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Counterpoint—

Preserving Public Values in the Private Sector: Unintended Consequences or Vouching for Ableism-Free Schools?

Stephen A. Rosenbaum*

In *The Limits of Federal Disability Law: State Educational Voucher Programs*,¹ commentator Wendy Hensel continues her inquiry into the efficacy of the school voucher model for students with disabilities.² This time her focus is on private school compliance with Title II of the Americans with Disabilities Act (Title II) and Section 504 of the Rehabilitation Act of 1973 (Section 504).³ The federal obligations of voucher schools to students with disabilities sparked a controversial federal investigation in a state where parental choice schools are fast becoming the norm.⁴

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1. See Wendy F. Hensel, *The Limits of Federal Disability Law: State Educational Voucher Programs*, 44 J.L. & EDUC. 199 (2015) (discussing the efficacy of the school voucher model for students with disabilities).

2. Professor Hensel wrote on the subject of vouchers in a previous issue of the Journal. See generally Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future for Special Education?*, 39 J.L. & EDUC. 291 (2010) (evaluating the way that vouchers affect students with disabilities).

3. Hensel, *supra* note 1, at 200.

4. *Id.*

My disagreement with Professor Hensel is not about the appropriateness or quality of a private school education for disabled⁵ students, as much as her focus on unintended consequences, such as the distortion or dilution of federalist doctrine. In this response to her article, I set out four principles. First, we must acknowledge that parental choice schools are a fixture of educational reform, and for many, represent an anticipated antidote to “failed schools.” Second, rather than argue for an opt-out of federal disability non-discrimination laws, we should seek ways to encourage these schools’ compliance to the maximum extent feasible. Third, all schools should adopt and embrace an ableist-free environment, beginning with an elevation of disability to the altar of core anti-discrimination values. Fourth, the above objectives can be obtained in both the private and public sector by having one clear standard for primary and secondary educational institutions to follow in accommodating disabled pupils, modifying policies or offering instructional support and services.

Finally, I share Hensel’s belief that public school compliance with laws enabling and protecting students with disabilities must be at the forefront of policy-making and advocacy. To that end, continued vigilance is required to ensure best practices for disabled—and other marginalized—students.

I. FEDERAL OBLIGATIONS OF VOUCHER SCHOOLS TO STUDENTS WITH DISABILITIES

Professor Hensel has a problem with school vouchers for special education students. She does not think these students are well served in private schools that accept public funds.⁶ But, at the same time, she contends the federal government has overstepped its authority in ordering these schools to comply with disability anti-discrimination

5. No umbrage is intended by the adjectival use of “disabled.” Some activists and academics actually prefer “disability first” in lieu of “people first” language—out of habit, for emphasis, to reclaim antiquated or pejorative terms or as a statement of pride or insider speak. Stephen A. Rosenbaum, *Une Procédure en Difficulté: A Blueprint for Resolving “Special” Education Disputes through a Quasi-Inquisitorial Process*, 32 WINDSOR Y.B. ACCESS JUST. (forthcoming 2016) (manuscript at 3, n. 8) (on file with author).

6. Hensel, *supra* note 1, at 209–10.

laws enacted by Congress, and that this decision will lead to unintended consequences.⁷

Her legal analysis may be correct insofar as the application of Title II and Section 504 to the private sector ultimately may be limited. However, the Department of Justice (DOJ) has determined that Wisconsin's state education agency must comply with federal anti-discrimination law when it offers placement at sectarian and other private schools at public expense.⁸ Specifically, the agency must implement and administer a school choice program in a manner that does not discriminate against children with disabilities, or disabled parents or guardians.⁹

I share Hensel's apprehension about the quality of education available in voucher schools for "special needs"¹⁰ students and the continuing obligation to advocate for meaningful and effective options for youngsters with disabilities attending public schools. But, when the public and private sectors are co-mingled, as they are in Milwaukee and other large urban school districts, it is incumbent on policy makers to create a variety of school settings for a diverse population, and to be sure that opportunities are not segregated along the lines of race, class, or ability.

Among the unintended consequences Professor Hensel identified is the "impos[ition of] burdens on private schools far beyond Wisconsin's borders."¹¹ If this adds a burden to participating schools—where there are already certain quality control and other state-imposed requirements—that just may be a cost of doing business with the public sector and a consequence worth bearing. Instead, I worry more about

7. *Id.* at 199–200. Hensel acknowledged that a *state* may condition a private school's participation in voucher programs on whatever basis it desires, including compliance with federal anti-discrimination laws directed at the state. *Id.* See Lynn M. Daggett, "Minor Adjustments" and Other Not-So-Minor Obligations: Section 504, Private Religious K-12 Schools, and Students with Disabilities, 52 U. LOUISVILLE L. REV. 301, 314–31 (2014) (advocating for direct and indirect application of Section 504 to private schools on certain procedures and programs).

