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State Action and Student Rights

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INTRODUCTION

Public K-12 education, traditionally a core function of the state, is undergoing a troubling shift towards privatization. Over the course of the past two decades, the school choice movement—which is largely composed of charter management organizations, private tuition tax credits, and state-funded school voucher programs—has contributed much to this transformation, complicating the once-clear distinction between public and private education sectors.[1] More recently, the nation's education struggles reached an inflection point in the wake of the COVID-19 pandemic, as Betsy DeVos, then the U.S. Secretary of Education, attempted to vastly expand the availability of publicly-funded vouchers and tax credits to underwrite private school tuition.[2] Although often framed as a benign avenue to

* Staff Attorney, Center for Law and Education. I am grateful to the outstanding editors of the *Yale Law & Policy Review*. All errors are my own.

1. JOHN ROGERS & JOSEPH KAHNE, EDUCATING FOR A DIVERSE DEMOCRACY: THE CHILLING ROLE OF POLITICAL CONFLICT IN BLUE, PURPLE, AND RED COMMUNITIES (Nov. 2022); *see also* Juan Perez, Jr., *The Coming Education Wars*, POLITICO (Dec. 16, 2022, 7:00 PM), https://www.politico.com/newsletters/politico-nightly/2022/12/16/the-coming-education-wars-00074418 [https://perma.cc/D9XA-ZW65].

2. Erica L. Green, *DeVos Funnels Coronavirus Relief Funds to Favored Private and Religious Schools,* N.Y. TIMES (May 15, 2020), https://www.nytimes.com/2020/05/15/us/politics/betsy-devos-coronavirus-religious-schools.html [https://perma.cc/PMU2-27T2] ("Educators are pleading with the department to revise or rescind the guidance. In Montana, school officials estimate that compliance would shift more than $1.5 million to private and

increased educational opportunity,[3] the privatization has produced significant constitutional and statutory consequences, particularly affecting students with disabilities and their families.[4]

The Individuals with Disabilities Education Act (IDEA),[5] enacted in 1975 as the Education for All Handicapped Children Act,[6] is pivotal as the nation's preeminent educational disability rights statute in protecting the rights of students with disabilities.[7] The IDEA protects all students with

home schools, up from about $206,469 that the schools are due under current law. In Louisiana, private schools would receive at least 267 percent more funding, and at least 77 percent of the relief allocation for Orleans Parish would be redirected, according to a letter state that education chiefs sent to Ms. DeVos. The Newark Public Schools in New Jersey would lose $800,000 in federal relief funds to private schools, David G. Sciarra, the executive director of the Education Law Center, said in a letter to the governor of New Jersey asking him to reject the guidance. Pennsylvania's education secretary, Pedro A. Rivera, protested to the department that under the guidance, 53 percent more money would flow 'from most disadvantaged to more advantaged students' in urban districts like Philadelphia, while rural districts like Northeast Bradford would see a 932 percent increase."); *see also* Fred Jones, *A Pandemic Is No Time to Undermine Public Education,* THE HILL (July 28, 2020, 12:00 PM) https://thehill.com/opinion/education/509350-a-pandemic-is-no-time-to-undermine-public-education?rl=1 [https://perma.cc/8HHD-A9QC] (criticizing the Department of Education for "taking advantage of the CARES Act to support private schools by siphoning public education dollars").

3. Wendy F. Hensel, *Recent Developments in Voucher Programs for Students with Disabilities*, 59 LOY. L. REV. 323, 324 (2013) (identifying the development of school choice paradigms as applied to students with disabilities).

4. Claire Raj, *Coerced Choice, School Vouchers, and Students with Disabilities*, 68 EMORY L.J. 1037, 1040 (2019) ("[V]oucher programs attempt to roll back crucial legal protections for students with disabilities and do so without making parents fully aware of the far-reaching consequences.").

5. Pub. L. No. 101-476, 104 Stat. 1141 (1990) (codified as amended at 20 U.S.C. §§ 1400-1482).

6. Education for All Handicapped Children Act of 1975 (EAHCA), Pub. L. No. 94-142, sec. 3(a), § 601(c), 89 Stat. 773, 774-75 (codified as amended at 20 U.S.C. §§ 1400-1482 (2012)) (introducing "free appropriate public education" into education law).

