

IN THE

Supreme Court of Appeals of West Virginia

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STATE OF WEST VIRGINIA, KATIE SWITZER and JENNIFER COMPTON,

*Petitioners,*

—v.—

TRAVIS BEAVER and WENDY PETERS, DAVID L. ROACH,  
State Superintendent of Schools, L. PAUL HARDESTY,  
President of the West Virginia Board of Education,

*Respondents.*

On Appeal from the Intermediate Court of Appeals of West Virginia  
No. 22-ICA-1 (consolidated with No. 22-ICA-3)  
Circuit Court of Kanawha County, West Virginia  
Civil Action Nos. 22-P-24, 22-P-26

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**BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS  
AND ADVOCATES, DISABILITY RIGHTS OF WEST VIRGINIA  
AND NATIONAL DISABILITY RIGHTS NETWORK  
IN SUPPORT OF RESPONDENTS AND AFFIRMANCE**

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## STATEMENT OF INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Council of Parent Attorneys and Advocates (COPAA)* is a national not-for-profit organization for parents of children with disabilities, their attorneys, and advocates. COPAA supports individuals with disabilities, their parents, and advocates, in efforts to safeguard their civil rights under federal laws, including the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504). COPAA has filed as *amicus curiae* in federal courts, including the United States Supreme Court and in state courts.

The *National Disability Rights Network (NDRN)* is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

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<sup>1</sup> Pursuant to Rule 30 W.Va. Rules App. Proc., *amici* state that: (A) there is no party, or counsel for a party in the pending appeal who authored the *amici* brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *amici* and its members.



*Disability Rights of West Virginia (DRWV)* is the federally mandated Protection and Advocacy (P&A) in West Virginia for all persons with disabilities. DRWV represents families and children with disabilities in West Virginia's public schools.

As these descriptions reflect, *amici* seek to ensure that children with disabilities receive the educational supports and services to which they are entitled by federal law and which they need to become productive members of society and participate fully in their communities. Since private schools provide few if any protections for students with disabilities, *amici* are concerned about the effects of private-school voucher and tax-credit programs at issue in this case.

*Amici* filed the required Notice to parties pursuant to Rule 30 (b) W. Va. Rules App. Proc.. The Motion is filed with this prospective brief of *amici*.

### **SUMMARY OF ARGUMENT**

Before the enactment of Section 504 and the Individuals with Disabilities Education Act (IDEA),<sup>2</sup> students with disabilities were regularly excluded from public schools. Even when allowed to attend, they were denied the education and supports they needed in order to make effective educational progress. Some students were confined to institutions and others were stuck in segregated classes or neglected until many dropped out. As then Representative Gerald Ford observed, for students with disabilities, lost education and wasted potential were “grim and depressing” facts of life. 121 Cong. Rec. H25537 (July 29, 1975).

Section 504 and IDEA, together with the Americans with Disabilities Act (ADA), have transformed education for students with disabilities; they are now entitled to receive a free appropriate public education and to be educated *with* their nondisabled peers. Integration of students with disabilities benefits *all* students. The West Virginia Constitution provides that “the

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<sup>2</sup> For simplicity, IDEA is used to refer to both IDEA and its predecessor statutes.

Legislature shall provide, by general law, for a thorough and efficient system of free schools.” W. Va. Constit., art. XII, § 1. That provision applies to all students regardless of disability status. “A thorough and efficient system of free schools” requires access for students with disabilities to all schools that receive public funds. But West Virginia’s H.B. 2013, W. Va. Code § 18-31-1, et seq., would erode the decades of progress these statutes have made by redirecting public money away from public schools which are required to include, accommodate, and serve students with disabilities, and instead directing funds to private schools that routinely deny them the protections provided to them by law in public school and even completely exclude students with disabilities from their schools.

First, while H.B. 2013 *does* bar private schools from discriminating on the basis of race, *see* W. Va. Code §18-31-11(a)(4), it *does not* protect against discrimination on the basis of disability. Specifically, H.B. 2013 does not require a participating school or educational provider to change its admission policy or curriculum. *See* W. Va. Code § 18-31-11(d). Thus, monies are funneled to private schools that create entirely segregated programs, serving only students without disabilities and completely excluding students with disabilities.

Second, even when private schools accept students with disabilities, they regularly fail to serve students with disabilities adequately. Many of these private schools do not employ any teachers or aides licensed to educate students with disabilities, and otherwise fail or refuse to offer them the support and services that they need to thrive. Some are quick to discipline or expel students for behavior caused by or relating to their disabilities. And the approximately \$4,300 provided for by the voucher (the Hope Scholarship) is simply inadequate to sufficiently fund necessary programming for students who require any significant special education or related services.