8. Letter from Jonathan Fischbach, Civil Rights Div., Dep't of Justice (DOJ) to Tony Evers, State Superintendent, Wis. Dep't of Pub. Instruction (DPI) (Apr. 9, 2013) (hereinafter DOJ Letter).

9. *Id.*

10. The term "special needs," like "special education," has been criticized for its paternalistic or non-inclusive and non-universal connotations. Rosenbaum, *supra* note 5, at nn.2–4.

11. Hensel, *supra* note 1, at 200.

clear standards and expectations regarding the education and civil rights of those whom she correctly described as a “vulnerable population [that] has routinely and indisputably been the target of discrimination and diminished opportunities” in the school system.¹²

The DOJ closed its investigation in early 2016 with “no apparent findings of major wrongdoing . . . [but] left the door open to investigating future complaints.”¹³ Triumphantlly announcing the end of the investigation, School Choice Wisconsin, a statewide pro-voucher and pro-charter “parent empowerment” organization,¹⁴ portrayed the complaint filed by the American Civil Liberties Union Foundation (ACLU) and Disability Rights Wisconsin (DRW) as an attempt to shut down Milwaukee’s school voucher program.¹⁵ Whether or not the choice organization’s charge is accurate, it is a reminder of the continuing controversy surrounding voucher schools. Professor Hensel has previously observed in this JOURNAL that the voucher debate “can be divisive even among advocates for students with disabilities, and the tenor of conversation here often matches that of other lightning-rod policy debates, like abortion rights and gun control.”¹⁶

12. *Id.* See also Paul E. Peterson, Neil Torinus & Brad Smith, *School Choice in Milwaukee Fifteen Years Later* in CHARTER SCHOOLS AGAINST THE ODDS: AN ASSESSMENT OF THE KORET TASK FORCE ON K-12 EDUCATION 71, 78 (Paul Hill ed., 2006) (noting how frequent partisan shifts in legislative, executive and school board posts “have translated into new laws or interpretation of laws” on school choice measures, at all levels of government).

13. Erin Richards, *Feds Quietly Close Long-Running Probe of Milwaukee Voucher Program*, MILWAUKEE J. SENTINEL, Jan. 4, 2016, <http://www.jsonline.com/news/education/feds-quietly-close-long-running-probe-of-milwaukee-voucher-program-b99644914z1-364068331.html>.

14. School Choice Wisconsin, <http://www.schoolchoicewi.org>.

15. See School Choice Wisconsin, *Fed. Dep’t of Justice: No Discrimination in Parental Choice Program* (Jan. 2016), <http://www.schoolchoicewi.org/index.php/news/news-releases/fed-dept-justice-no-discrimination-parental-choice-program/> (informing the public that the investigation against DPI was official closed and no action of the DPI is required). According to one of the attorneys for complainants, “perhaps one of the best outcomes of the investigation was raising awareness about the treatment of students with disabilities in the private schools.” See also Richards, *supra* note 13. A spokesperson for the Wisconsin Institute for Law and Liberty, another pro-voucher organization, echoed Professor Hensel’s argument insofar as he “saw the Justice Department’s probe as a legal overstep on school choice because it appeared to be asking private schools to be treated as public entities under federal disability law’ Perhaps [parents] don’t want to get under the (federal disability) laws, so they go to private schools to educate their kids with disabilities in a different manner than what they’d get in the public schools.” *Id.*

16. Hensel, *supra* note 2, at 294. Milwaukee’s MPCP has been heralded as the “largest, most mature” choice school system in a major U.S. city. Peterson et al., *supra* note 12, at 73.

Much has been written about the de facto creation of parallel school systems that leave inner-city schools bankrupt with overwhelmingly impoverished pupils, unengaged families, and decimated teachers' unions.¹⁷ Some critics have gone so far as to forecast the demise of the “‘common school’ model that has been the basis for the American public-education system for most of the nation’s history.”¹⁸ Hensel’s respect for federalist principles of governance is well-taken, but federalism for federalism’s sake is not worth cherishing at the expense of operating bifurcated and unequal school systems. I prefer to be more solicitous about defining what constitutes legal discrimination on the basis of disability, at any level of government.