7. There are two other disability rights laws affecting students with disabilities: Section 504 of the Rehabilitation Act [29 U.S.C. § 794(a)] and the Americans with Disabilities Act (ADA) [42 U.S.C §§ 12101 *et seq.*, as modified by the ADA Amendments Act of 2008, PL 110-324, 11 Stat. 3353 (2008)].

disabilities living in states that have accepted federal financial aid,[8] conferring both substantive and procedural rights upon more than seven million individuals.[9] Procedurally, the IDEA requires public schools to make available to all eligible children with disabilities a free appropriate public education (FAPE) in the least restrictive environment consisting of special education and related services in conformity with the child's individualized education program (IEP).[10] Substantively, the IDEA imposes an affirmative obligation on participating states to identify, assess, and serve students with disabilities, irrespective of the severity of the child's needs.[11] Importantly, the foregoing obligations apply equally to students placed in private schools as they do students in public school settings.[12]

Nearly 50 years after its enactment, the IDEA has generated more litigation before the federal judiciary than any other category of education law.[13] Much of this litigation relates to school district compliance with their statutory mandate to provide a FAPE to eligible students with disabilities under the Act.[14] Yet federal agencies, legal commentators, and the courts have paid little attention to the legal obligations owed to students with disabilities placed in private day or residential settings. This is especially true in the context of *publicly-placed*—as opposed to *parentally-* or *unilaterally*-placed—private school students with disabilities.[15] Indeed, as

8. *See* Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. 386, 390 (2017) (citing 20 U.S.C. § 1412(a)(1)).

9. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., CONDITION OF EDUCATION, available at https://nces.ed.gov/programs/coe/indicator/cgg/students-with-disabilities [https://perma.cc/55J4-WBGD].

10. *See* 20 U.S.C. § 1401(8).

11. 20 U.S.C. § 1412(a)(3).

12. 34 C.F.R. § 300.129.

13. PERRY A. ZIRKEL, NAT'L ASS'N OF STATE DIRS. OF SPECIAL EDUC., INC., NATIONAL UPDATE OF CASE LAW 1998 TO THE PRESENT UNDER THE IDEA AND SECTION 504/ADA (May 1, 2019), https://perryzirkel.files.wordpress.com/2019/05/national-update-05.01.19.pdf [https://perma.cc/2QQE-JFJL].

14. Andriy Krahmal, Perry A. Zirkel & Emily J. Kirk, *"Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor*, 9 TEX. J. C.L. & C.R. 201, 219 n.122 (2004) ("FAPE cases . . . continue to be the main source of IDEA litigation.").

15. U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON SERVING CHILDREN WITH DISABILITIES PLACED BY THEIR PARENTS IN PRIVATE SCHOOLS (Feb. 2022), https://sites.ed.gov/idea/files/QA_on_Private_Schools_02-28-2022.pdf [https://perma.cc/5JD9-H4Y5].

Professor Perry Zirkel has observed, the legal obligations owed to publicly-placed private school students with disabilities are "not subject to confusion" as compared to their parentally-placed counterparts.[16] Beyond the affirmative commands set forth in the IDEA, however, the non-special education rights owed to publicly-placed private school students with disabilities remain unclear.[17]

Whether publicly-placed private school students with disabilities sacrifice their state and federal constitutional rights at the schoolhouse gate raises novel issues at the intersection of both liberty and equality. Despite

16. Perry A. Zirkel, *Legal Obligations to Students with Disabilities in Private Schools*, 351 ED. LAW. REP. 688 (2018). A material distinction exists between publicly-placed students with disabilities from those who are unilaterally- or parentally-placed. Publicly-placed students are those who receive special education services within the public school system, typically through an Individualized Education Program (IEP). By contrast, unilateral or parental placement refers to circumstances whereby parents, dissatisfied with the services offered by their public school, place their child with a disability in a private school or educational setting at their own expense. This distinction raises critical legal and financial considerations, including questions of reimbursement for parental placement and the rights and responsibilities of both parties in ensuring an appropriate education for students with disabilities. One area that warrants further examination revolves around the structural bias that disproportionately benefits wealthy families, as families without means are often un able to pay the up-front tuition costs required to unilaterally place their child at a private school if the public school is not providing FAPE to the student. *See* Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 J. GENDER, SOC. POL'Y & L. 107, 121-26 (2011).

