilities Education Act, *supra* note 2.

<sup>211</sup> *Id.*

<sup>212</sup> *See* footnote 10.