When it comes to civil rights policy, schools should seek ways for compliance rather than avoidance. Compliance is not about spouting rhetorical vision statements and ticking boxes, but requires promotion of pragmatic and readily understood instructional strategies. It also means acknowledging that there may be added costs for private institutions that are not easily absorbed. I believe in using all advocacy tools available to make schools accessible to disabled students, to foster an ableism-free¹⁹ society, and to adopt consistent standards for the quality of education that all students receive.

II. PARENTAL CHOICE: A FIXTURE OF EDUCATIONAL REFORM

Today, voucher and private school choice programs are competing with public schools in Milwaukee and throughout urban America. These schools differ from other reforms in that they are not programmatic, but

17. See e.g., Brian Gill, P. Mike Timpane, Karen E. Ross, Dominic J. Brewer & Kevin Booker, *Rhetoric Versus Reality: What We Know and What We Need to Know About Voucher and Charter Schools* 2, 118 (RAND Educ. 2007).

18. *Id.* at xii.

19. Ableism is the discrimination (or social prejudice) against people with disabilities. Its focus is on the discriminator rather than the person with the disability or the impairment. See, e.g., Paul Harpur, *Sexism and Racism, Why Not Ableism? Calling for a Cultural Shift in the Approach to Disability Discrimination*, 34 *ALT. L.J.* 163 (2009). On the related concept of “dis-awareness” in an academic setting, see, Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs*, 11 *CLINICAL L. REV.* 271, 285–89 (2005).

aim to improve academic achievement or equity, stimulate innovation, and change the fundamental organization of the school system through competition.²⁰ In its twenty-five years, the Milwaukee Parental Choice Program (MPCP) has grown to include more than one hundred schools, of which the majority is identifiably religious; the program now enrolls approximately twenty percent of the city's students.²¹ One of the largest voucher programs in the United States, the MPCP is funded exclusively from the Wisconsin state treasury.²² Milwaukee Public Schools (MPS), the largest public school district in the state, receives fewer and fewer state resources to educate its approximately 81,000 students, including approximately 16,000 students with disabilities—or almost 20% of the district's enrollment.²³

Contrary to predictions from pundits and scholars on the right and the left, school vouchers are not dead, or even ailing.²⁴ Wisconsin Governor Scott Walker's 2015–2017 state budget actually eliminated the cap on

20. Gill et al., *supra* note 17, at 3–4. Choice programs include financial grants (vouchers) to children to attend private or public schools as well as self-governing charter schools and home schooling. In all instances, the hallmarks are reduced regulation, decentralization and increased accountability to parents. These programs were preceded by earlier experimentation in the form of alternative schools; magnet, theme and other district-wide schools; examination schools; inter-district transfer; and choice for students in low-performing schools under the No Child Left Behind Act. *Id.* at 1–6.

21. See Hensel, *supra* note 1, at 201. See also, Complaint at 3, Am. Civ. Liberties Union v. Wisconsin (DOJ Civ. Rts. Div, filed on June 7, 2011) (hereinafter DOJ Complaint), available at <http://www.disabilityrightswi.org/wp-content/uploads/2011/06/Complaint-to-DOJ-re-Milwaukee-Voucher-Program-final.pdf>. The DPI claimed over a year ago that there are actually more than 120 MPCP schools. Wisconsin Dep't of Public Instruction, News Release, *124 Schools Plan to Participate in Milwaukee Parental Choice Program*, (Feb. 6, 2016), available at <https://dpi.wi.gov/news/releases/2016/124-schools-plan-participate-milwaukee-parental-choice-program>.

22. Hensel, *supra* note 1, at 201. The Milwaukee program cost taxpayers an estimated \$130.8 million for the 2010–11 school year. DOJ Complaint, *supra* note 21, at 3.

23. DOJ Complaint, *supra* note 21 at 4.

24. Professor Hensel predicted the durability of this educational model when she observed more than five years ago that “[t]he momentum toward vouchers has the potential to make a significant and lasting impact on the manner in which children with disabilities are educated in the United States.” Hensel, *supra* note 2, at 293. In their report on Milwaukee schools, a team of policy analysts recently concluded: “Rumors of the death of school vouchers have been greatly exaggerated.” Patrick J. Wolf, John F. Witte & David J. Fleming, *When Rights, Incentives, and Institutions All Clash: The Case of School Vouchers and Special Education in Milwaukee 4* (Ann. Meeting of Am. Political Sci. Ass'n) (Aug. 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107763.

