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No Success Without Accountability: The Need for Reform in Wisconsin's Special Needs Scholarship Program

Abby Scott Busler
Valparaiso

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Notes

NO SUCCESS WITHOUT ACCOUNTABILITY: THE NEED FOR REFORM IN WISCONSIN'S SPECIAL NEEDS SCHOLARSHIP PROGRAM

I. INTRODUCTION

Sally is a Wisconsin middle school student with a learning disability.¹ She has an individualized educational plan (“IEP”) that her public school follows to best serve her academic needs. Sally’s family was dissatisfied with her IEP and applied for open enrollment in another public school district. Unfortunately, Sally was denied entry to the other public school, due to the lack of space. Recently, Wisconsin passed the special needs scholarship program, which provided Sally with the option of bringing her IEP with her to a private school.² Sally and her family believe the special needs scholarship program is a dream come true.³

Unfortunately, Sally’s family is not aware of the lack of accountability surrounding the private schools participating in this program. For instance, Sally’s new teacher might not be certified in special education, or even certified with a general teaching license.⁴ Sally’s family is also unaware that she might lose some of her protections under the Individuals with Disabilities Education Act (“IDEA”) if she leaves the public school

¹ This is a hypothetical situation that is solely the work of the author and does not mirror any other situation or case. Learning disabilities can include: autism, speech and language difficulties, emotional and behavior difficulties, and specific learning disabilities. *Detecting Learning Disabilities*, WEBMD (2016), <http://www.webmd.com/children/guide/detecting-learning-disabilities> [<https://perma.cc/Q2TV-GGEA>]. See Rosalie Levinson, *The Right to a Minimally Adequate Education for Learning Disabled Children*, 12 VAL. U. L. REV. 253, 256–59 (1978) (discussing the history of the classification of “learning disability”).

² See WIS. STAT. § 115.7915 (2015) (presenting the new Wisconsin special needs scholarship program statute that outlines the responsibilities of parents, students, the Department of Public Instruction, and the private schools participating in the program); Molly Beck, *Expanded Voucher Program Mostly Private School Students*, WIS. ST. J. (Oct. 24, 2014), http://host.madison.com/news/local/education/local_schools/expanded-statewide-voucher-program-mostly-students-from-private-schools/article_d9a30324-3b57-5efc-b6d3-dbbe8f933554.html [<https://perma.cc/WKC7-JZB4>] (describing that many parents felt that they had no other choices for their students in public schools).

³ See § 115.7915 (explaining that the public school provides the individualized education plan (“IEP”) services to the student and is required to update it on a regular basis, therefore not burdening the private school with that requirement).

⁴ See *id.* (addressing the lack of teacher certification and the requirement to simply inform parents of the teacher’s background, without placing requirements on the licensing).

system.⁵ Last, Sally and her family are oblivious that private schools accepting the state vouchers are not held to the same regulatory standards as public schools.⁶ Voucher schools are subject to the regulation of the Wisconsin Department of Public Instruction (“DPI”), and the DPI could shut the private school down if it is not following the regulations and rules.⁷ Unbeknownst to Sally and her parents, attending a voucher school could be a nightmare instead of a dream come true.

Special education scholarships provide parents with a choice to send their children to private schools at the expense of parents giving up their child’s federal IDEA rights and proper teacher certification. Wisconsin created a new special needs scholarship system that attempts to provide students with an alternative if they are unhappy with their current public school.⁸ However, the private schools receiving state taxpayer funding in Wisconsin lack accountability and regulation. As such, Wisconsin’s program is problematic because the current statute does not address accountability within teacher certification or the child’s IDEA rights that are forfeited by attending the private schools.⁹ Moreover, the current Wisconsin statutory language is inadequate and does not provide enough accountability for parents and students.¹⁰ To increase accountability in the special needs scholarship program, this Note proposes two amendments to the Wisconsin statute, clarifying teacher certification requirements and requiring notice of the loss of IDEA rights.¹¹ First, Part II introduces the original Milwaukee Parental Choice Program (“MPCP”), addresses the

⁵ See *id.* (recognizing that she might not know the implications of her decision to lose the Individuals with Disabilities Education Act (“IDEA”) federal protection once she enters the private school).

⁶ See *id.* (demonstrating that there are different standards in the private voucher schools, compared to the public schools).

⁷ See *id.* (introducing the new Wisconsin special needs scholarship program statute and demonstrating some of the many issues in the statutory language).

⁸ See *infra* Part II (highlighting the major changes in the Wisconsin special needs scholarship program).

⁹ See *infra* Part III.A-B (discussing the lack of standards and accountability with the teacher certification and loss of IDEA rights).

¹⁰ See *infra* Part III.A-C (examining the inadequate language of the Wisconsin special needs scholarship system). As a result of the poor language in the statute, private voucher schools have no teacher certification requirements for special education teachers, and no proper requirements to inform parents and students of their loss of IDEA federal protection rights. *Infra* Part III.A-C.

¹¹ See *infra* Part IV (introducing the proposed change to the Wisconsin statute governing the Wisconsin special needs scholarship program and suggesting that by adding heightened teacher certification requirements, students will receive a better education in these private schools). The contribution proposes a better way for the Department of Public Instruction (“DPI”) to inform parents of their loss of IDEA rights. *Infra* Part IV. Parents are not currently aware of the loss of rights, and this requirement will better inform parents and students of their decisions. *Infra* Part IV.

Wisconsin special needs scholarship program, and compares it to other programs throughout the country.¹² Next, Part III analyzes the problems with the Wisconsin special needs scholarship program language, and why additional amendments are necessary to add accountability and protect students.¹³ Finally, Part IV proposes two amendments to the statute and suggests that the Wisconsin legislators implement these changes requiring teacher certification and the notice of the loss of IDEA rights.¹⁴ These amendments will ultimately raise accountability in this program, which will provide students with a better learning environment.¹⁵

II. BACKGROUND

Wisconsin has debated whether voucher programs are valid alternatives to public schools for decades.¹⁶ In 1991, Wisconsin legislators created a statute implementing the first voucher program in the country.¹⁷

¹² See *infra* Part II (presenting the original Milwaukee Parental Choice Program (“MPCP”) program to provide an introduction into the voucher program and then introducing the new Wisconsin special needs scholarship program to demonstrate the current statutory language and present the flaws).

¹³ See *infra* Part III (analyzing the current language of the Wisconsin special needs scholarship statute, and more specifically, the teacher certification language and language relating to the loss of IDEA rights).

¹⁴ See *infra* Part IV (suggesting that amendments to the current statutory language addressing the teacher certification and loss of IDEA rights will provide better accountability for the taxpayer funded program and increase student performance and knowledge of rights when entering the program).

¹⁵ See *infra* Part III (examining the current statutory issues with the language addressing teacher certification and loss of IDEA rights leaving students and parents unprotected, and more importantly, students without proper special education teachers).

¹⁶ See Julie K. Underwood, *Choice in Education: The Wisconsin Experience*, 68 EDUC. L. REP. 229, 231 (1991) (addressing the introduction to the voucher program and describing the early regulation systems); Wisconsin Research Institute, *The Milwaukee Parental Choice Program*, WIS. POL’Y & RES. INST. (Nov. 1992), <http://www.wpri.org/WPRI-Files/Special-Reports/Reports-Documents/Vol5no5.pdf> [https://perma.cc/TW79-TZHE] (discussing the origins of the MPCP program); see also Sean T. McLaughlin, *Some Strings Attached? Federal Private School Vouchers and the Regulation Carousel*, 24 WHITTIER L. REV. 857, 864 (2003) (discussing the legality of the MPCP and addressing the Wisconsin Supreme Court decision to uphold the voucher program); Julie F. Mead, *Including Students with Disabilities in Parental Choice Programs: The Challenge of Meaningful Choice*, 100 EDUC. L. REP. 463, 479 (1995) (questioning the accountability in the MPCP and whether it provides students with proper choices); William N. Myhill, *No FAPE for Children with Disabilities in the Milwaukee Parental Choice Program: Time to Redefine A Free Appropriate Public Education*, 89 IOWA L. REV. 1051, 1064 (2004) (discussing the beginning of the MPCP and the increase in the program after the Wisconsin Supreme Court upheld the constitutionality of the program).

¹⁷ See generally *Wisconsin-Milwaukee Parental Choice Program*, FRIEDMAN FOUND. (2015) <http://www.edchoice.org/school-choice/programs/wisconsin-milwaukee-parental-choice-program/> [https://perma.cc/H78Y-72L9] (discussing the entire Wisconsin MPCP statute because it is the oldest program in the country); see also Wisconsin Research Institute,

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After this monumental program began, other states eventually joined the trend, while courts around the country began to rule on the legality of the programs.¹⁸ Ultimately, the Wisconsin Supreme Court, and later the United States Supreme Court, upheld the validity of MPCP voucher program, thus encouraging expansion into other voucher programs.¹⁹ This Note focuses on the expansion of the special needs scholarship program, and why the current Wisconsin statutory language is inadequate and does not provide accountability for parents and students.²⁰ First, Part

supra note 16 (addressing the beginning of the MPCP); McLaughlin, *supra* note 16, at 863–64 (analyzing the MPCP and describing that the voucher program survived state supreme court challenges).

¹⁸ See Cain v. Horne, 202 P.3d 1178, 1185 (Ariz. 2009) (concluding that the Arizona voucher program violated the state constitution); Bush v. Holmes, 919 So. 2d 392, 408 (Fla. 2006) (holding that the Florida voucher system violated the state constitution and the court struck down the program); Myhill, *supra* note 16, at 1063 (addressing that Ohio, Florida, Maine, and Vermont all have voucher programs and other states are starting to expand as well); *but see* Jackson v. Benson, 578 N.W.2d 602, 612 (Wis. 1998) (determining that the Wisconsin statute in the voucher program did not violate Wisconsin law and upholding the original MPCP). Under the Lemon test, “a statute does not violate the Establishment Clause if: (1) it has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create excessive entanglement between government and religion”; in this case, the court found that the Wisconsin statute fit all three. Jackson, 578 N.W.2d at 612. See also Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) (upholding the constitutionality of a state voucher program and allowing the states to make their own determinations on whether it violates a states’ constitution).

¹⁹ See Zelman, 536 U.S. at 652 (setting a ruling in favor of voucher programs and stating that they do not violate the federal constitution); Jackson, 578 N.W.2d at 611 (upholding the original MPCP statute and ruling that it did not violate the Wisconsin state constitution, and providing the first ruling in the country on voucher programs). Louisiana, Oklahoma, Ohio, North Carolina, Mississippi, and Arizona are states adding special needs voucher programs because there are legal changes and developments with general voucher programs that impact special needs students. Wendy F. Hensel, *Recent Developments in Voucher Programs for Students with Disabilities*, 59 LOY. L. REV. 323, 325, 328, 332, 334, 336 (2013) [hereinafter Hensel, *Recent*]. For example, in the MPCP, the American Civil Liberties Union (“ACLU”) and others filed a complaint with the Department of Justice (“DOJ”) claiming that MPCP discriminates against children with disabilities in violation of § 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (“ADA”). *Id.* at 341. The state must apply both 504 and Title II in public school; however, it is unclear about the applicability of those statutes to private schools participating in the program. *Id.* at 342. The DOJ directed the Department of Public Instruction (“DPI”) to:

Establish a complaint procedure relating to the treatment of children with disabilities in the school choice program, collect data about the program to determine how and to what extent students with disabilities are being served by voucher schools, and conduct outreach to the parents of students with disabilities to educate them.

Id. at 343. This discrimination, along with other states expanding to a special needs voucher system could provide some explanation as to why Wisconsin might have wanted to make the switch. *Id.*

²⁰ See *infra* Part III.A–C (examining the inadequate language of the Wisconsin special needs scholarship system). As a result of the poor language in the statute, private voucher

II.A provides a background of the first voucher program in the country, the MPCP.²¹ Then, Part II.B introduces the Wisconsin special needs scholarship program, including legislative history and accountability concerns.²² Finally, Part II.C provides a background of teacher certification and IDEA rights in public schools compared to private schools participating in the scholarship program.²³

A. *History of Wisconsin's Voucher Programs: The Milwaukee Parental Choice Program*

In 1991, the MPCP was the first Wisconsin voucher program passed by legislators to provide a new alternative for low-income families who believed Milwaukee Public Schools (“MPS”) were failing their children.²⁴ When the program first started, the MPCP required parents to be at “175% of the federal poverty level” and be residents of Milwaukee.²⁵ While the MPCP permitted only 1,000 students to participate, this program was monumental to parents who believed that MPS did not provide their children with proper education.²⁶ Furthermore, it gave low-income

schools have no teacher certification requirements for special education teachers, and no proper requirements to inform parents and students of their loss of IDEA federal protection rights. *Infra* Part III.A–C.

²¹ See *infra* Part II.A (providing a background to the Wisconsin special needs scholarship program by introducing the original voucher program and discussing the history throughout the country in voucher programs).

²² See *infra* Part II.B (explaining the legislative history of the Wisconsin special needs scholarship program and the accountability concerns within the program). This Part will address viewpoints from both proponents and opponents to the program and why each side either wanted the program passed, or fought hard against the bill. *Infra* Part II.B.

²³ See *infra* Part II.C (describing the difference between teacher certification requirements in the public school versus private schools receiving state taxpayer money, and providing a comparison of IDEA rights in the public school setting versus the private voucher schools). This Note also includes a look into other special education voucher programs and their requirements for both teacher certification and IDEA rights. *Infra* Part II.C.

²⁴ See Underwood, *supra* note 16, at 230 (discussing the introduction of the MPCP and how it became the first program in the country). The legislators introduced the MPCP through the budget bill in legislation during the last few days and passed it. *Id.*

²⁵ *Id.* See also Lyndsay Carothers, Note, *Here's an Idea: Providing Intervention Services for At-Risk Youth under the Individuals with Disabilities Education Act*, 42 VAL. U. L. REV. 543, 573 (2007) (addressing the concern that at-risk students have a higher chance of being misdiagnosed or not properly serviced as special needs). These at-risk students can come from low-income families, similar to the families that were originally given access to the MPCP. *Id.* at 573–74.

²⁶ See Underwood, *supra* note 16, at 230 (explaining the initial limits of participation in the MPCP).

For example, a family of four would qualify if its monthly income was at or below \$1,853. The program limits the number of students each participating school can accept. Choice students can make up no more

parents a choice in their child's education instead of "settling" for the MPS education.²⁷ Vouchers allow parents to send their child to a private school and have the state pay their tuition for attending the private school.²⁸

than 49 percent of a participating school's total enrollment. Schools must select eligible children for enrollment on a random basis.

Id. See also Julie F. Mead, *Private in Name Only: A Statutory and Constitutional Analysis of Milwaukee's Private School Voucher Program*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 331, 336 (2015) (addressing that Governor Tommy Thompson signed the bill into law and has amended it twenty times).

²⁷ See Mead, *supra* note 26, at 339 (illustrating that parents wanted a choice for their student's education and the voucher program provided them with that choice); see also Telephone Interview with Bonnie Smith, School Teacher (Oct. 20, 2015) (providing an interview from a person who taught at a Milwaukee private school that participated in the choice program and explained why parents wanted to send their child there). The choice school she worked at was overall a learning experience for Ms. Smith, and she described some of her experiences:

St. Marcus was regarded as one of the best choice schools, most likely because of their high graduation rates, which I believe are invalid as they can deny the students who may be unlikely to graduate or likely to face expulsions. Their discipline procedures were rigid and militaristic and they practiced zero tolerance. Students were expected to remain quiet throughout the majority of the day, (though the latest brain research proves that the brain is a social learner and a multisensory approach to education is best practice), stand in perfectly straight lines in the hallway, [and] wear uniforms which held clout as they were stripped of pieces of their uniforms (ties and blazers) if their behavior or grades were not up to par. This form of ostracism, called being on "crate," also involves sitting or standing apart from one's class during instruction, not being allowed to talk to other students (other students also faced crate if they were to talk to a student on crate), as the student is not deemed worthy of being a part of their grade level "family." This practice can occur for weeks at a time per student. The other thing I think is noteworthy is the fact that the majority of teachers identified as white and the clientele they serviced were black in the majority. There was a sense of the "white savior" and that these "hood kids" were some type of savages that needed "saving" in the earthly sense, not just the heavenly one. Finally, the teachers at St. Marcus do carry very large responsibilities. Many of them work thirteen plus hour days regularly and go out of their way to pick kids up for school, take them to doctor or dentist appointments, etc. There is a high burnout rate and high turnover rate. These teachers hardly have time to attend professional development seminars or plan coherent and differentiated instruction. Instead, they often rely on the structure of St. Marcus discipline to "remedy" students who would benefit from differentiated support for special needs.