17. *See* Raj, *supra* note 4. It is also important to note that 20 U.S.C 1412(10)(b)(ii) of IDEA sets forth that "[i]n 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." This standard's implementing regulations further define a state education agency's (SEA) responsibility to students who are publicly placed in private schools: "[e]ach SEA must ensure that a child with a disability who is placed in or referred to a private school or facility by a publicly agency . . . has all of the rights of a child with a disability who is served by a public agency." *See* 34 C.F.R. § 300.146(c). This Essay's thesis is premised on the notion that the foregoing statutory and regulatory language is confined solely to the statutory rights created by the IDEA and thus precludes state and/or federal constitutional protections.

the treatment that *parentally*-placed private school students with disabilities have received in judicial opinions and legal scholarship to date, neither forum has undertaken an exhaustive analysis on whether private day school and residential programs operate as state actors upon enrolling *publicly*-placed students with disabilities. This Essay aims to fill that gap, especially given that the national population of publicly-placed students with disabilities amounted to approximately 90,000 students as of the last reauthorization of IDEA.[18] As a normative matter, the Essay adds to the literature by demonstrating that publicly-placed private school students with disabilities should possess all of the same state and federal constitutional rights held by similarly-situated students enrolled in public schools. It then argues that private schools function as state actors once they enroll publicly-placed students with disabilities in their schools, thereby subjecting themselves to the same constitutional mandates that apply to their public school counterparts.

This Essay proceeds in two parts. Part I provides a brief overview of recent state action doctrine disputes in the context of public K-12 education. It then revisits *Rendell-Baker v. Kohn*,[19] a key Supreme Court decision that addressed whether § 1983 was applicable to private schools, and asks whether private school programs operate as state actors once they enroll publicly-placed students with disabilities. To address this question, Part II engages this doctrine by responding to the arguments proffered by the Court in *Rendell-Baker*. Leveraging the public function test of the state action doctrine, this Part argues that providing students with disabilities a free appropriate public education—as defined by state and federal law—is a power that is both "traditionally" and "exclusively" reserved to the state. The Essay then offers concluding remarks.

18. *See also* PAULA BURDETTE, PUBLICLY PLACED PRIVATE SCHOOL STUDENTS WITH DISABILITIES: ISSUES AND RECOMMENDATIONS, PROJECT FORUM AT THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION (Oct. 2006), https://nasdse.org/docs/32_452585b6-d80e-4580-8883-e4637eaa03b6.pdf [https://perma.cc/VEE2-ZT2P].

19. 457 U.S. 830 (1982).

I. RENDELL-BAKER V. KOHN AND THE STATE ACTION DOCTRINE

a. State Action Doctrine and Equal Educational Opportunity

On June 14, 2022, the Fourth Circuit held in *Charter Day School v. Peltier*[20] that a private non-profit corporation that operated a North Carolina charter school functioned as a state actor under the Equal Protection Clause of the Fourteenth Amendment.[21] At issue in *Peltier* was the Charter Day School's ("CDS") schoolwide dress code, which required its female students to wear skirts to the school each day. The school's skirt requirement, according to CDS's founder, was to "preserve chivalry and respect," with chivalry denoting "a code of conduct where women are . . . regarded as a fragile vessel that men are supposed to take care of and honor."[22] In blocking CDS from requiring its female students to wear skirts, the district court concluded that the skirt requirement was unconstitutional.[23] Although the district court held that CDS functioned as a state actor,[24] a Fourth Circuit panel reversed the lower court decision on appeal before the full Fourth Circuit decided to hear the case *en banc*.[25] CDS appealed to the Supreme Court, which the Court denied without explanation.[26]

The exceptional outcome of *Peltier* in the broader line of state action cases should be viewed as yet another canary in the coal mine for broader progressive education reform.[27] Following *Peltier*, some scholars worry that an increasing advent of religious charter schools may blur the constitutional

20. 37 F.4th 104 (4th Cir. 2022).

21. *Id.* at 119.

22. Brief for United States at 4, *Peltier*, 143 S. Ct. 2657 (No. 22-238).

23. *Peltier*, 384 F. Supp. 3d 574, 597 (E.D.N.C. 2019).