the number of students eligible to attend voucher schools in the statewide choice program.²⁵ The Wisconsin-based Center for Media and Democracy described Walker’s proposal as follows:

At a time when other states are reinvesting in public education, Wisconsin continues to slash and burn. The Wisconsin Budget Project says that the state is now spending \$1,014 less per public school student than it did in 2008 and more funds are slated to be siphoned off as Governor Scott Walker’s budget proposes an unprecedented voucher expansion, draining funds from public education and directing them to for-profit and religious schools.²⁶

Notwithstanding successes to date for individual students,²⁷ choice programs risk driving a wedge between the well-to-do and the “unrich”²⁸ and between the unrich and the poor. It is the unrich and poor parents who suffer most from “failing schools” and often lack the wherewithal to advocate on behalf of the educational needs of their children—be they disabled or non-disabled.

As Hensel has previously observed, many of the interest groups that sustain the voucher school movement “arguably have pre-determined agendas relating to school choice more generally.”²⁹ Smaller class size, religious affiliation, increased discipline in the classroom, school safety, and parent empowerment are some of the agendas listed on a School Choice Wisconsin website.³⁰ Curiously, in its informational materials,

25. Jonas Persson & Mary Bottari, *Unprecedented School Voucher Expansion Planned*, PRWATCH, June 22, 2015, <http://www.prwatch.org/news/2015/06/12861/walkers-voucher-expansion>. The Milwaukee and Racine school districts have their own special programs with caps still in place.

26. *Id.* at 2. The budget was later approved by the state legislature. Richards, *supra* note 13.

27. Wolf et al., *supra* note 24, at 8–14. The authors report a mixed record of MPCP schools meeting the needs of *disabled* pupils, with the severity of disability often determining the level of service or accommodation. On overall achievement outcomes for students on school vouchers in Milwaukee, the data and research are inconclusive. Gill et al., *supra* note 17, at 85–87.

28. See David C Vladeck, *In Re Arons: The Plight of the ‘Unrich’ in Obtaining Legal Services 6* (Georgetown Univ. Law Ctr., Working Paper No. 657461, 2004) (explaining that neither “low income” nor “poor” capture the socio-economic status of some families as well as “privileged” or “unrich”).

29. Hensel, *supra* note 2, at 293.

30. *Wisconsin FAQ*, CHOOSE YOUR SCHOOL WISCONSIN, <http://www.chooseyourschoolwi.org/parentinfo/wisconsin-parental-choice-program/wisconsin-faqs.html> (last visited Jan. 10, 2016). According to a Milwaukee news outlet, the voucher schools program began as “a way to allow

Wisconsin's Department of Public Instruction (DPI) offers no clear rationale for why parents should choose one of the state's school voucher programs. The Department simply presents parents with a menu of eligibility requirements, application and examination procedures, a roster of schools, and other logistics.³¹ In contrast, MPS has a website that touts its own array of diverse school programs and how to approach selecting educational options.³²

It would be unfair to suggest that private schools can never meet the needs of pupils with disabilities. More specifically, in a recent analysis of disabled student proportionality in MPCP, the authors challenge Professor Hensel's earlier critique of voucher schools.³³ According to the authors, one of the distinctions between the public and private sectors is "in form and style regarding how students with disabilities are identified and served in the two sectors."³⁴ They observed that the private sector is laced with less formality and labeling in student diagnoses and services: Private schools tend to be accountable to their customers – the parents who decide whether or not to send their children to the school. Organizations that operate in such a market environment face strong incentives to be flexible and accommodating towards their clients.³⁵

For some disabled students and their families, the voucher experience has been positive, whether measured by academic progress, individualized attention, a more flexible environment, integrated classrooms, quality of teaching and/or less stigmatization.³⁶ Youths with so-called mild-to-moderate intellectual or learning disabilities are particularly successful, as they require fewer human and material resources to access the curriculum.³⁷ The flexibility for teachers

inner-city students attending failing schools to receive a better education." *Is it the right choice?*, FOX6 NEWS (April 19, 2015), <http://fox6now.com/2015/04/19/is-it-the-right-choice-governor-walker-proposes-expanding-school-choice-program-lifting-cap/>.

31. See e.g., *Private School Choice Programs*, WIS. DEP'T OF PUB. INSTRUCTION, <http://dpi.wi.gov/sms/choice-programs>.

32. See MILWAUKEE PUBLIC SCHOOLS, <http://mps.milwaukee.k12.wi.us/en/home.htm>.

33. Wolf et al., *supra* note 24, at 2.

34. *Id.* at 9.