Id.

²⁸ See Smith, *supra* note 27 (providing a brief history as to why Ms. Smith decided to become a part-time choice school teacher). Ms. Smith chose to work for a choice school while she was earning her teacher licensure and a master's degree in teaching. *Id.* First, the school was a practical job and she had connections because of her religion. *Id.* Second, she believed it would provide her with practical teaching experience and provide her with a new

Additionally, private schools participating in the MPCP must meet state-imposed requirements.²⁹ For example, the school must be accredited,

perspective, because she always planned on working in public school after she earned her teaching license. *Id.* Third, she knew that her lack of licensure would not necessarily stand in her way of being hired at a choice school because it is not a hiring requirement. *Id.* School vouchers programs are meant to “empower parents of public school students with the freedom to select an alternative school.” Jo Ann Bodemer, Note, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid from the Lemon Test*, 70 ST. JOHN’S L. REV. 273, 280 (1996).

²⁹ See WIS. STAT. § 119.23(2), (4)–(5) (2015) (addressing the set of requirements that private schools must follow in order to participate in the program). Private schools must comply with 42 U.S.C. § 2000d, all health and safety laws or codes that apply to public schools. *Id.* See also § 119.23(2)(a)(b)(1) (discussing the requirements for students to be eligible for the program). In order to participate in the private school voucher program, the private school:

Submits to the department of public instruction the names, addresses, social security numbers, and other state and federal tax identification numbers, if any, of the pupil’s parents or legal guardians that reside in the same household as the pupil, whether and to whom the parents or legal guardians are married, the names of all of the other members of the pupil’s family residing in the same household as the pupil, and the school year for which family income is being verified under this subd. 1. b. The department of revenue shall review the information submitted under this subd. 1. b. and shall verify the eligibility or ineligibility of the pupil to participate in the program under this section on the basis of family income. In this subdivision, “family income” means federal adjusted gross income of the parents or legal guardians residing in the same household as the pupil for the tax year preceding the school year for which family income is being verified or, if not available, for the tax year preceding the tax year preceding the school year for which family income is being verified under this subd. 1. b. Family income for a family in which the pupil’s parents are married or in which the pupil’s legal guardians are married shall be reduced by \$7,000 before the verification is made under this subd. 1. b. The department of revenue may take no other action on the basis of the information submitted under this subd. 1. b. If the department of revenue is unable to verify family income or to verify whether the pupil is eligible or ineligible to participate in the program under this section on the basis of family income, the department of revenue shall notify the department of public instruction of this fact and the department of public instruction shall utilize an alternative process, to be established by the department of public instruction, to determine whether the pupil is eligible to participate in the program under this section on the basis of family income. The department of public instruction may not request any additional verification of income from the family of a pupil once the department of revenue has verified that the pupil is eligible to participate in the program under this section on the basis of family income. The department of public instruction shall establish a procedure for determining family income eligibility for those pupils for whom no social security number or state or federal tax identification number has been provided.

Id.

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employ teachers with at least a bachelor's degree, and demonstrate that the school is financially sound.³⁰ If the private school and students are both eligible for the voucher, then the DPI distributes vouchers randomly to the students.³¹ Therefore, the MPCP was the first alternative to parents who believed that MPS did not provide their children with proper education.³²

At first, critics challenged the MPCP because it provided private religious schools with financial state aid.³³ As such, the Wisconsin Supreme Court analyzed the MPCP's legality twice in the Wisconsin Supreme Court, but upheld it both times.³⁴ First, in 1992, in *Davis v. Grover*, the court held that the MPCP did not violate Article X, Section 3 of

³⁰ See § 119.23(2)(d)(3) (addressing a private school participating in the program must demonstrate that it is qualified to receive the state funds and comply with the statute). To be financially sound, the school must demonstrate its finances through a Financial Information Report. § (3)(g). These reports allow the DPI to ensure that the school is financially sound and will be able to use the state taxpayer money responsibly. *Id.*

³¹ See § 119.23(3)(a) (stating that private schools may give preference to students in certain instances). First, "pupils who attended the private school under this section during the previous school year" receive preference. *Id.* Second, "siblings of pupils . . . will receive preference." *Id.* Third, "pupils who attended a different private school under this section or s. 118.60 during the previous school year" received preference. *Id.* Fourth, "[s]iblings of pupils described in subd. 3" received preference. *Id.* Fifth, "[s]iblings of those pupils who have been randomly accepted to attend the private school under this section and who did not attend a private school under this section or s. 118.60 during the previous school year" will also receive preference. *Id.*

³² See Mead, *supra* note 26, at 336 (addressing that many viewed this program as a great alternative to Milwaukee Public Schools ("MPS")). The original MPCP differs dramatically from the current operation of the program. *Id.* at 332. This program has been revised in many different ways, "especially expanding the scope of the program . . ." *Id.* First, it now allows both religious and non-religious schools to participate. *Id.* at 332-33. Second, "[t]here are no longer limits on the percentage of students a private school may enroll through the program[,] in fact the average MPCP [s]chool enrolls more than 80% of its students through vouchers." *Id.* at 333. Third, "[t]here are no limits now on the total number of students from Milwaukee who can participate." *Id.* Fourth, schools eligible to participate can now be located outside of Milwaukee. Mead, *supra* note 26, at 333. Fifth, "[e]ligibility for low-income families has been expanded from 175% to 300% of the federal poverty level, an amount greater than the median household income for the state." *Id.*

³³ See *Davis v. Grover*, 480 N.W.2d 460, 463 (Wis. 1992) (holding that the MPCP did not violate the state constitution's Establishment Clause). One issue on appeal focused on whether the creation of the MPCP violated Article X Sec. 3 of the Wisconsin Constitution because the state provided money to the private schools. *Id.* However, the court held that this transfer of money did not constitute "district schools." *Id.* Another issue was whether the MPCP violated the public purpose doctrine because great weight is provided to the legislature in determining public policy. *Id.*

³⁴ See *id.* (discussing the first challenge to the MPCP in 1992 and upholding the program for its constitutionality and setting a precedent for all future challenges to the program); see also *Jackson v. Benson*, 578 N.W.2d 602, 617 (Wis. 1998) (upholding the constitutionality of the MPCP program and addressing the newer additions and changes to the program since 1992).

the state constitution.³⁵ Six years later, the constitutionality of the program, as amended, was questioned in *Jackson v. Benson*, and the Wisconsin Supreme Court upheld the validity of the voucher program again.³⁶ *Benson* created a legal precedent for other programs throughout the country that might consider adding voucher programs.³⁷

³⁵ See *Jackson*, 578 N.W.2d at 617 (discussing the first challenge to the MPCP in 1992 and upholding the program for its constitutionality and setting a precedent for all future challenges to the program); see also Mead, *supra* note 26, at 350 (discussing that the State Superintendent created regulations for the MPCP). The school administrators then interfered to challenge the constitutionality of the program. *Id.* at 350. As a side note, the State “[s]uperintendent Grover had created a rule that would have required MPCP schools to serve children with disabilities in a manner similar to public schools, effectively making what was then the Education for All Handicapped Children’s Act.” *Id.* This argument was later rejected by Judge Susan Steinglass, and never addressed again because the participating private schools could just make the reasonable accommodations to enroll children with disabilities. *Id.* However, if this was addressed by the court, the special needs scholarship program would have a higher set of regulations because of past legislation and allow that program to have a better standard of accountability. *Id.*

³⁶ See 578 N.W.2d at 617 (analyzing the establishment of religion issues raised by the legislature’s removal of the requirement for MPCP schools to be non-sectarian). This court allowed for the religious schools in Milwaukee to take part in the voucher program and receive federal money from the state. *Id.* The program also removed the cap of students that schools could enroll in each year, while opponents argued this turned the voucher school into a public school. *Id.* However, the court did not accept this argument and later rejected it because the number of students enrolled in the program did not change a voucher school from private to public. *Id.* Further, this court decision created a new persuasive authority for the rest of the country as they upheld voucher programs to be constitutional and not in violation of the Establishment Clause. *Id.* The court applied the *Lemon* test, and the purpose was secular in nature, and is usually conceded because it has such a compelling interest to help low-income students receive a better education. *Id.* at 612. Under the second prong of the *Lemon* test, the court held that the state is not promoting or inhibiting religion when it provides vouchers to the religious schools that take part in the program. *Jackson*, 578 N.W.2d at 612. The court held that it did not have excessive entanglement with the state and religion because the program is not promoting religion, and will continue with its accountability and enforcement of regulations by the state. *Id.* at 619. See also *Milwaukee Parental Choice Program Headcount and FTE*, WIS. DEP’T OF PUB. INSTRUCTION (Feb. 25, 2015), <https://sms.dpi.wi.gov/sites/default/files/imce/sms/pdf/MPCP%20201415%20Jan%20Numbers%20by%20School%20with%20all%20Pupils.pdf> [<https://perma.cc/2TL3-223V>] (demonstrating that some schools in the program have 100% enrollment numbers of choice students). This relates to *Jackson v. Benson*, demonstrating that it is legal to have choice private schools consisting of only voucher or choice students. *Id.*

³⁷ See *Jackson*, 578 N.W.2d at 617 (approving the MPCP and providing it as a stepping point for other states who might be interested in the program); see also *2015–2016 WPCP Income Limits*, WIS. DEP’T OF PUB. INSTRUCTION (Oct. 12, 2015), <http://sms.dpi.wi.gov/sites/default/files/imce/sms/2015-16%20Income%20Limits%20WPCP.pdf> [<https://perma.cc/MK2N-5XBK>] (referring to the new statewide Wisconsin voucher program that developed from the original MPCP). The two Wisconsin Supreme Court rulings on the MPCP allowed for the development of other systems throughout the state of Wisconsin and also was modeled after the original MPCP. Molly Beck, *Expanded Statewide Voucher Program Mostly Students from Private Schools*, WIS. ST. J. (2014), <http://host.madison.com/news/local/>

After the two Wisconsin Supreme Court decisions paved the way for more voucher programs, Wisconsin expanded its programs and now has three voucher programs throughout the state.³⁸ These additional programs include the MPCP, Wisconsin Parental Choice Program (“WPCP”), and the Racine Parental Choice Program (“RPCP”).³⁹

Alongside the precedent *Benson* case, the United States Supreme Court reiterated the validity of the voucher program by upholding a state voucher statute in *Zelman v. Simmons-Harris*.⁴⁰ In *Zelman*, the Court held that the Ohio Pilot Scholarship Program did not violate the Establishment Clause and held that the Ohio voucher program was allowed to provide scholarships to private schools.⁴¹ After these landmark cases, the voucher

education/local_schools/expanded-statewide-voucher-program-mostly-students-from-private-schools/article_d9a30324-3b57-5efc-b6d3-dbbe8f933554.html [https://perma.cc/WKC7-JZB4]. However, the students most likely to take the vouchers are students who were already attending private school. *Id.* Only nineteen percent of students attended public school that accepted the vouchers. *Id.*

³⁸ See generally *20 Schools Plan to Participate in Racine Voucher Program*, WIS. DEP’T OF PUB. INSTRUCTION (Oct. 12, 2015), http://dpi.wi.gov/sites/default/files/news-release/dpinr2015_21.pdf [https://perma.cc/KE69-B66W] (providing an example of a new voucher program in Wisconsin).

³⁹ See *id.* (discussing the growing program of the Racine voucher program that targets low-income students). The Racine program is a spin-off from the original Milwaukee program and is focused on providing children from the low-income families a choice to attend some of the “better” private schools in the Racine area. *Id.* See *98 Schools Plan to Participate in Wisconsin Parental Choice Program*, WIS. DEP’T OF PUB. INSTRUCTION (Oct. 12, 2015), http://dpi.wi.gov/sites/default/files/news-release/dpinr2015_22.pdf [https://perma.cc/BQA4-YZDZ] (introducing the ninety-eight schools that are participating in the Wisconsin Parental Choice Program). In the statewide program, there are thirty-six new schools that plan to join and take part of this new voucher system. *Id.*

⁴⁰ See 536 U.S. 639, 649 (2002) (addressing the issue of whether the Ohio Pilot Scholarship program violated the Establishment Clause of the Fourteenth Amendment because it provided state voucher money to the private religious schools); see also Gia Fonté, *Zelman v. Simmons-Harris: Authorizing School Vouchers, Education’s Winning Lottery Ticket*, 34 LOY. U. CHI. L.J. 479, 521 (2003) (analyzing the holding of *Zelman v. Simmons-Harris*). This Supreme Court decision will create an increase in voucher programs because of its constitutional ruling. Fonté, *supra* note 39, at 524. Before this ruling, only three states, Wisconsin, Florida, and Ohio had programs. *Id.* Now, it seems that other states can more easily add voucher programs, and not worry about the status of its constitutionality. *Id.* Essentially, this decision created more opportunities for other states to expand their state system in other ways and allow for voucher programs. *Id.*

⁴¹ See *Zelman*, 536 U.S. at 649 (holding the Ohio voucher program was constitutional). The Court reasoned that the “Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children.” *Id.* at 653. Further, the Court reasoned that the program permits participation of all the schools within the district, religious or nonreligious. *Id.* The program benefits are also offered to parents regardless of which private school they choose. *Id.* Therefore, with no financial incentives for the religious private schools, the state is not endorsing one religious school over a non-religious private school. *Id.* The Court did not find significance of the fact that ninety-six percent of the scholarship recipients were enrolled

programs are unlikely to be reversed and allow for future expansion for special education vouchers.⁴²

B. Wisconsin's Special Needs Scholarship Program

As a response to parental concerns in public school, the Wisconsin Legislature created the Wisconsin special needs scholarship program.⁴³ Part II.B introduces the Wisconsin special needs scholarship program.⁴⁴ First, this Part discusses the legislative history and the perceptions of the special needs scholarship bill.⁴⁵ Second, this Part addresses the accountability concerns within the program, and more specifically, issues with the language.⁴⁶

Wisconsin's special needs scholarship program was discussed for many years, beginning in 2011, before ultimately passing in July 2015.⁴⁷

in religious schools. *Id.* at 653. "On March 22, 2001, President Bush submitted his first education package to the 107th Congress entitled No Child Left Behind Act of 2001, the bill primarily targets improving teacher quality, increasing local flexibility, parental choice, and enhancing educational quality for low-income students." McLaughlin, *supra* note 16, at 858. This program did have restrictions, which included that students could only use the funds for private schools that agree to assist students in math, reading, and language arts. *Id.* at 859.

⁴² See *infra* Part II.B (showing that because the Wisconsin programs have been upheld by both the Wisconsin Supreme Court and the U.S. Supreme Court, the programs will not be struck down). This transition shows many differences between the MPCP statute and the Wisconsin special needs scholarship program statute, and more specifically, focuses on the teacher certification requirement differences within the program. *Infra* Part II.B.

⁴³ See 2013 *Special Archives*, STOP SPECIAL NEEDS VOUCHERS (2014), <http://www.stop-specialneeds vouchers.org/2013/page/2/> [<https://perma.cc/XCY3-2C62>] (illustrating a parent viewpoint on the Wisconsin special needs scholarship program). As one parent stated, "We should not be spending precious public tax dollars on an education that does not guarantee qualified staff, necessary therapies[,] and a true Individualized Education Program which must be implemented as written with parents at the table." *Id.*

⁴⁴ See *infra* Part II.B (introducing the Wisconsin special needs scholarship program and presenting some of the critical issues in the statute).

⁴⁵ See *infra* Part II.B (introducing the legislative history). This bill was highly contentious because it had strong supporters and strong opponents. *Infra* Part II.B.

⁴⁶ See *infra* Part II.B (presenting the accountability concerns from opponents of the bill and those concerns throughout the country). The language in the statute is particularly concerning because it limits the accountability in the program. *Infra* Part II.B.