24. *Id.* at 594.

25. *Peltier*, 8 F.4th 251 (4th Cir. 2021), *on reh'g en banc*, 37 F.4th 104 (4th Cir. 2022).

26. Charter Day Sch., Inc. v. Peltier, 143 S. Ct. 2657 (2023).

27. *See* Caviness v. Horizon County Learning Center, 590 F.3d 806, 812 (9th Cir. 2010) (holding that an Arizona charter school did not function as a state actor for employment purposes because state actor status could only be imposed if "there [were] such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself") (quoting Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950, 955 (9th Cir. 2008) (en banc)).

boundary between church and state. As one scholar put it, "the legal fight has now extended beyond dress codes to entangle public religious charter schools and [the] constitutional limits between church and state, after Oklahoma authorities' landmark decision this month to approve a public and directly taxpayer-funded Catholic school that teaches religious principles like a private institution."[28] Relatedly, what are the constitutional limitations of private school providers once these schools elect to enroll publicly-placed students with disabilities? While often characterized as a benign path to greater educational opportunity, the privatization of public K-12 education has led to substantial constitutional and statutory harms, especially among students with disabilities. The next Section considers these harms in turn.

b. Revisiting Rendell-Baker

Do private school programs operate as state actors—and thus subject themselves to state and federal law—once they enroll publicly-placed students with disabilities? At the core of this question is *Rendell-Baker v. Kohn*,[29] a key Supreme Court decision that addressed whether § 1983 was applicable to private schools. In *Rendell-Baker*, the Court considered whether nine public K-12 educators—who were employed by a private school to provide remedial education services to disadvantaged students under a government-funded program—had been terminated by the private school in violation of the First, Fifth, and Fourteenth Amendments.[30] In a unanimous decision, the Court found in favor of the private school, holding that the school's relationship with the state "is not fundamentally different

28. Josh Gerstein, *Supreme Court Won't Hear Charter School Dress Code Case that Promised Broader Fallout*, POLITICO (June 6, 2023, 11:05 AM), https://www.politico.com/news/2023/06/26/supreme-court-charter-school-dress-code-case-00103619 [https://perma.cc/CZ9Z-9QM9]; *see also* Jana Hayes, *Oklahoma Attorney General: Law Against Religious Charter Schools May Be Unconstitutional*, THE OKLAHOMAN (Dec. 2, 2022. 11:36 AM), https://www.oklahoman.com/story/news/education/2022/12/02/oklahoma-ag-releases-opinion-on-religious-charter-schools/69695429007 [https://perma.cc/Q8EK-V2BB]; *see generally* Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. TIMES (June 23, 2022), https://www.nytimes.com/2022/06/23/opinion/supreme-court-guns-religion.html [https://perma.cc/NV73-ZANP].

29. 457 U.S. 830 (1982).

30. *Id.* at 832-35.

from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government."[31] According to the Court, a contractual agreement of this type failed to establish state action "by reason of their significant or even total engagement in performing public contracts."[32] In addition, the majority found that this relationship between employee and school is not altered as a result of the state's payment of student tuition.[33]

Crucially, the Court rejected the claim that the private school provider functioned as a state actor due to its provision of education.[34] The Court argued that the action must be the "exclusive prerogative of the state" to be considered state action.[35] That the Massachusetts legislature established a mechanism allowing for the provision of publicly-financed educational services to maladjusted children enrolled in a private school "in no way ma[de] these services the exclusive province of the State."[36] Accordingly, Part II considers the public function exception to the state action doctrine in the context of educating students with disabilities. By applying the foregoing exception in such a way, this Part demonstrates that—in the context of educating publicly-placed private school students with disabilities—the Court's reasoning in *Rendell-Baker* is both inadequate and inapplicable in this particular context.

II. SPECIAL EDUCATION AS THE "TRADITIONAL" AND "EXCLUSIVE" PROVINCE OF THE STATE

a. Special Education as the "Traditional" Province of the State

The Supreme Court has long observed that state action exists when a private entity exercises power that is traditionally and exclusively reserved to the state.[37] As Part II contends, the power to educate students with

31. *Id.* at 840-41.

32. *Id.* at 841.