In short, West Virginia’s H.B. 2013 is in violation of West Virginia’s Constitution, as it redirects public funds to private entities unbound by federal laws that have guarded the rights of students with disabilities for generations. This Court should uphold the permanent injunction to prevent public funds from being spent on private schools that exclude or discriminate against students with disabilities and fail to provide them the services they need to thrive.

## **ARGUMENT**

### **I. H.B. 2013 Strips Away Essential Protections and Services That Public Schools Are Required To Provide Students with Disabilities**

Before Congress enacted IDEA and Section 504, “the educational needs of millions of children with disabilities were not being fully met.” 20 U.S.C. § 1400(c)(2). Many states allowed public-school districts to exclude children with disabilities.<sup>3</sup> As a result, “one out of every eight of these children [with disabilities] was excluded from the public school system altogether,” and “many others were simply ‘warehoused’ in special classes or were neglectfully shepherded through the system until they were old enough to drop out.” *Honig v. Doe*, 484 U.S. 305, 309 (1988) (citing H.R. Rep. No. 94-332, p. 2 (1975)). Parents, in turn, were told that their children would never have “meaningful lives.”<sup>4</sup>

By the early 1970s, 2.5 million children with disabilities were receiving an inappropriate education, and “1.75 million were receiving *no* educational services at all.”<sup>5</sup> After being neglected by or excluded from schools, many children were then committed to state institutions and housed

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<sup>3</sup> U.S. Dep’t of Educ., *Thirty-Five Years of Progress in Educating Children with Disabilities Through IDEA* 3 (2010), <https://files.eric.ed.gov/fulltext/ED515893.pdf>; see also Mitchell L. Yell et al., *The Legal History of Special Education: What a Long, Strange Trip It’s Been!*, 19 Remedial & Special Educ. 219, 220 (1998) (collecting cases).

<sup>4</sup> S. Rep. 94-168, p. 9 (1975).

<sup>5</sup> H.R. Rep. No. 94-332, p. 11 (1975).

in “subhuman conditions.”<sup>6</sup> To fight this discrimination and segregation, parents and advocates fought to ensure that children with disabilities got a meaningful, enforceable educational right. And as Congress investigated and prepared to legislate, it learned from educational experts that all children—even those with the most significant disabilities—“are educable.”<sup>7</sup> Given an appropriate education, students with disabilities can be “ensur[ed] equality of opportunity, full participation, independent living, and economic self-sufficiency.”<sup>8</sup>

As lawmakers began to better understand the lives of people with disabilities, Congress enacted IDEA, Section 504, and Title II of the ADA to respond to the exclusions and failures by providing rights, protections, and remedies to children with disabilities attending public schools. These laws have enabled millions of students to be educated at neighborhood schools *with* adequate support and services, and *among* their peers without disabilities. But when students with disabilities use vouchers like the Hope Scholarship at private schools, most of these protections evaporate, leaving students with disabilities and their parents by the wayside.

**A. Students with Disabilities Depend on Legal Protections To Ensure That They Are Properly Educated.**

The federal statutes protecting students with disabilities reflect what Congress, the courts, and educational experts recognize: Students with disabilities face unique challenges and have unique needs. They benefit from attending integrated neighborhood schools in classrooms alongside their peers without disabilities but may require additional support and services to access

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<sup>6</sup> S. Rep. 94-168, p. 9 (1975).

<sup>7</sup> Extension of the Education for the Handicapped Act: Hearings Before the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor, 94th Cong., 1st Sess. 40 (1975) (testimony of Frederick Weintraub).

<sup>8</sup> *Id.*

those schools. And with the right protections and services, even students with the most significant disabilities can and do achieve a great deal.

IDEA ensures that public-school students receive a free appropriate public education in the least restrictive setting by requiring that schools provide the additional supports and services that students require. 20 U.S.C. § 1400(d)(1). Likewise, Section 504 and the ADA prohibit discrimination on the basis of disability in programs or activities that receive federal funds from the U.S. Department of Education. 29 U.S.C. § 794, 34 C.F.R. §104.4(a), 42 U.S.C. §§ 12131(1) & 12132, 28 C.F.R. § 35.130(a). These laws ensure that students with disabilities have access to and are accommodated and served in their local public schools, and have an opportunity to achieve the same potential as their non-disabled peers.