⁴⁷ See Joanne Juhnke, *To Help Special Needs Students, End Voucher Expansion*, STOP SPECIAL NEEDS VOUCHERS (Dec. 5, 2013), <http://www.stopspecialneeds vouchers.org/2013/12/> [<https://perma.cc/6R96-533V>] (providing a place for opponents of the bill to voice their opinions). This blog started in 2012, after the special needs scholarship bill was proposed the first time. *Id.* The group is composed of families throughout Wisconsin who share the common goal of preventing a special needs scholarship system in Wisconsin. *Id.* This group believes in the progress our country has made with the IDEA, and is concerned about the new program in Wisconsin. *Id.* They believe that parents are not fully informed about the new program and do not like the lack of accountability in the new program. *Id.* Essentially,

Even though the bill was not passed immediately, Republican legislators pushed each year for the bill to enter the budget.⁴⁸ Because of its extreme controversy and polarizing topic, some members of the legislature and the general public strongly opposed this bill.⁴⁹ In 2013, the DPI testified why

the parents believe that there are better options in expanding the public school special education programs instead of moving the money outside of the public school system. *Id.*

⁴⁸ See *Candidate Positions on Special Needs Vouchers*, STOP SPECIAL NEEDS VOUCHERS (July 2014), <http://www.stopspecialneeds vouchers.org/candidates/> [<https://perma.cc/LAW8-32RL>] (providing a survey of legislators, and the governor candidates in 2014 on their position of the special needs scholarship). The survey asked the candidates: “[d]o you support the creation of a statewide special needs scholarship program in Wisconsin, as proposed in Wisconsin’s past two legislative sessions? Why, or why not?” *Id.* Many candidates had strong feelings each way on whether the program should be created in Wisconsin. *Id.* For example, one candidate said:

I work with some of the most severe students with behavior problems and emotional disabilities. My fear is that the public school is going to be left with the most severe students to work with, and the private schools will take the students that are less severe and somewhat easier to educate, from my perspective, if you’re taking public money, then you should take the public. That’s what public schools do. Our doors are open to anyone who needs education. If these schools are going to take tax dollars, then they should have to live by the same rules.

Id.

⁴⁹ See H.R. 110, 2011 Assemb. Sess. (Wis. 2011) (proposing a special needs scholarship program in 2011 that would give students the choice to attend a private school through a voucher if they were denied open enrollment in another district). An Individualized Education Program (“IEP”) must be completed for the child, and the child must have attended public school the year immediately preceding the school year for which the child first received a scholarship. *Id.* This first version of the statute was silent on any teacher certification requirements and also informing parents of the loss of IDEA rights. *Id.* See also Jennifer Kammerud, Department of Public Instruction Testimony on 2011 Assembly Bill 110, Assemb. Comm. on Educ. (May 3, 2011) (addressing the legislature and testifying against the passage of the special needs scholarship program in 2011). Jennifer Kammerud is the legislative liaison for the Department of Public Instruction and testified that this bill “strips special education students of due process rights and rights to services.” *Id.* at 1. Additionally, Kammerud stated that it will “devastate funding for public education in select districts . . . [and] result in the largest expansion of private school regulation ever seen in Wisconsin and, at the end of the day, no one will have any data to show if it resulted in a better education.” *Id.* Last, she said that “this is not the way we operate public schools. This is not accountability; it is a blank check—a rather large blank check written on the taxpayers’ account.” *Id.* See also *2012 Election Impact Report*, AMERICAN FED’N FOR CHILD. (2012), http://media.jsonline.com/documents/ASC1290_FINAL_3.25.13UPDATED.pdf [<https://perma.cc/22YA-EKJN>] (providing a state survey of voucher programs and addressing the potential for a special needs scholarship program in Wisconsin). The article stated that:

With strong leadership from Governor Scott Walker, legislators in the state that is home to the nation’s oldest publicly funded private school choice program are now looking to create a statewide special needs scholarship program and increase funding amounts in the existing school choice and independent charter programs. In addition to strengthening the Milwaukee Parental Choice Program and the new

the program should not be passed.⁵⁰ For example, the DPI shared its concerns about the lack of IDEA protection, and as a result, this bill was once again not passed.⁵¹ Legislators, parents, and educators were conflicted on whether this special needs scholarship program was the correct response because it is unclear whether this program will be beneficial or harmful.⁵²

Although the program received strong opposition, in 2015, Act 55 passed, and the vision of a special education scholarship program became a reality.⁵³ The DPI opposed the 2015 bill that ultimately passed, and

Racine Parental Choice Program, educational choice supporters have also set their sights on expanding the charter school authorizing body.

Id. See also Survival Coalition, *Statement on Joint Finance Committee Decision to Create Special Needs Vouchers for Students with Disabilities*, WIS. DISABILITIES ORG. (May 19, 2015), http://www.thewheelerreport.com/wheeler_docs/files/0519sc.pdf [<https://perma.cc/TL33-ND6V>] (addressing the announcement to reintroduce the special needs scholarship program and the potential lack of transparency with the late addition to the finance committee). This voucher program has been “repeatedly proposed and defeated in Wisconsin since 2011 . . . [n]o Wisconsin disability organization has supported a special needs voucher and parents have come out in the thousands to indicate opposition.” *Id.*

⁵⁰ See Kammerud, *supra* note 49 (providing testimony on 2011 Assembly Bill 110). Kammerud’s testimony focused on the higher costs to the state from the program and the decrease in resources for local school districts that are trying to educate special education students. *Id.* She stressed that the private schools do not have any data to demonstrate how much it would cost them to educate special education students; therefore, the department cannot do the calculations that the bill would have required. *Id.*

⁵¹ See *id.* (providing testimony on 2011 Assembly Bill 682 that described the issues with IDEA funding). Kammerud provided the example that:

[I]f five students from the Sparta School District take scholarships to attend a private school in Tomah, it will be the Tomah School District that will see the amount of IDEA dollars available to cover their own special education costs decrease as Tomah will need to set aside more of this money for private school students.

Id.

⁵² See *Stop Special Needs Vouchers*, *supra* note 48 (showing that the candidates in 2014 held mixed opinions regarding the special needs scholarship program); see also Kathleen Vinehout, *Looking Back, Looking Forward*, UPPITY WIS. (Dec. 21, 2012), <https://www.uppitywis.org/blogarticle/looking-back-looking-forward> [<https://perma.cc/DDE4-SLFH>] (discussing Vinehout’s role as Senator and that her constituents are concerned about the special needs scholarship program). She said that, “[n]early everyone who contacted me about education is concerned about money for local schools and opposed to an expansion of the charter and voucher programs, especially the expansion of vouchers to special education students.” *Id.*

⁵³ See Christina Samuels, *Wisconsin Special Needs Vouchers Survive Controversial Start, Opposition*, EDUC. WEEK (July 15, 2015), http://blogs.edweek.org/edweek/spaced/2015/07/wisconsin_special_needs_vouchers_survive_controversial_start_opposition.html [<https://perma.cc/Z7T2-5Q3E>] (showing how the bill was placed in the budget around 1:00 A.M. on May 20, 2015, which angered parents, educators, and the state superintendent because it was not given any time for public debate or input). However, regardless of its start, Governor Scott Walker is pleased with the bill and officially signed it into law on July

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fought hard through testimony and veto recommendations to eliminate it, or alternatively, modify some of the language.⁵⁴ Ultimately, the legislature passed the bill with no modifications, and it will be implemented in the 2016–17 school year.⁵⁵ This strict timeline gives the DPI a year to transition into the new program and prepare for the extra regulation and implementation of yet another voucher program.⁵⁶

Like the DPI, additional opponents of the Wisconsin special needs scholarship program criticized the lack of accountability in the statutory language.⁵⁷ The statute contains many different problematic areas, but more specifically, within the private school duties section.⁵⁸ For example,

12, 2015. *Id.* See also Scott Walker, *Senate Bill 21 as 2015 Wisconsin Act 55: Veto Message*, 2015 Legislature 10 (July 15, 2015) (addressing the governor’s support for the special needs scholarship program). Walker believes it increases transparency in kindergarten through twelfth grade funding by having public funding follow the students for expansions in the school choice program and the special needs scholarships. *Id.*

⁵⁴ See Tony Evers, *Veto Recommendations for the 2015-17 Budget Bill*, WIS. DEP’T OF PUB. INSTRUCTION 1 (2015), http://pb.dpi.wi.gov/sites/default/files/imce/pb/pdf/FINAL_July_8_2015_Veto_request_letter_to_Gov.pdf [<https://perma.cc/YX92-W5RU>] (addressing the veto concerns within the special needs scholarship program). The Wisconsin State Superintendent, Evers, requested a veto for the entire special needs scholarship program because he felt it did not protect students enough. *Id.* at 9. Furthermore, the special needs scholarship program is not providing the same level of services and protections that is required under public schools. *Id.* For example, “[w]hen students enroll in a private school, they forfeit their rights to a free appropriate public education (“FAPE”), which includes special education programs and services.” *Id.* Also, the public school district is still required to provide the IEP; however, the private school is not held accountable to implement the IEP. *Id.* For these reasons and many more, the state superintendent requested that the governor veto this section of the bill. *Id.*

⁵⁵ See WIS. STAT § 115.7915 (2015) (stating that the program will begin in the 2016–17 school year); see also Shanon S. Taylor, *Special Education, Private Schools, and Vouchers: Do All Students Get A Choice?*, 34 J.L. & EDUC. 1, 22 (2005) (addressing that parents ultimately want that choice to remove their students from public schools if they want a better educational environment to serve their children). Taylor also questions whether the current voucher programs meet the needs of students with special needs, and many programs, like the Cleveland program, do allow the schools to deny admission based on a student disability. *Id.* at 22.

⁵⁶ See Evers, *supra* note 54, at 10 (explaining Evers’s concern for the enforcement of the program). He specifically wanted certain words removed from the statute because they were too broad and created subjective standards of review. *Id.*

⁵⁷ See Steering Committee of Stop Special Needs Vouchers, *Testimony on the 2015/17 State Budget*, STOP SPECIAL NEEDS VOUCHERS (Mar 23, 2015), <http://www.stopspecialneeds.org/uncategorized/testimony-on-the-201517-state-budget/> [<https://perma.cc/CC5H-W7C9>] (describing the Steering Committee’s reasons for wanting to stop the special needs scholarship program). The committee testified about the lack of accountability in the voucher programs and the harm that students with disabilities will face. *Id.* This harm comes from the lack of regulations and rules that the private school does not need to follow, like the IDEA. *Id.*

⁵⁸ See § 115.7915(6) (demonstrating that the private school duties are minimal and do not provide the adequate accountability for a state taxpayer program). This section of the private

the private schools do not have to comply with the IDEA law, but only have to meet basic requirements such as complying with health and safety laws.⁵⁹ This section of the statute also addresses how the private school must inform the students of the teacher's qualifications, or lack thereof.⁶⁰

school duties is critical to this background and analysis because this is the section that critics point to as containing accountability flaws:

Private school duties. Each private school participating in the program under this section or receiving a payment under sub. (4m) shall do all of the following:

(a) Comply with all health and safety laws or codes that apply to private schools

(g) Provide to each applicant under sub. (2) (f) a profile of the private school's special education program, in a form prescribed by the department, that includes the methods of instruction that will be used by the school to provide special education and related services to the child and the qualifications of the teachers and other persons who will be providing special education and related services to the child.

Id.

⁵⁹ See *id.* (explaining the duties of private schools that choose to take part in the program); see also McLaughlin, *supra* note 16, at 885 (discussing the health and safety requirements in other voucher programs). He stated that other schools must include the health and safety requirements. *Id.* Many cases that addressed the validity of voucher programs described that:

[A]ny federal voucher regulation that ensures health and safety standards in participating private schools should easily satisfy strict scrutiny. The Court has found narrowly tailored compelling state interests when examining far less serious First Amendment issues. Once the federal government offers parents a voucher and enables their children to attend private schools, its responsibility to ensure adequate health and safety should not end.

Id. at 886. See also James G. Dwyer, *No Accounting for School Vouchers*, 48 WAKE FOREST L. REV. 361, 383 (2013) (comparing the health and safety regulation requirements for voucher schools to grocery stores). The requirements that the statutes place on private schools with health and safety requirements are similar to those that exist for grocery stores. *Id.* at 383-84. However, these regulations do not ensure academic quality, and comparing them to grocery store regulations shows how irrelevant some of the accountability regulations are.

Id. For example:

Some programs require the school to demonstrate financial viability, just as a grocery store might be required to carry liability insurance. Participating schools might be required to perform criminal background checks on potential employees and exclude those convicted of certain crimes. This, too, is necessary . . . in a grocery store . . . but it does nothing to ensure that employees who are hired do their jobs well.

Id. at 384.

⁶⁰ See § 115.7915(6)(g) (describing the informative process for parents to find out teacher certification in the voucher program); see also McLaughlin, *supra* note 16, at 887 n.220 (showing that it is not illegal or unconstitutional to have teacher certification requirements in a private school). For more examples of case law that support the right to require teacher certification in private schools because the government has a compelling interest, see, e.g., *Johnson v. Charles City Cmty. Sch. Bd. of Educ.*, 368 N.W.2d 74, 83-85 (Iowa 1985) (illustrating that requiring certification for all school teachers did not violate free exercise of

Instead of the DPI monitoring teacher credentials, the DPI informs parents and students of the qualifications after the student enrolls.⁶¹ Teachers will not be required to have special education certification either.⁶² Also, accountability concerns arise in the statute under the DPI duties.⁶³ Some

religion and was constitutional); *Sheridan Rd. Baptist Church v. Dept. of Educ.*, 396 N.W.2d 373, 375 (Mich. 1986) (allowing teacher certification requirements in parochial schools); *State ex. rel Douglas v. Faith Baptist Church of Louisville*, 301 N.W.2d 571, 576 (Neb. 1981) (upholding teacher certification for private school teachers).

⁶¹ See § 115.7915(6)(g) (addressing the lack of control that the DPI has in teacher certification requirements); see also WASB, *Vouchers and Student Achievement*, WIS. ASSOC. OF SCHOOL BOARDS (2015), http://wasb.org/websites/advocGovRelations/File/vouchers/vouchers_faq.pdf [<https://perma.cc/5JWL-KLJ3>] (addressing the lack of accountability within the program and that student achievement is not reported to be higher in the MPCP versus the MPS). This MPCP study, completed by the University of Arkansas's School Choice Demonstration Project, did not show a significant difference in performance of select choice students and similar Milwaukee Public school students in 2009–10. *Id.* Further, its findings were affirmed by the Wisconsin non-partisan Legislative Audit Bureau's test statistics. *Id.* See also *Test Score Data for Pupils in the Milwaukee Parental Choice Program*, LEGIS. AUDIT BUREAU 11 (Aug. 2011), http://legis.wisconsin.gov/lab/reports/11-schoolchoice_ltr.pdf [<https://perma.cc/3QL6-QU3C>] (illustrating that the choice schools in Milwaukee did not increase student achievement and learning because in certain statistics the public schools were better, otherwise the difference was not statistically significant at the ninety-five percent confidence level). This report was required by law in the 2005 Wisconsin Act 125 but does not require all students in the MPCP to participate in the study. *Id.* Overall, the project's five-year longitudinal study did not show any significant difference in the performance of MPCP students and similar pupils after four years of participation. *Id.* at 17. It is challenging to create the study because student can switch back to the MPCP schools or MPS and difficult to determine whether the academic achievement of pupils who transferred is attributed to their attendance at Choice schools, MPS, or both. *Id.*

⁶² See § 115.7915(6)(g) (demonstrating that teachers do not have any requirements for special education teacher certification). These private schools will be receiving up to \$12,000 per special education student participating in the voucher program, even though their teachers do not need to be certified. § 115.7915(4m).

⁶³ See § 115.7915(4) (describing the DPI duties in the special needs scholarship program). This is a pertinent section of the statute because it addresses the DPI, referred to in the statute as "department," duties in the special needs scholarship program, which includes addressing the IDEA concerns and also demonstrating that the DPI does not hold much regulatory power in the current draft:

Department duties.