33. *Id.*

34. *Id.* at 842.

35. *Id.* (internal quotation marks omitted).

36. *Id.*

37. *See, e.g.,* Nixon v. Condon, 286 U.S. 73 (1932); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Evans v. Newton, 382 U.S. 296 (1966).

disabilities has long rested with the state. Indeed, prior to IDEA's enactment nearly fifty years ago, the education of children with disabilities fell entirely within the province of the state: "[t]hrough most of the history of public schools in America, services to children with disabilities were minimal and were provided at the discretion of local school districts. Until the mid-1970s, laws in most states allowed school districts to refuse to enroll any student they considered 'uneducable,' a term generally defined by local school administrators."[38] To address such exclusion, states began passing and enacting legislation to better protect students with disabilities.[39]

Indeed, by 1973, 45 states enacted such legislation to ensure that children with disabilities were able to attain a quality education.[40] Despite these efforts, however, the newly enacted state laws often lacked adequate funding and enforcement mechanisms that could elicit broader compliance within and between school districts. In fact:

> Congressional hearings in 1975 revealed that millions of children with disabilities were still being shut out of American schools: 3.5 million children with disabilities in the country were not receiving an education appropriate to their needs, while almost one million more were receiving no education at all. By 1971-72, despite the fact that every school district in the United States had some kind of ongoing special education program, seven states were still educating fewer than 20% of their *known* children with disabilities, and 19 states, fewer than a third. Only 17 states had reached the halfway figure.[41]

Accordingly, the foregoing history supports the instant claim: the power to control the provision of special educational services—be it through state law enacted prior to IDEA, or through the provision of FAPE following IDEA's enactment—has been *traditionally* reserved to the state. In terms of the former, despite the abhorrent classroom conditions faced by students with disabilities prior to IDEA's enactment, parents and community advocates "lobbied aggressively to root out [the] entrenched

38. Edwin Martin, Reed Martin & Donna L. Terman, *The Legislative and Litigation History of Special Education*, 6 THE FUTURE OF CHILDREN, 25, 26 (1996).

39. *Id.* at 27-28.

40. *Id.*

41. *Id.* at 29.

discrimination" that pervaded the nation's public schools.[42] What followed were "state laws and federal court decisions [that] made clear the states' responsibility for providing a free, appropriate, public education to all children, regardless of disability . . . ."[43]

As for the latter, for nearly half a century, the provision of FAPE for children with disabilities has been governed by the Individuals with Disabilities in Education Act (IDEA). Enacted in 1975, the purpose of IDEA was to "ensure that all children with disabilities have available to them a free appropriate public education . . . [and] ensure that the rights of children with disabilities and parents of such children are protected."[44] For students placed in a nonpublic setting, moreover, the provision of FAPE remains the *exclusive* responsibility of the SEA. Specifically, the SEA must guarantee that FAPE is delivered in a school or facility that aligns with both SEA and LEA standards during the student's placement in a private setting.

The foregoing conclusion is further supported by the decision in *Riester v. Riverside Community School*,[45] an Ohio federal district court case that analyzed whether private companies that operate charter schools function as state actors. The plaintiff in *Riester*, a former charter school teacher, brought a § 1983 action against the charter school and its attendant management companies on First Amendment grounds.[46] Under both the public function and entwinement tests, the district court found that the charter school and the management companies functioned as state actors.[47] Under the public function test, in particular, the court reasoned that the management companies operated as state actors given that "free, public education, whether provided by public or private actors, is *a historical, exclusive, and traditional state function*."[48] Perhaps more critically, at least for purposes of this Essay's thesis, the court denied the defendant's motion to dismiss that alleged, *inter alia*, that the holding in *Rendell-Baker* required a different conclusion. In rejecting the defendant's claim, the court distinguished the facts in the instant case from those at issue in *Rendell-Baker* on the grounds that: (1) the school in question was established "only

42. Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 NAT'L ASS'N ADMIN. L. JUD. 423, 426 (2012).

43. MARTIN, *supra* note 38, at 29.

44. 20 U.S.C. § 1400(d)(1)(A)-(B).

45. 257 F. Supp. 2d 968 (S.D. Ohio 2002).

46. *Id.* at 969-70.

47. *Id.* at 972.