35. *Id.* at 10.

36. See *id.* at 12–14.

37. See *id.* at 8–14; Stuart Buck, *Special Education Vouchers are Beneficial: A Response to Hensel*, 41 J.L. & EDUC. 651, 656–63 (2012).

contrasts with the special education legal dictates, bureaucratic processes, and parental influence embedded in the MPS and other public school systems. For example, one MPCP school's "learning support specialist" disclosed to analysts what she likes about her job:

Because of the incredible freedom that I have to meet the needs of the children as I see best, in collaboration with the teachers and the parents. I can really build a program to meet the needs. And my program changes every year . . . And that is magnificent . . . I don't have external parameters dictating what I have to do.³⁸

An earlier *Counterpoint* rebutted Hensel's arguments that private school services provided to pupils with disabilities are inadequate and that special education vouchers are inherently problematic.³⁹ Commentator Stuart Buck cited empirical research that when parents are "empowered with vouchers," they are *more* likely to be satisfied with services their children receive.⁴⁰ Moreover, private teacher quality and accountability for student achievement are not necessarily gauged by conventional standards of credentials or test scores.⁴¹ With regard to the viability of special education vouchers, Hensel argued that too many of the "less disabled"⁴² special education students may end up going to private schools, leaving behind a smaller budget for the students who have more significant disabilities.⁴³ The latter are often placed in self-contained classrooms, thereby fostering segregation and stigmatization.⁴⁴ Buck has countered that the research does not support Hensel's argument. And, for those parents of disabled pupils who are dissatisfied with private

38. Wolf, et al., *supra* note 24, at 13. See also Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside it All*, 15 HASTINGS WOMEN'S L.J. 1, 18 (2004) (noting special education teachers' perception of time spent on administrative tasks that are marginal or irrelevant to primary role of instruction).

39. See Buck, *supra* note 37.

40. *Id.* at 656 (emphasis in original). See also Gill et al., *supra* note 17, at 142–48 (discussing evidence of positive parent satisfaction in programs throughout the country).

41. Buck, *supra* note 37, at 657–59.

42. *Id.* at 661.

43. Hensel, *supra* note 2, at 338. There is no quibbling with Hensel's conclusion that "children with less severe impairments have the best chance for meaningful integration and success in general education classrooms." *Id.* at 341.

44. *Id.*

schools, he evoked his own free market spiel that they are at liberty to leave and return to the public schools.⁴⁵

DRW and the ACLU maintain that because many MPCP participating schools are now comprised entirely (or of a majority) of students receiving public voucher dollars, the scope of public funding transforms these institutions into de facto public entities: “DOJ cannot continue to allow the State of Wisconsin to permit these nominally private, but practically public, institutions to be absolved of any responsibility to provide reasonable accommodations to children with disabilities under § 504 and the ADA.”⁴⁶

Moreover, the fact remains that the general public, policy-makers and educators “have [become] accustomed... to the idea that widespread choice is an important and possibly beneficial policy option.”⁴⁷ The voucher program is gaining ground—at least in Wisconsin—and is not dead yet.

III. DISABILITY NON-DISCRIMINATION: A CORE VALUE

Milwaukee and Racine prohibit schools from using information about an applicant’s race, ethnicity, or religion in the voucher application process; this is explicitly stated in program literature from the State Superintendent.⁴⁸ The message communicated about disability discrimination is more mixed. For example, the following FAQ and response are posted by DPI for prospective applicants:

- Is a private Choice school required to enroll a child with special needs in the Choice program, and to provide the child with whatever services are required to allow the child to learn?

45. Buck, *supra* note 37, at 661–62.

46. DOJ Complaint, *supra* note 21, at 28.

47. Gill et al., *supra* note 17, at 5.

48. *Milwaukee Parental Choice Program & Racine Parental Choice Program Frequently Asked Questions*, WIS. DEP’T OF PUB. INSTRUCTION 1, 3, (hereinafter Parental Choice FAQ) available at <http://dpi.wi.gov/sites/default/files/imce/sms/Choice/MPCP%20and%20RPCP%20FAQ%202015-16.pdf>. However, the application form does ask for the student’s race and ethnicity. See PRIVATE SCHOOL CHOICE PROGRAMS, <http://dpi.wi.gov/sms/choice-programs/> (last visited Mar. 2016).