(a)

1. The department shall develop a document for inclusion with an application under sub. (2) (f), and revise it as necessary, comparing the rights of a child with a disability and of his or her parent under this subchapter, other than this section, and 20 USC 1400 to 1482, with the rights of a child with a disability and of his or her parent under this section and 20 USC 1400 to 1482.
2. Receipt by an applicant of the document developed under subd. 1., acknowledged in a format prescribed by the department, constitutes notice that the applicant has been informed of his or her rights under this section and 20 USC 1400 to 1482. Subsequent acceptance of a

argue that the DPI does not have enough resources to monitor the program and provide the support the statute requires.⁶⁴ Alternatively, others argue that the DPI's duties are not expansive enough and will not properly hold these private schools accountable.⁶⁵ Regardless of accountability concerns, the DPI has one year to accredit the private schools planning to participate in the program and then begin monitoring the program in the 2016-17 school year.⁶⁶

scholarship under this section constitutes the applicant's informed acknowledgment of the rights specified in the document.

(b) Upon being notified under sub. (3) (c), the department shall notify the child's resident school board that the child has been awarded a scholarship under this section. The child's resident school board shall, within 3 days of receiving the notice, provide the department and the governing body of the private school that accepted the child with a copy of the child's individualized education program.

Id.

⁶⁴ See Kammerud, *supra* note 49, at 1 (stating the DPI does not have proper tools to implement this special needs scholarship system). This statement was made in regards to the first version of the voucher program statute, but the concerns are still valid for the statute that was passed on July 12, 2015. *Id.* For example, Kammerud stated that there was no appeals system in place for children or parents to use in order to deal with disagreements between parents and private schools. *Id.* This was, and still is, a critical issue for the special needs scholarship program, because it essentially leaves the parents with no options if they believe their child is not provided proper services at the private schools. *Id.* This lack of regulation is specific to the voucher program because in public schools, parents would be able to seek many different remedies for issues. *Id.* However, now that parents have the choice to enter the special education scholarship voucher program, their rights in the private schools will significantly diminish. *Id.* See also § 115.791(4) (stating that this problem has not been satisfied over the past four years before the bill was placed into law because the new statute still fails to address it). The statute will be law for one year before the program is set to begin in 2016-17. *Id.* See also McLaughlin, *supra* note 16, at 867 (explaining that monitoring programs can be challenging).

⁶⁵ See Wendy F. Hensel, *The Limits of Federal Disability Law: State Educational Voucher Programs*, 44 J.L. & EDUC. 199, 202 (2015) (addressing the accrediting process for schools participating in the MPCP). In the MPCP, the DPI must ensure that the private schools are:

[F]iscally solvent, meet all health and safety laws applicable to private schools, and employ teachers with a bachelor's degree or higher from an accredited institution of higher education. Schools must also be accredited, or receive accreditation within three years of participating in the program, and may not discriminate with respect to race, color, or national origin.

Id. These requirements are similar to the new requirements from the Wisconsin special needs scholarship system, but the DPI will need to learn how to address some of the different standards in the Wisconsin special needs scholarship statute. *Id.*

⁶⁶ See § 115.7915(2) (addressing the DPI duties and requirements in accrediting the schools before they join the program in the 2016-17 school year). This requirement can be problematic, as many private schools will want to participate in the program, placing heavy burdens on the DPI to accredit all the schools before the 2016-17 school year. *Id.* Because the program is set to begin in the 2016-17 school year, many private schools will need to be accredited fast. *Id.*

C. *Teacher Certification and IDEA Rights in Public Schools and Private Voucher Schools*

As one parent stated, “[p]ublic schools must abide by the Individuals and Disabilities Education Act, requiring specialized training for teachers and a standard of services to accommodate students with special needs. Private schools don’t have this obligation.”⁶⁷ This Part of the Note addresses two specific accountability concerns within voucher school programs and specifically, the Wisconsin special needs scholarship system.⁶⁸ Part II.C.1 explains the differences between teacher certification in public school and compares certification to other voucher programs throughout the country.⁶⁹ Next, Part II.C.2 presents the IDEA rights that students have in the public schools versus the private voucher schools.⁷⁰

1. *Teacher Certification Requirements Differences*

Wisconsin’s public schools have high standards for their teachers practicing in Wisconsin.⁷¹ Specifically, the teachers are required to have an education degree and earn their certification after they pass the Praxis test.⁷² For example, if a college student wants to be a special education

⁶⁷ Harriet Brown, *About Us*, STOP SPECIAL NEEDS VOUCHERS (2014), <http://www.stopspecialneeds vouchers.org/about/> [<https://perma.cc/MA8Q-V2HY>]. See *infra* Part III (analyzing the concerns with the Wisconsin special needs scholarship system).

⁶⁸ See *infra* Part II.C (illustrating the differences between teacher certification and IDEA rights in both the public schools and private voucher schools). This includes presenting examples from other special needs scholarship programs throughout the country. *Infra* Part II.C.

⁶⁹ See *infra* Part II.C.1 (discussing specifically the differences in teacher certification if a teacher is working in the public schools versus the private voucher schools).

⁷⁰ See *infra* Part II.C.2 (tackling the differences between student rights under the IDEA in public school and explaining that those rights are not the same when a student enters a private voucher school).

⁷¹ See § 118.19(14) (addressing the statutory teacher certification requirements for teachers in Wisconsin Public Schools); see also *Pathways to Licensure*, WIS. DEP’T PUB. INSTRUCTION (Dec. 13, 2015), <http://tepd.dpi.wi.gov/licensing/pathways-to-licensure> [<https://perma.cc/UA9X-LLSG>] (illustrating that there are many different pathways to earn a teaching license in the state of Wisconsin). The Wisconsin DPI is flexible in granting licenses depending on the background of the future teacher. *Id.* For example, there is a pathway listed on the website to assist teachers who are licensed in a different state other than Wisconsin, and it provides information on how to become certified in Wisconsin. *Id.*

⁷² See *Testing Requirements for Wisconsin Educator Licensing*, WIS. DEP’T PUB. INSTRUCTION (Oct. 19, 2015), <http://tepd.dpi.wi.gov/licensing/wisconsin-educator-testing-requirements> [<https://perma.cc/56MM-PNQR>] (providing information relating to testing that one must pass in order to earn a teacher license). To earn an educator license in Wisconsin, the student seeking a special education license must demonstrate basic competency in reading, writing, mathematics, and a basic content knowledge of their specific license area. *Id.* To enter an educator preparation program in a Wisconsin college/university, each student is required to complete and pass subject area tests for his or

teacher, the student must first pass the reading, writing, and mathematics requirements, and then the special education exams.⁷³ The testing requirements do not cease once a teacher is certified because Wisconsin requires their teachers to continually renew their license and broaden their knowledge through additional classes.⁷⁴ Given all these high standards, the teachers in Wisconsin public schools are known for their excellence and are continually working to better educate their students.⁷⁵

Contrasting the public school teacher requirements, the private voucher schools hold vastly different sets of standards.⁷⁶ The private voucher schools participating in the Wisconsin special needs scholarship program do not require proper state teacher certification.⁷⁷ Further, there is no consistency even in the two voucher programs in Wisconsin.⁷⁸ For

her licensure area to qualify for a Wisconsin educator license. *Id.* These requirements are much more extensive than the requirements in private schools, and more specifically, the private schools receiving state funds for voucher programs. *Id.*

⁷³ See *Wisconsin Test Requirements, PRAXIS* (2015), <http://www.ets.org/praxis/wi/requirements> [<https://perma.cc/T84L-K665>] (addressing the Praxis tests requirements for future teachers in the State of Wisconsin). Further, in addition to the standard math, reading, and writing requirements, teachers must also pass specific tests relating to their specialty area. *Id.* For example, if a student were in the process of earning a special education license, the student would be required to sit for a special education test in addition to general licensing tests required for teacher certification. *Id.*

⁷⁴ See *Online Teacher Re-licensure & Professional Development Courses*, PROF. LEARNING BD. (Oct. 24, 2015), <https://k12teacherstaffdevelopment.com/tlb/select-your-state-below-to-get-started/wisconsin/> [<https://perma.cc/G4X4-X3LH>] (illustrating examples of how teachers in the state of Wisconsin can renew their licenses). For example, a special education teacher could enroll in the “Cognitive Skills – Understanding Learning Challenges” class in order to help fulfill his or her professional development requirements and renew a license through Wisconsin. *Id.*

⁷⁵ See Tom McCarthy, *Six Educators Are Wisconsin Finalists for Presidential Teaching Awards*, WIS. DEP’T OF PUB. INSTRUCTION (Aug. 27, 2015), <http://dpi.wi.gov/news/releases/2015/six-educators-are-wisconsin-finalists-presidential-teaching-awards> [<https://perma.cc/6SS2-W5KD>] (demonstrating excellence in the Wisconsin Public School System and recognizing deserving teachers in the public schools). This award specifically focuses on teachers who “bring mathematics and science alive in the classroom, which is so important to our kids.” *Id.* This is one example of how the DPI highlights and recognizes great teachers in public schools throughout the state. *Id.*

⁷⁶ See Hensel, *Recent*, *supra* note 19, at 329 (addressing the many other changes in teacher certification in private voucher schools versus public schools). Hensel notices a large gap in the different standards between the private and public schools and finds this to be a critical part of her analysis. *Id.*

⁷⁷ See *id.* (demonstrating that private voucher school teachers are held to a much lower standard for certification). This is one of the major concerns with the different voucher programs throughout the country. *Id.* Without certification, these teachers might not be the most knowledgeable on their specific subject, or general teaching principles. *Id.*

⁷⁸ See WIS. STAT. § 115.7915(6)(g) (2015) (addressing that private schools are only required to inform parents of the certification each teacher has); § 119.23(2)(6)(a) (stating the teacher requirements from the MPCP). The private school teachers must have:

example, a teacher must hold a college degree from an accredited university if he or she teaches in a private school participating in the MPCP.⁷⁹ However, in the Wisconsin special needs scholarship program, a private school only needs to inform the parents and students of the qualifications, or lack thereof in its school after the student is enrolled.⁸⁰

Additionally, other states' special education voucher programs have different regulations regarding teacher certification.⁸¹ For instance, the Florida and Georgia special needs voucher programs have similar teacher certification standards, requiring either a bachelor's or higher degree, or

[A] teaching license issued by the department or a bachelor's degree or a degree or education credential higher than a bachelor's degree . . . any teacher employed by the private school on July 1, 2010, who has been teaching for at least the 5 consecutive years immediately preceding July 1, 2010, and who does not satisfy the requirements must apply to the department on a form prepared by the department for a temporary, nonrenewable waiver.

§ 119.23(2)(6)(a)-(c).

⁷⁹ See *id.* (requiring a teacher participating in the MPCP to have at least a bachelor's degree from an accredited university); see also Smith, *supra* note 27 (presenting her viewpoint on teacher certification at her MPCP school). Ms. Smith has a strong opinion in favor of certified teachers in schools, she believes:

[T]hat it is absolutely necessary to have certified educators in all schools. Just as we would not send a layperson into an operating room to perform a surgery, we ought not to entrust the minds of our country's youth to someone who is not knowledgeable in pedagogy and brain development.

Id.

⁸⁰ See § 115.7915(6)(g) (providing a much lower standard than the other voucher programs in Wisconsin by only requiring the school to inform its potential students of their teacher's qualifications). For example, if the teacher was only a high school graduate, he or she would still be allowed to teach in the Wisconsin special needs scholarship program. *Id.* See also Smith, *supra* note 27 (speculating on the potential problems with the lack of teacher certification requirements in the Wisconsin special needs scholarship program). Ms. Smith explained that as a recently certified special education teacher, she would find it extremely hard to teach and meet her students' needs if she did not have the schooling and certification she did. *Id.* Additionally, she explained that there were some teachers that were not certified in special education at her old MPCP school she worked at and did not believe the students were receiving the best application of their IEPs. *Id.*

⁸¹ See J. Matt Jameson & Dixie S. Huefner, "Highly Qualified" Special Educators and the Provision of a Free Appropriate Public Education to Students with Disabilities, 35 J.L. & EDUC. 29, 30 (2006) (insisting that teacher quality is a large component to student success); see also FLA. STAT. § 1002.421(h) (2015) (demonstrating that teachers in the Florida special needs program must have either a bachelor's degree or higher degree, have at least three years of teaching experience in the public or private schools, or have special skills, knowledge, or expertise that qualifies them to provide instruction in subjects taught); GA. CODE § 20-2-2115(7) (2010) (discussing that teachers must either "hold a bachelor's degree or a higher degree or have at least three years of experience in education or health and annually provide to the parents the relevant credentials of the teachers who will be teaching the students"); OHIO ADMIN. CODE § 3301-103-06(3) (2012) (stating that the teachers in the private school must have the appropriate credentials from the state board of education).

at least three years of teaching experience in the public or private schools, or have special skills, knowledge or expertise that qualifies them to provide instruction in the subjects taught.⁸² Further, the Ohio special needs voucher program holds its teachers to higher standards than the Wisconsin special needs scholarship program because it requires a teaching license.⁸³ Overall, not every state program holds the same requirements for teachers; therefore, Wisconsin had many different illustrative models to choose from when adopting their new special needs scholarship program.⁸⁴

2. IDEA Rights in Private Schools and Public Schools

The IDEA applies to students with disabilities attending public schools.⁸⁵ The IDEA contains six components: (1) free appropriate public education (“FAPE”); (2) appropriate evaluations; (3) the individualized education plan; (4) placement in the least restrictive environment; (5) parent and student participation in the process; and (6) procedural safeguards.⁸⁶ Public schools receiving this money are required to adhere

⁸² See Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291, 300-01 (2010) [hereinafter Hensel, *Future*] (distinguishing that both the Florida special needs voucher program teacher requirements and the Utah special needs voucher teacher certification requirements are different than Wisconsin’s); see also McLaughlin, *supra* note 16, at 887 (stating that President George W. Bush’s voucher program would require participating private schools to use qualified teachers that possess state certification and special training in the subject area).

⁸³ See Dwyer, *supra* note 59 at 388 (showing the Ohio statutes require teachers to have some type of teacher certification requirements). However, the Ohio statutes mandate that “the state education department accept as a sufficient basis for teacher certification a ‘diploma’ from a ‘bible college’ or ‘bible institute.’” *Id.*

⁸⁴ See *id.* (addressing the different programs throughout the country and their approaches to teacher certification). This demonstrates that Wisconsin had many different examples that it could have chosen instead of the current statutory language, including the Florida program. *Id.* Wisconsin was advantaged because this time the state was not the first to create a voucher program for special education and could have looked to other state voucher programs, but chose not to and did not create high accountability standards. *Id.*

⁸⁵ See Cynthia L. Kelly, *Individuals with Disabilities Education Act – the Right “IDEA” for All Children’s Education*, 75 J. KAN. B. ASS’N, 24, 34 (2006) (describing the IDEA as a federal law mandating special education programs in public schools). This article provided background information explaining that each public school must meet a list from the IDEA in order to receive federal funding. *Id.* See also Gabriela Brizuela, Note, *Making an “IDEA” a Reality: Providing a Free and Appropriate Public Education for Children with Disabilities under the Individuals with Disabilities Education Act*, 45 VAL. U. L. REV. 595, 601 (2011) (presenting the IDEA requirements under federal law, and providing an overview of the federal law). Brizuela provided the history of the IDEA and the background regarding the federal laws and how the United States Supreme Court addressed the IDEA and the FAPE. *Id.* at 601-05.

