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Legal Brief

Espinoza v. Montana and the Unintended Implications for Special Education and Parental Rights

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On June 30th, 2020, the Supreme Court ruled 5–4 to allow states to publicly fund private religious education through school vouchers in the case known as *Espinoza v. Montana Department of Revenue* (2020; Liptak, 2020). While supporters of private education consider this a victory (Whelan, 2020), others feel that public dollars should stay with public education (Chávez, 2020). For families of students with disabilities, this ruling begs the question: If private schools accept public funding, to what extent should private schools be held accountable for the education of students with disabilities whom they serve?

For nearly 50 years, the precedent has been that publicly funded institutions must not discriminate from providing services to people with disabilities (Office for Civil Rights, 2020). Section 504 of the Rehabilitation Act (1973) mandated that any organization which receives federal funding must not discriminate based on disability. While not directly dealing with education, the passage of this law ensured that public schools could not discriminate against students with disabilities from being served in public schools even though special education services were not yet formally established until 1975 with the Education for All Handicapped Children Act (PL 94-142). Now known as the Individuals with Disabilities Education Improvement Act ([IDEA], 2004), this legislation mandates the right to a free appropriate public education (FAPE) for students with disabilities (U.S. Department of Education, n.d.). This right was challenged in 1989 when a boy with multiple severe disabilities was denied public education under the premise that he was not “capable” of benefitting from special education services. In this landmark case, *Timothy v. Rochester, New Hampshire*, (1989), the U.S. Court of Appeals for the First Circuit adopted the “zero-reject” policy and ruled in favor of Timothy receiving free appropriate public education. The court ruled that “capacity to benefit” was not a prerequisite for eligibility of services (*Timothy v. Rochester*, 1989).

IDEA and Section 504 only applied to public settings and public schools until 1990, when the Americans with Disabilities

Act ([ADA], 1990) was passed. The ADA expanded the expectations set forth in the 1973 Rehabilitation Act by outlawing discrimination against persons with disabilities at public and private institutions, unless associated with a church (Civil Rights Division, 2020). The ADA further required public and private institutions to provide reasonable accommodations to persons with disabilities.

Traditional public and public charter schools must comply with the IDEA, but private schools do not. For example, private schools are not held to a “zero-reject” policy established in the *Timothy* case. While private schools are not allowed to discriminate on the basis of disability, they are allowed to deny enrollment to students who do not meet certain admission requirements. This creates disproportionality within the private school system. Additionally, while private schools must participate in Child Find and identify students with disabilities, they do not have to offer a full range of services or a continuum of placements to meet the least-restrictive-environment mandate.

The Trump administration is an outspoken advocate of school choice and using public dollars to fund private education through programs like school vouchers (Green, 2019). However, it does not clarify that parents of students with disabilities waive their rights for due process once they enroll their children in a private school. On the other hand, if a parent disagrees with a public school regarding special education services for their child, the procedural safeguards of the IDEA protect parents by outlining processes for dispute resolutions.

The Council for Exceptional Children (CEC) maintains the position that school vouchers are “contrary to the best interests of children and youth and their families, the public-school system, local communities, and taxpayers” (2017, p.1). This position is held due to many reasons, including no guarantee of FAPE, the lack of accountability in the private school system, and loss of protections for families served under the IDEA. The absence of due process rights especially becomes a problem if students with disabilities receive ineffective or even harmful

education experiences. While parents can sue a public school under IDEA, it can be challenging to bring a private school to court.

In the case of *Espinoza v. Montana* (2020), three mothers were denied using their school voucher funds towards a private religious school. These mothers sued on the basis of religious discrimination and the Supreme Court ruled in their favor and held that this violation invalidated the entire school voucher program. In other words, states must allow school vouchers to be used towards private religious education or the entire voucher program is invalidated. While this ruling grants parents the right to choose to use school vouchers towards any private school of their choice, religious or not, the irony is that parents of students with disabilities lose rights and protections under the IDEA when they use school vouchers.

If trends in special education law follow similar patterns in civil rights law, it is possible that students with disabilities may gain protections in private education. Just as the ADA promises nondiscrimination in public and private settings, except churches and private clubs, parents of students with disabilities should have extensive protections whether their child is in a public or private setting. Private schools funded with taxpayer funds should be held equally accountable for the education of students with disabilities as public schools.

Until then, it is crucial for educators and parents to be informed on the differences between public and private education for students with disabilities. Teachers and administrators should be prepared to answer questions asked by parents, and parents should carefully weigh risks and benefits before moving their child from a public school to a private school. It is also important to recognize and respect the perspective of families who feel their child with a disability may be better served in a private school setting. The *Andrew v. Douglas County* (2017) decision is a perfect example of a family with a child with a disability that experienced success with a private school.

In conclusion, here is a list of resources for school personnel and families to learn more about the IDEA in relation to private schools:

- **CEC's Position on School Vouchers**
Council for Exceptional Children, 2020
<https://exceptionalchildren.org/sites/default/files/2020-11/Public%20Funds%20-%202020.pdf>
- **6 Things to Know About Private Schools and Special Education**
Understood for All Inc., 2020
<https://www.understood.org/en/school-learning/choosing-starting-school/finding-right-school/6-things-to-know-about-private-schools-and-special-education>

- **The Individuals with Disabilities Education Act: Provisions Related to Children with Disabilities Enrolled by their Parents in Private Schools**
U.S. Department of Education, 2011
<https://www2.ed.gov/admins/lead/speced/private-schools/idea.pdf> ■

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