West Virginia public schools are required to comply with IDEA, Section 504, and ADA. In contrast, private schools are not required to comply with IDEA and many are not subject to either ADA or Section 504. This means that upon entering a private school system, students with disabilities lose access to the free appropriate public education (FAPE) required by IDEA as well as the antidiscrimination laws that have been designed to eliminate discrimination against students with disabilities

**B. West Virginia's H.B.2013 Allows Private Schools To Discriminate Against Students with Disabilities.**

H.B.2013 excludes many students with disabilities because it allows private schools that receive Hope Scholarships the ability to deny students with disabilities the rights that they would receive in public schools.

**1. H.B. 2013 Allows Private Schools That Receive Hope Scholarships the Ability To Deny Admission to Students with Disabilities.**

H.B. 2013 explicitly allows private schools that receive Hope Scholarships to exclude all students with disabilities, regardless of the students' needs. The statute holds discrimination based on race to be unacceptable for schools that receive public funds; it specifically bars private schools from discriminating on the basis of race, *see* W. Va. Code §18-31-11(a)(4). Yet, H.B. 2013 accepts discrimination based on disability in private schools that receive public funds. Specifically, H.B. 2013 does not require a participating school or educational provider to “alter its creed, practices, admissions policy, hiring policy or curriculum so as to accept eligible recipients whose parents pay tuition or fees from a Hope scholarship account.” *See* W. Va. Code § 18-31-11(d).

There are already numerous examples of students with disabilities who have been excluded from voucher programs because private schools will not admit students with disabilities. For example, a Michigan private school rejected an eighth-grade student diagnosed with moderate dyslexia, dyscalculia, and ADD because the school felt it could not “provide the curriculum necessary to assure [the student’s] successful transition” to the school. *Winkler v. Marist Fathers of Detroit*, No. 323511 (Mich. Ct. App. Nov. 12, 2015). In Texas, a child with disabilities was rejected by thirteen different private schools; the reasons for the denials were not provided.<sup>9</sup> A parent in Florida could not access that state’s voucher program because they could not find a private school within driving distance to accept her son, who had autism, ADHD, and a seizure disorder, even though the schools had never even met him.<sup>10</sup>

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<sup>9</sup> See Jill Ament, *Proposed Vouchers Wouldn’t Reach Most Special Needs Students*, KUT 90.5 (Jul. 4, 2017), <https://tinyurl.com/y6lzvhw4>.

<sup>10</sup> Anya Kamenetz, *For Families with Special Needs, Vouchers Bring Choices, Not Guarantees*, NPR (May 17, 2017), <https://tinyurl.com/y554h985> (Kamenetz, *No Guarantees*) (“[A]s soon as I say ‘behavioral issues,’ they’ll tell [me] they can’t accommodate him.”).

Similar obstacles exist for students with physical and medical disabilities. Several private schools in Milwaukee’s voucher program do not serve children in wheelchairs or children “who are unable to climb stairs.”<sup>11</sup> Students with chronic medical disabilities—including epilepsy, asthma, and diabetes—often could not attend private schools because they had no part-time or full-time nurses.<sup>12</sup>

## **2. H.B. 2013 Denies Students with Disabilities Who Accept a Hope Scholarship the Right to Appropriate Education Tailored to Students’ Needs.**

H.B. 2013 requires parents to waive their rights under IDEA to a free appropriate public education for their children. The statute provides that parents of students with a disability must “receive notice that participation in the Hope Scholarship Program is a parental placement under 20 U.S.C. § 1412 of the Individuals with Disabilities Education Act (IDEA) along with an explanation of the rights that parentally placed students possess under (IDEA) and any applicable state laws and regulations.” W. Va. Code § 18-31-9(a)(3).

In contrast, because students have unique disabilities and needs, IDEA requires public schools to develop a written “individualized education program,” 20 U.S.C. §§ 1401(9), 1412(a)(4). This program must outline a recommended placement and list a range of accompanying services the student must receive based on their unique needs. *See* 20 U.S.C. § 1401(29) (listing potential services). When necessary, students with disabilities must be educated by certified special-education teachers. 20 U.S.C. § 1412(a)(14)(C). These and other IDEA provisions ensure that a diverse set of students with disabilities can “make progress appropriate in

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<sup>11</sup> Barbara Miner, *Vouchers: Special Ed Students Need Not Apply*, 33 *Rethinking Schools* 4 (Winter 2013), <https://tinyurl.com/wvuwoan>.

<sup>12</sup> While more than 80 percent of public schools employ a school nurse, less than 35 percent of private schools employ either a full-time or part-time nurse. Nat’l Ass’n of School Nurses, *School Nurses in the U.S.* (2017), <https://tinyurl.com/qmse3c8>.

light of [their] circumstances.” *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 137 S. Ct. 988, 999 (2017).