⁸⁶ See *Building a Legacy: IDEA 2004*, U.S. DEP’T OF ED. (2014), <http://idea.ed.gov/explore/home> [<https://perma.cc/3RBK-ASCN>] (providing references for parents, students, and educators who might need additional information regarding IDEA and its recent

to the above standards and ultimately provide the best possible education to students with disabilities.⁸⁷ However, private schools are not required to provide all of the above services to students with disabilities because they do not receive federal funding like public schools.⁸⁸ Ultimately, this means private schools are not accountable to any of the above components and can pick and choose to either follow those requirements, or not; either way, the school will not receive any repercussions.⁸⁹

Similarly, private voucher schools receive taxpayer money like public schools; however, the private schools are not required to adhere to the IDEA components and also do not properly inform parents that IDEA standards do not apply.⁹⁰ Currently, the Wisconsin statute requires that

amendments); see also Kelly, *supra* note 85, at 27 (discussing the components of IDEA and providing a background for how states receive the federal funding under the IDEA and the conditions they must provide to the special education student). This list is a start to ensure that the public schools are providing the best possible education to the special education students. *Id.*

⁸⁷ See Kelly, *supra* note 85, at 34 (illustrating the standards that public schools must comply with and describing how the 2004 amendments are there to protect students with disabilities and ultimately improve their education). These standards and requirements are another way to ensure that public schools that receive the federal funding are properly serving students. *Id.* These schools are accountable to their students and are monitored in order to ensure that special needs students receive the best possible education. *Id.*

⁸⁸ See *id.* at 33 (stating that if parents unilaterally decide to place their child in private school, the private placement does not have to meet the same public school standards and this leads to many problems). This is a dangerous path that can have drastic negative effects to the student. *Id.* Parents are also required to monitor the services provided to their children, instead of the school holding educators accountable. *Id.* at 33. Many parents might not be able to monitor their child's services every day and ensure that their child's IEP is properly in use. Kelly, *supra* note 85, at 33. Parents must be much more involved in their child's education and services in order to ensure proper services in private voucher schools. *Id.*

⁸⁹ See *id.* (illustrating that private schools have no obligation to follow the IDEA). For example, if a private school does not want to implement an IEP, or chooses to modify the IEP, that school is free to do so, and will not be held accountable. *Id.* The private school is under no requirement to ever follow the IDEA requirements and will face no punishment for either disregarding an IEP, or even failing to provide special education services to that student. *Id.*

⁹⁰ See Hensel, *Future*, *supra* note 82, at 330 (discussing the different special needs voucher programs throughout the country, and the fact that it requires the students to give up their IDEA rights). Hensel described the potential issues with lack of IDEA protection as follows:

They are not obligated to provide a meaningful education and cannot legally be held accountable when a student makes no academic progress. While this is problematic for any student, it is particularly troublesome for students with disabilities who are eligible under the IDEA precisely because they have individualized, often intense instructional needs that cannot be met within the traditional curriculum. In the absence of discernable benchmarks of progress and clearly identified legal rights, there is a heightened chance that these children will face intentional discrimination or seemingly benign indifference.

parents receive a sheet that explains the differences in IDEA rights in public versus private schools to inform parents of their change of rights.⁹¹ Consequently, parents and students leaving public schools might not fully understand their lack of rights in private voucher schools compared to their rights in the public schools.⁹² Furthermore, different programs throughout the country address the loss of IDEA rights in other ways.⁹³ For example, in Georgia, parents are required to specifically sign away their IDEA rights, thereby increasing parental recognition of the consequences of waiving important IDEA rights.⁹⁴ Similar to Georgia, the Wisconsin special needs scholarship program should have the same provision requiring parents to acknowledge their loss of IDEA rights.⁹⁵

While states address the loss of IDEA rights differently, it is still important to recognize that students surrender their IDEA rights in each

Id. at 331.

⁹¹ See WIS. STAT § 115.7915(2) (2015) (describing the process that parents and students must go through before they are able to join the private school voucher program). Instead of requiring a signature or any other means to ensure parents read and understand the document, the Wisconsin statute does not contain any language to that extent. *Id.*

⁹² See Hensel, *Future*, *supra* note 82, at 330 (addressing the problems with losing legal protections in private voucher schools). The coverage by the ADA and § 504 does not properly make up for the loss of legal protection under the IDEA because the coverage does not have specific requirements like the IDEA has. *Id.* See also Smith, *supra* note 27 (illustrating her opinion on the IDEA rights and parents' knowledge of this information). Ms. Smith stated that she believes:

Most of the parents of these students had no higher education if they even had a high school diploma or GED. I do not believe they always fully understood how their decision to send their child to St. Marcus affected their child's rights and protections. Throughout the course of my time there, I felt more and more guilt concerning the parents' belief that their child was receiving a better education.

Id.

⁹³ See Hensel, *Future*, *supra* note 82, at 316 ("The U.S. Department of Education's Office of Civil Rights (OCR) has twice opined that students with disabilities who voluntarily participate in voucher programs waive most of their rights under the IDEA."). The DPI first made this decision when acknowledging the MPCP in 1990. *Id.* The agency restated its conclusion in 2001 in regards to the Florida's McKay Scholarship, and stated that students "who accepted the scholarships are treated as 'private school children with disabilities'" with "no individual entitlement to FAPE or related services" under the IDEA." *Id.*

⁹⁴ See *id.* at 315 (stating that the Georgia statute provides that an acceptance of a scholarship constitutes a parental refusal to consent to services under the IDEA). This acceptance moves the responsibility of monitoring student services from the public school, to the individual parents. *Id.*

⁹⁵ See § 115.7915(4) (addressing that the Wisconsin special needs statute requires that the parents acknowledge their loss of IDEA rights); see also *infra* Part IV.A (proposing an amendment to adjust the IDEA language in the Wisconsin special needs scholarship program language).

program.⁹⁶ Thus, Part III of this Note analyzes the current legal framework and evaluates why the current Wisconsin special needs scholarship program lacks accountability.⁹⁷ Only after thoroughly examining the current standards in the Wisconsin special needs scholarship program statute can one gain a better understanding of the need for two amendments addressing the lack of teacher certification and loss of IDEA rights.⁹⁸

III. ANALYSIS

The original MPCP began in March 1991 and paved the way for voucher programs throughout the country.⁹⁹ Building from the original program, legislators passed the Wisconsin special needs scholarship program in July of 2015, which takes effect in the 2016–17 school year.¹⁰⁰ Although advocates of the program praise its new solutions, critics fear the implications and lack of accountability in the program.¹⁰¹ Nonetheless, legislators must amend two of the statute's current sections because they are inadequate when protecting teacher certification and

⁹⁶ See Hensel, *Future*, *supra* note 82, at 330 (stating that a loss of legal protection is a common variable in the special needs programs throughout the country); *see also infra* Part IV (providing an amendment to the state statute in order to properly inform both parents and students of their loss of rights).

⁹⁷ See *infra* Part III (analyzing the language in the Wisconsin special needs scholarship program statute). This section criticizes the current statutory language because it lacks accountability measures. *Infra* Part III.

⁹⁸ See *infra* Part IV (proposing two amendments to fix the language and increase the accountability of the Wisconsin special needs scholarship program statute). These amendments are in place to raise the accountability and increase the DPI's ability to monitor the program. *Infra* Part III.

⁹⁹ See Wisconsin Research Institute, *The Milwaukee Parental Choice Program*, WIS. POL'Y & RES. INST. 1 (Nov. 1992), <http://www.wpri.org/WPRI-Files/Special-Reports/Reports-Documents/Vol5no5.pdf> [<https://perma.cc/UT2T-C6CB>] (describing the history of the MPCP).

¹⁰⁰ See H.R. 110, 2011 Assemb. Sess. (Wis. 2011) (addressing the 2011 proposed bill of the Wisconsin special needs scholarship program). The bill was originally proposed; however, it was not passed because many opponents criticized the original statutory language. *Id.* See also § 115.7915(2) (stating the current bill that was recently passed in July 2015).

¹⁰¹ See § 115.7915(1) (illustrating the new language in the Wisconsin special needs scholarship program); *see also* Christina Samuels, *Wisconsin Special Need Voucher System Survive a Controversial Start, Opposition*, EDUC. WEEK (July 15, 2015), http://blogs.edweek.org/edweek/speced/2015/07/wisconsin_special_needs_vouchers_survive_controversial_start_opposition.html. [<https://perma.cc/8YPT-ZU7N>] (discussing the controversial history of the special needs scholarship program including the late proposal to the legislature); Hensel, *Future*, *supra* note 82, at 330 (presenting different critiques to voucher programs throughout the country).

IDEA rights.¹⁰² First, the statutory language does not present any requirements for teacher certification in the special needs scholarship program.¹⁰³ Second, the statutory language does not require that parents receive notice regarding their loss of IDEA federal protection.¹⁰⁴ Therefore, Part III of this Note analyzes the language of two sections of the Wisconsin special needs scholarship program statute.¹⁰⁵ First, Part III.A presents the current statutory language from both the teacher certification and IDEA sections.¹⁰⁶ Second, Part III.B examines the teacher certification requirements for the private schools receiving state taxpayer money in the program.¹⁰⁷ Third, Part III.C evaluates the lack of IDEA protection in the private schools participating in the program and the need to inform parents of this costly decision.¹⁰⁸

A. Current Problems in the Wisconsin Special Needs Scholarship Statute Due to Accountability

The Wisconsin special needs scholarship statute addresses the teacher certification regulations for the new program, but it fails to provide guidelines for teachers of special needs students.¹⁰⁹ First, the statutory

¹⁰² See generally § 115.7915(4) (discussing the entire Wisconsin special needs scholarship system and the need for amendments to two sections); see also Pamela DeLap, Terri Hart-Ellis, et al., *Parents of Students with Disabilities: Take Special Needs Vouchers out of the Budget*, Wis. St. J. (June 16, 2015), http://host.madison.com/news/opinion/column/parents-of-students-with-disabilities-take-special-needs-vouchers-out/article_1099659b-8ce8-53bc-85ea-31fa3497dbdb.html [<https://perma.cc/7FNM-CPHT>] (discussing the controversial nature of the special needs scholarship bill and the direct opposition to the proposed statute).

¹⁰³ See § 115.7915(6)(g) (showing the section addressing teacher certification in the bill); see also *infra* Part IV.A (exploring amendments to the Wisconsin special needs scholarship program in order to improve accountability in the teacher certification).

¹⁰⁴ See § 115.7915(6)(g) (stating that the current statutory language requires the DPI to create a document to compare the rights a child has in public school versus the special needs scholarship program).

¹⁰⁵ See *infra* Part III.A–C (discussing the proposed amendments to the current Wisconsin special needs scholarship system and evaluating the current problems associated with the statutory language); see also *infra* Part IV (addressing the amendments to the Wisconsin special needs scholarship program).

¹⁰⁶ See *infra* Part III.A (describing the current statutory language of both the teacher certification and IDEA sections); see also §§ 115.7915(4), (6)(g) (focusing on two specific sections of the statute in order to improve accountability).

¹⁰⁷ See *infra* Part III.B (evaluating the lack of requirements relating to teacher certification in private schools receiving state money, and criticizing the lack of requirements for special education teachers in the private schools).

¹⁰⁸ See *infra* Part III.C (prompting the need for proper notice to parents to inform them of the IDEA losses in private school versus public school).

¹⁰⁹ See §§ 115.7915(4), (6)(g) (showing the specific language that will be criticized and analyzed later in the upcoming sections). Demonstrating the specific problematic language: Provide to each applicant under sub. (2)(f) a profile of the private school's special education program, in a form prescribed by the

language lacks any specific requirements for teachers working with students with disabilities in the private voucher schools.¹¹⁰ As a result, the accountability within this program is severely lacking because the teachers have no requirements for certification.¹¹¹ The teachers are less qualified and not as readily able to meet the needs of their special needs students.¹¹² Therefore, an amendment is needed to address the lack of requirements for teacher certification in the program.¹¹³

Second, the statute also inadequately acknowledges parent and student loss of rights under the IDEA by asserting unclear language.¹¹⁴

department, that includes the methods of instruction that will be used by the school to provide special education and related services to the child and the qualifications of the teachers and other persons who will be providing special education and related services to the child.

Id. § (6)(g). See also *infra* Part III.B (discussing the problems with the current statutory language addressing the teacher certification and comparing and contrasting the Wisconsin statute to other programs throughout the country).

¹¹⁰ See § 115.7915(6)(g) (examining the teacher certification language and noting that it only requires the private schools to inform parents of the teacher's status in the private schools).

¹¹¹ See Hensel, *Recent*, *supra* note 19, at 336 (describing that teacher certification is a concern because these schools are receiving state taxpayer money, and therefore, should be held to higher standards than other privately funded schools).

¹¹² See § 115.7915 (6)(g) (demonstrating that only the private school needs to inform the parents of the specific qualifications of each teacher instead of actually requiring the school to have properly qualified teachers); see also Hensel, *Future*, *supra* note 82, at 326 (addressing the concern regarding teacher certification). The teacher certification can be a concern for many critics of the program; however:

There is no question that many participating private schools will voluntarily impose more stringent requirements on its teachers than these programs. Likewise, there undoubtedly are some individuals who would not meet the federal standards but who nevertheless may be exemplary teachers. The complete absence of quality control over teaching, however, runs counter to wealth of evidence reflecting the significance of education, training, and professional development on teaching effectiveness. Students with disabilities are eligible under the IDEA in part because they need individualized education and related services in order to benefit from instruction. It strains common sense to conclude that teachers with "special skills" will systematically educate this challenging population more effectively than the highly qualified professionals in public schools. As such, voucher programs would seem to fail in their objective of providing superior services to children with disabilities.

Hensel, *Future*, *supra* note 82, at 326-27.

¹¹³ See *id.* at 326 (addressing the teacher certification problems in private schools). The "highly qualified" teacher requirements extend to special educators as stated from the 2004 reauthorization of the IDEA; however, there is no consideration of teacher qualification in special education voucher programs. *Id.*

¹¹⁴ See § 115.7915(4) (providing the specific language that is criticized in this Note); see also *infra* Part III.C (analyzing the Wisconsin statute language and notification process that informs parents of their loss of IDEA rights). The statute states:

The DPI duties section of the statute uses vague language because it does not properly acknowledge or inform parents of their change in protection.¹¹⁵ Specifically, the words “department [DPI] shall create a document” do not actually show what the document will contain.¹¹⁶ Furthermore, the statute does not take into account whether the parents understand the implications of this grave decision.¹¹⁷ Even if the parents are presented with documents, the statute fails to address how these parents would be properly informed of these losses.¹¹⁸ Consequently, both the teacher certification and the IDEA sections of the statute require amendments.¹¹⁹

B. No Requirement for Special Education Teacher Certification in the Program

A concerned parent against the Wisconsin special needs scholarship program stated that “[w]hen you let a voucher school get away with not following the same rules, like not having a legally enforceable IEP, or using unlicensed teachers, or not having to compare test scores to public schools, then families will end up suffering even more than they already

The department shall develop a document for inclusion with an application under sub. (2) (f), and revise it as necessary, comparing the rights of a child with a disability and of his or her parent under this subchapter, other than this section, and 20 USC 1400 to 1482, with the rights of a child with a disability and of his or her parent under this section and 20 USC 1400 to 1482.

2. Receipt by an applicant of the document developed under subd. 1., acknowledged in a format prescribed by the department, constitutes notice that the applicant has been informed of his or her rights under this section and 20 USC 1400 to 1482. Subsequent acceptance of a scholarship under this section constitutes the applicant’s informed acknowledgment of the rights specified in the document.

§ 115.7915(4).

¹¹⁵ See Hensel, *Recent, supra* note 19, at 328 (evaluating different state special needs scholarship programs that address the loss of IDEA rights). Special education voucher programs require the waiver of legal rights under the IDEA. *Id.* Furthermore, it essentially transfers the responsibility from the public to the individual parents in order for them to hold the private schools accountable. *Id.* at 329.

¹¹⁶ See § 115.7915(4) (providing the ambiguous words that do not specify with enough clarity the responsibilities of the DPI).

¹¹⁷ See *id.* (addressing the problems within the statute); Hensel, *Recent, supra* note 19, at 324 (stating that parents might not fully understand and make informed decisions regarding special needs scholarship programs).

¹¹⁸ See Hensel, *Recent, supra* note 19, at 333–34 (explaining the process of losing IDEA rights in a special needs scholarship program and lack of information for parents). Just providing a paper explaining the rights might not be entirely effective because parents do not always understand the implications of switching from public school to private school. *Id.*

¹¹⁹ See *infra* Part III.B (analyzing the requirements for teacher certification within the Wisconsin special needs scholarship program); see also *infra* Part III.C (examining the IDEA loss of rights section in the statute and showing that it is not adequate).

do.”¹²⁰ This lack of requirements in special education is harmful because a special education student’s IEP might not be followed correctly.¹²¹ As such, this Part evaluates the specific language regarding teacher certification in the special needs scholarship program and explains why additional requirements are necessary add-ons.¹²² First, Part III.B.1 examines the current language that legislators wrote in the statute and compares it to the general MPCP statute.¹²³ Second, Part III.B.2 critiques the current requirements and notification to parents about the teachers serving their children in the state taxpayer program and also analyzes the implications of unlicensed teachers in this area.¹²⁴

1. Lower Standards than the Current MPCP Statutory Regulations and Special Needs Scholarship Programs

The current Wisconsin special needs scholarship program will fail its special needs students with its lack of teacher certification requirements.¹²⁵ Public schools require licensed teachers, but the private special needs voucher schools receiving the taxpayer funds like a public school do not have the same stringent licensing requirements.¹²⁶ In fact, the statute only requires the school to inform the parents of the special education services offered at the schools, and the qualifications, or lack thereof, of those

¹²⁰ Karl Pierick, *Stop Special Needs Voucher Program*, PARENT QUOTES (2014), <http://www.stopspecialneeds vouchers.org/tag/stop-special-needs-vouchers/page/2/> [<https://perma.cc/6YRA-GTEP>].