- A private school may not discriminate against a child with special educational needs during the admissions process for the Choice program. However, as a private school, a Choice school is required to offer only those services to assist students with special needs that it can provide with minor adjustments.⁴⁹

Both the negative framing of the question and the carefully qualified answer leave parents wondering about the nature of specialized instructional services they can expect, and barely disguises a “back of the bus” inference about the reception they and their children will receive once inside the schoolhouse door.

Allegations in the DOJ Complaint filed by the ACLU and Wisconsin’s protection and advocacy system affirm this impression: “When students with disabilities do apply to voucher schools, they are faced with a ‘sink or swim’ situation in which they are forced to overcome their disabilities, no matter how minor, major, or easily accommodated, without any assistance whatsoever.”⁵⁰

In understatement, Hensel wrote that it is “notable” that the Wisconsin statute and regulations are silent on the question of disability discrimination.⁵¹ Requiring private schools to adhere as closely as possible to Section 504 and Title II helps to build in obligations to disabled students who are on public vouchers and to dismantle an otherwise segregated or “dual” system of education⁵²—the thrust of the DOJ Complaint. Despite satisfaction in individual cases, the irony is that pupils with disabilities attending an “unchosen” MPS school may fare better than those enrolled in schools of choice.⁵³

If inclusive schools make for an inclusive society, why are education reformers content with halfway measures? In addition to race, ethnicity

49. *Id.* at 4. This language tracks federal IDEA regulations. See 34 C.F.R. § 104.39(a) (2000) (private school recipients of federal funds may not exclude a disabled pupil who can “with minor adjustments” be provided an appropriate education). See *infra* text accompanying nn.59–70.

50. DOJ Complaint, *supra* note 21, at 31.

51. Hensel, *supra* note 1, at 202–03.

52. See DOJ Complaint, *supra* note 21, at 4.

53. The ACLU and DRW complainants have charged that the state’s “creation, implementation and expansion of a private school voucher program” has left disabled students “essentially one option:” Milwaukee Public Schools. *Id.*

and religion, equal treatment regardless of gender⁵⁴ and ability should be added to the list of non-discrimination and equity core values. And, if intersectionality amounts to more than an intellectual trend, the ultimate goal must be the achievement of racial and economic justice,⁵⁵ and disability justice,⁵⁶ in the nation's schools.

However, Hensel is reluctant to compel the adoption of non-ableist values by choice schools, as there is "little precedential support" for DOJ's perceived position that private school "be transformed into public entities . . . simply by virtue of their participation in voucher programs."⁵⁷

What the above values have in common is they are now universally recognized in this country, if not fully embraced within our schools or by every faith, and if not always adequately protected in our legal and educational systems. With or without prodding from the federal government, there should be no private school opt-out on subscribing to these principles and striving for equity. If resources are not always available in our educational institutions, the law usually allows for deficits in certain circumstances or compels policymakers to make adequate appropriations, as discussed below.

There is perhaps one area where private schools may justifiably protest external interference and eschew federal or state intervention. That would be their prerogative to teach and promote religious values and worship to the extent no voucher student is prejudiced or disadvantaged. Ironically, preservation of a school's religious identity does not appear to be an issue in the admission of Wisconsin voucher

54. I am using "gender" as shorthand for a student's sex, sexual orientation or gender identity, whether or not that status is currently protected against discrimination under local, state or federal law.

55. Wisconsin's various choice programs are already ahead in the area of economic justice or *class*-consciousness insofar as they are designed exclusively for youngsters from low-income families. Parental Choice FAQ, *supra* note 48 at 1. *But see* Peterson et al., *supra* note 12, at 101 (recommending that vouchers be provided to students regardless of income, to avoid "creat[ing] socially-segregated institutions").

56. One activist has characterized disability justice as a "mov[e] away from an equality-based model of sameness and 'we are just like you' to a model of disability that embraces difference, confronts privilege and challenges what is considered 'normal' on every front." Mia Mingus, *Changing the Framework: Disability Justice*, RESIST, Nov. 2010, at 1-2, available at <https://leavingevidence.wordpress.com/2011/02/12/changing-the-framework-disability-justice/>.