But when students with disabilities use the Hope Scholarship to attend private schools under H.B.2013, they forfeit their rights under IDEA—including the right to a FAPE. *See* W. Va. Code § 18-31-9(a)(3). *See generally* 20 U.S.C. § 1412(a)(10).<sup>13</sup>

Traditionally, most voucher and tax-credit programs require parents to waive their children’s IDEA rights to obtain funding for private schools.<sup>14</sup> Along these lines, the West Virginia plan specifically provides that “participation in the Hope Scholarship Fund is a parental placement under 20 U.S.C. § 1412 of the Individuals with Disabilities Act.” W. Va. Code § 18-31-9(a)(3). The clear reading of H.B. 2013 is that in order to use of the H.B.2013 monies families must assume “parentally placed private school student” status, thereby waiving the educational assessment, planning, service, and progress monitoring rights and procedural protections to which they are entitled under IDEA. *Compare* W. Va. Code § 18-31-9(a)(3) *with* 20 U.S.C. §§ 1400(a-d).

Although parentally placed children may still receive limited “equitable services” from their school districts, these students may receive “a different amount of services”—fewer services—than they would absent the voucher. 34 C.F.R. § 300.138(a)(2). “Related services” may be limited to supplemental services and are not required to the same extent under a traditional individualized education program. *See* 20 U.S.C. § 1412 (a)(10)(A)(iii)(IV). Teachers providing

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<sup>13</sup> *See also* U.S. Gov’t Accountability Office, GAO-18-94, *Private School Choice: Federal Actions Needed To Ensure Parents Are Notified About Changes in Rights for Students with Disabilities* 8 (2017), <https://tinyurl.com/ye5v5vzd> (“GAO, Parental Notification”); Nat’l Council on Disability, *National Disability Policy: A Progress Report* 60 (2012), [https://ncd.gov/sites/default/files/NCD\\_2012ProgressReport\\_Sep14FIN508.pdf](https://ncd.gov/sites/default/files/NCD_2012ProgressReport_Sep14FIN508.pdf) (NCD, *National Disability Policy*).

<sup>14</sup> *See, e.g.,* Dana Goldstein, *Special Ed School Vouchers May Come With Hidden Costs*, N.Y. Times (April 11, 2017), <https://tinyurl.com/y89cnvzq>.



these equitable services, moreover, need not meet “special education teacher qualification requirements.” 34 C.F.R. § 300.137(a)(1).<sup>15</sup>

### **3. H.B. 2013 Does Not Protect Students with Disabilities from Discrimination Or Segregation Based on Disability.**

For too long, students (and people) with disabilities were kept in institutions away from their communities and peers. In *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999), the Court recognized that this segregation “perpetuates unwarranted assumptions that persons so isolated are incapable of or unworthy of participating in community life.” Schools are also bound by the *Olmstead* principle—that those with disabilities should receive services in the “most integrated [least restrictive] setting appropriate.” *Id.* at 591-92.

In the public-school context, IDEA, Section 504, and the ADA work to limit discrimination and segregation. Broadly, Section 504 bars public schools from discriminating against students with disabilities and details the requirements of equal treatment with respect to both costs and services. *See* 29 U.S.C. § 794; 34 C.F.R. §§ 104.33(b)(1) & (c)(1). Title II of the ADA likewise prohibits state and local governments, including schools, from discriminating against people with disabilities. *See* 42 U.S.C. § 12132.

IDEA, Section 504, and the ADA guard against students with disabilities being unnecessarily segregated. IDEA dictates that students with disabilities be educated in the least restrictive environment and non-integrated education is to be the exception, not the rule, 20 U.S.C. § 1412(a)(5), and Section 504 requires that students with disabilities must be educated “in the regular educational environment” to the extent possible. 34 C.F.R. § 104.34. The ADA’s

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<sup>15</sup>GAO, *Parental Notification*, *supra* note 13, at 8.

integration mandate requires that every public entity, including every public school, “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. §35.130(d).

Conversely, when students with disabilities attend private schools in West Virginia, they receive few, if any, of these protections. As discussed above, H.B. 2013 expressly permits private schools to discriminate against students with disabilities in admissions. W. Va. Code 18-31-11(a)(4) & (6)(d). For admitted students, private schools are not subject to IDEA’s least restrictive environment requirement. *See* 20 U.S.C. § 1412(a)(10).<sup>16</sup> Many private schools are not subject to Section 504’s requirements because H.B. 2013 is not funded with money from the U.S. Department of Education; thus, Section 504 does not apply to these private schools unless they receive other federal funds.<sup>17</sup> *See* W. Va. §§ 18-9A-25, 18-31-6; 29 U.S.C. § 794(b)(1). Title II of the ADA similarly does not apply because private schools are not considered public entities.<sup>18</sup> While Title III of the ADA generally applies to public accommodations, it specifically exempts “religious organizations or entities controlled by religious organizations.” 42 U.S.C. § 12187.