¹²¹ See *infra* Part III.B.1 (addressing concerns regarding the lack of special education teacher certification requirements).

¹²² See *infra* Part III.B (evaluating the current language of the statute and describing why it ultimately harms the students in the program); see also Hensel, *Future*, *supra* note 82, at 326 (explaining why the teacher qualification requirements in voucher programs are problematic). Hensel explained, “[t]he breadth of these terms suggests that almost any adult potentially could meet this minimal threshold. Certainly, there is no expectation that teachers have a college degree or even a high school diploma in order to lead the classroom.” *Id.*

¹²³ See *infra* Part III.B.1 (analyzing the lower standard of teacher certification in the special needs program and special education teachers versus the MPCP requirements).

¹²⁴ See *infra* Part III.B.2 (introducing the implications of allowing private schools to not regulate special education teacher licensing in a tax payer funded program).

¹²⁵ See Jameson & Huefner, *supra* note 81, at 30 (“This relationship between teacher quality and student achievement has come under renewed scrutiny. Current research shows that highly qualified teachers significantly increase student learning outcomes.”). The IDEA has continued focused on the “qualified personnel” and requiring that qualified teachers provide special education services in public schools. *Id.*

¹²⁶ See WIS. STAT. § 115.7915(6)(g) (2015) (criticizing the requirement that only parents need to be informed by the private school of their student’s teacher certifications).

teachers after the student enrolls.¹²⁷ Even though this document informs the parents of the current teacher qualifications, the statute is grossly silent on any actual standards for teachers at schools participating in this program.¹²⁸ Consequently, unsuspecting parents do not even realize what qualifications are necessary for a teacher license, and do not understand the severity of their decision.¹²⁹

Additionally, compared to other special needs voucher programs throughout the country, the Wisconsin special needs scholarship program has the most rudimentary requirements.¹³⁰ Contrary to the MPCP statute

¹²⁷ See *id.* (showing that this statute states again that the DPI is required to create a form to give to the private schools in order to create a profile that the schools can show applicants of the program).

¹²⁸ See *id.* (showing the lack of teacher certification requirements). Comparatively, the original MPCP program statute required teachers to at least hold a bachelor's degree from an accredited university in order for the school to participate in the program. *Id.* See also Eric A. DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 B.Y.U. EDUC. & L.J. 363, 387 (2003) (analyzing the legality of teacher certification regulations in voucher schools). No United States Supreme Court case has ever forbidden the regulation of teacher certification in different voucher programs throughout the country. *Id.* at 387. Even though certain state courts have placed limits on "overly pervasive regulatory schemes," generally throughout the country and especially at a federal level, imposing teacher certification requirements on private schools in voucher programs is legal. *Id.*

¹²⁹ See *Stop Special Needs Vouchers, Special Needs Vouchers and Undermined Teacher Licensure: A Toxic Combination* (June 18, 2015), <http://www.stopspecialneedsvouchers.org/uncategorized/special-needs-vouchers-and-undermined-teacher-licensure-a-toxic-combination/> [<https://perma.cc/GL3S-ATR8>] (showing that these parents are aware of the teacher certification requirement faults in the new program). These parents are concerned about the treatment of students with disabilities. *Id.* One parent stated that:

These proposals are downright disrespectful to children and families, not to mention the professional special educators in our public schools across the state . . . [w]hat are we saying about how we value students with disabilities and those who teach them, when we say that just-about-anyone can get credentialed as special educators, and that voucher schools aren't even required to address their educational needs?

Id.

¹³⁰ See § 115.7915(6)(g) (lacking any specific teacher certification requirements because the statute only requires the private school to inform the parents of the teacher qualifications); see also § 118.60(2) (requiring teachers in the MPCP program to have at least a bachelor's degree from an accredited university); FLA. STAT. § 1002.421(h) (2016) (stating that teachers in the Florida special needs program must have: either a bachelor's degree or higher degree; have at least three years of teaching experience in the public or private schools; or have special skills, knowledge, or expertise that qualifies them to provide instruction in subjects taught); GA. CODE § 20-2-2115(7) (2010) (addressing that teachers must either "hold a bachelor's degree or a higher degree or have at least three years of experience in education or health and annually provide to the parents the relevant credentials of the teachers who will be teaching the students"); OHIO ADMIN. CODE § 3301-103-06(3) (2012) (addressing that the teachers in the private school must have the appropriate credentials from the state board of education).

requiring a bachelor's degree from an accredited university, the special needs scholarship statute has no requirements other than providing notice of teacher licensing or lack thereof.¹³¹ Further, other special needs scholarship programs throughout the country have requirements for teachers participating in the program.¹³² For example, in Florida, teachers are required to hold a "baccalaureate or higher degree, have at least three years of teaching experience in public or private school, or special skills knowledge or expertise that qualifies them to provide instruction."¹³³ This could serve as an example for the Wisconsin statute because it requires teachers to have some type of credentials, and even some type of special experiences with teaching, before the teacher is allowed to participate in Florida.¹³⁴ Wisconsin had the advantage of creating the special needs program later in comparison to other programs throughout the country, yet it failed to provide any meaningful teacher qualifications in the statute.¹³⁵

Even more concerning is that no special needs scholarship program addresses the special education licensing element.¹³⁶ Public schools

¹³¹ See WIS. STAT. § 118.60(2) (stating the MPCP teacher certification requirements); see also Elizabeth Adamo Usman, *Reality over Ideology: A Practical View of Special Needs Voucher Programs*, 42 CAP. U. L. REV. 53, 72 (2014) (evaluating different voucher programs in the country). For example, in the Ohio Autism Scholarship Program, the private schools are required to provide notification to parents in writing. Usman, *supra* note 131, at 72. The notification also requires the school to inform the parents of the teacher qualifications. *Id.*

¹³² See *supra* note 130 and accompanying text (providing examples of the different statutes in special education and their approach to teacher certification).

¹³³ See FLA. STAT. § 1002.421(h) (2016) (describing the Florida requirements for teacher certification in special needs voucher programs). However, the statute does not specify what "special skills knowledge or expertise" is classified as, so the person may or may not be qualified. *Id.* Special skills might not translate to proper teaching skills and especially knowledge to teach students with disabilities. *Id.*

¹³⁴ See *id.* (showing the Florida teacher certification requirements); GA. STAT. § 20-3-2115(2) (2010) (requiring teachers to "hold a bachelor's degree or higher degree, or have at least three years of experience in education or health and annually provide to the parents the relevant credentials of the teachers who will be teaching their students"). Once again, this requirement is higher than the Wisconsin special needs statutory requirement and could serve as an example because of its stricter requirements. GA. STAT. § 20-3-2115(2).

¹³⁵ See WIS. STAT. § 115.7915 (6)(g) (regarding the teacher certification language and the lack of a detailed statute).

¹³⁶ See *Stop Special Needs Vouchers*, *supra* note 129 (discussing the lack of special education teacher certification requirements in the program). Furthermore, concerned mother, Kelli Simpkins asked:

Can you imagine what a shady voucher-school operator could do with this? . . . They could hire anyone with a high-school diploma and declare that person to be a qualified special educator, no proof required. Then they could market their newly DPI-credentialed 'special educators' in combination with the special needs vouchers to

require teachers to have specific special education licensing in order to teach students with disabilities.¹³⁷ Unlike some states that have general licensing requirements for teachers, every special education voucher program in the country is silent in regards to specific special education license requirements.¹³⁸ Wisconsin parents are allowing their children to leave the highly regulated public schools without a full understanding that their child's teachers may not understand how to implement IEPs or provide additional support.¹³⁹ For example, a student's IEP could require

unsuspecting parents, who will have no way to tell the difference. Why in the world are we making this possible?

Id. See also Smith, *supra* note 27 (providing an opinion of a special education teacher). Mrs. Smith became a certified special education public school teacher this year, and in her personal opinion she explained that because she is certified in both special education and regular education, she is "horrified and devastated by the GOP's push for a special needs voucher program." *Id.* She continued by explaining that, "[a]s with racial segregation, we learned that separate cannot be equal. I believe that inclusion is the best model in education not only for students with disabilities but also for typically-developing students, and I believe this is true for academic reasons and not just the socialization though they do influence one another." *Id.* Smith also explained that though these students would be mixed with typically-developing peers in a voucher program, it is not guaranteed as private schools are not obligated to follow federal provisions and laws for students with disabilities. *Id.* Also, she stated that it is not guaranteed that they will be given an appropriate education from certified and knowledgeable staff. *Id.* In her experience, "choice school teachers have slightly different motivations and goals than public school teachers, which may influence the quality and equity of education." *Id.*

¹³⁷ See Jameson & Hueffner, *supra* note 81, at 33 (providing a background on the IDEA and No Child Left Behind ("NCLB") teacher qualifications). In November 2004, the House of Representatives and Senate passed amendments to the 1997 IDEA teacher requirements. *Id.* at 34. For example, under the IDEA 2004 amendments:

[A] special educator can choose to meet all the NCLB requirements for being highly qualified to teach academic core subjects but has alternatives that add flexibility. For instance, all middle and secondary school special educators (whether new or veteran teachers) who are teaching to alternate achievement standards rather than regular State achievement standards based on grade-level curriculum may meet the academic subject matter requirements by having subject matter knowledge appropriate to the level of instruction

Id. at 35.

¹³⁸ See Hensel, *Future*, *supra* note 82, at 300-04 (showing that special needs scholarships have similar teacher certification requirements). For example, the Florida, Georgia, and Utah programs have similar requirements. *Id.* Further, some proposed special needs voucher systems are choosing to follow the above statutes and base their program on the already in place special needs statutes. *Id.* at 307. However, some proposed programs in Alabama and Oregon are imposing higher teacher qualification services to their proposed autism programs. *Id.* The programs propose to increase the teacher qualifications and require the teachers to be certified and licensed pursuant to state standards. *Id.*

¹³⁹ See Hensel, *Future*, *supra* note 82, at 304-05 (discussing that Ohio's special needs voucher program does have requirements for IEP enforcement plans). Even though the Ohio program only authorizes scholarships for children with autism and autism-spectrum

the student to receive one-on-one services with a reading specialist, or it could require the special education teacher to modify the lesson plans to meet the student's lower cognitive level.¹⁴⁰ Instead, these private voucher schools allow unqualified teachers to potentially stunt the growth of the already vulnerable group of special education students because they are not required to follow the IEPs.¹⁴¹ Without the proper knowledge on specific learning disabilities or other special education services, these teachers are harming the students more than helping.¹⁴²

2. Current Requirements of the Wisconsin Special Needs Scholarship Program Statute Are Harmful

The repercussions created from the utter lack of teacher certification requirements in the Wisconsin special needs scholarship statute ultimately harm the students with disabilities.¹⁴³ Parents will not make the best choice for their student or recognize the implications of removing their student from a regulated public school containing special education teachers, to a new private school lacking any teacher certification

disorders, the program places requirements on the private schools to continue to properly implement the child's IEP as the resident school district had created it. *Id.*

¹⁴⁰ See Kristin Stanberry, *Understanding Individualized Education Programs*, UNDERSTOOD (Oct. 23, 2014), <https://www.understood.org/en/school-learning/special-services/ieps/understanding-individualized-education-programs> [<https://perma.cc/3C4G-9E2R>] (presenting what is contained in an IEP). Stanberry explained that by law, IEPs must contain the following elements: present level of educational performance, results of child's evaluations and tests, special education and related services that must be provided, accommodations and modifications, supplementary aids and services, and annual educational goals. *Id.*

¹⁴¹ See *id.* (commenting on the importance of qualified special education teachers); see also Usman, *supra* note 131, at 74 (demonstrating an example of a more stringent standard for teacher certification). In the Louisiana School Choice Pilot Program for certain students with exceptionalities, the private voucher program increased its teacher certification standards. Usman, *supra* note 131, at 74. More specifically, the program requires that the "established program in place at the school that includes instruction by teachers holding appropriate certification in special education or other appropriate education or training as defined by the DPI and that is in accordance with a student's Individual Education Plan." *Id.*

¹⁴² See *infra* Part III.C.2 (addressing the harm associated with unqualified teachers); see also *infra* Part IV (providing an example of how to improve accountability within the current Wisconsin special needs scholarship program).

¹⁴³ See Dwyer, *supra* note 59, at 388 (showing that voucher programs do not require participating schools to employ teachers with proper certification, only a certain level of education, which is typically a bachelor's degree); see also McLaughlin, *supra* note 16, at 895 (concluding that states should require private voucher schools to hire certified teachers). McLaughlin also addresses that if the federal voucher program ever becomes a success, it is necessary to have properly qualified teachers in that program. McLaughlin, *supra* note 16, at 895.

requirements.¹⁴⁴ Furthermore, these current requirements are not satisfactory because teachers need special knowledge to understand a student's specific IEP in order to best serve the students.¹⁴⁵ Comparatively, in Wisconsin public schools, the DPI holds teachers to much higher standards.¹⁴⁶ First, they must earn a specialized degree in special education.¹⁴⁷ Second, they must complete the required student teaching.¹⁴⁸ Third, they must earn a license by passing the required exams.¹⁴⁹ These requirements from the statute ensure that only certified and knowledgeable teachers are employed in public schools.¹⁵⁰

Many parents do not understand that certified teachers are better trained to implement their student's IEP compared to uncertified teachers

¹⁴⁴ See McLaughlin, *supra* note 16, at 885 (stating that in order to avoid unnecessary litigation, voucher regulations should strive for strict scrutiny in order to provide strict accountability standards). The McLaughlin article proposes that the voucher schools should have "[e]xplicit guidelines [that] will grant parents a real, informed choice regarding the private schools they may allow their child to attend." *Id.*

¹⁴⁵ See Hensel, *Future*, *supra* note 82, at 305 (addressing private voucher schools are not required to properly implement the IEPs for students). The Notewriter focuses on teacher certification in this Note; however, there are important points regarding the student IEP. For example, the only special needs voucher program that currently requires the private school to implement the student's IEP is Ohio. *Id.* In other special needs voucher programs throughout the country, the schools are not required to implement the IEP, and may struggle to implement the IEP partially because their teachers are not certified in special education. *Id.* at 305-06.

¹⁴⁶ See WIS. STAT. § 118.19(1) (2015) (explaining the full teacher certification requirements within the state of Wisconsin). In order for a teacher to be granted a teacher license for public schools in Wisconsin, the teacher must meet the requirements in the statute and also apply online for a license through the DPI. *Id.* See also *Educator Licensing*, WIS. DEP'T OF PUB. INSTRUCTION (2015), <http://tepd.dpi.wi.gov/licensing/educator-licensing> [<https://perma.cc/UFH7-73T3>] (providing the general requirements for public school teachers in Wisconsin, including "[a] minimum of a bachelor's degree, [c]ompletion of an approved educator preparation program, including meeting all applicable Wisconsin statutory requirements and testing requirements, and [s]atisfactory background checks.").