57. Hensel, *supra* note 1, at 211 (citing DOJ Letter, *supra* note 8, at 3 n.3)

students, even though most of the private schools on the state roster are sectarian—as is the national trend.⁵⁸

Inclusiveness is not merely about admitting students from various backgrounds. It is about changing the culture of teaching, learning, and academic and social engagement within the walls of the school and in the communities outside. More than a feel-good mission statement or plank in a platform for building self-esteem, this cultural shift can usher in an era of universal education. As I have previously written:

[W]e should peel off the labels so that we do not have competition for resources and services between the youth who are at risk and those who meet the definition of disabled—whether the gap is between pupils with IEPs and those with section 504 plans or between “regular ed” and “special ed” youngsters. We must look at each child individually . . . Doesn’t *every* child deserve an individualized learning plan that charts a course for obtaining an appropriate education and measuring her progress?⁵⁹

In waging this struggle, I resurrect and adapt a revolutionary slogan: From each student according to her needs and to each according to his ability.

IV. CLEAR AND NON-CONFLICTING STANDARDS FOR DISABILITY ADJUSTMENTS OR ACCOMMODATIONS

As alluded to earlier,⁶⁰ the MPCP disability non-discrimination provisions are tinged with ambivalence, if not outright disingenuousness. Professor Hensel has traced the legislative and jurisprudential history of Title II and Section 504 as applied to educational institutions, noting how the latter “afford[s] more limited

58. Peterson et al., *supra* note 12, at 87. See also Daggett, *supra* note 7, at nn.72–73 and accompanying text.

59. Stephen A. Rosenbaum, *Full Sp[el]ed Ahead: Expanding the IDEA Idea To Let All Students Ride the Same Bus*, 4 STAN. J. C.R. & C.L. 373, 384–85 (2008)(footnotes omitted). One commentator expressed a similar sentiment: “A focus on the individual child’s needs, parental involvement, enforceable rights, and a range of services should be part of every school child’s life, not only those designated as ‘special.’” Terry Jean Seligmann, *An IDEA Schools Can Use: Lessons from Special Education Legislation*, 29 FORDHAM URB. L.J. 759, 761(2001).

60. See *supra* text accompanying note 49.

protection” to disabled students in parental choice schools than in public schools.⁶¹ She also invoked a standard announced in the landmark Supreme Court decision, *Alexander v. Choate*,⁶² that the inquiry under 504 “is not whether individuals with disabilities will equally benefit from a program, but instead whether *meaningful access* to the program has been provided.”⁶³ Rather than acquiesce to a diluted definition of non-discrimination, youngsters who are enrolled in public and private schools alike should be subject to an interpretation of 504 and Title II that is uniform, robust, and easily administered.⁶⁴

The “minor adjustments” standard⁶⁵ is a vague and unhelpful guideline for parents and educators. Although the DOJ Complaint equates “minor adjustments” with “reasonable accommodations,” there is some precedent indicating that these standards are not equivalent. For example, Professor Hensel cited one district court interpretation that “[m]inor indicates a minimal burden and adjustment implies a small correction,” which is something less than reasonable accommodation.⁶⁶

In her exhaustive review of the applicability of Section 504 to private schools, and the meaning of “minor adjustments,” Lynn Daggett confirmed that it is a “conspicuously” isolated regulatory term and a “different and lesser standard” than reasonable accommodations.⁶⁷ She resourcefully compiled a list of examples and applied commonsense reasoning that “the kinds of adjustments a private school makes for

61. Hensel, *supra* note 1, at 209.

62. *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

63. Hensel, *supra* note 1, at 227 (emphasis added). *See also* *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 (2d Cir. 2003) (determining required level of access under ADA and Section 504 to city and state public benefits and services by indigent persons with HIV-related conditions, with conclusion that “[t]o accomplish such meaningful access, reasonable accommodations in the [federally-funded] program or benefit may have to be made.”).

64. A 504 plan, moreover, need not necessarily be perceived as “IEP Lite.” In fact, since passage of the 2008 ADA amendments, some commentators have asserted that Section 504 “now has the potential to provide protection that is equal or potentially superior to that provided to students with disabilities under the IDEA.” Hensel, *supra* note 1, at 209 & n.69 (quoting scholar and educator Perry Zirkel’s quip that a 504 plan, once considered a “consolation prize” for students ineligible for an IEP is becoming “the prize itself.” Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?*, 40 J. L. & EDUC. 407, 414 (2011)).

65. 34 C.F.R. §104.39(a) (2000).

66. *Hunt v. St. Peter Sch.*, 963 F. Supp. 843, 852 (W.D. Mo. 1997).