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<sup>16</sup> *See also* GAO, *Parental Notification*, *supra* note 13, at 8.

<sup>17</sup> Some private schools may receive school lunch money from the U.S. Department of Agriculture or other federal funds. However, many private schools do not accept federal funds precisely because they want to avoid Section 504’s non-discrimination requirements. Further, even if and when Section 504 does apply, private schools can still reject disabled students requiring more than “minor adjustments.” 34 C.F.R. § 104.39(a)–(c); *see also, e.g., St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 167–173 (2d Cir. 2001) (allowing private school that received public funds to exclude student with a disability from mainstreamed program and instead provide a segregated program because the student did not meet certain academic requirements due to his disability).

<sup>18</sup> As under Section 504, Title III may not prevent them from limiting their admission of students with disabilities, *see* Claire Raj, *Coerced Choice: School Vouchers and Students with Disabilities*, 68 Emory L.J. 1038, 1052–1053 (2019); NCD, *Choice & Vouchers—Implications for Students with Disabilities*, [https://ncd.gov/sites/default/files/NCD\\_Choice-Vouchers\\_508\\_0.pdf](https://ncd.gov/sites/default/files/NCD_Choice-Vouchers_508_0.pdf) (Nov. 2018) at 71.

Thus, religious schools are completely exempt from Title III of the ADA.<sup>19</sup> Without the antidiscrimination laws, children at these schools have no right even to the *basic* accommodations—such as accessible entrances, desks, and toilets—that most students now take for granted.

Furthermore, the amount of the Hope Scholarship is the same for all students, and for the current year is approximately \$4,300. That amount is simply inadequate to provide an education, including related services such as occupational therapy and physical therapy, to many students with disabilities, particularly those with the most significant needs. While students with disabilities are guaranteed a free appropriate public education from public schools, H.B. 2013 would allow those private schools that accepted students with disabilities to charge them for services and supports provided. Private schools charging students with disabilities higher prices—often beyond the value of the voucher or tax credit—is allowed so long as the surcharge can be “justified by a substantial increase in cost to the recipient.” 34 C.F.R. § 104.39 (b).

Thus, if private schools charge additional fees above what is offered through the Hope Scholarship to cover the cost of special education in their programs, parents are forced to pay the difference regardless of their economic status.<sup>20</sup> These added costs and fees can be prohibitive,

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<sup>19</sup> In the United States, four in five private schools are religious schools, and in voucher and tax-credit programs the percentage is usually even higher. See Halley Potter, *Do Private School Vouchers Pose a Threat to Integration?*, Century Foundation (Mar. 21, 2017) (citing, e.g., Stephen P. Broughman & Nancy L. Swaim, Nat’l Ctr. for Educ. Statistics, *Characteristics of Private Schools in the United States: Results from the 2013–14 Private School Universe Survey* 7 tbl. 2 (2016), <https://tinyurl.com/yfxr3qth>).

<sup>20</sup> COPAA, *School Vouchers and Students with Disabilities: Examining Impact in the Name of Choice*, [https://cdn.ymaws.com/www.copaa.org/resource/resmgr/docs/Policy\\_Docs/COPAA\\_Voucher\\_paper\\_final\\_R6.pdf](https://cdn.ymaws.com/www.copaa.org/resource/resmgr/docs/Policy_Docs/COPAA_Voucher_paper_final_R6.pdf) (June 2016) at 16; NCD, *National Disability Policy*, *supra* note 13, at 60.

further negating the “choice” in these programs.<sup>21</sup>

#### **4. H.B. 2013 Does Not Protect Students with Disabilities Against Disability-Related Discipline.**

In public schools, students with disabilities have added protections against discipline for conduct resulting from their disabilities. Public schools must evaluate whether a student with a disability’s alleged misconduct was rooted in the disability; if so, the school may not enact long-term discipline if it was a “manifestation” of the disability. *See* 20 U.S.C. § 1415(k)(1)(E)–(F); 34 C.F.R. §§ 300.530–300.536. In contrast, in private schools, students lose those protections and as a result, private schools regularly suspend or expel children with disabilities—even when the underlying conduct results from the child’s disability.<sup>22</sup> These consequences are bad enough for any<sup>23</sup> student with disabilities, but they are even more common and severe for students of color. Students who are expelled from private schools for behavioral reasons (often relating to their disabilities) face steeper hurdles gaining admissions to other private schools. And when students with disabilities must repeatedly change schools—either because they are expelled or because they are not receiving appropriate education and services from their private school—they experience delays and interruptions in their education that make it even harder to succeed. For example, in Tennessee, a child with a disability who returns to public school may be treated as a “new” student