48. *Id* (emphasis added).

with the help of the state," and (2) the school was "subject to various rules and regulations to which private schools are not."[49]

b. Special Education as the "Exclusive" Province of the State

In *Rendell-Baker*, the Supreme Court held that, for a private school to be considered a state actor, the action at issue must be the "exclusive prerogative of the state."[50] Providing students with disabilities a FAPE in the least restrictive environment[51] is a power "exclusively" reserved to the state. For students placed in a nonpublic setting, moreover, the provision of FAPE remains the exclusive responsibility of the SEA. Specifically, the SEA must guarantee that FAPE is delivered in a school or facility that aligns with both SEA and LEA standards during the student's placement in a private setting.

In addition, this exclusive state *obligation* cannot be outsourced to approved private programs, even if the state outsources the *performance* of this obligation. Indeed, in *West v. Atkins*,[52] the Supreme Court found that a private physician that had contracted with a state prison system to provide medical services to its incarcerated population constituted state action within the meaning of § 1983.[53] The Court reasoned that the state could not immunize itself from its constitutional obligations by simply outsourcing those obligations to private actors:

> [I]f this were the basis for delimiting § 1983 liability, the state will be free to contract out all services which it is constitutionally obligated to provide and leave it citizens with no means for vindication of those rights, whose protection has been delegated to private actors, when they have been denied.[54]

The reasoning in *West* provides additional support to this Essay's thesis. In the context of educating students with disabilities, when an approved private school provides a publicly-placed student with services that the

49. *Id.* at 972-73.

50. *Rendell-Baker*, 457 U.S. at 842.

51. *See* 20 U.S.C. § 1412(a)(5), P.L. 108-446 § 612(a)(5)(A).

52. 487 U.S. 42 (1988).

53. *Id.* at 57-58.

54. *Id.* at 56 n.14 (quoting West v. Atkins, 815 F.2d 993, 998 (4th Cir. 1987) (Winter, J., concurring and dissenting)) (internal quotation marks omitted).

public school is obligated to provide under federal law, the private school becomes the "intended recipient of the federal financial assistance disbursed via the IDEA."[55] Although the LEA is not delegating its *responsibility* to provide FAPE,[56] the LEA is merely outsourcing the *performance* or *service* aspect of its FAPE obligation to an approved private day or residential program. Because the outsourcing of the provision of FAPE is traditionally and exclusively provided by state actors, a private school that elects to enroll a publicly-placed student with disabilities cannot escape liability when it violates that student's constitutional rights. Otherwise, a publicly-placed student would be left with no avenue to vindicate such rights, a result that would be in direct conflict with courts' interpretation and application of the state action doctrine.[57]

CONCLUSION

The landscape concerning the constitutional rights owed to publicly-placed private school students with disabilities remains murky. Although IDEA mandates the provision of free appropriate public education to this population among participating states, whether private schools should be regarded as state actors, and thus subject to state and federal constitutional law, has been unexplored. Both conclusions are unsurprising. Indeed, as of the last reauthorization of IDEA, the total number of publicly-placed private school students with disabilities reached approximately 90,000 students nationally.[58] Despite this relatively modest figure, courts must ensure that this vulnerable population is not left without the same constitutional protections afforded to their public school counterparts. This Essay argues that an approved special education private school—once they have elected

55. Smith v. Tobinworld, No. 16-CV-01676-RS, 2016 WL 3519244, at *6 (N.D. Cal. June 28, 2016) (noting that the acceptance of IDEA funds renders private school providers subject to § 504).

56. 20 U.S.C. § 1412(a)(10)(B)(ii).

57. *See* Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOF. L. REV. 1379, 1393 (2006) ("The Court's reasoning in . . . *Rendell-Baker* was skewed towards protecting 'individual freedom,' yet a private nursing home does not have a constitutional right to change the level of medical care rendered to a patient without consulting the patient without consulting the patient or the family, nor does a private school have a constitutional right to terminate the employment of teachers because of their criticism of the school's administration.").

58. BURDETTE, *supra* note 18.

to enroll publicly-placed students—operate and function as state actors, given special education's place as the traditional and exclusive province of the state. As state actors, these private schools do and should become subject to the same state and federal constitutional commands as their public school counterparts.