67. Daggett, *supra* note 7, at 321.

students who do not have disabilities suggests what is feasible for that school and, thus, what is likely ‘minor’ for that school under Section 504.”⁶⁸ Professor Daggett concluded that “the low level of federal funding in private religious schools, coupled with the regulatory authorization to charge families for adjustments which involve ‘substantial costs’” is an indication that any costly accommodation for a student is per se not a “minor adjustment.”⁶⁹

A lawyer for the U.S. Catholic Conference offered a more generous interpretation, informed by church doctrine, of what parochial schools should do to serve children with disabilities while considering their limited resources:

The ultimate goal is for all schools to be as inclusive as possible, rather than focusing on the bare minimum legal requirements. This approach is fully consistent with Catholic teachings in this area. This approach is wise from a legal point of view as well. By being as inclusive as possible, a school is not likely to run afoul of the minor adjustment test.⁷⁰

However, undue emphasis should not be placed on dated decisions where the court was left to ponder the meaning of a terse regulation in the absence of any jurisprudence, or where the legislation and decisional law have since more fully developed. Nor should we rely on the goodwill or religious inspiration of private school authorities to accommodate students with disabilities. Given the sparse authority and continued disagreement about the application of Section 504 and Title II, the U.S. Department of Education would do well to scrap the Section 104.39 regulation setting out the “minor adjustments” obligation and rely instead on guidance from the Department’s Office for Civil Rights and on case law interpreting Section 504 regulations as applied in educational settings.

Appropriate defenses would be available to schools unable to meet reasonable accommodation or policy modification standards, so long as the undue hardship, burden or alteration arguments are applied to

68. *Id.* at 323.

69. *Id.* at 322–23 (citing 34 C.F.R. S 104.39(b)).

70. John Liekweg, *The Americans with Disabilities Act, Section 504, and Church-Related Institutions*, 38 CATH. LAW. 87, 100 (1998). See also Perry A. Zirkel, *Section 504, ADA, and Parochial School Students*, 211 EDUC. L. REP. 15 (2006).

individual participating schools, and not, as Hensel argued, to the voucher program as a whole or admission process at-large.⁷¹

With the elimination of a vague term of art, disability civil rights law would gain a measure of uniformity and cohesion. And educators would perhaps adopt a less compartmentalized and more holistic approach to teaching and reaching pupils with disabilities.

V. CONTINUED VIGILANCE REQUIRED FOR PUBLIC SCHOOL COMPLIANCE

For reasons stated above,⁷² Professor Hensel's "public policy question underlying it all—whether vouchers are ever beneficial for this population of [disabled] students"⁷³ cannot be definitively answered. Yet, she is reluctant to abandon the campaign to "shed light on and more readily improve" services to these students by directly pressing for changes to the voucher programs.⁷⁴ It is the Justice Department's "third-party intervention"⁷⁵ and "questionable legal authority" that Hensel decried as a diversion "from the real issues at stake and [which] may delay the protections sought by disability advocates."⁷⁶

These objectives need not be mutually exclusive. Advocates should use all legal tools available to seek protections and benefits for disabled pupils in public schools *and* private schools. Perhaps a better policy question to ask is: Can we adopt more creative measures for public districts or the state to share resources with private schools, e.g., to provide supplemental services or fees⁷⁷ rather than "contract out" students wholesale to a more costly or more restrictive non-public

71. Relying on the "meaningful access" standard articulated in *Choate* and progeny, *supra* note 63, Professor Hensel reasoned that it is sufficient that Milwaukee students with disabilities have "equal access" to the MPCP overall program. There is no requirement that each MPCP disabled student "equally benefit" from the program. Hensel, *supra* note 1, at 227.

72. Wolf et al., *see supra* note 27 and text accompanying notes 34–44.

73. Hensel, *supra* note 1, at 200–01.

74. *Id.* at 229.

75. *Id.*

76. *Id.* at 201.

77. Wolf et al., *supra* note 24, at 28–29.

school or residential placement?⁷⁸ Sloganeering aside, school vouchers, charter schools, and other parental choice programs can offer innovative alternatives. We do need to worry about the ghettoization or overpopulation in public schools of youngsters with severe disabilities and an emptying of the public school coffers. The public schools' stronger legal mandates do not necessarily translate into superior resources, services or personnel—for students with or without disabilities.

In the end, there is no value in safeguarding conventional federalist doctrine so that state education officials, school administrators and their lawyers can fuel statements of defense or fill their briefs with excuses for non-compliance. Scholars, policymakers, and advocates should instead focus on using the law to foster universal education and inclusive schools, founded on principles of disability (as well as racial, gender and economic) justice.

78. On the procedural and financial hurdles involved in securing a private school placement, particularly for families without resources, see Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 107, 121–26 (2011).