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<sup>21</sup> In Florida, for example, the largest school voucher is worth \$13,000, but annual tuition and fees charged to a student with disabilities ranges from \$40,000 to \$100,000. COPAA, *School Vouchers*, *supra* note 20, at 16. In context, for this year, the West Virginia voucher is little more than a third of the Florida voucher: \$4,300, but it can be presumed that special education in these private schools will far exceed this cost.

<sup>22</sup> *See* Raj, *supra* note 18, at 1059; *See also* COPAA, *School Vouchers*, *supra* note 20, at 16; *see also, e.g.,* Goldstein, *Hidden Costs*, *supra* note 14 (Florida seventh grader with autism was suspended and then asked not to return to the private school).

<sup>23</sup> NDRN, Press Release, *Students with Disabilities in Voucher Programs Losing Rights*, *Government Study Says* (Dec. 12, 2017), <https://tinyurl.com/y2kpqwft>.

who must start the 90-day special-education referral process from scratch, anew. Tenn. Code Ann. § 49-6-2607. Likewise, in West Virginia, if the former school does not have a current IEP to send with the student's records, the public school has no choice but to start the special education process anew. This new start of the special education process may require an evaluation before an IEP can be designed and services implemented, causing a student to fall further behind.

#### **5. H.B. 2013 Does Not Require Private Schools To Provide Parents of Students with Disabilities with Procedural Safeguards That Apply to Public Schools.**

In public schools, parents of children with disabilities have the right to participate in the development of an individualized education program for their child's needs. 20 U.S.C. § 1414(d)(1)(B). They may examine records relating to the administration of free appropriate public education and "obtain an independent educational evaluation of the child" 20 U.S.C. § 1415(b)(1), and must receive written notice about any changes to "the identification, evaluation, placement, or the provision of a free appropriate public education to the child." 20 U.S.C. § 1415(b)(3). Public schools also must notify parents of their procedural rights in the special education system.

However, under H.B. 2013, parents typically lose these enforceable federal rights. Private schools need not solicit parents' input on decisions affecting their children's education and services. And parents who disagree with a private school's decision regarding their disabled child have little recourse, even if the private school is acting unreasonably or capriciously.<sup>24</sup>

#### **II. H.B. 2013 Abridges Administrative and Judicial Remedies Available to Parents of Students with Disabilities Who Attend Public Schools**

When a public school violates the rights of a student with disabilities, the student and his parents may seek relief through administrative procedures or the courts. Students with disabilities

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<sup>24</sup> See Raj, *supra* note 18, at 1058–59.

attending private schools with Hope Scholarships pursuant to H.B. 2013 lose most of these remedies. Under IDEA, parents may challenge a public school's determinations with regard to their children's "identification, evaluation, or educational placement . . . or the provision of a free appropriate public education" by pursuing administrative remedies, including due-process hearings. *See* 20 U.S.C. § 1415(b)(6). Parents may also challenge disciplinary removals. 34 C.F.R. § 300.532(a). Under Section 504 and Title II of the ADA, hearings and other administrative remedies are likewise available. 29 U.S.C. § 794; 28 C.F.R. § 35.190(b)(2) & (6); 42 U.S.C. § 12132; 34 C.F.R. §§ 100.7(b), 104.36, & 104.61. After exhausting IDEA, Section 504, or ADA administrative remedies, parents may also seek relief in court. 20 U.S.C. § 1415(e)(2) & (i)(2); 29 U.S.C. § 794; 42 U.S.C. § 12133; 28 C.F.R. § 35.172(d); 28 C.F.R. § 35.175.

These remedies are unavailable to students with disabilities attending private schools under H.B. 2013. Parents who voluntarily place their children in private schools as parentally placed children are not eligible to obtain full public funding for private schools that meet their children's educational needs. *Compare* 20 U.S.C. § 1412(a)(10)(A) *with* 20 U.S.C. § 1412(a)(10)(C). Parents lose IDEA due process rights to challenge decisions about service plans or discipline. 34 C.F.R. § 300.140(a).<sup>25</sup> Parents may challenge only the modest "child find" or evaluation requirements that are placed on their local educational agencies. 34 C.F.R. § 300.131(a), (c).<sup>26</sup> Finally, when a public school violates ADA Title II, the *student* may sue for financial compensation; but if a private school violates ADA Title III, compensation may be requested only by the Attorney General. *See* 42 U.S.C. §§ 12188(a)(2) & (b)(2)(B).