¹⁴⁷ See *supra* note 146 and accompanying text (providing information relating to the teacher certification requirements in Wisconsin public schools). Special education teachers receive a specialized degree. *Id.* That degree contains classes to ensure that those teachers understand the intricacies with different student learning disabilities. *Id.*

¹⁴⁸ See *id.* (showing the requirements for teacher certification in public schools of Wisconsin). In order to teach in Wisconsin, the teacher must be certified through the state, and part of that certification includes student teaching. *Id.*

¹⁴⁹ See *id.* (demonstrating that students earning a teaching degree must pass exams depending on what area of teaching they plan on entering). These exams have sections that all teachers must pass, and then specialized exams. *Supra* note 146 and accompanying text. For example, if the person is pursuing a math degree, that person needs to pass the math portion of the exam. *Id.*

¹⁵⁰ See *Educator Licensing*, *supra* note 146 (providing requirements for individuals that are earning a teaching degree for public schools in Wisconsin). The DPI has a very informative website that allows teachers to understand the requirements they must meet in order to earn their degree. *Id.*

with lesser knowledge.¹⁵¹ In addition, the state should impose special education teacher certification regulations on the voucher schools in order to better serve the very important educational needs of the students.¹⁵² Ultimately, the students with disabilities are the ones negatively affected by unqualified teachers, and they will suffer from a lower education because the students are not being taught properly because their teachers do not know how to implement their IEPs, or have the appropriate resources to implement them.¹⁵³ Next, just as important as teacher certification, the state does not properly inform parents of the loss of IDEA rights when their child enters the voucher program.¹⁵⁴

C. Lack of IDEA Protection for Students

In addition to failed teacher certification requirements, private schools participating in the special needs scholarship system are less regulated than public schools under federal law.¹⁵⁵ Specifically, the students are not protected under the IDEA law when they attend private special needs voucher schools compared to their protection under the law in public schools.¹⁵⁶ Further, not all parents are aware of the legal implications of

¹⁵¹ See Hensel, *Recent*, *supra* note 19, at 350 (describing that parents realized after their special needs child returned to public school, their test scores were below the average score for the students in the other class). This study represents that parents might not realize the damage of their choice to enter the voucher program, and the potential academic harms that may come from their decision. *Id.*

¹⁵² See *id.* (stating that parents need additional information for their children in order to make an educated decision to leave public schools). Parents are not always informed of the services that their child will receive in the voucher school. *Id.* Also, these schools receive state tax money, so the state should be allowed to apply higher standards. *Id.*

¹⁵³ See McLaughlin, *supra* note 16, at 867, 889 (addressing the teacher certification requirements and stating that it is important to have qualified teachers in voucher programs). For example, if the federal voucher program ever was adopted, the author stated that teacher certification is a necessary component. *Id.* at 889. Instead of the other state teacher certification program requirements, that “merely require[s] a college degree or teaching experience, the regulation will provide accountability for government funding similar to public schools.” *Id.*

¹⁵⁴ See *infra* Part III.C (demonstrating the lack of IDEA protection for students who enter the special needs scholarship program).

¹⁵⁵ See Hensel, *Future*, *supra* note 82, at 327–28 (providing examples of how the private voucher schools do not have the same accountability standards as public schools). Children entering into special needs scholarship programs lose many protections under federal law once they enter the private schools. *Id.* For example, the students lose their entitlement to FAPE under the IDEA. *Id.* at 316. See also Brizuela, *supra* note 85, at 604 (explaining that students with disabilities need the protection of the IDEA in order to ensure that the students receive the best possible services).

¹⁵⁶ See WIS. STAT. § 115.7915(4) (2015) (requiring the DPI to provide some type of document to demonstrate the differences in the rights for students in the private voucher system); see also Hensel, *Future*, *supra* note 82, at 330 (discussing the loss of legal rights in voucher programs throughout the country).

losing those protections in their decision to leave public schools.¹⁵⁷ Consequently, the loss of IDEA protection has serious implications for both parents and students and should require proper notification to anyone entering the Wisconsin special needs scholarship program.¹⁵⁸ Thus, this Part analyzes the effect of waived IDEA protections, and why proper notice should be provided to parents.¹⁵⁹ First, Part III.C.1 analyzes why the special needs scholarship program statute should provide proper notice to parents and students entering the program.¹⁶⁰ Second, Part III.C.2 examines the difference between public school and voucher school protections under the IDEA.¹⁶¹

1. Implications of the Loss of IDEA Protections in Private Voucher Schools

When parents forfeit their child's IDEA rights, they are not properly informed about the serious consequences affecting their child that stem

¹⁵⁷ See Hensel, *Future*, *supra* note 82, at 330 (showing that parents might not understand the implications to removing their child from public school IDEA protection). However, proponents of the program suggest that parents now have the ability to withdraw their children from poorly performing schools and that is sufficient to ensure that the student is treated well and offered a quality education. *Id.* at 331.

¹⁵⁸ See *id.* at 332–33 (discussing that parent satisfaction is an important aspect to the voucher programs). Some proponents of voucher programs insist that it is the best measure of the success. *Id.* Some parents are extremely happy with their child's success in the program, while others may not be as happy. *Id.* at 333. For example, in Utah, "only 482 of 700 total scholarship recipients remained in the program between the program's inception in 2005 and the time of an audit in January 2008." *Id.* However, there are other reasons that could explain the drop in the program, such as inconvenience in school location. Hensel, *Future*, *supra* note 82, at 334.

¹⁵⁹ See *infra* Part III.C (describing the implications of the loss of IDEA protection and indicating a better system of informing parents and students of their IDEA loss); see also *infra* Part IV (amending the current Wisconsin statute and proposing new language).

¹⁶⁰ See *infra* Part III.C.1 (discussing the need for additional requirements to properly inform parents of their change of rights when entering the special needs program).

¹⁶¹ See *infra* Part III.C.2 (articulating the implications of the parents' decision to waive their IDEA protections when entering the special needs private school); see also Brizuela, *supra* note 85, at 604 (explaining the need for IDEA protection). Brizuela stresses the need for IDEA protection and additionally for schools to properly follow IEPs. Brizuela, *supra* note 85, at 604. She explained the need for the IDEA because:

[The IDEA] directive requires that disabled students be included in regular educational activities to the maximum extent appropriate. Removal of a handicapped child from the regular classroom is only permissible "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

Id.

from their loss of IDEA protections.¹⁶² For instance, the Wisconsin special needs statute does not require the private schools receiving state taxpayer funds to provide IDEA protection to their scholarship students.¹⁶³ Even though these private schools receive public funding, they have limited accountability because the requirements imposed on these private voucher schools are much more narrow and limited compared to Wisconsin public schools.¹⁶⁴ Furthermore, the private voucher schools are not required to provide a “meaningful education” and “cannot legally be held accountable when a student makes no academic progress” as required in public schools under the IDEA.¹⁶⁵ Therefore, the lack of IDEA protections raises serious concerns of the actual educational services students receive, because no one monitors the services and the schools are simply not required to follow federal law.¹⁶⁶

Finally, when these students leave the public schools and enter the private Wisconsin special needs scholarship schools, they become unprotected and thereby susceptible to diminished educational

¹⁶² See Hensel, *Future*, *supra* note 82, at 331 (discussing the implications of parents forfeiting IDEA rights in private voucher schools). Hensel is concerned about parents actually recognizing that they are losing their rights. *Id.* Additionally, parents are in control of monitoring their own child’s services once enrolled in the private school, and parents could be ineffective in advocating for their child. *Id.*

¹⁶³ See WIS. STAT. § 115.7915(4) (2015) (providing the statutory requirements for IDEA rights in the Wisconsin special needs scholarship program); see also Myhill, *supra* note 16, at 1060 (discussing parental rights under the IDEA and how they change if a student is enrolled in the private voucher program instead of public school).

¹⁶⁴ See Myhill, *supra* note 16, at 1060 (explaining how the accountability guidelines in this program are much less restrictive than the public school regulation standards).

¹⁶⁵ Hensel, *Future*, *supra* note 82, at 331. Further, this is so “troublesome for students with disabilities who are eligible under the IDEA precisely because they have individualized, often intense instructional needs that cannot be met within the traditional curriculum.” *Id.* Therefore, “[i]n the absence of discernable benchmarks of progress and clearly identified legal rights, there is a heightened chance that these children will face intentional discrimination or seemingly benign indifference.” *Id.*

¹⁶⁶ See § 115.7915(4) (showing private voucher schools in Wisconsin participating in the voucher program will not be required to follow IDEA law); see also Laura C. Hoffman, Esq., *Special Education for a Special Population: Why Federal Special Education Law Must Be Reformed for Autistic Children*, 39 RUTGERS L. REC. 128, 132 (2012) (discussing the loss of IDEA rights in a special needs scholarship program). Congress enacted the IDEA to protect students with disabilities and ensure that those students had a right to a free and appropriate public education, and an education that focus on special education and providing the student with specialized services. Hoffman, *supra* note 166, at 132. See also Hensel, *Future*, *supra* note 82, at 331 (suggesting that proponents of the special education voucher programs think parents are the new monitors). Proponents argue that parents are the monitors of the program and can determine whether their student is receiving the proper services, and withdraw their students at any time if necessary. *Id.* However, this is problematic because parents should not be the only monitors of the program and their child’s services. *Id.*

standards.¹⁶⁷ Furthermore, the private school's lack of IDEA protection eventually harms students with disabilities instead of providing a better alternative to public schools.¹⁶⁸ Students are ultimately harmed by the loss of IDEA rights because private schools are not required to appropriately evaluate and implement student IEPs, place them in the least restrictive environment, require parent and student participation in the process, and provide procedural safeguards.¹⁶⁹ For example, one of the most noticeable harms students face in the private school is the forfeiture of the least restrictive environment, which allows the special needs student to be in the non-special needs classrooms as much as possible.¹⁷⁰ The school is not required or held accountable if the student with disabilities is not in the

¹⁶⁷ See § 115.7915 (addressing the lack of IDEA requirements in the private school system and the concerns associated with that loss of rights); see also Hensel, *Future*, *supra* note 82, at 332 (commenting on the loss of IDEA rights). The loss of IDEA rights can be challenging because:

This transfer of responsibility from the public to individual parents is a troubling shift from the IDEA's recognition that society at large has a stake in the successful education of children with disabilities. Although voucher programs provide parents with additional choices, they also squarely place the burden of securing an adequate education for their child on their shoulders alone. This apparently is true even in Ohio, where parents retain some rights under the IDEA. Education officials have been quoted as saying, "[t]his is not the public education system. Parents now have more responsibility; they now have to ensure that the IEP gets implemented."

Hensel, *Future*, *supra* note 82, at 332.

¹⁶⁸ See Kelly, *supra* note 85, at 27 (addressing the components of the IDEA and demonstrating the extensive list of services that special education students can benefit from in public schools).

¹⁶⁹ See *id.* (providing a detailed description of how IEPs are utilized in public schools and that parents and students are able to participate in these conversations and take part in these conversations in public school). However, that does not minimize the effect of the other losses under the IDEA. *Id.* For example, under the Wisconsin special needs statute, the public schools are still required to complete the IEPs and regularly maintain them. *Id.* This Note only addresses the placement in the least restrictive environment and procedural safeguards. *Id.*

¹⁷⁰ See Hensel, *Future*, *supra* note 82, at 340 (addressing the least restrictive environment in the school setting). Public schools governed under the IDEA must provide the least restrictive environment to students with special needs. *Id.* at 340–41. Therefore, if a private school participating in the program is not required to follow the IDEA protections, parents cannot raise complaints if their student is not receiving proper services, or if the school is not providing the least restrictive environment. *Id.* at 341. For example, the private school could violate the least restrictive environment by continuing to pull out the student with special needs from the classroom to a special education class, even though the students could have been part of the full classroom. *Id.* A parent could argue that the teachers are not providing the least restrictive environment because they are isolating the student from the full classroom. *Id.* Even though this is a legitimate argument, it is not valid because the parent cannot raise an IDEA claim in a private voucher school. *Id.*

least restrictive environment.¹⁷¹ Most importantly, parents and students forfeit their procedural safeguards under the IDEA and are unable to raise a claim with the school if the student is not treated well and offered a quality education.¹⁷² Therefore, students lose the most when parents decide to forfeit rights under the IDEA.¹⁷³

2. Private Voucher Schools Must Provide Proper Notice of IDEA Rights to Parents

Parents are making a grave decision by transferring their student from a Wisconsin public school into a special needs scholarship school, without understanding the implications.¹⁷⁴ Currently, the Wisconsin statute requires the DPI to “develop a document . . . comparing the rights” and parent’s receipt of this document constitutes proper notice.¹⁷⁵ Nevertheless, there is no specific language in the statute to guide the DPI in drafting the document on the loss of IDEA rights.¹⁷⁶ Even if parents sign a document, it is unlikely that they are aware of the ramifications and

¹⁷¹ See Hensel, *Future*, *supra* note 82, at 334 (demonstrating the differences between private voucher schools and public schools in regard to least restrictive environments).

¹⁷² See Kelly, *supra* note 85, at 27 (providing a description on parental rights and monitoring within the private school voucher programs versus public schools); see also Hensel, *Future*, *supra* note 82, at 331 (showing that parents must be the monitors of their student’s education once the student leaves the public school system). Ironically, parents leave the public schools because they believe their student is not treated properly and receiving the best education; however, they are unaware that they lose rights to resolve disputes in private schools, unlike different complaint methods in public schools. Hensel, *Future*, *supra* note 82, at 331.

¹⁷³ See *SSNV Testimony: U.S. Senate Committee on Homeland Security and Governmental Affairs*, STOP WIS. VOUCHERS (July 27, 2015), <http://www.stopspecialneeds vouchers.org/blog/> [<https://perma.cc/K6ZC-4VHW>] (showing that parents in Wisconsin are extremely concerned about how these special needs scholarships will hurt their children and not provide them with the best education in the private schools). Not all parents who have students with disabilities believe this program is beneficial. *Id.* Some believe that their students are better served in public schools and are extremely concerned with the loss of state money to public schools. *Id.*

¹⁷⁴ See *id.* (addressing that the Wisconsin statute currently does not provide clarity with IDEA rights); *supra* Part II.C.2 (discussing the decision to leave the public schools that have higher accountability standards). For example, in Oklahoma, the statute makes it extremely clear that a parent’s acceptance of the voucher is the equivalent of a parental revocation of consent to services under the IDEA. Hensel, *Recent*, *supra* note 19, at 328.

¹⁷⁵ See WIS. STAT. § 115.7915(4) (2015) (demonstrating the current requirements that the DPI must adhere to in the statute); *infra* Part IV (providing an amendment to this section of the Wisconsin statute and requiring the DPI to have a document that specifically shows the parental rights very clearly and ensures that parents recognize their loss of rights).

¹⁷⁶ See § 115.7915(4) (showing that the statute is very unclear on what needs to be included in the document to inform parents of their loss of IDEA rights); Hensel, *Future*, *supra* note 82, at 336 (describing different state special education voucher programs and how each state handles the IDEA protections). In Ohio, students still retain part of their IDEA protections and are able to file restricted due process claims. Hensel, *Recent*, *supra* note 19, at 337.

the far-reaching effects of that pivotal decision.¹⁷⁷ Thus, parents do not know everything associated with IDEA rights and cannot make this critical decision under these minimal requirements.¹⁷⁸

In order to better inform parents, the DPI must provide proper notice to parents participating in the Wisconsin special needs scholarship system of their loss of IDEA rights.¹⁷⁹ Parental consent of loss of rights should be required in order to ensure that parents recognize the implications of their decision.¹⁸⁰ The current statutory language is not clear because it does not place requirements on what must be included in the document provided to parents that place their students in the program.¹⁸¹ However, proper notice should include a comparison between the IDEA rights in public schools, procedural safeguard protections, and the loss of rights in private schools.¹⁸² This safeguard now demonstrates that it is the parent's responsibility rather than the state's, to monitor his or her child's progress and services in the private school.¹⁸³ The DPI can create a document that contains adequate notice and informed consent to show parents that it is

¹⁷⁷ See Hensel, *Recent*, *supra* note 19, at 354 (concluding that the federal government should step in and consider clarifying the loss of legal rights in voucher programs). The federal government could provide clarification on the legal issues of IDEA and ADA in private voucher schools. *Id.*

¹⁷⁸ See *id.* (addressing the problems and implications with the lack of clarification in the legal rights of voucher programs). She concluded by stating that, "[c]hildren with disabilities and their parents deserve clear evidence of the positive and negative consequences of public policy decisions purportedly made for their benefit." *Id.*

¹⁷⁹ See *infra* Part IV (addressing the proposed amendments requiring proper notice for parents in the voucher program). This amendment will provide a better process for parents and students to understand the differences in legal protections. *Infra* Part IV. The parents should be required to at least turn in a document stating that they recognize their rights and the potential consequences of their decision. *Infra* part IV.

¹⁸⁰ See Kelly, *supra* note 85, at 33 (discussing the notice requirements from the IDEA statutes and how parents should be consenting to losing their child's IDEA rights in private schools); see also *supra* Part II.C (addressing other programs throughout the country and each program's different statutory requirements relating to the IDEA).