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<sup>25</sup> *See also* GAO, *Parental Notification*, *supra* note 13, at 8; U.S. Dep't of Educ., *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools* 30 (April 2011).

<sup>26</sup> *See also* GAO, *Parental Notification*, *supra* note 13, at 8.

Students with disabilities depend on these federal statutes to protect their basic rights—to an adequate education, individualized support and services, and for the chance to attend school in a more integrated setting alongside their peers without disabilities. However, H.B. 2013 will funnel public funding to private schools without requiring the schools to honor the basic civil rights of the very students with disabilities seeking access to those schools.

For students with disabilities and their parents, school-choice programs offer little actual choice. Instead, the participating private schools, not students with disabilities, get to choose who has access and what services will be received through the school choice. And even if private schools would admit students with disabilities, in practice many are ill-equipped to serve them.<sup>27</sup>

**A. H.B. 2013 Does Not Hold Private Schools Accountable For Failing To Educate Students with Disabilities.**

H.B. 2013 makes clear that private schools will face little oversight because “[e]ducation service providers shall be given maximum freedom to provide for the educational needs of Hope scholarship students without government interference.” W. Va. Code § 18-31-11(a)(6)(c). This is consistent with other voucher programs which are not typically subject to accountability mechanisms protecting students with disabilities.<sup>28</sup>

Even when they do accept students with disabilities, private schools participating in voucher and tax-credit programs often face little to no oversight in the services they provide to

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<sup>27</sup>See, e.g., U.S. Dep’t of Educ., NCEE 2010-4018, *Evaluation of the D.C. Opportunity Scholarship Program: Final Report* 24–26 (June 2010), <https://tinyurl.com/y54tzmat> (in the District of Columbia voucher program, 21.6% of all parents who declined to participate did so because participating schools did not provide the services their children needed).

<sup>28</sup>See Ctr. on Educ. Policy, *Little Evidence and Big Consequences: Understanding Special Education Voucher Programs* 5 (Oct. 2017), <https://tinyurl.com/y4yve56o> (as of 2017, only Ohio and Wisconsin require private voucher schools to plan for or implement individualized education programs) (CEP, *Understanding Special Education Voucher Programs*).

students with disabilities.<sup>29</sup> Voucher schools often do “not understand how to provide special education instruction and services or have the staff and professional capacity to serve all students with disabilities.”<sup>30</sup> In a 2016 COPAA survey, 83% of respondents were unsure about, or disagreed with, the statement that private schools had the capacity to provide the support and accommodations students with disabilities need.<sup>31</sup>

Further, the majority of private-school programs for students with disabilities require neither participation in, nor public reporting of results of standardized testing.<sup>32</sup> Only half of these programs required academic testing or program accreditation, and only a third required teaching in core subjects.<sup>33</sup> Plus, states monitor neither the schools’ curriculum nor courses, and the program does not require students to take any particular classes.<sup>34</sup>

Parents, in fact, have struggled to make informed decisions, and as a result, children with disabilities have suffered. For example, after the school specifically promised a mother of twins with autism that they would receive specialized education and support, the mother enrolled them in a Florida special-needs “learning center,” that was part of a larger private-school academy.<sup>35</sup> But nobody had told the state about this “learning center”—apparently for good reason. After her boys started attending this school, their mother learned that one of their main teachers was just 21

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<sup>29</sup> See, e.g., Mandy McLaren, *For Indiana Special-Education Students, Choice Comes at a Cost*, Wash. Post (Dec. 26, 2016), <https://tinyurl.com/zeq9lzt> (in Indiana, no requirement that schools receiving special education voucher funding oversee the effectiveness of special education services).

<sup>30</sup> COPAA, *School Vouchers*, *supra* note 20, at 16.

<sup>31</sup> *Id.* at 15–16.

<sup>32</sup> COPAA, *School Vouchers*, *supra* note 20, at 14; *see also* Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & Educ. 291, 301, 327 (2010); NCD, *National Disability Policy*, *supra* note 13, at 60.

<sup>33</sup> *Id.* at 11.

<sup>34</sup> *See* COPAA, *School Vouchers*, *supra* note 20, at 15.