¹⁸¹ See § 115.7915(4) (addressing the issues with the current statutory language and showing that it is not sufficient in addressing the loss of IDEA rights); *supra* Part II.C (demonstrating that there is no clear standards with the IDEA requirements in the Wisconsin special needs scholarship program); *supra* Part III.C (explaining why the Wisconsin statute is not clear and adds confusion with the program).

¹⁸² See *infra* Part IV (proposing the comparison of rights on the DPI document that will be sent to all parents and students entering the Wisconsin special needs scholarship program). This comparison will better inform parents especially of the procedural safeguards they lack in the Wisconsin special needs scholarship program. *Infra* Part IV.

¹⁸³ See Kelly, *supra* note 85, at 27 (presenting the IDEA requirements in the public school system and what all public schools must provide to students with disabilities). The parents would essentially become the monitors of their child's IEP services, and this would be an extremely difficult task for parents, especially if they are not aware of the change in oversight. *Id.*

now their responsibility to monitor their child's services.¹⁸⁴ It is a parent's decision to forfeit their child's IDEA rights; however, the decision should be made after parents understand the full consequences of that decision by receiving informed consent.¹⁸⁵

IV. CONTRIBUTION

The two proposed amendments to the Wisconsin special needs scholarship program will increase accountability in two areas of the program, the teacher certification and acknowledgement of IDEA rights.¹⁸⁶ The lack of accountability exists because the statutory language does not currently require enough sufficient compliance from the private schools participating in the voucher program.¹⁸⁷ This Note proposes that the Wisconsin State Legislature should adopt a statute that first adds heightened requirements for teacher certification and ensures sufficient parental acknowledgement of the loss of IDEA rights.¹⁸⁸ Utilizing the two proposed amendments, students with disabilities will be taught by certified teachers and the parents will be aware of the differences in rights they have at the private school.¹⁸⁹ First Part IV.A proposes the two

¹⁸⁴ See Hensel, *Future*, *supra* note 82, at 331 (addressing that parents now hold the responsibility to ensure that their child is receiving a proper education in the voucher school).

¹⁸⁵ See *id.* (showing that parents have the responsibility to monitor education); see also *infra* Part IV (adding an amendment to the Wisconsin statute that requires the DPI to provide better notice to the voucher schools).

¹⁸⁶ See *supra* Part III.A-C (addressing the problems with the current statutory language of the Wisconsin special needs scholarship program in both the teacher certification requirements and acknowledgement of the IDEA rights); see also WIS. STAT. § 115.7915(4) (2015) (illustrating that these amendments would fit into the original voucher statute and provide more clarity and requirements in the upcoming program).

¹⁸⁷ See *supra* Part II (presenting different accountability arguments and the lack of supervision in the voucher program). The Wisconsin special needs scholarship program lacks enough accountability because of the vague language used in the voucher statute. *Supra* Part II.

¹⁸⁸ See *infra* Part IV.A (creating an amendment to the Wisconsin special needs scholarship program and demonstrating how this amendment will help protect students in the voucher program).

¹⁸⁹ See *infra* Part IV.A (introducing the proposed legislation and explaining that the goal of the proposed statute is to create higher accountability standards within the Wisconsin special needs scholarship program because it receives state taxpayer money and should be held accountable).

amendments that the Wisconsin Legislature should adopt.¹⁹⁰ Second, Part IV.B offers commentary on the proposed legislation.¹⁹¹

A. *Proposed Legislation*

The current statutory language in the Wisconsin Statute is inadequate, and the Wisconsin state legislature should codify the following proposed amendments to the statute in the Wisconsin Statute, Section 115.7915, entitled Wisconsin Special Needs Scholarship Program:¹⁹²

(6) Private school duties. Each private school participating in the program under this section or receiving a payment under sub. (4m) shall do all of the following:

~~(g) Provide to each applicant under sub. (2) (f) a profile of the private school's special education program, in a form prescribed by the department, that includes the methods of instruction that will be used by the school to provide special education and related services to the child and the qualifications of the teachers and other persons who will be providing special education and related services to the child~~

(g) In order for a private school to be eligible and to participate in the program, all teachers interacting with students with disabilities that participate in the program must be certified under Wis. Stat. § 118.19 (14), and meet the same requirements that any public school teacher in the state of Wisconsin would hold.

(4) Department duties.

(a)

~~1. The department shall develop a document for inclusion with an application under sub. (2) (f), and revise it as necessary, comparing the rights of a child with a disability and of his or her parent under this subchapter, other than this section, and 20 USC 1400 to 1482, with the rights of a child with a~~

¹⁹⁰ See *infra* Part IV.A (proposing a Wisconsin state statute that would provide heightened teaching certification requirements in private voucher schools and add language to provide parents with a better understanding of their child's loss of rights in the IDEA).

¹⁹¹ See *infra* Part IV.B (commenting on the proposed Wisconsin state statute and responding to anticipated counterarguments).

¹⁹² The proposed changes are indicated by adding in language in italics and removing the language that is struck through. See WIS. STAT. § 115.7915(4) (2015) (presenting the original language of the Wisconsin special needs scholarship program).

~~disability and of his or her parent under this section and 20 USC 1400 to 1482.~~

~~2. Receipt by an applicant of the document developed under subd. 1., acknowledged in a format prescribed by the department, constitutes notice that the applicant has been informed of his or her rights under this section and 20 USC 1400 to 1482. Subsequent acceptance of a scholarship under this section constitutes the applicant's informed acknowledgment of the rights specified in the document.~~

1. The department shall develop a document demonstrating the differences in rights mandated by the IDEA and the Wisconsin special needs scholarship program private schools in easily understandable language to ensure informed consent.

a. This document must state that the IDEA requires the following:

- i. free appropriate public education,*
- ii. appropriate evaluations,*
- iii. the individualized education plan,*
- iv. placement in the least restrictive environment,*
- v. parent and student participation in the process,*
- vi. procedural safeguards.*

b. This document must state that those IDEA rights are terminated because they place their student in a private voucher school.

*c. The department and school must receive a signed copy of this sheet from each family joining the program to ensure that the parents read the document and are aware of the consequences.*¹⁹³

¹⁹³ The proposed statute is italicized and is the contribution of the author. The teacher certification requirements address a lack of clarity from the current statute and is the first set of language that would actually require a teaching license in a voucher program. *See supra* Part II.C (addressing the teacher certification concerns in voucher programs throughout the country); *see also supra* Part III.B (analyzing the current language from the teacher certification statute in the Wisconsin special needs scholarship program and comparing it to other special education voucher programs throughout the country). No other special education voucher program requires teacher certification in the private voucher schools accepting taxpayer money. *Supra* Part III.B. *See also supra* Part II.C (stating that the IDEA rights in public schools are different from private voucher schools). The current statutory language of the Wisconsin special needs scholarship program does not properly inform parents of the loss of IDEA rights. *Supra* Part II.C. That statute, along with other statutes in special needs scholarship programs throughout the country do not address or properly

B. Commentary

The proposed amendments add additional requirements to both teacher certification and informing parents and students of their loss of rights. However, the proposed statute does not alter any other accountability concerns within the program. Specifically, this proposed statute provides a groundbreaking, innovative requirement for teachers participating in the voucher program.¹⁹⁴ The teachers interacting with the voucher students with disabilities must have proper certification, including a special education teaching license.¹⁹⁵ No other program has required that teachers participating in the voucher program meet the same requirements as public school teachers must meet.¹⁹⁶ As such, this requirement adds accountability in requiring the teachers to be licensed in special education.¹⁹⁷ Requiring proper certification is important because many private school teachers are not certified in special education, yet could still be teaching these students.¹⁹⁸ This creates the potential for students with disabilities to receive a substandard education in private schools.¹⁹⁹ This proposed amendment adds teacher certification

inform parents of the differences between public school IDEA rights and private schools that do not have IDEA rights. *Supra* Part II.C. *See infra* Part IV.B (responding to potential counter arguments that could be posed against the amendments to the special needs scholarship program statute in Wisconsin).

¹⁹⁴ This proposed section is innovative because no other voucher program statute requires true teacher certification. *See supra* Part II.C (noting that teacher certification is a low accountability standard in voucher programs throughout the country); *see also* McLaughlin, *supra* note 16, at 887 (showing that requiring a proper teacher license in private schools is legal and has never been challenged by any court). The government holds a compelling interest in schools and educating students, and requiring teacher certification in private schools and private voucher schools is legal. McLaughlin, *supra* note 16, at 888.

¹⁹⁵ *See supra* Part IV.A (demonstrating that in the proposed legislation the teachers will have specific teacher certification requirements).

¹⁹⁶ *See supra* Part II-III (highlighting the lack of teacher certification requirements in various voucher programs throughout the country). This requirement will be the first of its kind, and hopefully provide students with better teachers and better special education services. *Supra* Part II-III.

¹⁹⁷ *See supra* Part IV.A (proposing the new teacher certification requirements in the Wisconsin special needs scholarship program). The teachers will be better prepared to handle their student's IEPs and provide the individualized educational services that the student might require. *Supra* Part IV.A.

¹⁹⁸ *See supra* Part III.B (highlighting the importance of proper teacher certification in voucher schools). Teachers without certification on special education students could be causing more harm to a student's education. *Supra* Part III.B.

¹⁹⁹ *See supra* Part III.B (warning parents that their child might not receive the best services if their child is taught by an uncertified teacher). Ultimately, schools are the place for every student to receive the best education possible, and those chances decrease if the teachers are not qualified to teach every student properly. *Supra* Part III.B.

requirements in order to better serve students with disabilities and provide the best education possible.

The second part of the proposed amendment to the statute addresses the lack IDEA rights in private voucher schools.²⁰⁰ This amendment will require parents to acknowledge that they have lost their IDEA rights, and better understand the implications of those decisions.²⁰¹ By including what the IDEA protects in public schools and requiring the language to be stated understandably, parents and students will now know exactly what they are losing when entering the private voucher schools.²⁰² Also, requiring the parents to sign the waiver sheet and return it to the DPI adds a heightened requirement to make sure the parents read the full document and its consequences in leaving the public school system.²⁰³ Without this amendment, the DPI merely provides the document to parents, which was considered enough for notice, but this notice might not be in plain language.²⁰⁴ However, here the parents should be required to at least sign off on the rights to help better inform them of their far reaching decision, and be assured that they will understand the document they receive. Ultimately, notice that is not understandable is not effective notice, so it is critical that the DPI drafts it in clear, comprehensible language.

Furthermore, critics may question whether the proposed statute will be effective or is too far reaching because it requires private school teachers to have proper state certification in special education.²⁰⁵ Because

²⁰⁰ See *supra* Part IV.A (addressing the proposed legislation that comments on IDEA rights). The loss of IDEA rights in private voucher schools are a critical issue that not many parents are aware of. *Supra* Part IV.A.

²⁰¹ See *supra* Part IV.A (emphasizing the specific requirements that should be added to the Wisconsin special needs scholarship program statute). Requiring parents to at least be aware of their student's rights before placing him or her in the special needs scholarship program is a step in the right direction. *Supra* Part IV.A.

²⁰² See *supra* Part III.C (demonstrating the vagueness with the current way parents are informed of the loss of IDEA rights). Even though this might not be a perfect solution, at least parents will be able to see which rights they currently have at public school and determine whether they feel comfortable in leaving that position. *Supra* Part III.C. Essentially, the parents will be required to have a larger role in their child's education at a private voucher school because each parent will need to monitor their child's education services instead of the school being held responsible. *Supra* Part III.C.

²⁰³ See *supra* Part III.C (discussing the problems of the current loss of IDEA rights and how parents are unaware of those rights being taken away at private voucher schools).

²⁰⁴ See *supra* Part II.C (presenting the Wisconsin special needs scholarship program statute and IDEA requirements).

²⁰⁵ See Stuart Buck, *Special Education Vouchers Are Beneficial: A Response to Hensel*, 41 J.L. & EDUC. 651, 659-60 (2012) (responding to Hensel's critique of special education vouchers). Buck provided many different arguments demonstrating his position for the special needs scholarships:

Thus, the waiver argument is difficult to follow. Special education vouchers can only increase families' legal rights, not diminish them.

this heightened requirement is usually only present in public schools, it could seem unduly burdensome for private schools. Also, private schools might not be able to comply with these laws, and therefore not be able to participate in the program. While these are some valid points, the need to provide students with disabilities a proper education is very compelling. Special education teachers have better training in implementing IEPs and specifically educating students with disabilities.²⁰⁶ If parents are looking for better alternatives to public schools, then the private schools receiving the state taxpayer money should be at least required to have proper special education certification.²⁰⁷ Some believe that teacher certification does not guarantee that a teacher will be effective and the best educator. However, it is not an unreasonable standard given that the school can receive up to \$12,000 dollars per special education student participating in the voucher program.²⁰⁸ Therefore, to ensure that these students using the voucher program still receive proper special education services in private schools, it is reasonable to add the proposed amendments to the statute.

Additionally, critics may question whether parents will fully understand the loss of IDEA rights even if parents or guardians sign a sheet and return it to both the school and DPI. However, because of the plain language requirement in the amendment, the statute would require the parents to have informed consent before signing away rights. The current language of the statute does not provide any means for parents and students to see exactly what the IDEA provides for students in public school and compare the loss of rights. Now, parents and students must at least sign off after being properly informed to signal their recognition of their decision to leave public school and IDEA protection to enter private schools.²⁰⁹ This additional requirement will force parents to think through

That is, with special education vouchers, families get both the right to an appropriate education from public schools and the option to purchase that appropriate education from private schools. Hensel suggested that families may find it difficult to uproot their children from a private school mid-year; that may be perfectly true, but those families still do not face a diminishment in their legal rights. That someone may regret having exercised an additional right to something, whether it be a special education voucher or a Pell grant or a jury trial, does not turn that additional right into a diminishment of rights.

Id. at 659–60.

²⁰⁶ See *supra* Part II.B (discussing public school special education teacher requirements).

²⁰⁷ See *supra* Part II.B (addressing the teacher certification requirements in public schools and more specifically, for special education teachers).

²⁰⁸ See WIS. STAT. § 115.7915(4)(m)(1) (2015) (stating that the DPI will pay the private school on behalf of the child's parent or guardian \$12,000 for the 2016 to 2017 school year).

²⁰⁹ See *supra* Part II.C (showing that many parents are not even aware of the IDEA rights, and the implications of leaving public schools); see also *supra* Part III.C (criticizing the current

their decision and its legal implications along with the loss of services for their child.

V. CONCLUSION

Returning to Sally's situation, Sally and her family have realized that they should not enter the Wisconsin special needs scholarship program because they fear the lack of accountability in the program. Sally does not want to be taught by an uncertified special education teacher. The current Wisconsin special needs scholarship program statute does not provide enough accountability for private schools. A lack of teacher certification requirements allows any person to teach students with disabilities in the private voucher schools, so long as the private school informs the parents. Also, currently parents and guardians are not fully aware of the implications of their decision to leave the public school system and enter the unregulated private schools. Students are not protected under the IDEA and the current statutory language does not properly inform parents and students of the change in legal protection.

Through the proposed amendments, the Wisconsin special needs scholarship program statute will gain accountability in two specific areas and become an effective tool to help provide better education to students. To achieve this goal, the proposed amendments take into consideration other voucher programs throughout the country, and tries to add accountability measures. Additionally, the proposed amendments are there to protect a state taxpayer system and require proper teaching requirements to better serve the students. Ultimately, these amendments will increase the accountability in the program and ensure that students with disabilities are given better services in the private voucher schools.

Abby Scott Busler*

statutory language because it does not require the DPI to know whether parents understand or even read the document, and further, it does not state what materials must be in the document created by the DPI).

* J.D. Candidate, Valparaiso University Law School (2017); B.S. Sociology and Certificate in Educational Policy Studies, University of Wisconsin-Madison (2014). First and foremost, I want to thank my family, and especially my parents, Jane and Brian Busler, for their constant support, guidance, and igniting and sharing my passion for educational law. Thank you to my law review mentor, Cecilia Harper, for her guidance throughout this process and the Volume 50 associate editors and editorial board. Finally, thank you to the Wisconsin Department of Public Instruction's legal counsel for their support with my topic choice.