<sup>35</sup> Leslie Postal, Beth Kassab & Annie Martin, *Florida Private Schools Get Nearly \$1 Billion in State Scholarships With Little Oversight* (Oct. 17, 2017), <https://tinyurl.com/tn8xro7>.



years old and had no special education certificate.<sup>36</sup> The school lacked both fire and building permits and many basic safety features—including door locks and exit signs which are crucial for her students with autism.<sup>37</sup> Another school, purporting to serve students with autism, shut down abruptly after submitting more than \$4.5 million in false and inflated Medicaid charges for falsified one-on-one therapies the students had never received.<sup>38</sup>

Further, of the fifteen school voucher programs restricted to students with disabilities, 80% had no annual audit mechanisms.<sup>39</sup> For example, Indiana’s \$1.3 million voucher program does not require oversight for the quality of education provided.<sup>40</sup> Similarly, Mississippi’s voucher program “lacks the accountability structure needed to ensure that... students with disabilities are receiving the services they need and progressing toward their special needs goals.”<sup>41</sup> This lack of accountability creates a significant problem: “The state does not know what special needs services [voucher] students receive and to what extent those services are provided by the nonpublic school.”<sup>42</sup> Without even basic oversight, states and their taxpayers have “no clear picture” of how their money is being spent.<sup>43</sup> This fuzzy picture is plenty discouraging. Remarkably, fewer than half of private-school programs for students with disabilities have any requirements to employ teachers or staff who are special-education certified.<sup>44</sup>

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<sup>36</sup> *Id.*

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

<sup>38</sup> Annie Martin, *Parents Say Something Was Amiss at Closed School*, Orlando Sentinel (Feb. 15, 2017), <https://tinyurl.com/rwz2r93>.

<sup>39</sup> GAO, *Parental Notification*, *supra* note 13, at 15.

<sup>40</sup> McLaren, *Indiana Special-Education*, *supra* note 29.

<sup>41</sup> Perf. Eval. & Expenditure Review, *Report to the Mississippi Legislature: A Statutory Review of Mississippi’s Education Scholarship Account (ESA) Program* (Dec. 2018), <https://tinyurl.com/y2gfw9b> (PEER, *Mississippi Program*) at 1; *see also id.* at 32–35.

<sup>42</sup> *Id.* at 31.

<sup>43</sup> NCD, *Implications for Students with Disabilities*, *supra* note 18, at 55.

<sup>44</sup> GAO, *Parental Notification*, *supra* note 13, at 13.

## **B. Private-School Vouchers and Tax-Credits Resegregate Students with Disabilities.**

Because federal least-restrictive environment protections do not apply to private schools, voucher and tax-credit programs may lead to schools becoming resegregated on the basis of disability.<sup>45</sup> Although state education departments do not systematically collect data on where parents use their vouchers or tax credits, information gathered from families and advocates suggests that students with disabilities often used them to attend segregated schools.<sup>46</sup>

More generally, because private schools need not admit or support students with disabilities, private school is often not a real option for these students—especially those whose disabilities are more significant and thus require more expensive support. And as public-school funding is reassigned to private schools, public schools will struggle to educate students with disabilities in integrated, general-education classrooms.<sup>47</sup> When public money follows a child from public school to private school, the public school’s loss of that money is not fully offset by the need to educate one fewer student, because many of the public school’s costs (such as salaries and training for special-education teachers and staff) are fixed.<sup>48</sup> If these trends persist, then public schools will have fewer resources to ensure that students with disabilities receive a quality education alongside their peers and avoid the segregation of the past despite the legal mandate to do so.

In sum, public funds move from public schools to private schools, yet many, if not most, of these private schools need not admit or properly educate students with disabilities; those that do may segregate them. The countless students with disabilities who cannot participate in or will not

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<sup>45</sup> See COPAA, *School Vouchers*, *supra* note 20, at 17.

<sup>46</sup> NCD, *Implications for Students with Disabilities*, *supra* note 18, at 25.

<sup>47</sup> *Id.* note 18, at 26.

<sup>48</sup> See Hensel, *supra* note 32, at 337.

benefit from these programs are left in depleted public schools unable to educate these students as effectively or in an environment as integrated. Ultimately, the growth of private-school voucher and tax-credit programs is “bringing us back to the days of excluding students with special needs from the mainstream; we are moving toward de facto segregation/separation.”<sup>49</sup>

### **Conclusion**

The judgment of the West Virginia Court should be affirmed.

Respectfully submitted,

*/s/ Michael J. Folio*

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<sup>49</sup> COPAA, *School Vouchers*, *supra* note 20, at 17.

### CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2022, I served the foregoing document via the Court's e-filing system, and, for those parties who are not capable of receiving electronic service, by email, as agreed by the parties, on the following counsel:

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